

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Entergy Services, Inc.

Docket Nos. ER91-569-026  
EL05-105-000  
EL05-105-001  
EL04-123-002

ORDER TERMINATING SECTION 206 PROCEEDING AND DISMISSING  
REHEARING

(Issued May 17, 2007)

1. The Commission, in a May 5, 2005 Order,<sup>1</sup> granted rehearing in part of an order acting on Entergy Services, Inc.'s (Entergy) updated market power analysis<sup>2</sup> and instituted a proceeding pursuant to section 206 of the Federal Power Act (FPA)<sup>3</sup> to investigate whether Entergy satisfies the Commission's transmission market power and affiliate abuse or reciprocal dealing standard for the grant of market-based rate authority.
2. In this order, the Commission finds that Entergy satisfies the Commission's transmission market power and affiliate abuse or reciprocal dealing standard for the grant of market-based rate authority. Accordingly, this order terminates the section 206 proceeding in Docket No. EL05-105-000.

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<sup>1</sup> *Entergy Services, Inc.*, 111 FERC ¶ 61,145 (2005) (May Order).

<sup>2</sup> *Entergy Services, Inc.*, 109 FERC ¶ 61,282 (2004) (December Order).

<sup>3</sup> 16 U.S.C. § 824e (2000).

3. Also in this order, the Commission dismisses as moot Entergy's request for rehearing concerning the institution of the section 206 proceeding on transmission market power.

### **I. Background**

4. On August 9, 2004, as amended, Entergy submitted for filing an updated market power analysis, as well as the results of a Delivered Price Test, in compliance with the Commission's orders issued on April 14, 2004 and July 8, 2004.<sup>4</sup> Entergy's filing indicated that Entergy passed the pivotal supplier screen but failed the wholesale market share screen in each of the four seasons considered in Entergy's control area. Because of Entergy's failure of the wholesale market share screen,<sup>5</sup> in the December Order, the Commission instituted a section 206 proceeding to investigate generation market power issues in the Entergy control area.<sup>6</sup> In the May Order, the Commission granted rehearing in part of the December Order and instituted a separate section 206 proceeding in Docket No. EL05-105-000 to investigate whether Entergy satisfies the Commission's transmission market power and affiliate abuse or reciprocal dealing standard. However, the Commission held the investigation in Docket No. EL05-105-000 in abeyance pending the outcome of the ongoing proceedings in Docket Nos. ER05-1065-000 (Entergy's Independent Coordinator of Transmission (ICT) proceeding) and ER03-583-000 (Entergy's Request for Proposal proceeding).

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<sup>4</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

<sup>5</sup> As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 and establishes a rebuttable presumption of market power in the section 206 proceeding.

<sup>6</sup> In instituting the section 206 investigation, the Commission noted that it would consider the results of Entergy's Delivered Price Test analysis in the context of the investigation. However, Entergy ultimately proposed mitigation which the Commission accepted in *Entergy Services, Inc.*, 115 FERC ¶ 61,260 (2006).

5. On June 6, 2005, Entergy filed a request for rehearing of the May Order.

## II. Discussion

### A. Section 206 Proceeding

#### 1. Transmission Market Power

6. As the Commission explained in the May Order, Calpine and Occidental Chemical Corporation (Calpine/OCC) have alleged that Entergy is able to exercise unmitigated transmission market power, despite the existence of an on-file OATT, by periodically failing to provide interconnections or otherwise foreclosing competitors' access to transmission services, including persistent denials of transmission service requests and questionable ATC calculations; raising its competitors' costs by demanding unjustified interconnection and/or transmission upgrades; causing undue delays in system impact studies, facilities studies, or transmission upgrades; preferentially allowing the delisting or redispatch of network resources to ensure market access for Entergy-owned generating units, while failing to provide such delisting or redispatch options for competing generators on a transparent and non-discriminatory basis; and dispatching, or failing to dispatch, Entergy-owned generation in a manner that forecloses competing generators from gaining access to adequate transmission services.

7. However, with the acceptance of the ICT proposal in the ICT Order, we find that Entergy satisfies the Commission's transmission market power standard for the grant of market-based rate authority.<sup>7</sup> The transmission market power issues have been rendered moot by Commission action in the ICT Orders. Specifically, the Commission has found that the ICT appears to have sufficient authority to grant or deny requests for transmission service, calculate Available Flowgate Capacity (AFC), administer Entergy's Open Access Same Time Information System (OASIS), and perform necessary feasibility and system impact studies.<sup>8</sup> Also, there will be a new process and standard for assigning cost responsibility for transmission upgrades and a new Weekly Procurement Process (WPP) as part of the ICT proposal. Further, other transmission market power concerns

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<sup>7</sup> See *Order Conditionally Approving Independent Coordinator of Transmission Filing, Entergy Services, Inc.*, 115 FERC ¶ 61,095 (ICT Order), *order on reh'g*, 116 FERC ¶ 61,275 (2006) (ICT Rehearing Order), *order on compliance filing*, 117 FERC ¶ 61,055 (2006) (ICT Compliance Order).

<sup>8</sup> ICT Rehearing Order, 116 FERC ¶ 61,275 at P 20; *Entergy Services, Inc.*, 117 FERC ¶ 61,055 (2006) (ICT Compliance Filing Order) at P 3.

such as preferentially delisting or redispatch of network resources should be further addressed by Entergy's compliance with Order No. 890,<sup>9</sup> and any OATT term or condition that is modified by Order No. 890 and not modified by the ICT proposal. We also note that Entergy has relinquished its market-based rate authority in its home control area.<sup>10</sup>

## **2. Affiliate Abuse or Reciprocal Dealing**

8. In the underlying proceeding, the intervenors listed several earlier Commission and state proceedings in which parties had raised affiliate abuse allegations, including Entergy's 2002 Request for Proposals (RFP) proceeding in Docket No. ER03-583 in which Entergy conducted an RFP for various long-term (life-of-unit) generating resources and "limited term" (three years or less) load-following combined cycle and combustion turbine capacity. Calpine stated that it submitted specific evidence that affiliate abuse has occurred in the Entergy control area in the recent past. For example, Calpine stated that protesters in the RFP proceeding in Docket No. ER03-583 have alleged that Entergy engaged in affiliate abuse by acting as both evaluator and competitor in the RFP process; refusing to consider certain contract proposals; exempting its affiliated operating company wholesale suppliers from having to bid into the RFP process, and subsequently entering into agreements with such affiliated sellers; allowing employees representing Entergy's generation interests to assess whether non-affiliated resources were likely to encounter transmission problems; restricting the length of the term of its requests for proposal; and refusing to consider generation sources other than solid fuel resources for some transactions, effectively excluding 14,000 MW of merchant generators' gas-fired units. Calpine further noted that similar affiliate abuse concerns also have been raised in proceedings involving Entergy's WPP. Furthermore, Calpine alleged that Entergy may also be exercising market power by foreclosing competing generators from the majority of the wholesale market in the Entergy control area by preferentially dispatching Entergy's own higher-cost generating units despite the availability of lower-cost competing generation.

9. Based on the Commission's findings in Opinion No. 485 (concerning Entergy's RFP proceeding in Docket No. ER03-583), we find that the Commission's concerns regarding affiliate abuse have been addressed and that Entergy satisfies the

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<sup>9</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007) at P 1539-1543.

<sup>10</sup> *See Entergy Services, Inc.*, 115 FERC ¶ 61,260 (2006).

Commission's standard for affiliate abuse or reciprocal dealing for the grant of market-based rates authority.

10. In Opinion No. 485, the Commission found that the 2002 RFP was adequate to ensure just and reasonable rates and, while not perfect, did not rise to the level of affiliate abuse.<sup>11</sup> The Commission affirmed the presiding judge's finding that four Entergy affiliate agreements obtained through the 2002 RFP are just and reasonable and not unduly discriminatory, but limited the term of the Independent System Electric Union Station Unit 2 contracts to ten years to coincide with the 10-year analysis used to justify the contracts.<sup>12</sup> The Commission found two of the agreements invalid on the basis that Entergy's use of a truncated 10-year bid analysis to evaluate life-of-unit contract bids may have allowed for discrimination of non-affiliate bids.<sup>13</sup> Therefore, the Commission directed Entergy to modify the contract term to a 10-year power purchase.<sup>14</sup> Additionally, with respect to four affiliate contracts secured outside of the 2002 RFP, the Commission affirmed the presiding judge's finding that Entergy improperly used information to price two Entergy Arkansas Wholesale Base Load agreements.<sup>15</sup> The Commission examined whether prices obtained through the agreements at issue in that proceeding are a product of behavior that rises to the level of affiliate abuse and found that, with the exception of the Entergy Arkansas Wholesale Base Load agreements, the contracts are just and reasonable and not unduly discriminatory.<sup>16</sup> With respect to the Entergy Arkansas Wholesale Base Load agreements, the Commission directed a remedy to address affiliate abuse concerns.<sup>17</sup> Further, in Opinion No. 485-A, the Commission

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<sup>11</sup> *Entergy Services Inc. and EWO Marketing, L.P.*, Opinion No. 485, 116 FERC ¶ 61,296 at P 39 (2006), *order on reh'g and clarification*, Opinion No. 485-A, 119 FERC ¶ 61,019 at P 4 (2007).

<sup>12</sup> Opinion No. 485, 116 FERC ¶ 61,296 at P 2.

<sup>13</sup> *Id.* at P 71-74.

<sup>14</sup> *Id.* at P 74. The Commission affirmed this finding in Opinion No. 485-A at P 20.

<sup>15</sup> Opinion No. 485 at P 3.

<sup>16</sup> *Id.* at P 58.

<sup>17</sup> *Id.* at P 81.

clarified that Entergy did not violate its code of conduct in the process used by Entergy to develop those contracts.<sup>18</sup>

11. Regarding allegations related to the WPP (*i.e.*, allegations that Entergy is dispatching its higher cost generation despite the availability of lower cost competitive generations), the ICT Order accepted Entergy's WPP proposal because Entergy represented that merchant generators and other wholesale suppliers would be permitted to compete to serve loads that participate in the WPP and the ICT's oversight of the transmission aspects of the WPP is intended to assure that transmission access would be granted on a fair and nondiscriminatory basis.<sup>19</sup> Entergy has also committed to posting the WPP audit procedures and its audit reports on its OASIS for stakeholder review.<sup>20</sup>

12. Accordingly, we find that the Commission has addressed the specific allegations of affiliate abuse and, where indicated, directed appropriate remedies. On this basis, we find that Entergy satisfies our affiliate abuse and reciprocal dealing concerns and that the affiliate abuse issues have been rendered moot by Commission action in Opinion No. 485 and the ICT Order. Further, as noted above, Entergy has relinquished its market-based rate authority in its home control area.

### **3. Termination of Docket No. EL05-105-000**

13. The Commission terminates the section 206 proceeding established in Docket No. EL05-105-000. That proceeding was established to investigate transmission market power and affiliate abuse or reciprocal dealing issues in the Entergy control area. Based on the above findings, the Commission finds that there is no further need for the proceeding in this docket.

#### **B. Rehearing Request**

14. On rehearing, Entergy argues that the Commission erred in instituting a separate section 206 proceeding to investigate whether Entergy has transmission market power on the basis of allegations made by intervenors, which Entergy asserts were unsubstantiated and unsupported by the evidence. According to Entergy, the Commission asserts that the intervenors have raised credible allegations but fails to discuss the intervenors' allegations and to define the issues set for hearing. Moreover, Entergy argues, the

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<sup>18</sup> Opinion No. 485-A, 119 FERC ¶ 61,019 at P 26.

<sup>19</sup> ICT Order, 115 FERC ¶ 61,095 at P 2.

<sup>20</sup> ICT Compliance Order, 117 FERC ¶ 61,055 at P 112.

allegations made by intervenors have already been made in other ongoing proceedings before the Commission and as such are not appropriately considered in yet another proceeding. Finally, Entergy also argues that the Commission erred in basing the decision to institute a section 206 proceeding in the May Order on the *Aquila Power Corp. v. Entergy Services, Inc.*<sup>21</sup> proceeding, which Entergy argues is irrelevant to the current dispute and, furthermore, has been resolved and settled.

15. We will dismiss Entergy's request for rehearing as moot in light of our termination of the 206 proceeding in Docket No. EL05-105-000.

The Commission orders:

(A) The Commission hereby terminates the section 206 proceeding established in Docket No. EL05-105-000.

(B) Entergy's request for rehearing of the May Order is hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>21</sup> 90 FERC ¶ 61,260 (2000), *order on reh'g*, 92 FERC ¶ 61,064 (2000), *order on reh'g*, 101 FERC ¶ 61,328, *aff'd*, *Entergy Services, Inc. v. FERC*, 375 F.3d 1204 (D.C. Cir. 2004).