

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 Gulf States, Inc.	Docket Nos. EC07-66-000
Entergy Gulf States Louisiana, L.L.C.	EC07-66-001
Entergy Texas, Inc.	EL07-45-000
	EL07-45-001

Entergy Gulf States, Inc.	Docket No. EC07-88-000
Entergy Gulf States Louisiana, L.L.C.	
Entergy Texas, Inc.	

(Not consolidated)

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES AND  
GRANTING PETITION FOR DECLARATORY ORDER

(Issued July 20, 2007)

1. On March 13, 2007, as supplemented on May 4, 2007,<sup>1</sup> Entergy Services, Inc., as agent for Entergy Gulf States, Inc. (EGS), Entergy Gulf States Louisiana, L.L.C. (EGS-LA), and Entergy Texas, Inc. (EGS-TX) (collectively, Applicants), filed an application requesting authorizations and other forms of review under sections 203 and 305(a) of the Federal Power Act (FPA)<sup>2</sup> with respect to their proposed jurisdictional separation plan (Separation Plan). The Separation Plan would result in the restructuring of EGS into two separate utilities, EGS-TX and EGS-LA. In this order, the Commission authorizes the

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<sup>1</sup> These filings are referred to collectively as the March 13 Application.

<sup>2</sup> 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (EPAct 2005) and 16 U.S.C. § 825d(a) (2000). Applicants also request authorization under FPA section 204, 16 U.S.C. § 824c (2000), with respect to the Separation Plan. That request will be addressed in a separate order in Docket No. ES07-26.

Separation Plan as consistent with the public interest and as otherwise meeting the requirements of section 203. The Commission further grants Applicants' petition for a declaratory order under section 305(a).

2. On May 11, 2007, the Applicants filed a second application (May 11 Application) under FPA section 203 requesting authorization to transfer all of EGS's Commission-jurisdictional tariffs (including all associated services agreements) and rate schedules to EGS-LA, EGS-TX or both (Reassignment). In this order, the Commission authorizes the Reassignment as consistent with the public interest and as otherwise meeting the requirements of section 203.

## **I. Background**

### **A. Description of Applicants**

3. EGS is a traditional public utility that has captive customers. It owns and provides service over Commission-jurisdictional transmission facilities. EGS is wholly-owned by Entergy Corporation, a public utility holding company.<sup>3</sup> It serves retail and wholesale electric customers and transmission customers in Louisiana and Texas. Through its electric generating facilities in Texas and Louisiana and purchases of electric generating capacity under contract, EGS controls approximately 6,482 megawatts (MWs) of generating capacity. EGS also owns approximately 5,186 miles of transmission facilities in Louisiana and Texas and provides transmission service on those facilities under an open access transmission tariff on file with the Commission (Entergy Operating Companies OATT). The Entergy Operating Companies contract with Southwest Power Pool, Inc. (SPP) to provide oversight over the operation of their transmission system as their Independent Coordinator of Transmission (ICT).<sup>4</sup> EGS and the other Entergy

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<sup>3</sup> Entergy Corporation also owns four other public utility operating companies that have captive customers and own and provide service over Commission-jurisdictional transmission facilities: Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; and Entergy New Orleans, Inc. (collectively, with EGS, the Entergy Operating Companies). Entergy Corporation also owns a number of other non-traditional public utility companies, such as power marketers, exempt wholesale generators, and qualifying facilities. *See* March 13 Application at 4.

<sup>4</sup> *Entergy Services, Inc.*, 115 FERC ¶ 61,095, *order on reh'g*, 116 FERC ¶ 61,275 (2006).

Operating Companies are parties to the Entergy System Agreement, which provides the contractual basis for, among other things, the companies' planning, construction and operational activities.

4. As part of the Separation Plan, described below, two separate vertically-integrated utilities will be created, EGS-TX and EGS-LA. EGS's Texas transmission and distribution assets and a share of EGS's generation facilities, assets and obligations will be allocated to EGS-TX. Similarly, EGS-LA will succeed to EGS's Louisiana transmission and distribution facilities, as well as a share of EGS's generation, assets, obligations and liabilities. Both EGS-LA and EGS-TX will be wholly-owned subsidiaries of Entergy Corporation. Applicants state that "the operation of the Entergy System Agreement's formula rates, and particularly the sharing of generation costs for EGS-LA and EGS-TX, will produce costs for service to EGS-LA and EGS-TX comparable to the costs for service EGS currently bears for service under the Entergy System Agreement."<sup>5</sup>

## **B. The March 13 Application**

### **1. The Separation Plan**

5. Applicants describe the Separation Plan as a series of five steps over a short period of time, at the end of which EGS will be restructured into two companies, EGS-TX and EGS-LA.

6. In step one, EGS will form EGS-TX as a Texas corporation, and EGS will be renamed Entergy Gulf States Louisiana, Inc. (EGS-LA Inc.). EGS-LA Inc. will allocate all of its Texas-jurisdictional assets to EGS-TX, and EGS-TX will assume its prorated share of each series of EGS-LA Inc.'s long-term debt. EGS-TX will place its transmission assets under the Entergy Operating Companies OATT, which the ICT will continue to administer.

7. In step two, EGS-LA Inc. will distribute the EGS-TX common stock to Entergy Corporation, making EGS-TX a wholly-owned subsidiary of Entergy Corporation.

8. In step three, Entergy Corporation will form EGS Holdings, Inc. (EGS Holdings). Entergy Corporation will contribute all its shares of EGS-LA Inc. common stock to EGS Holdings. At the end of this third step, Entergy Corporation will own EGS Holdings in its entirety and EGS Holdings will own EGS-LA Inc. in its entirety.

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<sup>5</sup> March 13 Application at 6.

9. In step four, EGS Holdings will form a limited liability company, EGS-LA. EGS Holdings will own all of the issued and outstanding membership interests of EGS-LA. At the end of this fourth step, Entergy Corporation will own EGS Holdings and EGS-TX in their entirety and EGS Holdings will own EGS-LA Inc. and EGS-LA in their entirety.

10. In step five, EGS-LA Inc. will redeem the then-issued and outstanding shares of EGS-LA Inc. Preferred Stock for cash, convert them into preferred membership interests in EGS-LA, which EGS-LA may issue, or redeem some shares for cash and convert other shares into EGS-LA preferred membership interests. Then EGS-LA Inc. will merge into EGS-LA, with EGS-LA surviving. EGS-LA will succeed to EGS-LA Inc.'s Louisiana assets, tariffs, and contracts and EGS-LA Inc.'s Commission-jurisdictional tariffs and rate schedules for servicing wholesale electric customers. EGS-LA will place its transmission assets under the Entergy Operating Companies OATT, which the ICT will continue to administer. At the end of this step, Entergy Corporation will own EGS Holdings and EGS-TX in their entirety, EGS Holdings will own EGS-LA's common membership interests in their entirety, and other entities may own EGS-LA's preferred membership interests, if any.

11. Applicants state that, post-restructuring, EGS-LA will own EGS's distribution and transmission facilities in Louisiana, and EGS-TX will own EGS's distribution and transmission facilities in Texas.<sup>6</sup> With the exception of EGS's ownership in its coal-fired generating facilities, which EGS-LA and EGS-TX will own jointly, EGS-LA will own EGS's generating facilities in Louisiana and EGS-TX will own EGS's generating facilities in Texas. EGS-LA will serve EGS's retail customers in Louisiana and EGS's current wholesale customers, and EGS-TX will serve EGS's retail customers in Texas. Applicants state that EGS-LA and EGS-TX each will continue to provide transmission service to customers under the Entergy Operating Companies OATT, which the ICT will continue to administer.<sup>7</sup>

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<sup>6</sup> There is one exception to this. EGS-LA will own a portion of an electric substation located at Hartburg, Texas, just across the Louisiana border, and a small portion of a 500 kV transmission line situated in Texas and interconnected with that substation, because those facilities serve Louisiana customers. EGS-TX will own the remaining portion of the substation and line. March 13 Application at 11, n.16.

<sup>7</sup> *Id.* at 11.

## 2. Authorizations Required for the Separation Plan

12. Applicants seek authorization under the FPA for the transactions that will occur during the five steps of the Separation Plan. Applicants seek authorization under FPA section 203 for the mergers, changes in upstream control over Commission-jurisdictional facilities, and acquisitions of public utility securities. Applicants also seek a declaratory order finding that certain transactions during the Separation Plan will not constitute payment of dividends out of capital account in violation of FPA section 305. These requests are discussed in greater detail below.

13. Applicants argue that the Separation Plan is consistent with the public interest because it will result in several benefits. First, Applicants argue that it “will better align EGS’s Louisiana and Texas operations to serve customers in those states and to operate consistent with state-specific regulatory requirements as the utility regulatory environments in those jurisdictions evolve.”<sup>8</sup> Applicants state that the Separation Plan “also will enhance the ability of the companies to engage in state-supervised resource planning processes and strengthen the ability of the [Louisiana Public Service Commission (Louisiana Commission)] and [Public Utility Commission of Texas (Texas Commission)] to efficiently oversee EGS-LA and EGS-TX’s compliance with state specific regulatory requirements.”<sup>9</sup> Applicants specifically note that the conversion of EGS to EGS-LA will permit EGS-LA, as a Louisiana limited liability company, to be exempt from the Louisiana corporate franchise tax, resulting in a lower cost of service.<sup>10</sup>

14. Applicants state that “[t]he end result of the allocation of EGS’s facilities between EGS-LA and EGS-TX will be that each post-structuring entity will have the same capacity relative to its load, measured on a twelve coincident peak demand basis, as EGS had in each state prior to the [Separation Plan].”<sup>11</sup> This allocation will be accomplished through a combination of discrete ownership of gas/oil fired generating units, co-

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<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.* at 6-7.

<sup>11</sup> *Id.* at 13.

ownership of coal-fired generating units, and agreements to share energy outputs.<sup>12</sup> EGS uses a twelve coincident peak demand allocator (Responsibility Ratio) for allocating certain assets and liabilities because “it most closely simulates the method used to set retail rates for production fixed costs in the pre-separation environment.”<sup>13</sup> Except for outstanding first mortgage bonds and outstanding pollution control bonds, the pre-merger liabilities of EGS will be allocated between EGS-LA and EGS-TX in proportion to their respective Responsibility Ratios. The first mortgage bonds and pollution control bonds (Retained Debt) will remain the liability of EGS-LA. EGS-LA and EGS-TX will, however, contemporaneously enter into debt assumption agreements, instruments of assumption, and related mortgages and security agreements whereby EGS-TX will agree to pay a portion of the Retained Debt proportionate to the assets and business of EGS allocated to it.<sup>14</sup>

15. Applicants add that if they “cannot obtain reasonable assurances from EGS’s rating agencies that the [Separation Plan] would not cause a downgrade such that upon jurisdictional separation EGS-LA’s and EGS-TX’s credit ratings would not be what EGS’s credit ratings are today, then Applicants will not proceed with the [Separation Plan]. In addition, if EGS’s credit ratings are downgraded at any time before the implementation of the [Separation Plan], Applicants will not proceed with the jurisdictional separation plan until EGS’s credit ratings improve.”<sup>15</sup>

### **C. The May 11 Application**

16. Under the proposed Reassignment, EGS will transfer all of its tariffs (including all associated service agreements) and rate schedules to EGS-LA, EGS-TX or both upon

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<sup>12</sup> The agreement refers to Service Agreement Schedule MSS-4, which governs the sale of unit-specific capacity and energy between the Entergy Operating Companies pursuant to a settlement agreement that was approved by the Commission in *Entergy Services, Inc.*, 111 FERC ¶ 61,035 (2005).

<sup>13</sup> March 13 Application at 13, n.18.

<sup>14</sup> *Id.* at 8, n.12.

<sup>15</sup> *Id.* at 10 (internal citations omitted).

consummation of the Separation Plan.<sup>16</sup> After the Reassignment, EGS-LA, EGS-TX or both will assume all of EGS's duties, rights and obligations under those tariffs and rate schedules.

## **II. Notice of Filing and Responsive Pleadings**

17. Notice of Applicants' March 13 Application was published in the *Federal Register*, 72 Fed. Reg. 14,268 (2007), with comments, protests or interventions due on or before April 12, 2007. Upon consideration of a March 26, 2007 motion for extension of time for filing comments made by the Arkansas Public Service Commission (Arkansas Commission), the Mississippi Public Service Commission (Mississippi Commission), the City Council of the City of New Orleans (New Orleans City Council) and the Louisiana Commission, the Commission granted an extension of time for filing motions to intervene, comments and protests to and including May 14, 2007.

18. Notices of intervention or timely motions to intervene were filed by: the Arkansas Commission; Calpine Corporation; East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc. and Tex-La Electric Cooperative of Texas (collectively, East Texas Cooperatives); the Electric Reliability Council of Texas, Inc. (ERCOT); the Louisiana Energy Users Group; the Mississippi Commission; the New Orleans City Council; NRG Power Marketing Inc., Bayou Cove Peaking Power LLC, Big Cajun I Peaking Power LLC, Big Cajun II Unit 4 LLC, Louisiana Generating LLC, and NRG Sterlington Power LLC (collectively, NRG Companies); Occidental Chemical Corporation; and the Southwestern Power Administration.

19. Timely comments and protests were filed by: Cleco Power LLC (Cleco); Cottonwood Energy Company, LP (Cottonwood); the Lafayette Utilities System (Lafayette); the Louisiana Energy and Power Authority and the Municipal Energy Agency of Mississippi, on behalf of themselves and their members (collectively, LEPA/MEAM); and the Louisiana Commission. On May 29, 2007, Applicants filed an answer to the protests.

20. Notice of Applicants' May 4 supplement to the March 13 Application was published in the *Federal Register*, 72 Fed. Reg. 29,149 (2007), with comments, protests or interventions due on or before May 24, 2007. None was filed.

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<sup>16</sup> The May 11 Application lists all of EGS's existing tariffs and rate schedules and explains to which entity the contracts will be transferred. May 11 Application at Att. 1. EGS, EGS-LA and EGS-TX seek waiver of "any requirement, to the extent that one exists, that service agreements be individually listed and identified." *Id.* at 4.

21. Notice of Applicants' May 11 Application was published in the *Federal Register*, 72 Fed. Reg. 28,483 (2007), with comments, protests or interventions due on or before June 1, 2007. Notices of intervention or timely motions to intervene were filed by: the Arkansas Commission; Cleco; East Texas Cooperatives; the Louisiana Commission; and the NRG Companies. Timely comments and protests were filed by: Lafayette and Tenaska Frontier Partners, Ltd. (Tenaska). On June 18, 2007, Applicants filed an answer to the protests.

22. On June 1, 2007, the Commission issued a deficiency request, directing Applicants to submit additional support for their accounting entries. On June 21, 2007, Applicants filed a response to the deficiency request (Deficiency Response). Notice of Applicants' Deficiency Response was published in the *Federal Register*, 72 Fed. Reg. 36,443 (2007), with comments, protests or interventions due on or before July 2, 2007. None was filed.

### **III. Discussion**

#### **A. Procedural Matters**

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

24. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' May 29 answer in Docket No. EC07-66-000, *et al.* and their June 18 answer in Docket No. EC07-88-000 because they have provided information that assisted us in our decision-making process.

#### **B. March 13 Application (Separation Plan)**

##### **1. Section 203**

##### **a. Standard of Review Under Section 203**

25. Section 203(a) of the FPA requires the Commission to approve a transaction if the Commission makes two determinations. First, the Commission must determine that the transaction will be consistent with the public interest.<sup>17</sup> The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and

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<sup>17</sup> *Supra* note 2.

(3) the effect on regulation.<sup>18</sup> Second, the Commission must determine that the transaction “will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”<sup>19</sup> The Commission’s regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in cross-subsidization or pledge or encumbrance of utility assets.<sup>20</sup>

**b. Analysis Under Section 203**

26. Applicants request authorization under section 203 for the mergers, change in upstream control over Commission-jurisdictional facilities and acquisitions of public securities that will occur during the Separation Plan. Applicants state that the Separation Plan will not cause any change in ultimate control over generating capacity or transmission facilities. Accordingly, Applicants argue that the Separation Plan will not adversely affect competition, rates or regulation, nor will the Separation Plan cause cross-subsidization of a non-utility associate company or any pledge or encumbrance of utility assets for the benefit of an associate company.<sup>21</sup>

**i. Effect on Competition**

**(a) Applicants’ Analysis**

27. Applicants argue that there will be no effect on competition because there is no change in ultimate ownership or control through the Separation Plan. They state that while the Separation Plan will result in a “nominal change in control” over EGS’s

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<sup>18</sup> See *Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (June 19, 1997), 79 FERC ¶ 61,321 (1997); See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh’g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

<sup>19</sup> 16 U.S.C. § 824b(a)(4) (as amended by EPAct 2005).

<sup>20</sup> 18 C.F.R. § 33.2 (2007).

<sup>21</sup> March 13 Application at 14.

jurisdictional facilities by transferring ownership from EGS to EGS-LA and EGS-TX, the Separation Plan will not “cause any real change in control because EGS-LA and EGS-TX will be wholly-owned subsidiaries of Entergy Corporation just as EGS currently is a wholly-owned subsidiary of Entergy Corporation.”<sup>22</sup>

28. In addition, Applicants argue that there will be no effect on competition because there will be no change in operation. Applicants state that EGS’s transmission facilities and generating facilities will “continue to be operated to serve EGS’s customers, and the ICT will continue to administer the Entergy Operating Companies OATT for the uninterrupted provision of service to transmission customers on the EGS-LA and EGS-TX transmission facilities.”<sup>23</sup>

29. Applicants further argue that the competitive screen analysis generally required by the Commission’s regulations is not necessary in these circumstances. Because the Separation Plan will not merge two or more non-affiliated utilities or cause the removal of any competitor from the market, they are not required to provide a horizontal competitive screen analysis. Moreover, Applicants maintain that the Separation Plan does not require a vertical competitive screen analysis because “it will not cause EGS-LA or EGS-TX to gain the ability or incentive to affect prices or outputs in the downstream electricity markets or to discourage entry by new generators.”<sup>24</sup>

**(b) Commission Determination**

30. We find that the Separation Plan effects no change in ownership or control of EGS. Both EGS-LA and EGS-TX will continue to be controlled by Entergy Corporation. Moreover, we note that the ICT will continue to administer the Entergy Operating Companies OATT. No adverse comments or protests were filed. We agree with Applicants that there will be no adverse horizontal or vertical market power effects.

**ii. Effect on Rates**

**(a) Applicants’ Analysis**

31. Applicants argue that the Separation Plan will not affect EGS’s current customers, stating that “EGS’s wholesale customers served under long-term contracts with EGS will

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<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 16.

continue to be served by EGS-LA under those current wholesale contracts under the same rates, terms, and conditions of service as were in effect pre-restructuring.”<sup>25</sup> Applicants state that, in light of concerns that EGS’s wholesale customers could be subject to increased price volatility as a result of the implementation of retail open access in Texas, EGS-LA will serve EGS’s wholesale customers in both Texas and Louisiana. Applicants also state that future sales by EGS-TX and EGS-LA in the Entergy Operating Companies’ control area will be made under cost-based rate schedules on file with the Commission under FPA section 205, as all Entergy Operating Companies are ineligible to make wholesale power sales at market-based rates in the Entergy Operating Companies’ control area.<sup>26</sup>

32. Applicants also state that transmission customers served under the Entergy Operating Companies OATT will continue to be served under the Entergy Operating Companies OATT’s rates, “which are based on all of the Entergy Operating Companies’ costs of owning and operating transmission facilities,” and SPP, as the ICT, will continue to administer the Entergy Operating Companies OATT.<sup>27</sup>

**(b) Comments and Protests**<sup>28</sup>

33. The Louisiana Commission supports this Commission’s approval of the application consistent with the Louisiana Commission’s conditional approval. It submits a copy of its order approving and modifying EGS’s application to separate on jurisdictional lines.<sup>29</sup> The Louisiana Commission found that the Separation Plan, as

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<sup>25</sup> *Id.* Applicants note that the Entergy Operating Companies do not have market-based rate authority for sales within the Entergy Operating Companies control area, so all wholesale power sales made by the Entergy Operating Companies in the Entergy Operating Control area are made at cost-based rates. *Id.* at 16, n.23.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 17.

<sup>28</sup> As part of their concerns about the Separation Plan’s effect on rates, protesters also discuss the rate effect if EGS-TX joins ERCOT and leaves the Eastern Interconnection upon completion of the Separation Plan (ERCOT Transfer). The ERCOT Transfer is addressed in section III.B.1.c, below.

<sup>29</sup> Louisiana Commission May 10 Comments, *citing* Louisiana Public Service Commission, Order Nos. U-21453, U-20925 and U-22092 (Subdocket-J) (issued Jan. 31, 2007) (Louisiana Commission Order).

modified therein, is in the public interest. It found that the Separation Plan balances the interests of EGS and customers. The Louisiana Commission also found that the Separation Plan allows for the continued provision of safe, reliable service. In addition, the Louisiana Commission found that the Separation Plan will provide benefits to retail ratepayers in both the short and the long term.

34. Cleco states that the March 13 Application contains little detail in support of Applicants' assurances that the Separation Plan will not affect rates and requests a hearing to determine the effects of the Separation Plan on the public interest.

35. Lafayette also argues that Applicants' assurance that rates will not increase is insufficiently documented. Lafayette states that ratepayers will bear an adverse rate impact or erosion in the quality of service as a result of the Separation Plan. Lafayette also expresses concern about the financial strength of its post-Separation Plan counterparty. The Separation Plan offers no obvious benefit to wholesale customers, and ratepayers will be assigned a portion of the transaction costs.<sup>30</sup> Lafayette "conditionally protests" the Separation Plan "pending review of additional information concerning the [Separation Plan] and its impact on Entergy's customers."<sup>31</sup>

36. LEPA/MEAM question Applicants' claim that the Separation Plan will not affect rates. They maintain that if Applicants are correct that the Separation Plan will reduce EGS-LA's corporate franchise state tax liability, the Commission's approval of the Separation Plan should not prevent appropriate ratemaking treatment in Applicants' Commission-jurisdictional rates. They ask that the Commission clarify that the Separation Plan will not adversely affect rates.<sup>32</sup>

37. Cottonwood seeks clarification that the interconnection of its generating facility to the Hartburg substation, which is to be divided between EGS-TX and EGS-LA, will occur on the Texas side of the Hartburg substation at the EGS-TX/EGS-LA border. Cottonwood explains that it has proposed a transmission line to connect its generating facility to an interconnection point within ERCOT and that an interconnection to the EGS-LA portion of Hartburg would impair its ability to market power from its generating facility in Texas.<sup>33</sup>

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<sup>30</sup> Lafayette April 12 Protest at 4-5.

<sup>31</sup> *Id.* at 5.

<sup>32</sup> LEPA/MEAM May 14 Protest at 8-9.

<sup>33</sup> Cottonwood April 11 Request for Clarification at 3-4.

(c) **Applicants' Answer**

38. Applicants state that protesters have not shown that the Separation Plan will have an adverse effect on rates and have not raised any issues of material fact that warrant a hearing. Applicants state that the March 13 Application demonstrates that the Separation Plan will not have any adverse effect on wholesale rates. They also note that EGS-TX transmission customers “have rights under FPA [section] 206 under which they could seek an investigation of transmission rates if they believe in the future that the [Separation Plan] has caused them harm.”<sup>34</sup> Applicants also clarify that Cottonwood’s electric generating station will be interconnected to the EGS-TX-owned portion of the Hartburg substation, as Cottonwood requested.

(d) **Commission Determination**

39. Applicants have stated in their application, and restated in their answer, that the Separation Plan is an internal reorganization that will have no adverse effect on rates, and that all contracts will be honored. No party has argued that rates will increase as a result of the Separation Plan, nor has any party raised a specific issue concerning the effect on rates related to the transactions that make up the Separation Plan. While Lafayette raises concerns about the financial strength of its counterparties, Applicants commit that they will execute the Separation Plan only if they are assured that the Separation Plan will not result in the deterioration of credit ratings. With respect to concerns about the lack of demonstrated benefits to wholesale customers, we note that our section 203 standard of review does not require that a proposed transaction have positive benefits to wholesale customers; we need only find that the whole proposed transaction is consistent with the public interest.<sup>35</sup> Accordingly, we find that the Separation Plan will have no adverse effect on rates.

iii. **Effect on Regulation**

(a) **Applicants' Analysis**

40. Applicants argue that the Separation Plan will not affect the ability of the Commission to regulate the jurisdictional activities of EGS-LA or EGS-TX. Applicants state that “EGS-LA will serve EGS’s pre-restructuring wholesale customers and EGS’s transmission customers will continue to be served under the Entergy Operating

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<sup>34</sup> May 29 Answer at 7.

<sup>35</sup> *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 945 (1st Cir. 1993).

Companies OATT.”<sup>36</sup> They maintain that EGS-LA and EGS-TX will remain subject to this Commission’s regulatory jurisdiction in the same manner as EGS. Each will continue to conduct Commission-jurisdictional activities pursuant to rate schedules, tariffs, and contracts on file with the Commission.

41. Moreover, Applicants maintain that the Separation Plan will not adversely affect the authority or ability of state regulators to regulate the sale of power to retail customers. “To the contrary, the [Separation Plan] will enhance the ability of EGS-LA and EGS-TX to engage in state-supervised resource planning processes and strengthen the ability of the [Louisiana Commission] and [Texas Commission] to efficiently oversee EGS-LA and EGS-TX’s compliance with state specific regulatory requirements.”<sup>37</sup> Applicants state that the Separation Plan is subject to review by the Louisiana Commission, which has already conditionally authorized it. They state that the Texas Commission does not have jurisdiction under Texas law to approve the Separation Plan but that EGS has informed the Texas Commission of the substance of the proposal. Finally, Applicants state that the Separation Plan is also subject to approval by the Nuclear Regulatory Commission.

**(b) Commission Determination**

42. Applicants have shown that the Separation Plan, as filed, will have no adverse effect on the ability of the Commission to regulate the Applicants. In addition, no state commission has argued that the Separation Plan will impair its ability to regulate EGS-LA or EGS-TX. Accordingly, we find that the Separation Plan does not have an adverse effect on regulation.<sup>38</sup>

**iv. Cross-subsidization and Encumbrance of Utility Assets**

43. FPA section 203(a)(4), as amended by EPAct 2005, requires that the Commission find that a proposed transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be

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<sup>36</sup> March 13 Application at 17.

<sup>37</sup> *Id.* at 18.

<sup>38</sup> The regulatory ramifications of the ERCOT Transfer are discussed in section III.B.1.c, below.

consistent with the public interest. Under Order Nos. 669, 669-A and 669-B,<sup>39</sup> Applicants are required to show how a proposed transaction will not result in: (1) transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) new issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

(a) **Applicants' Analysis**

44. Applicants state that the Separation Plan will result in transfers of facilities between EGS and its "traditional utility" successor companies, EGS-TX and EGS-LA, but that such transfers are consistent with the public interest because EGS is being restructured in a way that does not harm customers.<sup>40</sup> Applicants state that EGS will equitably divide its utility facilities between EGS-TX and EGS-LA. They state that the Separation Plan will reallocate EGS's assets and liabilities to EGS-TX and EGS-LA so that EGS-TX and EGS-LA will each have an appropriate share of assets and liabilities in proportion to its service obligations. Furthermore, the capital structures of EGS-TX and EGS-LA will be similar to the capital structure of their predecessor, EGS. Applicants also state that EGS-LA and EGS-TX will not cross-subsidize one another or any other associate company at the completion of the Separation Plan, and neither will have the ability to cross-subsidize the other or any other associate company in the future without regulatory review. Applicants maintain that EGS-TX and EGS-LA will issue new securities for their own benefit but not for the benefit of a non-utility associate company. They further state that EGS-TX and EGS-LA will not grant new pledges or encumbrances of traditional utility assets for the benefit of any associate company. Finally, Applicants state that the Separation Plan will not result in new affiliate contracts between either EGS-TX or EGS-LA and a non-utility associate company.

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<sup>39</sup> *See supra* note 18.

<sup>40</sup> March 13 Application at Exh. M.

(b) **Commission Determination**

45. The Separation Plan is an internal reorganization that allocates facilities, assets and liabilities to successor companies. It does not involve an external merger or acquisition. Accordingly, we find that Applicants have provided adequate assurances that the Separation Plan will not result in cross-subsidization. We note that no party has argued otherwise.

c. **Effect of the Possible ERCOT Transfer on Wholesale Customers' Rates and Service Reliability**

i. **Applicants' Retail Competition Plan Pending Proceeding Before the Texas Commission**

46. Several protesters identified a proceeding pending before the Texas Commission. On December 29, 2006, before making their filing here, Applicants filed a retail competition plan with the Texas Commission.<sup>41</sup> In the Texas Commission Application, Applicants state that “the most viable path” to full customer choice in Texas is for EGS-TX to join ERCOT, and that the separation of the Texas and Louisiana portions of EGS is necessary for that to happen.<sup>42</sup>

47. In the Texas Commission Application, Applicants identify the approvals from this Commission that they state that EGS-TX “will need to obtain” in order to join ERCOT.<sup>43</sup> Applicants state that they will seek a declaratory order from this Commission to determine whether EGS-TX’s move to ERCOT would trigger Commission jurisdiction under FPA sections 210, 211 and 212 over ERCOT’s wholesale electricity and transmission markets.<sup>44</sup> They maintain that the ERCOT Transfer “will not cause [this Commission] to have any greater jurisdiction over the wholesale electricity market within ERCOT than it does currently.”<sup>45</sup> Additionally, Applicants state that they will request

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<sup>41</sup> Entergy Gulf States, Inc., *Transition to Competition Plan*, Public Utility Commission of Texas Control No. 33687 (filed Dec. 29, 2006), at 6, *available at* <http://www.puc.state.tx.us/> (Texas Commission Application).

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *Id.* at 27.

<sup>44</sup> *Id.* at 21 (*citing* 16 U.S.C. § 824i-k (2000)).

<sup>45</sup> *Id.*

approvals from this Commission “under [s]ections 203, 205, 210 and 211 of the [FPA]” for “the authority to transfer operational control of [EGS-TX’s] transmission facilities to ERCOT and [Commission] approval of cost recovery issues such as the mechanics of paying for facilities constructed outside of ERCOT by entities other than [EGS-TX].”<sup>46</sup>

**ii. Comments and Protests**

48. Several protesters express concern about the effect of the ERCOT Transfer. For example, Cleco is concerned that the ERCOT Transfer will have adverse effects on both rates and reliability. Cleco states that, based on studies performed by Applicants as part of the Texas Commission Application, the ERCOT Transfer will fundamentally change the nature of the transmission system and that Cleco may need to alter its transmission system. Cleco argues that modifying the system so that EGS-TX and Cleco no longer operate synchronously as a looped AC system, as is proposed as part of the ERCOT Transfer described in the Texas Commission Application, may “detract materially from the usefulness of the 500-kV system” established under the interconnection agreement among Cleco, EGS-TX and Entergy Louisiana.<sup>47</sup> Cleco states further that its system was planned and engineered based on the assumption that AC ties between it and the Entergy Operating Companies would continue to be in service. Changes in generation dispatch as a result of the ERCOT Transfer could undermine the reliability of its service. Moreover, Cleco is concerned that the ERCOT Transfer will require its customers to incur additional costs to ensure the present reliability of service. Cleco argues that customers of EGS should be held harmless from adverse reliability, rate, and cost effects of the proposed separation.<sup>48</sup> It requests a hearing to determine the effect of the ERCOT Transfer on rates and reliability.

49. Other protesters express concern over the direct and indirect rate effects of the ERCOT Transfer. LEPA/MEAM argue that, in the event of the ERCOT Transfer, transactions crossing the Texas-Louisiana border will no longer be possible. The decreased availability of generation in Texas markets may disrupt and shrink energy markets. LEPA/MEAM note that LEPA has recently considered buying a large portion of its generation from Texas and that such a transaction could be impossible if the ERCOT Transfer is completed.<sup>49</sup> LEPA/MEAM are also doubtful about the

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<sup>46</sup> *Id.* at 27-28.

<sup>47</sup> Cleco May 11 Protest at 7.

<sup>48</sup> *Id.* at 7-8.

<sup>49</sup> LEPA/MEAM May 14 Protest at 7.

commitments that Applicants made concerning sales under the Entergy Operating Companies OATT because of the potential integration into ERCOT. They ask that the Commission condition its approval of the Separation Plan on Applicants' commitment that EGS-TX will not join ERCOT unless the Commission finds that consumers in the remainder of the Entergy Operating Companies system will not be harmed by the reduction in access to generation located on the EGS-TX system or by decreased ability to use the EGS-TX transmission system.<sup>50</sup>

50. The Louisiana Commission's approval of the Separation Plan was conditioned on, among other things, the requirement that "Texas customers will bear the incremental transmission costs that are incurred solely as a result of EGS-TX joining ERCOT or SPP."<sup>51</sup>

### iii. Applicants' Answer

51. Applicants maintain that EGS-TX does not propose to join ERCOT as part of the Separation Plan, so they did not address ERCOT-related issues in the March 11 Application. Applicants note it is not certain whether the ERCOT Transfer will occur. They state that EGS-TX "expects to require [this Commission's] prior authorization under the FPA, and it may require additional [Texas Commission] approvals as well."<sup>52</sup> Applicants state that interested parties can raise ERCOT issues in that Commission proceeding, as well as any proceeding before Texas Commission. They also state that, whether interconnected with ERCOT or the Eastern Interconnection, EGS-TX will be subject to mandatory reliability standards enforced by the North American Electric Reliability Corporation (NERC). Applicants further state that, "whether regulated by the [Texas Commission] as a member of ERCOT or by [this Commission] as a jurisdictional transmission provider interconnected with the Eastern Interconnection, EGS-TX will be subject to transmission rate regulation and regulatory oversight, which will protect EGS-TX's customers."<sup>53</sup> Applicants add that Cleco has not raised any issues of material fact that warrant a hearing.

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<sup>50</sup> *Id.* at 8.

<sup>51</sup> Louisiana Commission May 10 Comments, Louisiana Commission Order at P 23 and ordering paragraph 3.

<sup>52</sup> May 29 Answer at 6.

<sup>53</sup> *Id.*

**iv. Commission Determination**

52. Requests for authorization of the ERCOT Transfer have not been brought before us and therefore, we are not acting on them at this time.<sup>54</sup> Accordingly, we will deny the request for a hearing.

**d. Accounting Entries**

53. As part of the March 13 Application, Applicants submitted a *pro forma* “split balance sheet” that demonstrates EGS’s proposed methodology for allocating to EGS-LA and EGS-TX the balances in each of EGS’s balance sheet asset and liability accounts that EGS expects will exist upon completion of all the transactions in the Separation Plan. EGS’s account balances will be allocated between EGS-LA and EGS-TX on the same basis as EGS’s assets and liabilities will be allocated to EGS-LA and EGS-TX.<sup>55</sup> In the March 13 Application, Applicants provided a *pro forma* split balance sheet using data from 2003. In their May 4 supplemental filing, Applicants submitted an updated *pro forma* split balance sheet and a *pro forma* split income statement that reflect information from fiscal year 2006.

54. In the Deficiency Response, Applicants submitted *pro forma* journal entries for each step of the Separation Plan using information from fiscal year 2006. The proposed accounting entries reflect Applicants’ evaluation of expected external financial statement

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<sup>54</sup> In their application before the Texas Commission, Applicants identified a number of approvals that they say must be obtained from this Commission before the ERCOT Transfer takes place, including approvals under FPA sections 203, 205, 210 and 211. Moreover, the Commission determined in Order No. 672 that “[a]ny change in the size, scope, or configuration of a Regional Entity would constitute an amendment to the delegation agreement, and any amendment would be subject to review by the [Electric Reliability Organization (ERO)] and approval by the Commission.” *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 671, *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006)). Thus, if EGS-TX seeks to leave the SERC Reliability Corporation (SERC) Regional Entity and join the ERCOT Regional Entity, the respective NERC-SERC and NERC-ERCOT ERO-Regional Entity delegation agreements, as appropriately modified, must be submitted to the Commission.

<sup>55</sup> March 13 Application at 25.

requirements, as of the anticipated December 31, 2007 closing date, for the Separation Plan and generally accepted accounting requirements for transactions between entities under common control.

55. Applicants' proposed accounting entries for the first step of the Separation Plan record the formation of EGS-TX and EGS-LA Inc., EGS-LA Inc.'s temporary assumption of ownership of EGS-TX, and EGS-TX's assumption of liabilities under the Debt Assumption Agreement. For the second step, Applicants' proposed accounting to record EGS-LA Inc.'s distribution of EGS-TX common stock to Entergy Corporation. For the third step, Applicants proposed accounting to record the initial formation of EGS Holdings by Entergy Corporation and the transfer of Entergy Corporation's interest in EGS-LA Inc. in return for investment in EGS Holdings. For the fourth step, Applicants proposed accounting to record the initial formation of EGS-LA by EGS Holdings and the issuance of common membership interest by EGS-LA to EGS Holdings. Finally, for the fifth step, Applicants propose accounting to record the redemption of preferred stock by EGS-LA Inc. and the reclassification of common stock and retained earnings accounts to a common membership interest account.

56. The proposed accounting entries for the first and second steps of the Separation Plan do not provide sufficient detail to determine whether they comply with the Commission's Uniform System of Accounts. Accordingly, the Commission directs the Applicants to submit complete details of all accounting entries related to the Separation Plan, along with complete narrative explanations describing the basis for the entries, within six months of the date on which the Separation Plan is consummated.<sup>56</sup>

## **2. Petition for Declaratory Order and Analysis Under Section 305**

### **a. Applicants' Analysis**

57. Applicants seek a declaratory order "finding that EGS-LA Inc.'s distribution of EGS-TX common stock to Entergy Corporation during the second step of the [Separation Plan] and EGS-LA Inc.'s redemption of EGS-LA Inc. preferred stock for cash and/or conversion of EGS-LA Inc. preferred stock into EGS-LA preferred membership interests during the fifth step of the [Separation Plan] will not constitute payments of dividends from capital account in violation of FPA [section] 305(a). Further, should [this Commission] determine that any other of the subtransactions that will occur during the

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<sup>56</sup> Specifically, the narrative explanation to describe the basis for the journal entries must explain the purpose of each journal entry and provide the generally accepted accounting principle relied upon.

five steps of the [Separation Plan] may constitute payment out of capital account, Applicants request [this Commission] to declare that such payment does not violate FPA [section] 305(a).”<sup>57</sup>

58. Applicants argue that, in determining whether a payment of dividends out of capital account is prohibited under section 305(a), the Commission considers “whether the payment will be from unidentified sources, will be excessive, or will result in the raiding of ‘corporate coffers’ for the ‘personal financial benefit’ of corporate officials” and that “the [Separation Plan], considered at the stage of each of its steps or in total, will not cause any of the evils that FPA § 305(a) is designed to guard against.”<sup>58</sup> Applicants state that, for the reasons discussed above, the Separation Plan will in fact benefit customers. Applicants also note that their petition is consistent with the Commission’s recent grant of a petition for declaratory order under section 305(a) in *Entergy Louisiana, Inc.*<sup>59</sup>

**b. Commission Determination**

59. We will grant Applicants’ petition for declaratory order because the concerns underlying section 305(a) of the FPA are not present in the circumstances of the Separation Plan. Section 305(a) provides that:

It shall be unlawful for any officer or director of any public utility to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale by such public utility of any security issued or to be issued by such public utility, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such public utility from any funds properly included in capital accounts.<sup>60</sup>

60. The concerns that underlie section 305(a) are that dividends could be paid from sources that are not clearly identified, that holding companies might pay excessive

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<sup>57</sup> March 13 Application at 31.

<sup>58</sup> *Id.* at 31-32 (internal citations omitted).

<sup>59</sup> *Id.* at 32 (citing *Entergy Louisiana, Inc.*, 114 FERC ¶ 61,060 (2006) (*Entergy Louisiana*)).

<sup>60</sup> 16 U.S.C. § 825d(a) (2000).

dividends on the securities of their operating companies, and that corporate officials might raid corporate coffers for their personal financial benefit.<sup>61</sup>

61. We will grant Applicants' petition because these concerns are not present in the Separation Plan. Applicants are proposing to distribute, redeem and convert stock as part of Separation Plan. Applicants have clearly identified the source from which payments will be paid. There is also nothing to indicate that any dividends paid by Applicants will be excessive. Finally, the Separation Plan will not have an adverse effect on the value of shareholders interests. Implementation of the Separation Plan will not impair the financial integrity of EGS-LA or EGS-TX because Applicants state that they will not proceed with the Separation Plan unless they obtain reasonable assurances from EGS's rating agencies that the Separation Plan would not cause a downgrade such that EGS-LA's and EGS-TX's credit ratings would not be what EGS's credit rating is today.<sup>62</sup>

62. For these reasons, and under the circumstances of this case, we will grant the petition and find that section 305(a) of the FPA is not a bar to the Separation Plan.

**C. May 11 Application (Reassignment)**<sup>63</sup>

**1. Effect on Competition**

**a. Applicants' Analysis**

63. Applicants argue that while the Reassignment will cause a "nominal change" in control over EGS's tariffs and rate schedules, *i.e.*, replacing EGS with EGS-LA, EGS-TX or both, it will not cause any real change in control because EGS-LA and EGS-TX, like EGS, will be wholly owned by Entergy Corporation. Applicants maintain there will be no change in control over the ownership and operation of the generating facilities or any other property owned by EGS. Accordingly, Applicants argue that there will be no effect on competition.

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<sup>61</sup> See *Entergy Gulf States, Inc.*, 118 FERC ¶ 61,271, at P 9 (2007); *Entergy Louisiana*, 114 FERC ¶ 61,060 at P 12 (2006); *Exelon Corp.*, 109 FERC ¶ 61,172, at P 8 (2004); *ALLETE, Inc.*, 107 FERC ¶ 61,041, at P 10 (2004).

<sup>62</sup> See *supra* P 15.

<sup>63</sup> The Commission's standard of review under section 203 is discussed at P 25, *supra*.

64. Applicants also state that the Reassignment is part of the Separation Plan and that the Separation Plan is solely an internal restructuring that will not cause a merger of EGS facilities with the facilities of any other non-affiliated utility or cause the elimination of any competitor from the market. Applicants conclude that the Reassignment cannot affect horizontal competition and that therefore, they are not required to provide a horizontal competitive screen analysis.

65. Further, Applicants state that the Reassignment will not increase EGS-LA's or EGS-TX's ability or incentive to affect prices or outputs in the downstream electricity markets or to discourage entry by new generators. Applicants conclude that the Reassignment cannot cause any vertical power concerns and that therefore, Applicants are not required to provide a vertical competitive screen analysis.

**b. Commission Determination**

66. Applicants have shown that the Reassignment raises no issues with respect to horizontal competition; there will be no change in ownership or control of generation or Commission-jurisdictional facilities as a result of the transfer. Because the proposed transfer will not increase EGS-LA's or EGS-TX's ability or incentive to affect prices or outputs in downstream electricity markets or to discourage entry by new generators, the Reassignment also raises no vertical market power concerns.

**2. Effect on Rates**

**a. Applicants' Analysis**

67. Applicants state that the rights of EGS's pre-restructuring customers will not be affected by the Reassignment. They state that "EGS's wholesale power supply customers served under long-term contracts with EGS will continue to be served by EGS-LA under those current wholesale contracts under the same rates, terms, and conditions of service as were in effect pre-restructuring."<sup>64</sup> Applicants maintain that all transmission customers served under the Entergy Operating Companies OATT will continue to be served under that OATT under standard terms and conditions for open access transmission service. The ICT will continue to administer the Entergy Operating Companies OATT.

68. Applicants state that EGS-LA and EGS-TX will enter into the same affiliate agreements to which EGS is currently a party, simply replicating EGS's current

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<sup>64</sup> May 11 Application at 6.

arrangements. Applicants state that EGS-LA and EGS-TX will become parties to the Entergy System Agreement. They say that the Entergy System Agreement governs the continued planning, construction, and operation of the electric generation, transmission, and other facilities of the Entergy Operating Companies to achieve economies consistent with the highest practicable reliability of service, subject to financial considerations, reasonable use of natural resources, and minimizing the effect on the environment. It provides a basis for sharing costs and benefits of the construction, ownership, and operation of facilities that are used for all the Entergy Operating Companies. Applicants also state that the Entergy System Agreement's formula rates, particularly the sharing of generation costs for EGS-LA and EGS-TX, will produce costs for service to EGS-LA and EGS-TX comparable to the costs EGS currently bears for service. Applicants argue that, moreover, the end result of the allocation of EGS's facilities between EGS-LA and EGS-TX will be that each post-restructuring entity will have the same capacity relative to its load, measured on a twelve coincident peak demand basis, as EGS had in each jurisdiction before the Separation Plan.<sup>65</sup>

**b. Comments and Protests**

69. Commenters raise various arguments, similar to those discussed above, related to the effects of the ERCOT Transfer. For instance, Tenaska states that its interconnection agreement with EGS (Entergy Gulf States Rate Schedule No. 178) is one of the agreements proposed to be transferred. Tenaska does not protest EGS's contractual right to assign its interconnection agreement to EGS-TX. Tenaska notes, however, that Applicants' filing in this proceeding "is but one part of a multi-part Entergy reorganization process . . . ultimately leading to a filing that may separate its systems into [Commission]-jurisdictional and [Texas Commission]-jurisdictional systems."<sup>66</sup> Accordingly, Tenaska seeks assurance from the Commission that the interconnection agreement between itself and EGS will not be affected by the Reassignment. Tenaska also reserves its right "to ensure that all of the rights for which Tenaska . . . bargained in its agreements with Entergy are honored."<sup>67</sup>

70. Lafayette argues that the Separation Plan and Reassignment could significantly impair the services Lafayette and other parties receive from Applicants and could affect the financial strength of Lafayette's post-restructuring counter-party. It argues that jurisdictional separation of the two systems could result in significant changes in

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<sup>65</sup> *Id.* at 7-8.

<sup>66</sup> Tenaska June 1 Comments at 4.

<sup>67</sup> *Id.*

generation dispatch and power flows in a region that has suffered frequent transmission overloads and firm service curtailments. It adds that the proposed separation would probably cause changes in Entergy's generation dispatch that could affect power flows throughout the region, including on adjacent systems. Lafayette argues that, if this causes higher operating costs on adjacent systems, the ratepayers of those adjacent systems should not be made to shoulder the burden. Lafayette argues that "[t]he precise nature of these impacts cannot be known in advance without study, and only [Applicants have] the data and information that would be needed for such a study."<sup>68</sup> Lafayette argues that it "finds it difficult to accept at face value the claim that such a thorough reshuffling of facilities ownership and inter-affiliate power purchase arrangements will have no effect whatsoever on the costs or character of Entergy-provided services."<sup>69</sup> Accordingly, Lafayette "conditionally protests the Applicants' submittal, pending review of additional information concerning the [Separation Plan] and [Reassignment], and the impact of these integrated transactions on Entergy's customers and adjacent systems."<sup>70</sup> Lafayette notes that "[w]hether the jurisdictional separation will relieve or exacerbate . . . problems [of transmission overloads and firm service curtailments] is unknown (or, at least undisclosed) at this point."<sup>71</sup> Lafayette notes its agreement with the concerns raised in the Cleco May 11 Protest.

71. Lafayette argues that the Commission should condition its approval of the Separation Plan, including the transfer contemplated in the May 11 Application, on a commitment by Entergy to negotiate a Joint Operating Agreement with other potentially affected system operators. Lafayette maintains that:

The [Joint Operating Agreement] would address matters such as coordination of outage scheduling, transmission operations, redispatch to relieve the loading of reciprocal flowgates, compensation for redispatch, and long-term planning. In that way, such a [Joint Operating Agreement] would establish a framework for addressing any adverse

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<sup>68</sup> Lafayette June 1 Protest at 6.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 7.

impacts that might arise from the [Separation Plan], as well as for resolving other operating issues (*e.g.*, transmission congestion) having multi-system impacts.<sup>72</sup>

72. Lafayette asks the Commission to consolidate Docket Nos. EC07-66-000, *et al.* with Docket No. EC07-88-000, arguing that the March 13 and May 11 Applications involve common issues of law and fact.

**c. Answer**

73. In their answer, Applicants agree with protesters that the Separation Plan and Reassignment are related and therefore do not oppose the Commission addressing both transactions in a single order.<sup>73</sup> However, Applicants reiterate their claim that neither the Separation Plan nor the Reassignment should be set for hearing because no issues of material fact have been raised and argue that therefore, formal consolidation is not needed.

74. Applicants say that Lafayette provides no support for the claim that the Separation Plan and Reassignment may harm adjacent systems. They argue that the concerns are merely hypothetical, given that after the Reassignment, EGS-TX will remain interconnected with the Eastern Interconnection and EGS-TX will continue to serve transmission customers under the Entergy Operating Companies OATT, administered by SPP as the ICT. Applicants also note that Lafayette's reliance on protests raised as to the March 11 Application is inappropriate and state that they have adequately addressed those concerns in the May 28 Answer.

75. Applicants also argue that Lafayette's "extraordinary" request for a Joint Operating Agreement is unwarranted. The Separation Plan and Reassignment meet the standards for the Commission's review under section 203, and Lafayette does not identify any specific harm it expects to arise from the transactions. Moreover, Applicants note that the Commission has held that any conditions on a section 203 approval must be

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<sup>72</sup> *Id.* at 9.

<sup>73</sup> June 18 Answer at 4.

related to the harm resulting from the proposed transaction.<sup>74</sup> Applicants also note that the coordination Lafayette seeks under a Joint Operating Agreement already exists through the ICT and that “there are ongoing discussions between SPP, Lafayette, Cleco Power and Entergy Services with respect to coordination of operations.”<sup>75</sup>

76. With regard to Tenaska’s concerns, Applicants state that Tenaska’s interconnection agreement (as well as Lafayette’s interconnection agreement) will remain interconnected to the Entergy System and that the existing agreement will remain intact.

**d. Commission Determination**

77. Applicants have shown that the Reassignment will not have any adverse impact on rates. EGS’s wholesale power supply customers served under long-term contracts with EGS will continue to be served by EGS-LA under the same rates, terms, and conditions. EGS-LA and EGS-TX will enter into the same affiliate agreements to which EGS currently is a party. This answers Tenaska’s concerns.

78. We deny Lafayette’s request that we condition our approval of the Separation Plan on a commitment by Applicants to negotiate a Joint Operating Agreement with it and other potentially affected transmission owners. First, under the Separation Plan, Applicants have made clear that there is no change of ultimate ownership, control or operation. Lafayette has offered no evidence of problems resulting from the Separation Plan. Second, if there is a change in operation, such as a control area split or a concern over coordination should the ERCOT Transfer take place, as stated above, filings under FPA may be necessary.<sup>76</sup> Moreover, Lafayette, or any other customer, is free to file a complaint under FPA section 206 documenting how changes in transmission operation affect its system.

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<sup>74</sup> *Id.* at 6 (citing *Entergy Services, Inc.*, 64 FERC ¶ 61,001, at 61,013 (1993); *Ohio Edison Company*, 95 FERC ¶ 61,178, at 61,584 (2001); *First Energy Operating Companies*, 95 FERC ¶ 61,237, at 61,812 (2001); *CPL Holdings, Inc.*, 92 FERC ¶ 61,023, at 61,058 (2000); *IES Utilities*, 81 FERC ¶ 61,187, at 61,838 (1997); *Union Electric Company*, 81 FERC ¶ 61,011, at 61,058 (1997)).

<sup>75</sup> *Id.* at 7.

<sup>76</sup> *See supra* note 54.

### **3. Effect on Regulation**

#### **a. Applicants' Analysis**

79. Applicants argue that the Reassignment will not affect the ability of the Commission to regulate EGS-LA or EGS-TX with respect to their jurisdictional activities because EGS-LA will serve EGS's pre-restructuring wholesale customers and EGS's transmission customers will continue to be served under the Entergy Operating Companies OATT. Applicants argue that nothing about the Reassignment will adversely affect the authority or ability of state regulators to regulate the sale of power to retail customers, noting that the Louisiana Commission already has authorized it.<sup>77</sup>

#### **b. Commission Determination**

80. Applicants have shown that the Reassignment will not affect the authority or ability to regulate of either state regulators or the Commission. The Louisiana Commission has already determined the Separation Plan to be in the public interest. In addition, no state commission has argued that the Reassignment will impair its ability to regulate EGS-LA or EGS-TX. Additionally, the Reassignment does not affect the ability of the Commission to regulate the jurisdictional activities of the separate entities.

### **4. Cross-subsidization and Encumbrance of Utility Assets<sup>78</sup>**

#### **a. Applicants' Analysis**

81. Applicants state that the Reassignment does not present a risk of cross-subsidization of a non-utility associate company or any pledge or encumbrance of utility assets for the benefit of any non-utility associate company at the time of the transaction or in the future.

82. First, Applicants argue that while the Reassignment will result in the transfer of Commission-jurisdictional tariffs and rate schedules between a traditional public utility and an associate company, cross-subsidization is not a concern because EGS will not transfer its utility facilities to *non-utility* associate companies; EGS-LA and EGS-TX are *utility* associate companies (subject to regulation by the Commission and the Louisiana and Texas Commissions, respectively). Applicants also state that neither EGS-LA nor

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<sup>77</sup> May 11 Application at 8.

<sup>78</sup> The Commission's standard of review under section 203(a)(4) is discussed at P 43, *supra*.

EGS-TX “will cross-subsidize the other or any other associate company at the time the [Separation Plan] is completed, and neither will have the ability to cross-subsidize the other or any associate company in the future without regulatory review.”<sup>79</sup>

83. Moreover, Applicants state that Reassignment will not result in any new issuance of securities for the benefit of any non-utility associate company. Any securities they issue will be for their own benefit as appropriate and necessary to serve their customers. Applicants also argue that post-Separation Plan liabilities are intended largely to replicate each company’s share of EGS’s pre-restructuring liabilities.

84. Further, Applicants state that the Reassignment will not result in any new pledge or encumbrance of assets of any traditional public utility for the benefit of a non-utility associate company because EGS-TX and EGS-LA will simply replicate EGS’s existing pledges and encumbrances and not grant any new pledges or encumbrances of traditional utility assets for the benefit of an associate company.

85. Finally, Applicants state that the Reassignment will not result in any new affiliate contract between non-utility associate companies and any traditional public utility. EGS-LA and EGS-TX will enter into the same affiliate agreements to which EGS is a party. Applicants state that as part of the Reassignment, EGS-LA and EGS-TX will become parties to the Entergy System Agreement. In separate filings, EGS-LA and EGS-TX will replace EGS as parties to the Entergy Corporation utility money pool agreement, and will be added to the service agreements with Entergy Services for centralized services that EGS currently holds.

**b. Commission Determination**

86. Applicants have demonstrated that the Reassignment does not raise any concerns with respect to cross-subsidization. They have shown that the Reassignment of Commission-jurisdictional tariffs and rate schedules between a traditional utility associate company with wholesale or retail customers served under cost-based rates and an associate company does not raise cross-subsidization concerns because EGS will not transfer its utility facilities to non-utility associate companies. Applicants have also shown that the Reassignment will not result in: new issuances of securities by a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; new pledges or encumbrances of assets of a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company, or

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<sup>79</sup> May 11 Application at 10.

new affiliate contracts between non-utility associate companies and traditional utility associate companies with wholesale or retail customers served under cost-based regulation, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

The Commission orders:

(A) The Separation Plan is hereby authorized under FPA section 203, as discussed in the body of this order.

(B) The Reassignment is hereby authorized under FPA section 203, as discussed in the body of this order.

(C) The foregoing authorizations are without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before this Commission.

(D) The Commission retains the authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost of any valuation of property claimed or asserted.

(F) Applicants shall make appropriate filings under section 205 of the FPA, as necessary to implement the Separation Plan and Reassignment.

(G) Applicants shall notify the Commission within 10 days of the date that the Separation Plan has been consummated.

(H) Applicants shall notify the Commission within 10 days of the date that the Reassignment has been consummated.

(I) Applicants' petition for declaratory order under section 305(a) is hereby granted, as discussed in the body of this order.

(J) Applicants' must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the petition.

(K) Applicants shall submit post-Separation Plan and Reassignment accounting to the Commission within six months of the date that the transactions are consummated. The accounting submission shall provide: (1) all accounting entries related to the Separation Plan and (2) narrative explanations describing the basis for the accounting entries and explaining the accounting principles relied upon.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.