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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

'93 APR 26 P4:43

GULF STATES UTILITIES, et al.)

DOCKET NO. 50-458

RESPONSE OF
MUNICIPAL ENERGY AGENCY OF MISSISSIPPI
TO NOTICE OF CONSIDERATION OF TRANSFER
OF CONTROL OF LICENSEE AND OPPORTUNITY
FOR PUBLIC COMMENT ON ANTITRUST ISSUES
AND CONDITIONAL PETITION TO INTERVENE

Pursuant to this Commission's March 18, 1993 Notice (as published in the Federal Register on March 25, 1993), the Municipal Energy Agency of Mississippi ("MEAM") hereby submits its Response to that Notice, and comments regarding the antitrust issues involved in the requested approval of the transfer of ownership of Gulf States Utilities ("GSU"), a partial owner and licensee and the operator of the River Bend station, to Entergy Corporation. If Petitions to Intervene are to be accepted at this time, MEAM requests that this Response be treated as a petition to intervene.

SUMMARY OF POSITION

As described more fully below, MEAM believes that there are antitrust problems which are involved in the transfer of control here at issue. Those problems are tied in part to changes that have taken place on the Entergy (previously Middle South Utilities) system since the issuance of the NRC (or AEC) licenses for the nuclear plants on that system, and tied in part to the expansion of the Entergy system, as its problems have modified) through the acquisition of GSU. In both cases, the

problems involve significant changes since the issuance of the extant licenses.

These problems, in part involve the failure of Entergy to consider the impact of this Commission's license conditions as Entergy's operating mode has changed so that the Entergy operating companies have become mere legal shells rather than real utilities, while Entergy itself as a whole has taken over and centralized the utility function at the G&T level. GSU is to become a part of the Entergy utility empire, in which GSU will now also lose any semblance of real separate identity. In these circumstances, the existing license conditions, which are predicated upon the operation of both GSU and the pre-existing Entergy subsidiaries as separate real utilities, are no longer adequate, and need to be updated to conform to the changes in activities of the licensees that have occurred since the issuance of the extant licenses.

While it might have been appropriate for this Commission to rely on the resolution of some of these issues in the pending proceedings on the merger by the Federal Energy Regulatory Commission ("FERC"), FERC has thus far adamantly refused to consider these issues. Especially where the problems involve the Nuclear Regulatory Commission ("NRC") license conditions, it would be inappropriate for this Commission to rely on FERC to resolve issues which we all now know FERC does not intend to resolve. FERC has so far ignored the existing license conditions, and it would be imprudent to suppose that it might change its mind and delve into the expanded license conditions sought

by MEAM. 1/ While it is conceivable that FERC may change its mind, the deadline for response set by this Commission precludes awaiting the result of that reconsideration before MEAM responds.2/

I. MEAM

The name and address of MEAM are:

Municipal Energy Agency of Mississippi
Suite 101
600 East Amite Street
Jackson, Mississippi 39201

MEAM is a joint action agency organized on November 21, 1978 under Chapter 363, Laws of Mississippi of 1978, by the Mississippi Cities of Clarksdale, Greenwood, Yazoo City, Leland, Kosciuscko, Canton, Durant, and Itta Bena. MEAM was created in order to furnish reliable electric service to its member cities at the lowest possible cost. MEAM engages in the sale and purchase of power for that purpose and is interconnected with the Mississippi Power & Light Co. ("MP&L"), a subsidiary of Entergy. MEAM is a transmission dependent utility with respect to MP&L and to the Entergy System.

1/ MEAM notes that these issues are now before the FERC on applications for rehearing, and that FERC has granted rehearing for purposes of reconsideration, to allow it more than the statutory thirty days in which to respond to those rehearing applications. Nonetheless, hearings on the issues (exclusive of anticompetitive conduct, as to which the parties thus far have been precluded from discovery or hearing) are underway.

2/ President Clinton has announced his intention to appoint four new commissioners, and it is not clear that FERC will have a quorum for these purposes until those new commissioners are confirmed -- no hearings on the confirmation have, to the best of our knowledge, yet been scheduled.

The names, addresses and phone numbers of the attorneys for MEAM to whom communications concerning this docket should be addressed, pursuant to 10 C.F.R. § 2.713, are:

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If Petitions to Intervene are to be accepted at this time, MEAM requests that this Response be treated as its petition to intervene pursuant to 10 C.F.R. § 2.714(a).

II. RESPONSE

a. The Legal Structure

Section 103(a) of the Atomic Energy Act (AEA), 42, U.S.C. § 2133(a), authorizes this Commission to issue licenses to persons "to transfer, or acquire . . . utilization or production facilities for industrial or commercial purposes." Section 184 of the Act, 42 U.S.C. § 2234, provides:

No license granted hereunder . . . shall be transferred, assigned or in any manner disposed of . . . through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of the Act.

Section 183(c) of the Act, 42 U.S.C. § 2233(c), further provides that every license shall include a provision that "[n]either the

license nor any right under the license shall be assigned or otherwise transferred in violation of the provisions of this Act."

While MEAM recognizes that there is some question as to whether a full-blown antitrust review is automatically triggered by such an application to transfer control of a license, 3/ there is no need to resolve that issue here, since the events that lead to the request for an antitrust review are significant changes in the licensee activities or proposed activities that have occurred subsequent to the previous review by the Attorney General and the Commission.

b. The Situation Which MEAM Requests The Commission Address

This Commission has explicitly recognized the necessity for smaller, non-vertically integrated competitors to have network transmission to permit them to compete effectively with more powerful, fully integrated utilities. The nexus between network transmission service and effective competition in bulk power markets that gave rise (as discussed below) to the Waterford and Grand Gulf license conditions remains. The evolution of the relevant bulk power markets since the license conditions were crafted, particularly if the proposed merger is to be approved, does not destroy that nexus, but rather compels the expansion of existing network transmission service offered by individual Entergy operating companies to encompass the

3/ Compare Section 105(c)(1), 42 U.S.C. § 2135(c)(1) and (5) with 10 C.F.R. §§ 50.33a, 50.80(b).

entire merged company system, if the objectives of the license conditions are to be served.

FERC has thus far declined even to consider the issue of network transmission, raising issues of nexus and asserting that the essentially point to point "open access" transmission tariff approved by FERC at Entergy Services, Inc., 58 FERC ¶ 61,234, order on reh'g, 60 FERC ¶ 61,168 (1992), appeal pending, Cajun Electric Power Cooperative, Inc., et al. v. FERC, Nos. 92-1461, et al. (D.C. Cir., filed October 23, 1992), solves the problem without further analysis. A copy of MEAM's Request of Municipal Energy Agency of Mississippi for Rehearing and for Expedited Consideration and Motion for Stay of Procedural Schedule is attached. That document was timely filed on March 1, 1993, and no action (other than granting of rehearing for the purposes of reconsideration) has yet been taken by FERC.

MEAM and other transmission dependent utilities within the Entergy system as it would be expanded (sometimes referred to as the TIG group) have argued at FERC that the merger would produce savings for Entergy which are substantially (perhaps largely) dependent upon the use of the transmission grid of the enlarged Entergy system at a single annual cost for the Entergy system, with no additional incremental cost (other than losses). Thus Entergy is enabled to transmit energy and power between and among its subsidiaries and between and among its subsidiaries and other entities connected to the expanded system at no additional disincentive charge. With the evolution of the electrical economy, and the disaggregation of services attendant thereto, major savings can and do occur with greater use of the

greatly expanded coordination market. MEAM, and the remainder of the TIG group, suggested that it would be necessary to permit them access to this market on a similar basis to that which the expanded Entergy system would enjoy if it were to be possible to avoid the anticompetitive consequences of the merger, and offered the example of the TDU arrangements which FERC itself had approved in the Northeast Utilities/Public Service Company of New Hampshire merger. FERC has thus far absolutely failed to recognize the concept of network (or "between and among") transmission as being a solution in the Entergy merger proceeding.

MEAM pointed out, and perhaps more clearly on rehearing, that there is nothing very new about the concept of network transmission. The difference here is that Entergy was required to provide the service to the TDUs on the LP&L and MP&L systems when LP&L and MP&L were real operating companies; now that they are mere corporate shells and Entergy itself is functionally the single operating company (which seeks FERC and NRC permission to add to its size and resources) the obligation should be expanded to keep track with the changes which both Commissions are being asked to sanction. The difficulty with the point to point concept embodied in the open access tariff is that which was explained at some length by the Atomic Energy Commission in 1974, nearly 20 years ago. Service is priced for coordination service among a series of entities, as two permutations taken two at a time. In other words, for coordination among five entities, there would be 20 transmission charges. ^{4/} For six members of

^{4/} See In the Matter of Louisiana Power and Light Company, Waterford Steam Generating Station Unit No. 3, 8 AEC 718, 732-733 (1974) for a complete explanation.

the TIG, there would thus be 30 such charges. ^{5/} That point to point concept was rejected by the AEC in 1974 as unreasonable and insufficient to overcome a situation inconsistent with the antitrust laws. Id. at 733-34. It is extraordinary, and contradictory to the general principles of comity, for FERC simply to gloss over these concerns without even an attempt at a hearing.

Access and pricing are two sides of the same issue. If the TIG members are paying the same relative amount for transmission that Entergy itself pays, they should either be getting the same service or paying less. As was pointed out to FERC, MEAM and other TIG members pay for and jointly plan (with Entergy) for the transmission necessary to serve their load centers and their generation resources. MEAM and other TIG members pay proportionate shares of the transmission backbone costs; there is no justification for a contention that additional costs should be charged by Entergy to advantage its competitive situation in the generation market vis-a-vis that of MEAM and other TIG members, although that is what FERC has tacitly approved in its January 28 Order. There is also no justification for FERC to permit modification of the existing rights of Entergy and GSU under sections 205 and 206 while precluding members of the TIG group from modifying their own existing contracts with Entergy and/or GSU in order to permit them to deal consistently with the surviving entity, which FERC

^{5/} Footnote 101 in the January 28 Order seems to suggest that TIG members could redesignate delivery or receipt points under the open-access tariff from time to time at will. MEAM does not so understand.

has permitted to aggrandize itself at their expense. The net result of the merger, absent either admission to the Entergy/GSU pool on a fair basis that would require renegotiation of the agreement or the provision of network transmission service, is that the TDUs who compete with Entergy and GSU are left with a playing field tilted against them by this decision.

The decision by FERC to reject out of hand the request for network transmission is also in direct contravention of a policy of the NRC. For Entergy is already required to make network access available to those members of the TIG within particular subsidiaries. Thus, dating from the days when the Entergy (then Middle South Utilities) subsidiaries operated as separate entities, there are the following license conditions with which Entergy must comply.

Grand Gulf License Condition 5 (emphasis added):

- (a) [MP&L] shall facilitate the exchange of bulk power by transmission over its transmission facilities between or among two or more entities in the Western Mississippi Area with which it is interconnected Such transmission shall be on terms that fully compensate Applicant for its cost.
- (b) Applicant shall include in its planning and construction program sufficient transmission capacity as required for the transactions referred to in subparagraph (a) of this paragraph. . . .

Waterford 3 License condition 5 (emphasis added):

[LP&L] shall transmit power and energy over its transmission facilities among entities in the State of Louisiana with which it is interconnected and has or will have a transmission schedule in effect. For each coordinating group of entities there shall be a single transmission charge.

The Waterford License Conditions also include transmission planning and construction obligations much like those for Grand Gulf. It may be noted that the second sentence from Waterford Condition 5 quoted above was added by the Atomic Safety and Licensing Board to make clear its view of the first sentence quoted, and to reflect its view that LP&L was attempting to preclude coordination among cities and/or coops by its insistence that it only be required to transmit "between" such entities. As the Board noted, In the Matter of Louisiana Power & Light Company (Waterford Steam Generating Station Unit No. 3), 8 AEC 718, at 733-34 (LBP-74-78, 1974):

Assuming without deciding that Applicant's transmission rate is reasonable per se, the payment of 6 to 20 or more transmission charges by a single group of entities is deemed unreasonable. ^{6/}

The limitation of "between two entities" in Applicant's [proposed license conditions] is not an adequate provision designed to permit coordination (both operation and development) sufficient to overcome a situation inconsistent with the antitrust laws. A change from "between" to "among" will correct this deficiency.

Since the Board apparently found that LP&L had been particularly recalcitrant, it went further and noted (Id. at 737):

The purpose of this change [from "between" to "among"] is to prevent multiple transmission charges for transmission of a contracted transmission entitlement among a coordinating group of two or more entities. To make the purpose of this change free from doubt, a clarifying sentence has been added.

^{6/} The Board went through the explanation of the "6 to 20 or more" description at some length. Id. at 731-733.

That "clarifying sentence" is the second sentence of the license condition quoted above. 7/

In addition, the open access tariff which FERC has thus far found to be the answer is inconsistent with the NRC license conditions of MP&L, LP&L and GSU in its provision for stranded investment, since each of those license conditions precludes transmission charges to reflect lost sales:

[In setting transmission rates] No value shall be included for loss of revenues from sale of power at wholesale or retail by one party to a customer which another party might otherwise serve. 8/

It should be clear that Entergy (at least for MP&L and LP&L resources) and GSU are precluded from the imposition of the sort of stranded investment charge which would be permitted under the open access tariff, and that they are so precluded (and agreed to the preclusion) in order to remedy anticompetitive practices. It is extraordinary that FERC should apparently choose to permit the Applicants here simply to ignore those obligations, especially when the very tariff which ignores the obligations is the excuse for failure to examine the remainder of the anticompetitive concerns raised by a vast number of intervenors.

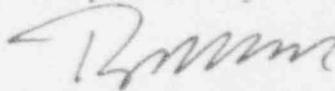
7/ The decision cited above was one which offered LP&L the opportunity to accept the proposed modified license conditions. It did so. In the Matter of Louisiana Power & Light Company (Waterford Steam Generating Station, Unit No. 3), 8 AEC 887 (1974).

8/ MP&L license condition 1(d). Similar language is included in River Bend License condition 1(c) and LP&L license condition 1(b). MP&L license condition 5(a), River Bend license condition 10 and LP&L license condition 5 permit the licensee to recover its costs for the provision of transmission service. The quoted section above is a limitation of what can be included in that "cost."

CONCLUSION

For the reasons set forth above, MEAM requests that this Commission determine that there have been significant changes in the circumstances affecting MEAM, other transmission dependent utilities, Entergy (and its operating subsidiaries), and GSU, and that it should review the antitrust conditions heretofore imposed upon the Entergy subsidiaries and upon GSU to determine whether they are still adequate or should be modified to cover the entire Entergy system in order to reflect the operating realities of that system as it has evolved.

Respectfully submitted



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Dated: April 26, 1993

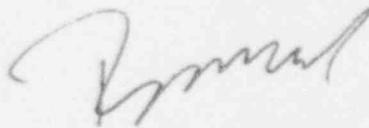
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Certificate of Service

I hereby certify that I have this day caused the foregoing document to be served upon all parties on the official service list in this proceeding.

Dated at Washington, D.C. this 26th day of April, 1993.



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Attachment

Kassett

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ENTERGY SERVICES, INC. AND) Docket Nos. EC92-21-000
GULF STATES UTILITIES COMPANY) and ER92-806-000

REQUEST OF
MUNICIPAL ENERGY AGENCY OF MISSISSIPPI
FOR REHEARING AND FOR EXPEDITED CONSIDERATION
AND MOTION FOR STAY OF PROCEDURAL SCHEDULE

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713, the Municipal Energy Agency of Mississippi ("MEAM") hereby requests rehearing of the Commission's January 28, 1993 "Order on Applications," 62 FERC ¶ 61,073 ("the January 28 Order") and joins in the request for expedited consideration and motion for stay of procedural schedule filed on February 22, 1993 by the Central Louisiana Electric Company ("CLECO").

INTRODUCTION

The Commission's January 28 Order summarily concludes, without any substantive analysis or record evidence, that the proposed merger of Entergy Services, Inc. ("Entergy") and Gulf States Utilities Company ("Gulf States") to form the second largest utility company in the United States will have no adverse effect on competition. The rationale for the Commission's refusal to consider anticompetitive issues in this merger is not entirely clear. As discussed below, there is obvious circularity of reasoning, at best, in the rationale that can be discerned. But to the extent that the rationale can be discerned, there are several areas where the Commission is simply wrong either as a matter of law or of economics, or of both. It may be that the

Commission has simply misunderstood the consequences of the "open-access" transmission tariff approved in Docket No. ER91-569-000 1/ , which the Commission has declared to be the Deus ex Machina which has saved the proposed merger from scrutiny as to its anticompetitive effects. In any event, the decision to abstain from examination of this issue cannot stand. In refusing to conduct a hearing on the competitive impacts of the proposed merger, the Commission fails to respond to issues raised by MEAM and numerous other intervenors, fails to articulate any reasoned explanation for its action, and departs without explanation from previously established policies and precedent, all in violation of its obligations under Section 203 of the Federal Power Act, 16 U.S.C. § 824b (1988).

SPECIFICATIONS OF ERROR

The Commission's refusal to initiate a hearing on the impact of the proposed merger on competition is arbitrary, capricious, an abuse of discretion and fails to meet the Commission's responsibilities under the Federal Power Act, 16 U.S.C. §§ 824, et seq., and the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq., because the January 28 Order:

- (1) fails to respond to substantial issues raised by the parties;
- (2) fails to articulate any rational explanation for the refusal to direct a hearing on competition issues;
- (3) fails to articulate any rational explanation for the refusal to consider system-wide network transmission service

1/ Entergy Services, Inc., 58 FERC ¶ 61,234, order on reh'g, 60 FERC ¶ 61,168 (1992), appeal pending, Cajun Electric Power Cooperative, Inc., et al. v. FERC, Nos. 92-1461, et al. (D.C. Cir., filed October 23, 1992).

as a condition of approving the proposed merger;

- (4) departs without any explanation from previously established Commission policies and precedent; and
- (5) rests upon a misapplication of the burden of proof and applicable standards for summary disposition.

ARGUMENT

- I. THE JANUARY 28 ORDER FAILS TO RESPOND TO THE SHOWING OF MEAM AND OTHERS THAT THE ANALYSIS OF COMPETITIVE IMPACTS IN DOCKET NO. ER91-569-000 CANNOT BE PRESUMED TO BE SUFFICIENT FOR EVALUATING THE EFFECTS OF THE PROPOSED MERGER AND FAILS TO ARTICULATE ANY RATIONAL EXPLANATION FOR THE REFUSAL TO DIRECT A HEARING ON COMPETITION ISSUES

The Commission's refusal to conduct a hearing on the competitive impacts of the proposed merger is based solely on the Commission's ipse dixit assertion that the open access tariff, when extended to then GSU territory and in perpetuity, will adequately mitigate any increase in market power that may arise from the proposed merger, if approved. 62 FERC at _____, slip at 54. The January 28 Order nowhere responds to the showing of MEAM and other intervenors that the market context in which the open access transmission tariff was evaluated in Docket No. ER91-569-000 is significantly different from the market context which will exist if the proposed merger is approved.

As discussed at page 10 of MEAM's September 28, 1992 motion to intervene in this proceeding, the proposed merger of Entergy and Gulf States has substantially broader implications for market structure and performance than the transactions at issue in the transmission tariff proceeding. The market-based transactions approved by the Commission in Docket No. ER91-569-

000 will not result in permanent changes in market structure. Moreover, the Commission's authorization for such market-based transactions could be revoked if market conditions changed significantly or if the Commission subsequently found that the "open access" transmission tariff as applied did not in fact mitigate Entergy's market power. In contrast, the proposed merger would result in substantial and permanent changes in market structure. The January 28 Order does not address in any way the differences in context between the transmission tariff proceeding and the proposed merger, but simply assumes without explanation that the transmission access tariff approved in Docket No. ER91-569-000 will be adequate to mitigate the significantly enhanced market power of the merged company.

The Commission in Docket No. ER91-569-000 evaluated the adequacy of the transmission access tariff in markets in which Gulf States was a significant and independent competitor of the Entergy system. The proposed merger would eliminate Gulf States as a competitor and would lead to increased concentration and, at least presumptively, decreased competition, in a number of relevant markets.

The January 28 Order acknowledges the increased concentration in relevant markets that will result from the proposed merger but dismisses these market share statistics as only preliminary indicators of the effects of the proposed merger on competition. 62 FERC at _____, slip at 55-56. 2/ The January 28

2/ MEAM agrees with the Central Louisiana Electric Company that the Commission cannot properly rely upon the undisclosed and extra-record "up-dated market analysis" referenced at page 43 of the January 28 Order. MEAM hereby joins in and incorporates by reference the discussion at pages 14-16 and 27-28 of the February 22, 1993 Request of Central Louisiana Electric Company for [Continued on next page]

Order asserts that ". . . only an examination of the particular market -- its structure, history, and probable future -- can provide the appropriate setting for judging the probable anticompetitive effect of a merger." 62 FERC at _____, slip at 56. The Commission, however, has made no such examination and indeed has foreclosed any such analysis by refusing to initiate a hearing regarding the effects of the proposed merger on competition.

Moreover, the concentration ratios calculated by the Commission assume that the transmission access tariff is in place and functioning perfectly. In other words, the indicated increases in market concentration occur in spite of the transmission access tariff. ^{3/} There is no logical or evidentiary foundation for the Commission's completely circular presumption that the existence of the transmission access tariff will adequately mitigate any adverse effects of increased market concentration that will occur even with the transmission access tariff in place. ^{4/}

[Continued from previous page]

Rehearing and for Expedited Consideration and Motion for Stay of Procedural Schedule regarding the Commission's improper reliance upon extra-record material.

^{3/} Moreover, the Request for Rehearing of South Mississippi Electric Power Association, filed on February 26, 1993, establishes at pages 46-58 that the market concentration ratios relied upon by the Commission may be significantly understated. SMEPA's analysis of market concentration, among many other considerations, clearly establishes the need for an evidentiary hearing on the competitive impacts of the proposed merger.

^{4/} Indeed, in presupposing perfect operation of the transmission access tariff in calculating concentration ratios, the Commission violates the framework for analysis that it determined was appropriate in Northeast Utilities Services Company (Re Public Service Company of New Hampshire), 56 FERC ¶ 61,269 (1991). In that case, the Commission rejected NU's contentions that the analysis of effects on competition should presume the effects of voluntary
[Continued on next page]

The Commission itself recognized in Docket No. ER91-569-000 that the kind of dramatic change in market structure resulting from a merger could require re-evaluation of the market power analysis and conclusions made in that proceeding. It specifically "reserve[d] the right to require Entergy to file an updated [competition] analysis if Entergy acquires any utility." 58 FERC at 61,798, n.91. In this case, however, the Commission summarily rejects the need for such an analysis on the unexplained and completely unsupported presumption that the transmission access tariff, approved in the context of the pre-merger market structure, will be completely adequate to assure effective competition in the dramatically different market structure that will exist after the merger.

II. THE JANUARY 28 ORDER PROVIDES NO RATIONAL EXPLANATION FOR SUMMARILY REJECTING MEAM'S REQUEST TO REQUIRE NETWORK SERVICE AS A CONDITION OF APPROVING THE PROPOSED MERGER

MEAM, and other TIG members, asserted that network transmission access was a potential remedy for at least

[Continued from previous page]
transmission commitments proposed by NU. The Commission concluded, 56 FERC at 61,999:

We must compare the competitive situation which exists before the merger to the competitive situation which would result from an unconditioned merger in order to establish a baseline for determining whether the merger should be conditioned and, if so, in what ways. Without such an initial assessment, we cannot determine whether additional conditions are necessary to mitigate any anticompetitive effects of the merger. [Footnote omitted.]

Entergy's pursuit of a two-step strategy, proposing voluntary transmission access terms in one proceeding and then applying for approval of the merger soon thereafter, certainly provides no justification for abandoning the analytical framework found to be appropriate in the NU/PSNII case.

significant elements of the anticompetitive effects of the proposed merger. The January 28 Order refuses even to contemplate a condition requiring network service, claiming (again without explanation or support) that the existing transmission tariff provides adequate mitigation of anticompetitive effects, 62 FERC at ____, slip at 59, claiming that the definition of requested network service was unclear, 62 FERC at ____, slip at 57, footnote 102, and asserting that intervenors failed to establish a sufficient nexus between the impacts of the proposed merger and the request for network transmission service, 62 FERC at ____, slip at 59. Part I above demonstrates the absence of any record support or rational explanation for the Commission's conclusion regarding the adequacy of the transmission tariff to mitigate the impacts on competition of the proposed merger. This part addresses the Commission's other purported reasons for refusing to consider network transmission, which also lack any rational basis.

A. MEAM's Request for Network Service Was Adequately Defined

The Commission asserts confusion as to the meaning of the requests by MEAM and others for network transmission service. 62 FERC at ____, slip at 57, footnote 102. Perhaps intervenors' arguments assumed too much familiarity on the part of the Commission and its staff with the terms being used. Certainly Entergy understood the term network access; it is already subject to a network access requirement for several of its operating companies imposed by the NRC (then the AEC) as a condition of its nuclear operating licenses. And Entergy went so far as to make a

last minute filing recognizing, in part, the validity of the point and offering to cooperate in creating a network access arrangement for the TIG members. 5/ This Commission should also be aware of the implications of its action, for the network access it so blithely brushes aside in this context is an essential element to permit the operation of the market in generating resources which it counts upon to discipline the industry in lieu of the Commission's cost of service regulation for the future.

In any case, MEAM will attempt to spell out what is wanted -- and needed -- even more clearly. 6/ Network transmission, as requested by the TIG members as a potential remedy for the expansion of the anticompetitive powers of the Entergy system, and as recognized in part by Mr. Saacks' late filed affidavit, is necessary for the use of generation resources in an "untilted" generation market, or in other words, a level playing field. If there is to be a workably competitive generation market (and the Commission assumes that one or more generation markets exist), 7/ the Commission must impose conditions sufficient to solve the anticompetitive problems that are otherwise exacerbated as a result of the proposed merger, or the merger must fail.

5/ On January 22, 1993, Applicants filed the supplemental response from which the Commission quotes in its order.

6/ The requests for network transmission service were presented, of course, in the context of interventions. It was the Commission's summary rejection of the competition issues that prevented those requests from being fleshed out more thoroughly.

7/ In the NU merger proceeding, the Commission found that the relevant markets were transmission, long- and short-term power markets. Northeast Utilities Service Company (Re Public Service Company of New Hampshire), 56 FERC ¶61,269 (1991) at 62,002-003.

There are some basic engineering elements which govern the cost of transmission systems. With slight over simplifications, the costs of the transmission system necessary to move the power from a generator to the transmission backbone are set when the generator is sited, and should not vary thereafter. 8/ Similarly, the cost of that portion of the transmission system necessary to move power from the backbone to a load is determined by the size of the load to be met from the backbone, and is not impacted at all by the source of the generation which is contracted to serve the load. And power and energy generated by any generating unit are actually consumed in the nearest load (electrically), regardless of the contractual ownership of the unit. The flow of electrons in a transmission system is happily indifferent to everything other than physics, and indifferent, in particular, to the contractual ownership of any operating generating unit attached to the system. Finally, once a generating unit is sited, its impact upon the Entergy/GSU transmission system is identical whether it is owned by GSU, Entergy, MEAM, or another member of the TIG. 9/

Network transmission service, which simply allows the use of the system for the output of those generating units which can be delivered to it, is measured by the coincident use placed

8/ The transmission backbone system may be thought of as essentially an infinite electrical bus. That would be consistent with the planned operation of the Entergy/GSU system as well.

9/ In principle, there could be some difference resulting from variance in the actual operation, but if the operation is rational, with the economy energy schedules which exist among the parties, no party would run a generator which is more expensive to run than another available generator owned by another party which can be run at a higher level. In other words, the system lambdas (or incremental generating cost) of every connected entity ought to be essentially identical.

on the transmission system. In that way, the coordinating systems may fix their obligation for transmission service by the maximum use they make of that service as a whole on a coincident basis. Obviously, if there are transmission impediments which would prevent Entergy/GSU from making a transaction to improve the economics of its system, the TIG members could not do so either, but those impediments are rare, and should not occur on anything other than a truly extraordinary basis, given the planning obligation which Entergy has accepted. Network service was ordered for TDUs by the Commission in Northeast Utilities Services Company (Re Public Service Company of New Hampshire), 56 FERC ¶61,269 (1991), at page 62,050, in which the TDUs obtained a "proportionate use of the system" for "a proportionate rate." Moreover, a network transmission service is that which Entergy is required to provide as a result of its NRC licenses in Grand Gulf and Waterford 3, as discussed below.

There is nothing very new about the concept of network transmission. The difference here is that Entergy was required to provide the service to the TDUs on the LP&L and MP&L systems when those were real operating companies; now that they are mere corporate shells and Entergy itself is functionally the single operating company (which seeks this Commission's permission to add to its size and resources) the obligation should be expanded to keep track with the changes which this Commission is being asked to sanction. The difficulty with the point to point concept embodied in the open access tariff is that which was explained at some length by the Atomic Energy Commission in 1974, nearly 20 years ago. Service is priced for coordination service among a series of entities, as two permutations taken two at a

time. In other words, for coordination among five entities, there would be 20 transmission charges. 10/ For six members of the TIG, there would be 30 such charges. 11/ That point to point concept was rejected by the AEC in 1974 as unreasonable and insufficient to overcome a situation inconsistent with the antitrust laws. Id. at 733-34. It is extraordinary, and contradictory to the general principles of comity, for this Commission simply to gloss over these concerns without even an attempt at a hearing.

Access and pricing are two sides of the same issue. If the TIG members are paying the same relative amount for transmission that Entergy itself pays, they should either be getting the same service or paying less. As has been noted, MEAM and other TIG members pay for and jointly plan (with Entergy) for the transmission necessary to serve their load centers and their generation resources. MEAM and other TIG members pay proportionate shares of the transmission backbone costs; there is no justification for a contention that additional costs should be charged by Entergy to advantage its competitive situation in the generation market vis-a-vis that of MEAM and other TIG members, although that is what the Commission has tacitly approved in its January 28 Order. There is also no justification for the Commission to permit modification of the existing rights of Entergy and GSU under sections 205 and 206 while precluding

10/ See In the Matter of Louisiana Power and Light Company, Waterford Steam Generating Station Unit No. 3), 8 AEC 718, 732-733 (1974) for a complete explanation.

11/ Footnote 101 in the January 28 Order seems to suggest that TIG members could redesignate delivery or receipt points under the open-access tariff from time to time at will. MEAM does not so understand.

members of the TIG group from modifying their own existing contracts with Entergy and/or GSU in order to permit them to deal consistently with the surviving entity, which this Commission has permitted to aggrandize itself at their expense. The net result of the merger, absent either admission to the Entergy/GSU pool on a fair basis that would require renegotiation of the agreement or the provision of network transmission service (see Part III below), is that the TDUs who compete with Entergy and GSU are left with a playing field tilted against them by this decision.

B. There Is No Rational Explanation for the Commission's Rejection of Network Transmission Service on Grounds of Absence of Nexus

The January 28 Order summarily rejects MEAM's request that any approval of the proposed merger be conditioned by a requirement that network transmission service be made available over the entire transmission network of the merged company. The Commission asserts that it is inappropriate to consider a requirement for network transmission service as a condition of the merger because there is no "nexus" between network transmission service and any effects of the proposed merger on competition. 62 FERC at ____, slip at 58-59.

Contrary to the January 28 Order, there is a clear nexus between increased concentration in bulk power markets and transmission services necessary to mitigate the adverse effects on competition arising from increased market concentration. The Commission's own conclusion that the transmission access tariff will mitigate any increased market power of the merged company (albeit unexplained, unsupported, and incorrect) itself

recognizes the nexus between transmission access conditions and the effects on competition from the proposed merger.

Moreover, the Nuclear Regulatory Commission has explicitly recognized the necessity for smaller, non-vertically integrated competitors to have network transmission to permit them to compete effectively with more powerful, fully integrated utilities. The nexus between network transmission service and effective competition in bulk power markets that gave rise (as discussed below to the Waterford and Grand Gulf license conditions remains. The evolution of the relevant bulk power markets since the license conditions were crafted, particularly if the proposed merger is to be approved, does not destroy that nexus, but rather compels the expansion of existing network transmission service offered by individual Entergy operating companies to encompass the entire merged company system, if the objectives of the license conditions are to be served.

The purported explanation in the January 28 Order is that there is no nexus between the proposed merger and network transmission service, because there is no right to system-wide network transmission service that will be negated by the proposed merger. Id. That rationale, however, is patently inconsistent with Commission actions in prior merger proceedings requiring various transmission services or transmission access commitments as conditions for merger approval. For example, in both the Utah Power & Light and NU/PSNH merger proceedings, the Commission required offerings of transmission services that were not available previously as conditions for approval of the mergers. 12/

12/ NU/PSNH, supra; Utah Power & Light Company and PC/UP&L Merging Corporation, 45 FERC ¶61, 095 (1988).

The existence of nexus for a proposed merger condition clearly cannot turn on establishing a pre-merger right to the service that is the subject of the condition. 13/

III. THE JANUARY 28 ORDER CANNOT BE RECONCILED WITH EXISTING COMMISSION PRECEDENT

The issue of access by TDUs to network transmission is not a new one for this Commission. But the action of the Commission in rejecting even consideration of the issue is an extraordinary and unjustified leap of faith in reliance upon the chimera of an open access tariff whose operation the Commission misunderstands. Moreover, such action cannot be reconciled with established policies and precedent reflected in prior Commission cases dealing with power pool arrangements or mergers. 14/

The Applicants here request two actions by the Commission. First, they request approval under Section 203 of the Act for Gulf States to dispose of certain of its jurisdictional facilities to Entergy. Second, however, they request the appro-

13/ Nor could there be any argument that the new authority over transmission access which the Commission has acquired as a result of the passage of the National Energy Policy Act of 1992 (Public Law 102-486, 106 Stat. 2776) changed the Commission's authority and obligation to act as the "first line of defense against those competitive practices that might later be the subject of anti-trust proceedings." 56 FERC at 61,998, quoting Gulf States Utilities Co. v. FPC, 411 U.S. 747, 760 (1973). The National Energy Policy Act made clear, in amended section 212(e) of the Federal Power Act, that, except as expressly provided, nothing in those segments of the Federal Power Act added by the National Energy Policy Act shall "be construed as limiting or impairing any authority of the Commission under any other provision of law."

14/ The February 22, 1993 Request of Central Louisiana Electric Company for Rehearing and for Expedited Consideration and Motion for Stay of Procedural Schedule also demonstrates at pages 18-20 that the January 28 Order departs without explanation from established Commission policies and precedent regarding the need for evidentiary hearings on competition issues. MEAM hereby joins in and incorporates by reference that discussion.

val, under Section 205 of the Act, to amend the agreement among the preexisting Entergy subsidiaries to add GSU. As discussed above, in the context of what is intended by network transmission service, there are substantial efficiencies to be gained by being able to dispatch generation most efficiently for the entire load being served from a transmission system or network. This is not only the justification for power pools and "bulletin boards," but also the justification for the merger at issue here. The merger here, and in particular the changes requested under Section 205 of the Act, may be viewed as permitting the pooling of generating -- and transmission -- resources between MP&L, NOPSI, AP&L, LP&L and GSU. This is the expansion of an existing pool. Under settled precedent, the TIG members would be entitled to participate in such a pool in order not to be discriminated against in the ability to operate economically. E.g., Central Iowa Power Cooperative v. FERC, 606 F.2d 1156 (D.C.Cir 1979), affirming Mid-Continent Area Power Pool (MAPPOOL) Agreement, 58 F.P.C. 2622 (1977).

MEAM, and the remainder of the TIG members, have not thus far formally asked to be admitted to the pool set up by the merger of Entergy and GSU, although the conceptual separation of the ownership and pooling of resources segments of the merger proceeding would be a potential (albeit more disruptive to the Applicants) solution here as well. ^{15/} What they have asked is a lesser, and less intrusive remedy -- to be permitted to operate

^{15/} MEAM now requests that result and admission to the pooling of resources envisioned by the merger on a nondiscriminatory basis in the alternative, if the request for a network transmission alternative or a hearing on the anticompetitive issues is not granted.

among themselves, or with Entergy/GSU if that is desired, and with others, in the most efficient manner, and not to have the transmission necessary for that purpose priced in such a manner as artificially to impede that efficiency. That result would be essentially identical to the service ordered for TDUs by the Commission in the NU/PSNH merger proceeding, 56 FERC at 62,050, in which the Commission ordered NU to file a tariff for the TDUs in that proceeding through which the TDUs would obtain a "proportionate use of the system" for "a proportionate rate for use of the system." The "CMEEC arrangement" there referred to as the paradigm was developed in the record of that proceeding, and did in fact offer CMEEC the transmission rights to use any or all of its generating units or others available to it in the most efficient manner possible for its own load and for transactions available to it and others in the area, as did NU itself with its generating resources.

This merger between Entergy and GSU would, of course, permit Entergy to make the most efficient use of the Entergy/GSU generating resources as a whole; indeed that is the premise of the savings projected by the applicants. MEAM and the remainder of the TIG members have simply requested the right to take advantage of the opportunities to more efficiently utilize the generating resources owned by them and available to them in the market in the same fashion as will Entergy/GSU. That would be entirely consistent with this Commission's decision in NU/PSNH.

The decision by this Commission to reject out of hand the request for network transmission is also in direct contravention of a policy of a sister agency, the NRC. For Entergy is already required to make network access available to those

members of the TIG within particular subsidiaries. Thus, dating from the days when the Entergy (then Middle South Utilities) subsidiaries operated as separate entities, there are the following license conditions with which Entergy must comply.

Grand Gulf License Condition 5 (emphasis added):

- (a) [MP&L] shall facilitate the exchange of bulk power by transmission over its transmission facilities between or among two or more entities in the Western Mississippi Area with which it is interconnected Such transmission shall be on terms that fully compensate Applicant for its cost.
- (b) Applicant shall include in its planning and construction program sufficient transmission capacity as required for the transactions referred to in subparagraph (a) of this paragraph. . . .

Waterford 3 License condition 5 (emphasis added):

[LP&L] shall transmit power and energy over its transmission facilities among entities in the State of Louisiana with which it is interconnected and has or will have a transmission schedule in effect. For each coordinating group of entities there shall be a single transmission charge.

The Waterford License Conditions also include transmission planning and construction obligations much like those for Grand Gulf. It may be noted that the second sentence from Waterford Condition 5 quoted above was added by the Atomic Safety and Licensing Board to make clear its view of the first sentence quoted, and to reflect its view that LP&L was attempting to preclude coordination among cities and/or coops by its insistence that it only be required to transmit "between" such entities. As the Board noted, In the Matter of Louisiana Power & Light Co (Waterford Steam Generating Station Unit No. 3), 8 AEC 718, at 733-34 (LBP-74-78, 1974):

Assuming without deciding that Applicant's transmission rate is reasonable per se, the payment of 6 to 20 or more transmission charges by a single group of entities is deemed unreasonable. 16/

The limitation of "between two entities" in Applicant's [proposed license conditions] is not an adequate provision designed to permit coordination (both operation and development) sufficient to overcome a situation inconsistent with the antitrust laws. A change from "between" to "among" will correct this deficiency.

Since the Board apparently found that LP&L had been particularly recalcitrant, it went further and noted (Id. at 737):

The purpose of this change [from "between" to "among"] is to prevent multiple transmission charges for transmission of a contracted transmission entitlement among a coordinating group of two or more entities. To make the purpose of this change free from doubt, a clarifying sentence has been added.

That "clarifying sentence" is the second sentence of the license condition quoted above. 17/

It should be clear that the issue of whether or not network transmission which permits transmission dependent entities within the Entergy borders to coordinate is required to obviate antitrust concerns is not new. It is not something which Entergy can claim it fails to understand or is undefined, nor should it be a concept alien to the thinking of this Commission. Since this Commission is asked to expand the area, loads and generating resources with which Entergy can coordinate and commit

16/ The Board went through the explanation of the "6 to 20 or more" description at some length. Id. at 731-733.

17/ The decision cited above was one which offered LP&L the opportunity to accept the proposed modified license conditions. It did so. In the Matter of Louisiana Power & Light Company (Waterford Steam Generating Station, Unit No. 3), 8 AEC 887 (1974).

to efficient operation, it would be anomalous should it continue to blind itself to the attempts of others in the area simply to expand the existing obligations of the Entergy operating companies to maintain consistency, now that those operating companies are mere dried legal husks with no real separate responsibilities of their own, and now that all responsibilities for system planning and operation have passed to the centralized Entergy system. 18/

In addition, the open access tariff is inconsistent with the NRC license conditions of MP&L, LP&L and GSU in its provision for stranded investment, since each of those license conditions precludes transmission charges to reflect lost sales:

[In setting transmission rates] No value shall be included for loss of revenues from sale of power at wholesale or retail by one party to a customer which another party might otherwise serve. 19/

It should be clear that Entergy (at least for MP&L and LP&L resources) and GSU are precluded from the imposition of the sort of stranded investment charge which would be permitted under the open access tariff, and that they are so precluded (and agreed to the preclusion) in order to remedy anticompetitive practices. This Commission cannot permit the Applicants here

18/ As settlements between the Department of Justice and the applicants, the obligations imposed by the License Conditions are contractual, binding upon the Applicants, and may be enforced by MEAM and others similarly situated as third party beneficiaries. United States v. Pacific Gas & Electric Co., 714 F.Supp. 1039, 1051 (1989).

19/ MP&L license condition 1(d). Similar language is included in River Bend License condition 1(c) and LP&L license condition 1(b). MP&L license condition 5(a), River Bend license condition 10 and LP&L license condition 5 permit the licensee to recover its costs for the provision of transmission service. The quoted section above is a limitation of what can be included in that "cost."

simply to ignore those obligations, especially when the very tariff which ignores the obligations is the excuse for failure to examine the remainder of the anticompetitive concerns raised by a vast number of intervenors.

IV. THE JANUARY 28 ORDER MISAPPLIES THE BURDEN OF PROOF AND IS INCONSISTENT WITH APPLICABLE STANDARDS FOR SUMMARY DISPOSITION

In the interest of avoiding unnecessary repetition, MEAM hereby joins in and incorporates by reference the discussion at pages 7-12 of the Request of Central Louisiana Electric Company for Rehearing and for Expedited Consideration and Motion for Stay of Procedural Schedule, dated February 22, 1993, regarding the January 28 Order's misapplication of the burden of proof and violation of applicable standards for summary disposition.

V. MOTIONS FOR EXPEDITED CONSIDERATION AND FOR STAY OF PROCEDURAL SCHEDULE

For the reasons set forth at pages 29-38 of the February 22, 1993 Request of Central Louisiana Electric Company for Rehearing and for Expedited Consideration and Motion for Stay of Procedural Schedule, MEAM hereby joins in and supports CLECO's motions for expedited consideration of the requests for rehearing of the January 28 Order and for stay of the procedural schedule in this proceeding pending action on the requests for rehearing.

CONCLUSION

For the reasons above stated, and for those stated in MEAM's original papers in this docket, the Commission should grant rehearing, set the competitive issues for hearing, and modify the procedural schedule under which the Administrative Law

Judge is now operating in order to permit these issues also to be considered. MEAM also respectfully urges the Commission to grant expedited consideration of the requests for rehearing of the January 28 Order and to stay the procedural schedule in this proceeding pending action on the requests for rehearing.

Respectfully Submitted,

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Dated: March 1, 1993

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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 1993, served the foregoing document by mailing copies thereof, first-class, postage prepaid, to all parties in this proceeding.

Bonnie S. Blair