UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of Gulf States Utilities	)))	NRC Docket No. 50-458

REPLY OF TERREBONNE PARISH CONSOLIDATED GOVERNMENT TO RESPONSE OF GULF STATES UTILITIES COMPANY TO THE COMMENTS ON ANTITRUST ISSUES

On June 11, 1993, Gulf States Utilities Company ("Gulf States") filed a second response to the comments on antitrust issues filed following the Nuclear Regulatory Commission's Federal Register Notice soliciting comments regarding this matter. The Gulf States response was neither requested by the NRC nor provided for in the NRC's rules. The many misstatements of fact and law it contains require Terrebonne Parish Consolidated Government ("Terrebonne")[1] to file this reply.

Gulf States Has Ignored The Primary Thrust Of Terrebonne's Argument: Gulf States and Entergy Are In Violation Of Existing License Conditions

While Gulf States spends almost 30 pages to detail its responses to comments, it virtually ignores the primary thrust of Terrebonne's argument: that the requested transfer should not be approved because both Gulf States, the transferror, and Entergy

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[1] Terrebonne is also referred to at times as the City of Houma, Louisiana.

Corporation ("Entergy"), the transferee, are now operating in violation of existing NRC license conditions.

As explained in detail at pages 13-22 of Terrebonne's Comments,[2] Gulf States and Entergy are violating their license conditions in at least two ways. First, they are assessing multiple transmission charges for transmission of a given quantity of power between two points -- i.e., from A to B and from B to A -- and among several points. Second, they are including stranded investment costs in calculating transmission rates. The reasons Gulf States gives for urging the NRC to decline to make a significant change finding despite these violations cannot sustain the requested inaction.

Initially, Gulf States urges the NRC to ignore comments dealing with the pricing of transmission service because such pricing is solely a matter for the FERC. Gulf States' response at 3, 10, 13 and 16. This argument ignores the fact that the license conditions contain explicit restrictions on how Entergy can price transmission service. Indeed, the entire thrust of the decision in Louisiana Power & Light Co. (Waterford Steam Generating Station, Unit No. 3), 8 AEC 718 (ASLB 1974) was that transmission service cannot be priced the way Entergy and Gulf States are pricing it -- by the assessment of multiple transmission charges for transmission of a given quantity of

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[2] Gulf States' claim that the comments submitted were only general and unspecific in nature, Gulf States' response at 27, is simply incorrect. The extremely detailed submission of Terrebonne contained hundreds of pages of supporting documentation.

power in either direction between two points or among several points. These pricing limitations were voluntarily accepted in the license conditions of both Louisiana Power & Light Company and Mississippi Power & Light Company. Entergy and Gulf States also voluntarily accepted the exclusion of stranded investment costs in their license conditions. The fact that these license conditions bear on a service generally subject to regulation by FERC does not mean that the FERC can modify or set them aside even if it were asked to. On the contrary, FERC's regulation of the licensees' transmission rates is required, so long as the public interest permits, to accommodate such restrictions even when they are the product of mere private contracts, much less conditions on licenses granted by the United States. See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

FERC itself has recognized that the pricing of transmission service may well be limited by agreements made by Entergy, such as NRC license conditions. See Entergy Services, Inc. 63 FERC ¶ 61,025, 61,147 and 61,153 (1993).

Gulf States' contention that the NRC should defer to the FERC on these pricing questions, Gulf States' response at 3, 13, 16, is highly disingenuous as well as legally incorrect. Before FERC, Entergy and Gulf States urged that FERC disregard the NRC license conditions because their enforcement was a matter for the NRC to consider. FERC complied. See Entergy Services Inc. 63 FERC at 61,147 and 61,153.

Now that Terrebonne has come to the NRC to enforce the conditions, Gulf States says defer to the FERC. The licensees can't have it both ways. The NRC must act on these violations now.

Other Contentions Made By Gulf States Do Not Warrant Withholding a Significant Change Finding

Gulf States has made a number of other contentions in support of its request that the NRC not make a significant change finding. None has any merit.

First, Gulf States claims that the NRC should not look into the merger because the FERC has primary antitrust jurisdiction. Gulf States' response at 3, 17-23. This is simply not true. While the FERC does have to take antitrust policy into account in making decisions it "of course lacks principal responsibility for the implementation of antitrust policy . . . (emphasis added), Alabama Power Co. v. FPC, 511 F.2d 383, 393 (D.C. Cir. 1974), and it does not enforce the antitrust laws. Gulf States Utilities Co. v. FPC, 411 U.S. 747, 760 (1973); Northeast Utilities Service Company v. FERC, Nos. 92-1165 et al., slip op. at 20-24 (1st Cir. 1993). Indeed, it is the NRC that has more explicit statutory antitrust enforcement responsibility. It is the NRC that must determine if there is a situation inconsistent with the antitrust laws. Consumers Power Co. (Midland Plant, Units 1 and 2), 6 NRC 892, 907-14 (ASLAB 1977). This different antitrust responsibility argues for the NRC to take a more active role, not

a less active role, in enforcing the antitrust laws. See Alabama Power Co. v. Nuclear Regulatory Commission, 692 F.2d 1362, 1367-69 (11th Cir. 1982); cert. denied 464 U.S. 816 (1983).

Gulf States also urges the NRC to defer to the FERC because competitive issues have been fully examined and decided at the FERC. Gulf States' response at 3, 22-28. The facts show otherwise. Indeed, not only did the FERC not hold an evidentiary hearing, it did not even hold a paper hearing. This is considerably different than the Seabrook decision relied on by Gulf States, Gulf States' response at 25-26, since there the NRC Staff had the benefit of a full evidentiary hearing record; here there is no hearing record at all.

Moreover, it was not until its order denying rehearing in the merger proceeding that the FERC finally, grudgingly, revealed some of the analysis upon which its refusal to set competition issues for hearing rested. Entergy Services Inc., Order Denying Rehearing, 64 FERC ¶ 61,001 (July 1, 1993), slip op. at 21 and Attachment No. 1. This came far too late, however, for any of the parties to challenge it or discover the underlying basis for the market definitions or the numbers used therein. Since the FERC refused to consider damaging admissions by Entergy undermining the FERC's monopoly power analysis after the deadline for requesting rehearing, see discussion at 6-7 infra, there is no reason to expect that the FERC will entertain argument attacking its analysis after rehearing has been denied. Intervenors have never had an opportunity to discover the basis

for FERC's analysis or to challenge it because what little of the analysis FERC revealed was not disclosed until after FERC's deadline for disputing it.

As stated in more detail in a recent filing with the FERC by Louisiana Energy and Power Authority ("LEPA") (which is attached for the convenience of the Commission) evidence adduced during the limited FERC hearing (but after the deadline for filing requests for rehearing) undermines the cornerstone of the FERC's decision not to hold a hearing on competitive issues. Specifically, in concluding that the merger would not enhance Entergy's monopoly power, the FERC assumed, without any factual basis, that Entergy's open access tariff provided sufficient access to all first tier utilities -- i.e., utilities directly interconnected to Entergy and Gulf States -- to permit them, in practice, to engage in transactions with one another. See Gulf States' response at 6; Order Denying Rehearing, 64 FERC ¶ 61,001, Attachment 1. This meant that the relevant geographic market encompassed an area that included all areas where so-called "first tier" utilities were located in addition to the areas where Entergy and Gulf States were located. In this large geographic area Entergy/Gulf States was found not to have monopoly power.

However, when one of Entergy's principal witnesses, Mr. Gallaher, testified at the FERC, he stated that there were many practical restraints that prevented first tier utilities that were not directly interconnected with one another -- i.e.,

that were interconnected through Entergy and/or Gulf States -- from engaging in transactions with one another.[3] At the very least, this admission requires any regulatory agency looking at competitive issues to hold a hearing to determine whether, in practice, the open access tariff provides sufficient access to the Entergy/Gulf States transmission system to mitigate the monopoly power created by the merger. The FERC never even gave intervenors an opportunity to discover evidence on this point, although a primary Entergy witness subsequently testified that FERC's factual assumption was in error.

In its Order Denying Rehearing FERC refused to consider this damaging evidence because it was presented after the deadline for requesting rehearing. Id. slip op. at 18. But this evidence did not surface until May 13, 1993, well after the March 1, 1993, date for filing rehearing requests. See attached pleading. FERC didn't even have the decency to acknowledge the fact that it was impossible to present this evidence by March 1.

FERC apparently accepted without question that Entergy lived up to its obligation to be candid with one of its regulators even though Entergy not disclose its view, as stated by Mr. Gallaher, that the mere existence of the open access tariff does not mean that, in practice, all first tier entities can deal with each other as the FERC assumed. This assumption is absolutely fundamental to the "analysis" disclosed in Attachment 1 to the

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[3] The pertinent portions of Mr. Gallaher's FERC testimony are included in the attached FERC pleading of LEPA.

FERC's Order Denying Rehearing, 64 FERC ¶ 61,0001. The FERC's attitude of sticking its head in the sand on this issue is particularly egregious since Entergy had taken the exact position rejected by Mr. Gallaher and the FERC had accepted it hook, line and sinker, despite objections from over a dozen different intervenors. It is precisely this type of evidence that could have been developed by intervenors in the FERC proceedings if they had been given an opportunity, but they were not. FERC apparently felt more comfortable relying on economic theories than on the commercial realities in defining the relevant markets for competition analysis.

In addition, FERC apparently did not understand the significance of some of the arguments made to it. For example, although it acknowledged that LEPA (and Terrebonne/Houma, which concurred in LEPA's pleading) argued that FERC incorrectly defined the markets.[4] Id., slip op. at 12. FERC nevertheless stated that LEPA and Terrebonne did not challenge the economic analysis. Id., slip op. at 21. FERC cites no authority or other reason for the mind-boggling conclusion that challenging market definition does not challenge the antitrust analysis resting on that definition.

Gulf States also contends that all that LEPA and its fellow transmission dependent competitors of Gulf States and Entergy want is network transmission service, to which they are not

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[4] LEPA and Terrebonne argued for markets like those that have been used in prior NRC cases. See Terrebonne's Comments at 9.

entitled because: (1) it is too ill defined to understand, (2) it is not sufficiently related to the merger to constitute appropriate relief, (3) it would require Entergy to provide innumerable firm transmission paths at an enormous cost, (4) failure to provide such service is not anticompetitive, and (5) such service can be obtained in other ways. Gulf States' response at 9-17. None of these arguments passes muster.

First, network transmission service has been defined in various papers submitted by Terrebonne and the Transmission Intervenors' Group, "TIG," to the FERC. Such service requires, at a minimum, the provision of transmission service in accordance with the NRC license conditions discussed above. Without meeting that criterion, there can be no network service, and that criterion has not been met. Further, members of the TIG submitted a detailed proposal on network transmission service to Entergy on March 5, 1993, more than three and a half months ago. If Entergy does not understand what network transmission service is, it is merely because Entergy has not taken the TIG proposal seriously enough to read it.

Gulf States' claim that network transmission service is not an appropriate remedy because it is not related to the merger is in error. As detailed in Terrebonne's Comments, at 13-22 and 25-34, the provision of such service is necessary and appropriate because such service is required by existing NRC license conditions and because expanding Entergy's intracompany network service to include the Gulf States system within Entergy as a

direct result of the merger, while withholding network service from TIG members, places the TIG at a competitive disadvantage vis-a-vis Entergy.

Gulf States argues that provision of network service would require the licensees to provide firm transmission for up to 138 separate paths. Gulf States' response at 14. This argument is frivolous. Gulf States has apparently not bothered to read Terrebonne's Comments, and specifically pages 17-18 of Terrebonne's Comments, where this straw man was knocked down. Briefly, the TIG does not insist that Entergy provide 138 firm transmission paths. What TIG does insist on is: (1) that Entergy not assess multiple charges (up to 138 separate charges) to transmit a given quantity of power among all first tier utilities if there is existing capacity available for such transmission and Entergy incurs no additional costs, and (2) that Entergy removes transmission constraints that adversely affect TIG members to the same extent that Entergy removes constraints that adversely affect it. At present Entergy would assess 138 transmission charges (totalling $2202.48 per kW per year) for transmission among first tier utilities even if it has ample capacity available to accommodate transmission among these 138 paths without incurring any additional costs, and, therefore, only incurs costs of $15.96 per kW per year for such service. In addition, Entergy is free to plan and build its system in a way that discriminates against TIG members.

Gulf States' contention that the failure to provide network transmission service is not anticompetitive, Gulf States' response at 11-12, must also be rejected. As detailed at 25-34 of Terrebonne's Comments, the merger, coupled with Entergy's refusal, widens the competitive gap between the merged companies and the TIG members.

Finally, Gulf States argues that the NRC should do nothing because the TIG members could try to obtain network transmission service by using sections 211 or 212 of the Energy Policy Act of 1992 or by using other vehicles. Gulf States' response at 16. Such an argument begs the question. Just because theoretically there may be other ways of obtaining the desired relief does not mean relief under the Atomic Energy Act is unavailable. Taking Gulf States' argument to its logical conclusion the TIG could never obtain any relief anywhere if it could be shown that there is more than one forum that could grant the relief.

CONCLUSION

For the reasons stated in Terrebonne's Comments, the NRC should not grant the requested approvals unless and until Entergy and Gulf States revise their transmission arrangements to provide for transmission of a given quantity of power among points for one transmission charge and remove stranded investment charges from the transmission rate. The NRC should make a significant

change finding and conduct an antitrust review and a hearing prior to approving the requested license amendments.

Respectfully submitted,

Melvin G. Berger
Sean T. Beeny
BRAND, BEENY, BERGER & WHITLER
1730 K Street, N.W.
Suite 1000
Washington, DC 20006
(202) 347-7002

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