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August 2, 1993

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Mr. Geoffrey Grant, Acting Chief
Inspection and Licensing Policy Branch
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Nuclear Regulatory Commission
Washington, D.C. 20555

Re: NRC Docket No. 50-458

Dear Mr. Grant:

This will respond to your letter of inquiry dated July 7, 1993 with respect to the proposed transfer of the control of ownership of the River Bend Station from Gulf States Utilities Company ("GSU") to Entergy Corporation ("Entergy") now pending in the above-captioned docket. You have asked that the Municipal Energy Agency of Mississippi ("MEAM") respond to certain questions. We address each of these questions below. For ease in response we set out your question first, then our response.

Question 1

In the FERC "Order Accepting Rate Schedules, Accepting Amendment to Power Agreement, Conditionally Accepting Transmission Tariff With Modifications, Conditionally Accepting Service Agreements, Granting Waiver of Notice, and Denying Motion to Update Market Power Analysis," dated April 5, 1993, 63 F.E.R.C. Paragraph 61,025, the FERC urged the Entergy customers (and the NRC staff presumes GSU's customers as well subsequent to the merger) who are eligible for certain benefits perceived to be broader than what is termed "point-to-point" transmission service over the Entergy system, to approach the FERC with specific objections in the context of a request to amend or approve a service contract with Entergy Corporation. Would MEAM explain to the staff why this proposal

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would not be an acceptable option in resolving its transmission access dispute with GSU/Entergy?

- A.1. We have been unable to determine what the FERC had in mind that might resolve the problems which are now manifest. The proposal as you state it -- that MEAM and others who believe themselves entitled to rights under the NRC license conditions "approach the FERC with specific objections in the context of a request to amend or approve a service contract with Entergy Corporation" -- does not appear to work from a practical point of view, as we explain below.

The specific passage in the April 5 FERC order to which you refer is presumably that somewhat enigmatic paragraph which appears at Entergy Services, Inc., 63 FERC ¶61,025, at p.61,147 (1993):

With respect to NRC license conditions, any customer that is eligible for different terms and conditions due to an NRC license condition may be separately accounted for in a service agreement. If the customer alleges that the terms and conditions contained in the service agreement do not conform to applicable requirements, the Commission will address the issue at that time based on the specific facts presented by the customer and Entergy.

We refer to this provision hereafter as the FERC "invitation." This invitation provision seems to say that if there is a clear NRC license condition of which Entergy is in violation, and if the service agreement is inconsistent with that NRC condition [the "applicable requirements"] the FERC will entertain a complaint proceeding to remedy the matter if Entergy will not voluntarily modify the service agreement. In substance, this suggests that we talk to Entergy and, if that does not work, complain to the FERC.

This suggestion has not been ignored. MEAM and others approached Entergy about a year ago, in the context of a request to amend service agreements. In that context, MEAM and others have in fact made the same argument that they have made here -- that the changes to the operation of the Entergy system and the changes in the operation of the electrical industry which have occurred since the license conditions justified the expansion of the license

Mr. Geoffrey Grant
August 2, 1993
Page 3.

obligations to the Entergy system (including GSU, when and if the merger is approved). While this was done in the context of a settlement discussion, and it would not be appropriate to provide a detailed description of that process, there is no such amendment now in place, nor is it clear that such an amendment is even close to fruition. While there has been no overt refusal to negotiate further by any party, it is not at all apparent that a satisfactory resolution is nigh. 1/

The fact that negotiations with Entergy do not seem very likely to reach satisfactory resolution leaves the second half of the FERC invitation -- to apply to the FERC to remedy a violation of the license conditions. On the one hand, this is precisely what MEAM and others have sought to do in their pleadings at FERC so far in the merger proceeding; FERC has expressly declined to respond to our requests, other than to invite us to think of coming back again with the same contention. On the other hand, this is not as simple an effort as might appear, since, as we have noted to this Commission, the license conditions requiring network access were drafted initially in a much different environment and legal conditions.

Entergy has argued that the licenses apply only to the subsidiary which technically holds the NRC license, regardless of the fact that MP&L (for example) scarcely exists any longer as anything more than a corporate shell, and that the planning and operating functions for all Entergy subsidiaries are now centralized for the entire system, as is the generation function for the entire system. Entergy apparently takes the position that the substitution of a separate common operator (Entergy Operations, Inc, or "EOI") for all of the Entergy nuclear units (and proposed to be added to the River Bend unit) changes nothing and that this Commission should continue to assume that each of the Entergy franchised subsidiaries (MP&L, NOPSI, AP&L and LP&L) operate as separate entities, even though that is no longer so. As we note below, in response to your fourth inquiry, those changes by Entergy, undertaken to respond to the changes in the regulatory structure imposed by FERC and by Congress, mean that MEAM can no longer deal with MP&L in any meaningful

1/ MEAM does note that it is still engaged in discussions with Entergy on these matters, and retains some hope that there is a resolution which could be reached.

Mr. Geoffrey Grant
August 2, 1993
Page 4.

way, since all MP&L functions of interest to MEAM which used to exist are now in reality Entergy functions instead. Since MP&L has functionally ceded all functions and rights in dealing with MEAM to Entergy, it is not unreasonable for MEAM and others to expect that the obligations similarly be undertaken by Entergy.

As the FERC order to which you have referred shows, however, Entergy has taken the position even before the FERC that the license conditions need be given only the most narrow, cramped interpretation, and that a license condition for Grand Gulf, for example, applies only to the activities of Mississippi Power & Light Co. As that order also demonstrates, at p. 61,147, Entergy argues that only the NRC should enforce NRC license conditions, and that in any event disputes should be dealt with in NRC enforcement proceedings. So far as the likely effectiveness of the FERC "invitation" is concerned, we note that, in response to MEAM and others pointing out that the NRC license conditions were expressly crafted to preclude the separate double charge for point to point service from A to B when a charge is also levied for service from B to A (in the course of the Licensing Board ruling in the Waterford 3 proceeding), the FERC went so far as expressly to permit the double charge, saying only -- in the invitation clause -- that if MEAM or others had a separate NRC right and that if Entergy tried to override that right, MEAM could come back to FERC to complain.

The problem with the invitation clause as a solution to the problem faced by MEAM and other TDUs is that it is hollow and inconsistent on its face. MEAM and other TDUs were faced with the operation of the Entergy tariff filed and accepted for operation in FERC Docket No. ER91-569-000. That tariff (supposedly an "open access" tariff, which Entergy had filed to be applicable to its entire system) is intended to be used by MEAM and other TDUs to accomplish sales to and purchases from others who could not now be reached through the interconnection agreements which these entities had with the historic Middle South (now Entergy) operating companies. MEAM and others pointed out that this very tariff, which Entergy filed to apply to them and intended to apply to them, violated the NRC license conditions in several ways. It was this effort which led the FERC to issue its invitation to come back if Entergy intended to apply provisions to them in a way which violated the license conditions.

It may be, of course, that those responsible for the application of FERC policy at the time of the filings in question did not read the comments of MEAM and others. It might also be that the filings of MEAM and the other TDUs were unclear, although we do not think that to have been the case. But unless the FERC was suggesting that Entergy should and must deviate in dealing with MEAM and other TDUs from the very tariff which the FERC was approving (which would ordinarily be thought to be in violation of usually accepted principles dealing with filed rates and the non-discrimination provisions of Sections 205 and 206 of the Federal Power Act) it seems clear that FERC was simply rejecting our contention as to NRC license conditions out of hand, although sub silentio.

MEAM and others had pointed out that the application of the "open access" tariff to them would violate several provisions of the NRC licenses at issue. These violations included:

the violation of the "between and among" clause -- charging multiple times for a use which did not exceed a fixed amount of power, 2/ and

the violation of the provision which precludes charging transmission customers for loss of revenues from sales of power displaced over the transmission provided which is temporarily idled by changes in contract. 3/

Entergy, on the other hand, had argued, and the FERC has now agreed, that the "open access" tariff resolved the concentration of control problems and increase in monopoly power associated with the proposed merger with GSU because the "open access" tariff could be used by MEAM and other TDUs. Between FERC and Entergy, the net result is that MEAM and other TDUs are forced to use the "open access" tariff if they are to deal with others, whether or not it is inconsistent with or violates the NRC licenses.

2/ Grand Gulf condition 5, Waterford 3 condition 5.

3/ Grand Gulf condition 1(d), Waterford 3 condition 1(b), River Bend condition 1(c).

MEAM and others have argued that, if the principles of the NRC licenses were applied by FERC in the merger proceeding, the open access tariff could be modified (or a network tariff created) in a manner which was consistent with the license conditions. FERC has thus had the issue placed squarely before it, and has opted to wash its hands of it, thus leaving MEAM and others to deal with a tariff which seems on its face to violate the license conditions, but which has been approved by FERC. Inviting MEAM and others similarly situated to ask Entergy to modify the tariff as to them, when they had raised the issue with FERC and been rebuffed, seems an exercise in futility. So does the invitation to return to FERC if Entergy does not modify the tariff which FERC has just approved, over MEAM's objection.

If the corporate shell shuffling associated with the merger had resulted in MP&L being the name of the combined companies there would be no real question that the Grand Gulf license obligations would apply within the expanded system. The fact that the name is somehow different should not change the fact that the functional obligations should follow the operational changes which Entergy has imposed. The NRC has not permitted health, safety or funding obligations to be avoided by corporate shell shuffling; nor should it permit the antitrust obligations to be avoided by the same arid legalisms. FERC has found in the ER91-569-000 proceeding that Entergy is now operated as a single entity:

Entergy operates its system on an integrated basis and will be making sales ... at market-based rates on a system basis. Moreover, the Entergy pool agreement ... recognizes that the transmission system is planned and operated on a single system basis.... Given this, there is no reason to require customers to negotiate separately with up to four separate operating companies.... Entergy shall, therefore, consolidate its tariffs into one and adopt a single rate reflecting the equalized costs under its pool agreements.

Entergy Services, Inc., 58 FERC ¶ 61,234, at p. 61,769 (1992). It appears inconsistent for FERC to recognize that Entergy is now operated as a

single unitary entity and to direct that it price its services on that basis, and at the same time to refuse to recognize that the principles behind this Commission's license conditions need be applied in a method which recognizes this change in operation.

Nor do we believe that it can be that FERC simply misapprehends the issues, or misunderstands that this Commission's license conditions really do apply in a manner which makes a difference. For these issues were briefed to the FERC on rehearing. 4/ On July 1, 1993, the FERC issued its Order Denying Rehearing, Granting Motions to Strike, Denying Motion to Dismiss and Denying Requests for Stay. Perusal of that Order does not offer any suggestion that FERC is willing to consider these issues.

Question

In terms of MEAM's access to the GSU/Entergy transmission grid, what is MEAM's understanding of the significance, if any, of the presence of a specific sentence requiring one transmission rate for a group of entities (i.e., "For each coordinating group of entities there shall be a single transmission charge.") in the Waterford 3 nuclear license (antitrust license condition 5) and the lack of a similar sentence in the River Bend and Grand Gulf licenses?

A.2. The timing of these license conditions is relevant here. The AEC Board in the Waterford 3 proceeding expressly noted that Entergy (then Middle South) had agreed to the "between and among" formulation in the MP&L Grand Gulf proceeding, and could not understand why LP&L (which then had a separable corporate identity in a meaningful way) insisted on fighting about it. See Louisiana Power & Light Co., (Waterford Steam Generating Station Unit No. 3), LBP-74-78 (1974), 8 AEC 718, 733. The clarifying sentence was added to make the purpose of the change

4/ MEAM's Request of Municipal Energy Agency of Mississippi for Rehearing and for Expedited Consideration and Motion for Stay of Procedural Schedule was filed with FERC on March 1, 1993, and was attached to the Response of Municipal Energy Agency of Mississippi to Notice of Consideration of Transfer of Control of Licenses and Opportunity for Public Comment on Antitrust Issues and Conditional Petition to Intervene filed with this Commission on April 26, 1993.

from "between" to "among" "free from doubt. Id at 737. As the Board stated, id, at 733:

Transmission "among" simply means transmission from any member of a coordinating group to any other member of such group.

In sum, it appears that in the days when LP&L existed as a separate functioning subsidiary and had different policies than MP&L, this Commission found it to be necessary to spell out the obligation in greater detail because it expected LP&L to seek to avoid, through legalisms, the obligations which MP&L had accepted. MP&L recognized its obligations in this regard in its negotiations for an interconnection agreement with MEAM, once this Commission issued its May 29, 1980 Notice of Violation against MP&L. It is the addition of Entergy, as owner and as operator, to the GSU license that raises the question here of the uniform application of the Entergy obligations on a basis that is consistent with the operations which Entergy seeks permission to undertake.

Question 3

Are there currently any specific power transactions underway or currently being negotiated which MEAM will have to forego if the GSU/Entergy merger is consummated and MEAM is not granted "network transmission" or parallel meaningful access to the newly created GSU/Entergy regional transmission network?

A.3. MEAM has completed negotiations for and signed contracts with Entergy Power, Inc. (EPI) and Cajun Electric Cooperative (Cajun) for the purchase from each of a long term power supply to be added to the current mix of generation from which MEAM supplies its eight member cities. It is still not clear what charges Entergy will impose for transmission from EPI's Independence Steam Electric Station (ISES). Nor is it clear what charges Entergy will seek to impose for the transmission of the power purchased from Cajun.

MEAM has interchange agreements with a number of other utilities within the Entergy transmission area (as it will be expanded if the permission sought here is granted). These include Cajun, Lafayette,

Louisiana, and the South Mississippi Electric Power Association, and each of these agreements provides for various services such as economy transactions. The costs and conditions for transmission service by Entergy to permit the effectuation of short term or economy transactions has not been clear, and this forces MEAM to plan its operations on an assumption that only extraordinary potential savings would justify the transaction costs. Were the requested network services available, MEAM believes that there would be numerous transactions available to it and others that would be economically justified.

Question 4

The focus of MEAM's concerns appears to be Entergy's alleged failure to comply with its Waterford and Grand Gulf antitrust license conditions. Is this a correct assumption?

- A.4. Not quite. There are three basic changes which have occurred since the original AEC license conditions involved in this proceeding, and it appears to us that FERC (and Entergy) are ignoring each of them. These changes are:
- A. the functional sea change initiated by the FERC itself in changing the electric utility industry from a regulated industry into one in which the generation function is to be largely deregulated and governed by competitive market forces;
 - B. the equivalent change initiated by Entergy itself in essentially eliminating the operating utility companies (MP&L, LP&L, AP&L and NOPSI) as separate functioning entities in favor of more efficient, centralized management established on a functional basis across state lines; and
 - C. the addition of GSU to the Entergy family, eliminating GSU as a competitive force, since it will now be run as one of the Entergy operating companies, just as MP&L, LP&L, NOPSI and AP&L are -- from Entergy central management. This also substantially increases Entergy's position in the industry to a point where it truly dominates the area.

Mr. Geoffrey Grant
August 2, 1993
Page 10.

These changes are marked formally as well as in practical effect. For example, EPI is now a participant in the market pricing of generation sales, and has a major stock of generation to sell to others, although it is apparently used by Entergy when not being sold to others. MEAM has, in fact, purchased some 20 MW of generation at ISES (in Arkansas) from EPI as a part of its future power supply mix. Moreover, all of the Entergy nuclear units are now (and will be on the addition of GSU, if the pending application at this Commission is granted) operated by a single entity (EOI), whose sole job is to serve as operator of all of these units on behalf of the Entergy system. MEAM no longer deals with MP&L for most transactions, but rather deals with centralized decision making for Entergy in Pine Bluff or in New Orleans. MEAM does not object to reorganization for greater efficiencies, but does believe that it is fundamentally inconsistent of Entergy to assert that MP&L is and should be the only entity bound to provide network transmission to MEAM because it is a separate organization on paper, when all of the decisions are made on a centralized basis by Entergy in Arkansas or Louisiana. It would also be fundamentally inconsistent for this Commission to permit the continuation of this charade.

Very truly yours,


Robert C. McDiarmid

RCMcD/kah

cc: Mr. Neil Davis (MEAM)
David Hunt, Esq. (MEAM)
Mark Wetterhahn, Esq.
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