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April 26, 1993

VIA CERTIFIED MAIL

Regulatory Publications Branch
Division of Freedom of Information and
Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Docket No. 50-458, Gulf States Utilities; Consideration of Transfer of Control of Ownership of Licensee and Opportunity For Public Comment on Antitrust Issues

Dear Sir or Madam:

Enclosed for filing in the above-captioned proceeding are the Comments of Occidental Chemical Corporation concerning antitrust issues. Pursuant to the terms of the March 25, 1993 Federal Register Notice soliciting comments and our conversation with Mr. Emile Julian (Chief, Docketing Branch), it is our understanding that today's mailing of the Comments constitutes timely filing.

Respectfully submitted,

Judith A. Center

Earle H. O'Donnell
Judith A. Center

Attorneys for
Occidental Chemical Corporation

cc via hand delivery (w/enclosure):
Nuclear Regulatory Commission
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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Gulf States Utilities; Consideration of Transfer of Control of Ownership of Licensee and Opportunity For Public Comment on Antitrust Issues	))))	Docket No. 50-458

COMMENTS OF
OCCIDENTAL CHEMICAL CORPORATION

Pursuant to a Notice published in the Federal Register on March 25, 1993, Vol. 58, No. 56 at 16246, and 10 C.F.R. § 2.101, Occidental Chemical Corporation ("OCC") submits its Comments regarding antitrust issues relating to the application of Gulf States Utilities Company ("GSU") for transfer of its interest as partial owner of the River Bend Station to the Entergy Corporation ("Entergy").

1. Communications concerning these Comments should be directed to the following persons:

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2. OCC is the largest retail electric customer on the present Entergy System, and is among the 25 largest retail

customers of GSU. It would almost certainly be among the largest retail customers on a combined Entergy/GSU system. As such, OCC would be directly and substantially affected by the impact of the proposed merger (and the attendant transfer of control of the River Bend Station) on competition in electric markets.

OCC is an active intervenor in the Federal Energy Regulatory Commission ("FERC") proceeding which is addressing the proposed merger, Entergy Services, Inc. and Gulf States Utilities Company, Docket Nos. EC92-21-000 and ER92-806-000. OCC is also a participant in the U.S. Securities and Exchange Commission merger proceeding, Entergy Corporation, et al., File No. 70-8059.

3. OCC filed a detailed expert witness affidavit on competition issues as part of its September 28, 1992 Motion for Leave to Intervene in FERC Docket No. EC92-21-000. That affidavit, which is attached as Appendix A to these Comments, pointed out the ways in which the proposed Entergy/GSU merger -- even when considered in conjunction with the so-called "open-access" Entergy transmission tariff -- could potentially adversely affect competition. In an order issued on January 28, 1993, FERC summarily found that the merger would not diminish competition and refused to grant a hearing of any sort on competitive issues. Entergy Services, Inc. and Gulf States Utilities Company, 62 FERC ¶ 61,073 at 61,374-376 (1993). OCC and a number of other parties have filed requests for rehearing

of FERC's January 28 order. A copy of OCC's February 26, 1993 FERC rehearing request is attached as Appendix B.

4. On April 20, 1993, OCC filed a Motion For Reconsideration and to Reopen Record which asks FERC to reconsider its determinations on competition in light of a Stipulation entered into on March 8, 1993 by Entergy, GSU, and Texas Utilities Company ("TU") regarding Texas Public Utility Commission ("Texas PUC") Docket No. 11292, Application of Entergy Corporation and Gulf States Utilities Company For Sale, Transfer, or Merger. OCC's Motion For Reconsideration is attached as Appendix C; a copy of the Entergy/GSU/TU Stipulation is attached to OCC's Motion as Appendix A. This Stipulation effectively resolved all issues in dispute between Entergy/GSU and TU in the Texas PUC proceeding, but has not been submitted to the administrative law judge for review and approval.1/

5. In the Entergy/GSU/TU Stipulation, Entergy states that it would affirm under oath, inter alia, that: (1) none of the benefits of the proposed merger is dependent upon Entergy and GSU selling electric power to any electric utility in the Electric Reliability Council of Texas ("ERCOT") or through any

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1/ A Settlement Stipulation and Agreement (which does not include the Entergy/GSU/TU Stipulation) was entered into on March 30, 1993 by Entergy, GSU, and the Texas PUC Staff, and has been submitted for review by the administrative law judge. OCC and a number of other parties to the Texas PUC merger case are not signatories to the Settlement.

ERCOT utility to any ultimate consumer; (2) Entergy "has no current plans to expand the sale of electric energy and/or capacity by its affiliates into wholesale or retail markets located, in whole or in part, within ERCOT"; and (3) Entergy "has no current plans to seek the interconnection of ERCOT with the Southwest Power Pool ("SPP"), or any other electric reliability council . . .". GSU provides stipulations identical to (1) and (3) above. TU, in turn, stipulates that "all disputed issues involved in this Docket which are of interest to TU Electric have been compromised and settled by this Stipulation."

6. Section 1 of the Sherman Act, 15 U.S.C. § 1, specifically prohibits a "contract, combination . . ., or conspiracy in restraint of trade or commerce." As explained in greater detail in OCC's attached FERC Motion For Reconsideration, the Entergy/GSU/TU Stipulation constitutes persuasive evidence of a market allocation agreement violative of Sherman § 1 principles. Although cast as "stipulations" concerning "current plans" to market power, the Entergy and GSU statements strongly suggest the existence of an underlying understanding with TU not to compete with TU in certain markets -- an understanding which was reached in order to secure TU's acceptance of the merger.

7. The proposed transfer of control of ownership which is the subject of this proceeding is an integral feature of the overall Entergy/GSU merger proposal. This Commission must

consider the anticompetitive implications of the Entergy/GSU/TU Stipulation pursuant to its responsibilities under Section 184 of the Atomic Energy Act, 42 U.S.C. § 2234, as well as other competitive issues raised by the merger proposal/transfer request as outlined in attached Appendix A. The Commission should find that significant changes in competitive conditions have occurred since completion of the previous antitrust review of River Bend Station ownership, in view of the proposed merger and attendant activities such as those embodied in the Entergy/GSU/TU Stipulation.

Respectfully submitted,

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Dated: April 26, 1993

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc.	)	Docket No. EC92-21-000
and	)	
Gulf States Utilities Company	)	

AFFIDAVIT

OF

MARK W. FRANKENA

ON BEHALF OF

OCCIDENTAL CHEMICAL CORPORATION

SEPTEMBER 28, 1992

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc. and Gulf States Utilities Company	))	Docket No. EC92-21-000

Affidavit
of
Mark W. Frankena

I. Introduction

Q. Please state your name and business address.

A. My name is Mark W. Frankena. I am a senior economist at Economists Incorporated, an economics consulting firm located at 1233 20th Street, N.W., Washington, D.C. 20036.

Q. Please describe your educational and professional background.

A. I received a B.A. in economics from Swarthmore College in 1965 and a Ph.D. in economics from the Massachusetts Institute of Technology in 1971. Between 1971 and 1982, I was a member of the economics department at the University of Western Ontario.

From 1982 to 1988, I was employed by the Bureau of Economics of the Federal Trade Commission (FTC), one of the two federal agencies responsible for enforcing the antitrust laws. At the time I left, I was Deputy Director for Antitrust, responsible for supervising the roughly 35 economists who analyzed the competitive effects of mergers and other matters involving market power issues.

While I was at the FTC, I was also Deputy Director for Economic Policy Analysis. In that position I was responsible for supervising the economic analysis in comments submitted by the FTC to other federal agencies, including the Federal Energy Regulatory Commission (FERC), and to state and local governments on competitive issues raised by proposed rulemakings and legislation. In addition, I was responsible for supervising Bureau of Economics research studies. I was also an economic advisor to the Chairman, and I worked on investigations of mergers between natural gas pipelines regulated by FERC.

In 1988 I joined Economists Incorporated as a senior economist.

Q. Since joining Economists Incorporated, have you worked on competitive issues relating to the electric power industry?

A. Yes. During 1989-90, I worked on the competitive analysis of the proposed merger between Southern California Edison and San Diego Gas & Electric (FERC Docket No. EC89-5-000). During 1989, I testified in U.S. Bankruptcy Court on issues relating to the competitive effects of the merger between Northeast Utilities and Public Service Co. of New Hampshire. I have recently published articles that address FERC's analysis of market power issues in decisions on market-based pricing as well as competitive issues in electric utility mergers.

My education and professional background are described more fully in my curriculum vitae, which is attached to this affidavit. My curriculum vitae includes a list of books and articles I have published.

Q. What is the purpose of your testimony in this proceeding?

A. I have conducted on behalf of Occidental Chemical Corporation an economic analysis of two issues related to the proposed merger of Entergy Corporation (Entergy) and Gulf States Utilities Company (GSU): First, does the proposed merger raise significant competitive issues that are not adequately analyzed by the prepared direct testimony and exhibits of Joe D. Pace, Ex. Nos. ___ (JDP-1) through ___ (JDP-11)? Second,

would the proposed combined Entergy/GSU "open access" transmission tariff prevent the combined entity, alone or in combination with others, from exercising market power in transmission?

Q. How is your testimony organized?

A. Sections II through IV describe competitive issues that are raised by the proposed merger and evaluate the adequacy of Dr. Pace's analysis in addressing those issues. Section II considers issues raised by the competitive overlap between Entergy and GSU in west-to-east transmission across their combined territories. Section III considers other horizontal competitive issues. Section IV considers vertical issues relating to evasion of regulation and foreclosure of competition. Section V compares market power analyses in market-based pricing and merger decisions. Section VI addresses whether the proposed open access transmission tariff would prevent the exercise of market power. Section VII presents conclusions.

Q. Please summarize you conclusions.

A. First, I do not believe that Dr. Pace has adequately addressed the competitive issues in this merger. His discussion of generating costs in different parts of the Southwest Power Pool (SPP) and Southeastern Electric Reliability Council (SERC) areas suggests that the overlap between Entergy and GSU as links in independent contract transmission paths connecting generating facilities in their territories and points north and west, on the one hand, with purchasers in areas such as Eastern Mississippi and Alabama, on the other, could be competitively significant. Yet Dr. Pace does not address this. In addition, Dr. Pace has not addressed the possibility of vertical competitive issues, specifically the effect of the merger on the potential for evasion of regulation through transactions between Entergy/GSU and unregulated affiliated suppliers of power, and for use of control over transmission to foreclose competition between Entergy/GSU's unregulated affiliates and other suppliers in the sale of bulk power to third parties.

Second, the proposed open access transmission tariff would not prevent the exercise of market power if the proposed merger results in a reduction of competition in transmission.

II. Transmission Across the Combined Entergy/GSU Territories

Q. Does the proposed merger raise competitive issues?

A. Yes. The proposed merger raises issues relating to effects on competition in transmission service. It also raises vertical issues relating to the evasion of regulation and the foreclosure of competition. I have focused on these in part because of the role they have played in the competitive analysis of other recent electric utility merger proposals.

Specifically, the California Public Utility Commission (CPUC), which rejected the proposed merger of Southern California Edison (SCE) and San Diego Gas & Electric (SDGE) in 1991, concluded that that merger would have led to market power problems in transmission and to evasion of regulation. In transmission, the principal problem was a reduction in competition in short-term transmission between suppliers of low-cost coal-generated power in the Southwest (Arizona, New Mexico) and purchasers in Northern California, where incremental generating costs based on oil and natural gas were higher.

Q. Has Dr. Pace provided an analysis that is adequate to justify a conclusion that the proposed Entergy/GSU merger would not substantially lessen competition in transmission?

A. No. Dr. Pace acknowledges that the merger would reduce the number of independent transmission contract paths between Central Louisiana Electric Co. (CLECO) and the Southern Company (Southern) from two to one, and that the merger would similarly reduce the number of independent paths between Central and South West Corp. (C&SW) and Southern from two to one. He argues that these two overlaps present

no competitive problem because "neither Entergy nor GSU has been requested to provide transmission service between CLECO and Southern in the past" and because C&SW has shown no interest in obtaining wheeling service to Southern under a transmission service schedule offered by GSU. (Ex. No. ___ (JDP-1), pp. 23-24.)

This analysis suffers from several problems. First, one cannot carry out a competitive analysis of transmission service by looking only at wheeling. While the formal contracts are different when a utility engages in wheeling and in buy-sell transactions (including simultaneous incremental purchases and sales that are not contractually linked), the electron flows are the same. In either case, from an economic point of view the utility provides transmission service. In fact, both Entergy and GSU have purchased energy from CLECO and C&SW (which includes Southwest Electric Power Co. (SWEPCO)) and sold energy to Southern. Data in FERC Form 1s and Dr. Pace's other workpapers (including JDP-00076-112) are not sufficient to determine whether the purchases and sales were simultaneous.

Second, even with regard to wheeling, the fact that C&SW did not choose to obtain service under a particular schedule offered by GSU at some time in the past does not imply that GSU's independent transmission path between C&SW and Southern is not competitively significant. The existence of an independent path through GSU could constrain Entergy's exercise of market power in transmission even if C&SW and Southern never actually used the GSU path. The reasoning here is similar to that used by Dr. Pace in the context of another overlap in explaining why he did not focus on the volume of Entergy's and GSU's actual transactions. (Ex. No. ___ (JDP-1), p. 41, lines 16ff.)

Third, the demand for transmission in the recent past may not provide a basis for gauging demand in the future. For example, because of widespread excess supply of generating capacity, one might not expect there to have been much demand for transmission of capacity in the recent past. As excess capacity declines in the future, one might expect greater demand for transmission of capacity.

Fourth, and most important, Dr. Pace limits his analysis of competitive issues in transmission to "the effect of the proposed Entergy/GSU merger on the transmission alternatives available to the *utilities interconnected with Entergy and/or GSU*...." (Ex. No. ___ (JDP-1), p. 3, emphasis added.) He ignores competition between Entergy and GSU in providing transmission service (whether unbundled as wheeling or bundled with power in buy-sell transactions) that also involves *transmission provided by another entity*.

For example, Entergy and GSU are both links in independent transmission contract paths connecting generation in areas such as Oklahoma, Kansas, and Missouri with purchasers in areas such as Eastern Mississippi and Alabama. While he ignores this overlap in discussing transmission, Dr. Pace testifies at some length about the relatively low cost of nonfirm energy generation to the north and west of Entergy and GSU, the relatively high cost of nonfirm energy generation to the east of Entergy and GSU, and the efficiency of transmitting nonfirm energy from the north and west of Entergy/GSU to the east of Entergy/GSU given the generating cost differential and the cost of transmission. (Ex. No. ___ (JDP-1), pp. 38-43.)

Dr. Pace testifies in connection with nonfirm energy transactions among utilities in the MAPP, MAIN, SPP, and SERC areas that:

> ....low-cost western coal generation is displacing higher cost eastern coal generation and both are displacing natural gas generation, particularly during winter months when natural gas is relatively high priced. (Ex. No. ___ (JDP-1), p. 39.)

In connection with generators in states such as Iowa, Kansas, and Nebraska, Dr. Pace notes:

> Because these suppliers are located in low fuel cost areas, they can sell nonfirm energy at prices low enough to compete even when extra transmission charges must be paid. Moreover, these suppliers do in fact make major nonfirm energy sales to first tier utilities which either resell that energy or sell their own freed-up energy resources into the

> Entergy area or further east. For example, an examination of the data shows that AECI, EDE, OG&E, and UE all sold nonfirm energy into the Entergy area at prices averaging 16.5 to 18 mills per Kwh during the 1990-91 period. The data also show that substantial nonfirm energy sales were made by the Iowa utilities, the Omaha Public Power District and Northern States Power during this period at prices averaging 10-13 mills per Kwh, by the Nebraska Public Power District at 12-15 mills per Kwh and by Kansas suppliers in the 14 to 17 mill price range. This indicates that these second tier utilities can pay a typical nonfirm wheeling charge (or equivalent buy/resell markup) and still be very competitive. (Ex. No. ___ (JDP-1), p. 40.)

Dr. Pace also finds that the purchasing utilities that are willing to pay the most for nonfirm energy are located to the east of Entergy's and GSU's areas. (Ex. No. ___ (JDP-1), p. 43.)

Jerry J. Saacks provides data indicating that Entergy has non-simultaneous summer peak transmission interface transfer capability of 2800 MW from SWEPCO and 3500 MW from Oklahoma Gas & Electric Co. (OG&E) and 550 MW to Southern and 1800 MW to TVA. (Ex. No. ___ (JJS-1), p. 71.) Dr. Pace's workpapers (JDP-00085-86, 137) indicate that Entergy has engaged in brokering of power and hence transmission from Associated Electric Cooperative, Inc. (AECI), OG&E, Union Electric (UE), Empire District Electric (EDE), and C&SW—which have generation in Missouri, Oklahoma, Texas and other states north and west of Entergy/GSU—to Southern.

Thus, Dr. Pace's analysis in connection with *bulk power* raises the possibility that the proposed merger would significantly increase concentration in control over competitively significant transmission from the lower-cost suppliers of power in the SPP to areas such as Eastern Mississippi and Alabama. Dr. Pace has not provided any competitive analysis of the reduction that would result from the merger in the number of competitors able to provide *transmission service*.

Furthermore, Applicants have not provided with their application many of the types of data that would be needed to carry out such an

analysis. For example, they have not provided data on area-to-area transfer capacity and load factors for either Entergy's or GSU's transmission systems (other than data on Entergy's interface capacities in Ex. No. ___ (JJS-2), p. 71); identified or provided capacity data for any other systems that they might allege offer competing transmission service; provided data identifying simultaneous purchases and sales of power by Entergy and GSU (other than Entergy's purchases for resale in JDP-00080, 83); or provided information on the incremental costs of alleged competing sources of power (other than annual average purchase and sale prices, which are insufficient for reasons that are explained in the following paragraph).

Dr. Pace's workpapers (JDP-00215-220) provide some data on prices paid for energy by Southern. At first glance, these data might appear to suggest that Southern has numerous cost-competitive alternatives to energy delivered from or through Entergy and GSU. However, it is unclear what one can actually infer from these data. First, the issue is control over transmission, and one cannot infer anything about transmission *rights* from past purchases and sales of bulk power. Second, some of the energy prices vary widely. In 1990 the price/MWh for energy purchased by Southern from Duke Power is listed as $3.23; in 1991, the same price is listed as $19.99. For TVA, the 1990 and 1991 prices are listed as $30.30 and $20.40 respectively. Third, the data on Southern's purchases are annual averages. They cannot be used to make inferences about the competitiveness of prices of energy during particular seasons or hours. Fourth, prices of energy can be affected by differences in provisions of contracts entered into at different times when market conditions varied. Fifth, the very fact that Southern purchased energy at different prices suggests that Southern was not able to buy at the lower prices additional energy that was comparable to the energy purchased at the higher prices. Sixth, if one were to rely on annual data, one would find that for Entergy's largest bulk power customer—Alabama Electric Cooperative—Entergy was the cheapest source of power in 1991; the next cheapest source was 10 percent higher in price (JDP-00231).

III. Other Horizontal Competitive Issues

Q. Do you agree with Dr. Pace's methodology of counting the number of separate wheeling charges paid to transmit power between two points as a basis for evaluating the competitive effects of the merger on transmission customers (e.g., Ex. No. ___ (JDP-1, p. 33, lines 2-9)?

A. The issue is not what happens to the number of wheeling charges but what happens to the *total price* for the transmission service, and Dr. Pace has not addressed that. A transmission customer that pays a wheeling charge of $100 to each of two utilities is not made better off by a merger that results in a single wheeling charge of $200 or more.

Q. Have you identified other areas in which Dr. Pace's analysis of the elimination of competition between Entergy and GSU is not adequate?

A. There are several problems. First, in addressing competition in bulk power, Dr. Pace argues that "it is reasonable to include all first-tier utilities in the narrowest plausible relevant market" because of the Entergy/GSU commitment to open access at cost-based rates. (Ex. No. ___ (JDP-1), p. 12.) I believe this reasoning is incorrect for energy because, as Dr. Pace points out elsewhere, it is necessary to consider whether the relevant generation is cost-competitive. It is also necessary to consider whether energy would be available during relevant seasons and hours of the day in light of load patterns.

Second, in discussing whether internal generation of a purchaser would constrain a price increase by a hypothetical monopoly seller of nonfirm energy, Dr. Pace argues: "If utilities buy very little nonfirm energy, that clearly indicates that internal generation is generally more economic than purchasing nonfirm energy in the marketplace." (Ex. No. __ (JDP-1), p. 39.) The problem with this is that to determine whether internal generation is in the relevant antitrust market for a purchaser of nonfirm energy, the relevant issue is whether the purchaser has *additional*, unused generating capacity that has competitive

costs and to which it could turn to escape a price increase imposed by a hypothetical monopolist of other sources of nonfirm power.

Third, Dr. Pace's calculations of "market" shares for sales of nonfirm energy (Ex. No. ___ (JDP-1), pp. 8-9) are based on annual data, which Dr. Pace observes (Ex. No. ___ (JDP-1), p. 17) could mask variations across seasons or times of day. His calculations could understate concentration during significant periods. For example, Dr. Pace acknowledges (Ex. No. ___ (JDP-1), p. 39, lines 20-21) that natural gas-based generation is less competitive during winter months. Elsewhere, he has testified that Kansas City Power & Light "is primarily a seller of nonfirm coal-fired energy generated on its system during hours other than summer peak hours." (FERC Docket No. EC90-16-00, Ex. No. ___ (JDP-1), p. 32.)

Fourth, CLECO has two separate service territories. Entergy's and GSU's transmission systems appear to provide two independent contract paths between those territories. Applicants do not provide information on the importance to CLECO of transmission between its territories, or on whether CLECO controls transmission facilities or rights that connect its territories. It is possible that CLECO would face a significant reduction in the number of independent contract paths for transmission connecting its two territories.

IV. Vertical Competitive Issues

Q. **Have regulators evaluating the competitive effects of other proposed electric utility mergers found significant vertical problems?**

A. Yes. In evaluating the proposed SCE/SDGE merger, both the CPUC's decision rejecting the merger (CPUC Decision 91-05-028, May 8, 1991, slip op. at 79, 92) and the FERC administrative law judge's Initial Decision recommending rejection of the merger (FERC Docket No. EC89-5-000, 53 FERC ¶63,014, Nov. 27, 1990, slip op. at 41) found that the merger of SCE and SDGE would significantly increase the oppor-

tunities for evasion of cost-based rate regulation that was designed to limit the exercise of market power. It was concluded that the merger would increase the scope for the regulated utility to purchase power at inflated prices from its unregulated generating affiliate, Mission Energy. Such evasion of regulation is an antitrust problem because it involves increased exercise of market power in the resale of electricity.

Purchase of power from affiliated generators is not the only context in which vertical mergers in the electric utility industry have raised concerns about evasion of rate regulation and foreclosure of competition. In the prefiled testimony in *Utah Power & Light* that I quote below (Section V), William R. Hughes discusses how a vertical merger between one firm with generating interests, Pacific Power & Light (PP&L), and another firm with transmission interests, Utah Power & Light (UP&L), could facilitate the evasion of FERC regulation of transmission rates.

FERC found that the merged firm that controlled UP&L's transmission facilities and PP&L's generation facilities would have the ability and incentive to deny transmission service to the cheapest power that would be available to supply the Southwest and to supply the Southwest instead from PP&L's more expensive generating facilities. (FERC, Opinion 318, Oct. 26, 1988, Docket EC88-2-000, slip op. at 27-37.)

FERC found a similar problem in connection with the merger of Northeast Utilities (NU) and Public Service of New Hampshire. FERC found that increased market power in transmission that would result from the proposed merger would enable the merged firm to deny transmission access and force customers to purchase bulk power from the merged firm at prices above those at which power was available from alternative sources. Thus, FERC stated:

> NU's control of key transmission corridors and facilities would allow it to control bulk power trade. Its substantial inventory of excess generating capacity would give NU the incentives to block the sale of competing sources of short-

> term bulk power services. To the extent that NU's resources are not the lowest cost resources that would otherwise be available, the results would be higher electricity prices for consumers in many parts of New England. (FERC Opinion 364, Aug. 9, 1991, Docket EC90-10-000, slip op. at 43; see also 22-23, 26, 38, 40.)

Q. Is the evasion-of-regulation and foreclosure-of-competition theory used by the U.S Department of Justice (DOJ) and the courts in enforcing the antitrust laws?

A. Yes. The evasion-of-regulation and foreclosure-of-competition theory is explicitly stated in DOJ's 1984 *Merger Guidelines*, which describe the general principles normally used by DOJ in analyzing mergers. While the portions of the *Merger Guidelines* relating to horizontal mergers were updated in 1992, the portions dealing with vertical mergers, including Section 4.23 ("Evasion of Rate Regulation") were not changed. (DOJ and FTC, "Statement Accompanying Release of Revised Merger Guidelines," April 2, 1992, p. 3.)

Also, the evasion-of-regulation and foreclosure-of-competition theory played an important role in DOJ's suit that led to the breakup of AT&T (*United States v. AT&T*, 552 F. Supp. at 131 (1982)). Recently the DOJ Antitrust Division has argued in favor of allowing the regional Bell telephone companies to integrate vertically into unregulated equipment manufacturing. One rationale offered for DOJ's change in position appears to be that unless foreclosure involves harm to third-party customers, it is a regulatory, not an antitrust, problem. (Charles F. Rule, Assistant Attorney General, Antitrust Division, Department of Justice, "Antitrust and Bottleneck Monopolies: The Lessons of the AT&T Decree," Remarks before the Brookings Institution Seminar on Developments in Telecommunications Policy, 1988, Washington, D.C., Oct. 5, 1988, p. 11.) Thus, DOJ's about-face appears to have been due principally to a jurisdictional judgment: that determination of whether the conditions for anticompetitive vertical integration have been met should be left to regulators rather than antitrust courts.

Q. What are the potential vertical competitive problems in the proposed Entergy/GSU merger?

A. There are two potential problems. First, Entergy has an unregulated generating and marketing affiliate, Entergy Power, Inc. (EPI), which currently has 809 MW of generating capacity. EPI has embarked on an aggressive expansion program, and has applied to the Securities and Exchange Commission (SEC) for approval of an additional 1000 MW of generating capacity and an unspecified amount of transmission capacity in an area that includes GSU's territory. (Entergy and EPI, SEC Form U-1, Application-Declaration under the PUHCA, March 20, 1992.) Entergy manages, controls, operates and maintains EPI's present capacity at cost. Thus far, most of EPI's bulk power sales have been to Entergy at EPI's incremental cost. In 1990-1991, EPI sold $45.9 million of energy to Entergy; its only other sale was $2.4 million of energy to TVA. (EPI, 1990 and 1991 FERC Form 1, pp. 310-11.)

Problems of evasion of regulation and foreclosure of competition might arise in connection with purchases of power by Entergy/GSU not only from EPI but also from facilities that have been excluded from the Entergy and GSU rate bases, e.g., 107 MW of Entergy's capacity at the Grand Gulf nuclear plant. The issue that Dr. Pace identifies (Ex. No. ___ (JDP-1), p. 10, lines 21-24) but does not address is whether the proposed merger would expand the scope of future self-dealing, as regulators found to be the case in the proposed SCE/SDGE merger.

Second, if the proposed merger increases the likelihood that Entergy and GSU will be able to exercise market power in transmission, the combined firm may be able to use that market power to foreclose competition in the sale of bulk power *to third parties* from lower-cost sources of supply that are alternatives to their own unregulated generating facilities.

V. Market Power Analysis in Decisions on Market-Based Pricing and Mergers

Q. Does FERC's evaluation of market power in its March 3, 1992, Order on Rate Filing in *Entergy Services, Inc.* (Docket No. ER91-569-000) imply that the proposed merger would not adversely affect competition in transmission?

A. Not at all. There is no inconsistency between a finding that Entergy's market power is sufficiently limited to justify market-based pricing for bulk power, on the one hand, and a finding that the proposed merger would significantly reduce competition in transmission.

First, even if neither a stand-alone Entergy nor a stand-alone GSU, alone or in combination with others, possesses market power in a particular transmission service market, the proposed merger, by eliminating one competitor, may significantly reduce competition. Certainly the fact that one party to a proposed merger has been found not to have market power does not imply that the merger would be competitively benign.

Second, when FERC is evaluating market power in the context of an application for market-based pricing, the issue is to compare the outcomes from (a) conventional cost-based regulation, and (b) market-based pricing (in conjunction with an open access transmission tariff in the case of Entergy). Here the issue is to balance the substantial costs involved in conventional regulation against the costs involved in the exercise of market power.

In the case of a proposed merger, the issue is different. DOJ has distinguished between the analysis of market power that is undertaken for the purposes of assessing a merger, on the one hand, and the analysis of market power that is undertaken for the purposes of evaluating an application to move from conventional regulation to "light-handed" regulation or deregulation, on the other. In the words of the DOJ in

Competition in the Oil Pipeline Industry (1984, pp. 28-29), which addressed the issue of when cost-based regulation is appropriate:

> In making an initial determination of whether a pipeline origin or destination market is so concentrated that a pipeline might have market power, the study has tentatively used an HHI threshold value of 2500. This HHI standard for initial high-risk status for pipeline markets is higher than the 1800 level used to demarcate highly concentrated markets in the Department's Merger Guidelines because of the different purpose served by the index. A higher threshold is used for suggesting that pipeline regulation may be appropriate than for determining that a merger is liable to lead to the exercise of market power because regulation itself imposes significant costs, whereas the economies foregone, if any, when a particular merger is prevented are apt to be less significant.

The relevance of DOJ's distinction between these two contexts for market power analysis was recently emphasized by the FERC administrative law judge in the *Williams Pipe Line Company, Enron Liquids Pipeline Company* Initial Decision, 58 FERC ¶63,004, January 24, 1992 (slip op. at 20-22). That Initial Decision finds:

> The present examination of market power is designed to facilitate a decision on Williams' entitlement to a system of light-handed regulation, as opposed to traditional cost-based rate regulation. That inquiry is much closer in purpose to the Department's Oil Pipeline Deregulation study, than to questions of merger. Williams seeks light-handed regulation, not merger.

Moreover, if FERC makes a mistake in approving market-based rates, or if competitive conditions change, it can reverse itself. FERC has stated that it "will not hesitate to reimpose cost-of-service regulation." (Order on Rate Filing, Docket No. ER91-569-000, p. 35.) By contrast, if FERC makes a mistake in approving a merger, cost-of-service regulation will not restore the *status quo ante,* and consumers will have to live with the consequences of continuing competitive harm, consequences that FERC does not have the ability to remedy post-merger.

VI. Competitive Analysis of the Proposed Open Access Transmission Tariff

Q. What is your understanding of how transmission service would be priced under the proposed combined Entergy/GSU open access transmission tariff?

A. It is my understanding that under the open access transmission tariff, the firm transmission service rate would be based on the combined Entergy/GSU system's embedded costs, with provision for alleged "stranded investment" costs, and customers would be responsible for 3 percent or more in transmission losses. The nonfirm transmission service rate would be capped at the lower of (a) the firm transmission service rate and (b) an allowance of 3 percent or more for transmission losses, plus one mill per kWh, plus one-third of the savings (after transmission losses) based on the difference between the marginal costs of the seller and buyer. (Ex. No. ___ (JJS-2), pp. 48-55.) One mill per kwh amounts to $0.73 per kW-month (at 100% capacity factor), compared to the 1992 firm transmission rate of $1.33/kW-month (Ex. No. ___ (JJS-1), p. 32) under the proposed combined Entergy/GSU open access transmission tariff.

Q. Do you agree with Dr. Pace's view that the proposed Entergy/GSU open access transmission tariff "will preclude the exercise of market power by reason of control over transmission assets" (Ex. No. ___ (JDP-1), p. 4, lines 12-13)?

A. I disagree with Dr. Pace. Even with the proposed open access transmission tariff, there would be significant opportunities for the merged firm to exercise any increased market power in transmission that results from the proposed merger.

Q. How could transmission service customers be injured by the proposed merger if it reduces competition in transmission, given the proposed open access transmission tariff?

A. First, with competition, both firm and nonfirm transmission service rates (or the markups on buy-sell transactions) could often be substantially below the rates allowed under the proposed open access transmission tariff. This is more likely if stranded investment costs are included in the latter tariff rates, since existing fixed costs play no role in the determination of competitive prices. Transmission rates under competition are determined by incremental costs of providing transmission service. Where there is excess capacity, competitive transmission service rates could be as low as actual transmission losses plus transactions costs.

Second, I doubt that regulation of access to and expansion of transmission facilities under the open access transmission tariff is likely to work well enough to prevent Entergy/GSU from exercising any market power that exists by denying access to its transmission system or delaying or denying requests for expansion of its transmission facilities. Regulation is imperfect given the limited resources available to regulators, including the fact that regulators have imperfect information about such things as transmission capacities, costs, effects on reliability, etc. Furthermore, Applicants indicate that Entergy/GSU "shall be the sole judge of transmission service availability for a specified transaction." (Ex. No. ___ (JJS-2), p. 44.) Also, competition between Entergy and GSU might lead to access and/or facility expansion that might not occur under regulation.

Third, to be eligible for the open access transmission tariff, and thus to limit the exercise of market power, some transmission customers are required to pay a "price." Utilities are required to offer comparable service on similar terms to the merged company and its affiliates, and customers may be required to forego future purchases of power and energy at system average cost rates. (Ex. No. ___ (JJS-1), pp. 11-12.)

In addition, some transmission customers would be adversely affected by the proposed merger regardless of effects on competition, given the pricing terms of the proposed open access transmission tariff. In his prepared direct testimony (Ex. No. ___ (JJS-1), p. 32, lines 10-17), Mr.

Saacks states that for Entergy's current transmission service customers, the proposed merger will lead to an increase in the price of transmission service because GSU's average embedded cost of bulk transmission facilities is higher than Entergy's. In the case of nonfirm transmission, the merger would lead to an increase in the ceiling price for transmission service and thus increase the scope for exercise of any market power in transmission.

Mr. Saacks does not quantify the increase in transmission service rates that will occur for Entergy's customers as a result of the merger. However, he reports that for 1992 the Entergy/GSU open access transmission tariff price for firm transmission—and the ceiling price for nonfirm transmission—will be $1.33 per kW-month with the merger. (Formula Rate Development for the Year Ending December 31, 1991, Workpaper JJS-000008.) This is 12.7 percent higher than Entergy's stand-alone open access transmission tariff price for firm transmission--and its ceiling price for nonfirm transmission—of $1.18 per kW-month. (Entergy, Formula Rate Development for the Year Ending December 31, 1991, FERC Docket No. ER91-569-000, June 1, 1992, Tab 2, p. 4.)

Q. Why do you believe that competition would play a role in the determination of transmission service prices in the stand-alone case?

A. Before I respond to the question, let me explain two points by way of background. First, it is useful to distinguish between two questions: (1) Does competition play a role in reducing transmission service prices below rates reflecting embedded costs? (2) Does competition constrain the extent to which transmission service prices exceed rates reflecting embedded costs? Even where the answer to (2) is negative, because cost-based regulation imposes an effective ceiling on prices, the answer to (1) may still be affirmative.

Second, again by way of background, it is important to keep in mind that a utility can provide transmission service in three ways: (1) it can provide unbundled wheeling service; (2) it can simultaneously purchase

and sell bulk power at two different points on its transmission system (either with or without an explicit contractual link between the purchase and sale), bundling transmission service with bulk power; and (3) it can sell delivered bulk power generated on its own system, again bundling transmission with bulk power. To evaluate the extent to which competition determines transmission service prices, one should consider all of these types of transactions.

Now, in response to the question, first, let me quote from Professor Paul L. Joskow:

> Coordination and wheeling transactions have increased substantially....These markets are subject to only very loose FERC regulation. As a result of extensive interconnections, coordination agreements and power-pooling arrangements, and voluntary wheeling, the anecdotal evidence suggests that these markets are often very competitive.
>
> ....FERC regulation of the prices for coordination transactions has not been a binding constraint in short- and medium-term coordination markets. ("Regulatory Failure, Regulatory Reform, and Structural Change in the Electric Power Industry," in M. N. Baily and C. Winston, eds., *Brookings Papers on Economic Activity: Microeconomics 1989*, Brookings Institution, Washington, D.C., 1989, pp. 189-90.)

Second, under the *existing* Entergy open access transmission tariff approved by FERC in its March 3, 1992, Order on Rate Filing, in the stand-alone case *Entergy's nonfirm transmission service price is explicitly subject to negotiation and hence competition.* Competition could limit Entergy's nonfirm transmission service price to one mill per kWh ($0.73 per kW-month), plus an allowance for losses. (Entergy, Transmission Service Tariff, FERC Docket No. ER91-569-000, June 1, 1992, pp. 46-48, and Explanatory Statement, p. 22, explaining that the floor price was reduced from two mills to one mill per kWh.) If the merger reduces competition in transmission by eliminating GSU's independent transmission service contract path, then based on 1992 prices *customers could face an increase in the nonfirm transmission service price of $0.60 per kW-month—or 82 percent*—because the cap on

the proposed combined Entergy/GSU nonfirm rate is $1.33 per kW-month.

Third, in practice it appears that the regulation of markups on buy/sell transactions among utilities—and thus the charge for bundled transmission service—can sometimes be avoided. In connection with the merger of Utah Power & Light (UP&L) and Pacific Power & Light (PP&L), William R. Hughes testified that UP&L had been able to avoid FERC regulation of transmission rates and to exercise market power in transmission by engaging in the purchase, transmission, and resale of bulk power, realizing supracompetitive prices for transmission through high markups on the delivered power. (Prefiled testimony, FERC Docket No. EC88-2-000, Ex. No. 84, Feb. 12, 1988, pp. 7, 54-55, based on 1986 data. Dr. Hughes observed that in the future FERC reasonably could "be expected it assert its jurisdiction and require UP&L to charge only a just and reasonable rate for such transmission," and that "The practice of reselling at a high markup is very difficult to accomplish in the firm bulk electricity market in large long term contracts where close regulatory scrutiny of each transaction is more likely....")

Fourth, FERC's regulation of bundled generation and transmission supplied by vertically-integrated utilities is limited. According to Dr. Hughes' *UP&L* testimony:

> Q. How can regulated firms exploit market power?
>
> A. A regulated, vertically integrated firm having market power in one aspect of its business may seek to avoid regulatory scrutiny by packaging its product in one bundle so as to hide the non-competitive price inherent in one of the components of that bundle. ...
>
> As I explain in my testimony, the merged company can include the profits from its transmission market power in the overall bulk electricity price. As a practical matter, regulatory scrutiny of bulk electricity transactions of a vertically integrated company is unable to identify the profits on transmission that are implicit in the price of the bulk electricity. ...

> ... [T]here are strong indications that the merged company will avoid FERC scrutiny by bundling UP&L transmission with PP&L-generated bulk electricity. (FERC Docket EC88-2-000, Ex. No. 84, Feb. 12, 1988, pp. 24, 26-27.)

Fifth, because of concern that regulation has been responsible for wasting resources, the extent of regulation of the electric utility industry is being reduced and increased reliance is being placed on market forces. Therefore, the role of competition cannot be evaluated by looking only at the industry today. It is important to be forward-looking and to preserve competition in areas where regulation could be relaxed in the future. Acceptance of an increase in concentration on the grounds that the industry is now regulated would reduce the future scope for deregulation and hence benefits from increased reliance on competition.

VII. Conclusions

Q. What conclusions have you reached regarding the competitive effects of the proposed merger of Entergy and GSU?

A. First, I do not believe that Dr. Pace has adequately addressed the competitive issues in this merger. Most important, his discussion of generating costs in different parts of the SPP and SERC areas suggests that the overlap between Entergy and GSU as links in independent contract transmission paths connecting generating facilities in their territories and points north and west, on the one hand, with purchasers in areas such as Eastern Mississippi and Alabama, on the other, could be competitively significant. Dr. Pace does not address this. In addition, Dr. Pace has not addressed the possibility of vertical issues related to evasion of regulation and foreclosure of competition.

Second, the proposed open access transmission tariff would not prevent the exercise of market power if the proposed merger results in a reduction of competition in transmission. A reduction in competition could

lead to an 82 percent increase in the nonfirm transmission service price.

Third, the materials that Applicants have supplied with their application are insufficient to permit an adequate analysis of these market power issues. Much of the information identified above that would be used in a traditional market power analysis is not public and would be available only through discovery.

Q. Does this conclude your testimony?

A. Yes.

CURRICULUM VITÆ

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Professional Experience

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U.S. Federal Trade Commission, Bureau of Economics (1982 - 1988)
Deputy Director for Antitrust (1987 - 1988)
Deputy Director for Economic Policy Analysis (1986 - 1987)
Economic Advisor to the Chairman (1986)
Assistant Director for Consumer Protection (1985 - 1986)
Assistant to the Deputy Director, Antitrust (1985)
Deputy Assistant Director, Consumer Protection (1985)
Staff Economist, Antitrust (1983 - 1984), Consumer Protection (1982 - 1983)
Senior Executive Service (1986 - 1988)
Senior Executive Service Award (1987)
Award for Excellence in Economics (1985)

University of Western Ontario, Department of Economics (1971 - 1982)
Associate Professor, tenured (1976 - 1982)
Director of Graduate Studies (1977 - 1978)
Associate Director of Graduate Studies (1976 - 1977)
Assistant Professor (1971 - 1976)

Professional Experience (continued)

University of Ghana, Department of Economics
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Visiting Lecturer assigned by the University of Western Ontario and the Canadian International Development Agency.

Indian Institute of Management, Calcutta
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Visiting Research Associate assigned by M.I.T. and the Ford Foundation.

Testimony

Testimony on behalf of Public Service Co. of New Hampshire concerning competitive effects of the acquisition of PSNH (an electric utility) by Northeast Utilities (another electric utility), U.S. Bankruptcy Court, 1989.

Publications

"The Yield Spread Between New and Seasoned Corporate Bonds," with J.W. Conard, in J.M. Guttentag and P. Cagan, eds., *Essays on Interest Rates*, Vol. 1, National Bureau of Economic Research, 1969, pp. 143-222.

"The Influence of Call Provisions and Coupon Rate on the Yields of Corporate Bonds," in J.M. Guttentag, ed., *Essays on Interest Rates*, Vol. 2, National Bureau of Economic Research, New York, 1971, pp. 134-186.

"Restrictions on Exports by Foreign Investors: The Case of India," *Journal of World Trade Law*, September-October 1972, pp. 575-593.

"Marketing Characteristics and Prices of Exports of Engineering Goods from India," *Oxford Economic Papers*, March 1973, pp. 127-132.

"The Industrial and Trade Control Regime and Product Designs in India," *Economic Development and Cultural Change*, January 1974, pp. 249-264.

"Devaluation, Recession and Non-Traditional Manufactured Exports from India," *Economic Development and Cultural Change*, October 1975, pp. 109-137.

Publications (continued)

"Revival and Expansion of Export Subsidies" (co-author), Chapter 7 of J.N. Bhagwati and T.N. Srinivasan, *Foreign Trade Regimes and Economic Development: India*, National Bureau of Economic Research, New York, 1975. pp. 99-110.

"Income Distributional Effects of Urban Transit Subsidies," *Journal of Transport Economics and Policy*, September 1973, pp. 215-230.

"Alternative Models of Rent Control," *Urban Studies*, October 1975, pp. 303-308.

"A Bias in Estimating Urban Population Density Functions," *Journal of Urban Economics*, January 1978, pp. 35-45.

"The Demand for Urban Bus Transit in Canada," *Journal of Transport Economics and Policy*, September 1978, pp. 280-303.

Urban Transportation Economics, Butterworths, Toronto, 1979, 141 pages. (Japanese edition, 1983).

Economic Analysis of Provincial Land Use Policies in Ontario (with D.T. Scheffman), University of Toronto Press, 1980, 171 pages.

"A Theory of Development Controls in a 'Small' City" (with D.T. Scheffman), *Journal of Public Economics*, April 1981, pp. 203-234.

"The Effects of Alternative Urban Transit Subsidy Formulas," *Journal of Public Economics*, June 1981, pp. 337-348.

"Intrametropolitan Location of Employment," *Journal of Urban Economics*, September 1981, pp. 256-269.

Urban Transportation Financing: Theory and Policy in Ontario, University of Toronto Press, 1982, 232 pages.

Publications (continued)

"The Efficiency of Public Transport Objectives and Subsidy Formulas," *Journal of Transport Economics and Policy*, January 1983, pp. 67-76.

An Economic Analysis of Taxicab Regulation, with P. Pautler, FTC Bureau of Economics, May 1984, 176 pages.

"Taxicab Regulation: An Economic Analysis," with P. Pautler, in R. Zerbe, ed., *Research in Law and Economics*, Vol. 9, JAI Press, Greenwich, Conn., 1986, pp. 129-65.

Alcohol Advertising, Consumption, and Abuse, with others, FTC Bureau of Economics, 1985, 53 pages.

Antitrust Policy for Declining Industries, with P. Pautler, FTC Bureau of Economics, 1985, 108 pages.

"Capital-Biased Subsidies, Bureaucratic Monitoring and Bus Scrapping," *Journal of Urban Economics*, 1987, pp. 180-93.

"FERC's Acceptance of Market-Based Pricing: An Antitrust Analysis," with Barry C. Harris, *The Electricity Journal*, June 1992, pp. 38-51.

"Competitive Issues in Electric Utility Mergers," *International Merger Law*, October 1992.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc.	)	
	)	
and	)	Docket No. EC92-21-000
	)	
Gulf States Utilities Company	)	

AFFIDAVIT OF WITNESS

I, the undersigned, being duly sworn, depose and say that the affidavit testimony of MARK W. FRANKENA in this proceeding is the testimony of the undersigned and that to the best of my knowledge, information and belief, is true, correct, accurate and complete, and I hereby adopt said testimony under oath.

Mark W. Frankena
MARK W. FRANKENA

SUBSCRIBED AND SWORN to before me,
a Notary Public in the District of Columbia
on this 28th day of September 1992.

Lori J. Rodriguez
Notary Public

My Commission expires: LORI J. RODRIGUEZ
A Notary Public of the District of Columbia
My Commission Expires June 14, 1993

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc. and Gulf States Utilities Company	)	Docket Nos. EC92-21-000 and ER92-806-000

REQUEST FOR REHEARING
OF
OCCIDENTAL CHEMICAL CORPORATION

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.713, Intervenor Occidental Chemical Corporation ("OCC") hereby respectfully requests rehearing of the January 28, 1993 order issued in the above-named consolidated proceedings.

I. BACKGROUND

This case concerns the Joint Application for merger authorization under Section 203 of the Federal Power Act ("FPA") filed on August 28, 1992 by Entergy Services, Inc. ("ESI") (as agent for Entergy Corporation ("Entergy")) and Gulf States Utilities Company ("GSU") (collectively, "Applicants"), and Applicants' concurrent application under FPA Section 205 to amend the 1982 System Agreement (contingent upon approval of the proposed merger) to incorporate GSU into the System Agreement as an Entergy Operating Company. On September 23, 1992 OCC filed a Motion for Leave to Intervene and Request for Hearing in Docket No. EC92-21-000, which, inter alia, requested FERC to set for

evidentiary hearing the material factual issues concerning the Applicants' market power raised by OCC and others. OCC's intervention also asked, in the alternative, for additional time to obtain discovery and file written comments and evidence concerning competition and other issues raised by the merger application.[1/]

Although OCC had only the short notice period to review Applicants' voluminous application materials and retain consultants, its intervention motion included an expert affidavit which noted numerous evidentiary deficiencies in Applicants' bulk power and transmission market power analysis and identified OCC's and other intervenors' need for discovery on such points. On September 21, 1992, OCC served data requests on Entergy and GSU which asked for information relevant to the concerns addressed in OCC's intervention, including the effect of the proposed merger on competition. The Applicants flatly refused to respond to OCC's data requests concerning competition, alleging that OCC's interest in this proceeding as a retail customer was limited to the merger's potential impact upon costs and rates.

The Commission's January 28 order granted summary disposition on the effect of the proposed merger on competition and refused to grant a hearing of any sort on this critical Section 203 issue. FERC bases its decision almost wholly upon its determination that the Applicants' "open" transmission

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[1/] OCC also filed on September 23, 1992 a Motion for Leave to Intervene and Request for Hearing in Docket No. ER92-806-000.

service tariff ("TST") approved in Entergy Services, Inc., Docket No. ER91-569-000 ("ESI")[2/] "[w]ill adequately mitigate any increase in market power in the relevant geographic and product markets that may arise from the proposed merger, if approved." (Slip op. at 54).

II. ARGUMENT

A. Denial of a Hearing

The Commission is required to hold a full evidentiary hearing where parties have raised disputes concerning material facts and have shown that an "inquiry in depth" is appropriate. Independent Bankers Ass'n of Georgia v. Bd. of Gov. of Federal Reserve System, 516 F.2d 1206, 1220 n.57 (D.C. 1975); Municipal Light Boards v. FPC, 450 F.2d 1341, 1345 (D.C. Cir. 1971). The agency "bears a weighty burden in justifying a denial of an evidentiary hearing," General Motors v. FERC, 656 F.2d 791, 798 (D.C. 1981) (citations omitted), yet FERC's decision does not even attempt to address the factual questions concerning the merger's effects on competition set forth by OCC. Instead, FERC simply relies upon the unsupported assumptions that: (1) present competition between Entergy and GSU is only "de minimis"; and (2) in any event, the TST will adequately mitigate any increase in the Applicants' market power in transmission and bulk power sales.

2/ 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.).

The Commission's conclusion that the Applicants do not now appreciably compete in the relevant transmission and bulk power markets is, first of all, belied by FERC's own contradictory statement that the merger would produce increased concentration measured by HHIs in some markets. (Slip op. at 55-56).[3/] In any event, FERC erroneously suggests that intervenors bear the burden of demonstrating that the present level of competition between Applicants is more than de minimis. (Slip op. at 55). However, it is the Applicants who must show affirmatively that the proposed merger is consistent with the public interest.[4/] FERC cannot shift the evidentiary burden to OCC and other intervenors who have requested a hearing -- especially where Applicants alone possess much of the data relevant to competition issues and have refused to provide any such data to OCC, and where OCC has presented expert evidence identifying specific flaws in Applicants' case.

3/ In fact, while flawed, the HHI analysis in Appendix B indicates increases in HHIs of as much as 375 and post-merger HHIs as high as 1928. Under the 1992 DOJ-FTC Merger Guidelines (1.51c), such a market is highly concentrated, and such increases in concentration "potentially raise significant competitive concerns."

4/ See Pacific Power & Light Company v. Federal Power Commission, 111 F.2d 1014, 1017 (9th Cir. 1940); Iowa Public Service Company, Iowa Power Inc., and Midwest Power Systems, 60 FERC ¶ 61,048 (1992); Northeast Utilities Service Company, 56 FERC ¶ 61,269, 61,994 (1991) ("Northeast Utilities"); Southern California Edison Company and San Diego Gas and Electric Company, 53 FERC ¶ 63,014, 65,098 (1990) ("Southern California Edison"), Utah Power and Light Company, PacifiCorp and PC/UP&L Merging Corporation, 45 FERC ¶ 61,095, 61,278-79 (1988) ("Utah Power and Light").

Moreover, it is not appropriate to limit consideration to "present competition" between Entergy and GSU in transmission and bulk power markets nor to measure the extent of present competition by looking at current sales by Entergy and GSU. OCC demonstrated, for example, that Entergy's and GSU's transmission systems provide alternative bulk-power contract routes. (OCC Motion, Frankena Affidavit at 4-5). Even if Applicants do not sell large amounts of the same kind of transmission service, the Commission should -- consistent with antitrust analysis principles -- consider the extent to which the availability of a second, independent transmission route currently constrains and in the future could constrain the pricing of the first. Similarly, the fact that two utilities do not make sales in the same bulk power market at any given time does not mean that the option to purchase from one does not restrain the other's pricing behavior.

OCC's intervention motion and the accompanying affidavit of Dr. Mark W. Frankena[5/] identified several key shortcomings in the Applicants' evidence concerning market power in transmission and bulk power, including their inclusion of all first-tier utilities in the relevant market for bulk power without considering whether those utilities' generation is cost-competitive. (OCC Motion at 16; Frankena Affidavit at 9-10). The Commission apparently has accepted without question the

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5/ Dr. Frankena is a Senior Economist at Economists Incorporated, and is a former Deputy Director for Antitrust of the U.S. Federal Trade Commission's Bureau of Economics.

Applicants' geographic market definition for bulk power (see Order Appendices A and B). FERC's denial of an evidentiary hearing here stands in stark contrast to past contested merger proceedings, where the agency has consistently undertaken highly adjudicative market power inquiries,[6] recognizing that questions concerning "probable competitive behavior and its probable effects" require knowledge of the specific factual context and future effects and the benefit of expert evaluation. United States v. C.A.B., 511 F.2d 1315, 1326 (D.C. Cir. 1975)(remanding case for full evidentiary hearing).

The Commission seems to believe, however, that a rigorous analysis of market power for transmission and bulk power is unnecessary, thanks to its determination that with the TST in place, "the merged company will not be able to exercise market power in either: (1) the long- and short-run firm bulk power markets; (2) non-firm energy markets; or (3) transmission markets." (Slip op. at 59). FERC's conviction that concerns regarding market power in transmission and bulk power issues are obviated by the TST is not only erroneous as a legal matter;[7] it also is lacking in evidentiary support. The order addresses only one TST issue raised by intervenors -- the tariff's point-to-point service restriction -- and ignores all other material factual questions concerning the TST raised by OCC and others.

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[6] See Northeast Utilities, 56 FERC at 61,998-62,011; Southern California Edison, 53 FERC at 65,099-65,109; Utah Power and Light, 45 FERC at 61,283-61,289.

[7] See discussion infra.

OCC, for example, emphasized that an evidentiary hearing was required to address numerous flaws in the Applicants' presentation, including:

- Applicants' failure to provide any information concerning the amount of transmission capacity that would be available to accommodate third-party service requests. (OCC Motion at 20).

- Applicants' failure to consider whether the TST's rate structure would enable the merged company to exercise market power even with the TST in place, since a transmission rate yielded by competition could fall below the tariff's embedded cost rates. (OCC Motion at 20-21; Frankena Affidavit at 16-21).

- Applicants' failure to address the merger's potential impact on de facto transmission provided by means of Entergy and GSU transactions involving simultaneous purchase and sale of bulk power at different points and delivery of their own bulk power. (OCC Motion at 14; Frankena Affidavit at 5).

OCC and other intervenors went to unprecedented lengths to submit evidence raising competition issues (as well as other merger issues) at the early intervention stage of this proceeding in order to meet the demanding (and unreasonable) standards for obtaining a hearing set forth in ESI. In ESI, FERC chided intervenors for their alleged failure to provide substantial evidence with their interventions and for not requesting additional time beyond the intervention notice period to submit additional comments and evidence. Although OCC strongly opposes the ESI procedural determination,[8/] it nevertheless within the less than month-long notice period for intervention in Docket No. EC92-21-000 filed a detailed intervention motion, accompanied by

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8/ OCC has appealed the ESI order in D.C. Cir. No. 92-1523, Occidental Chemical Corporation v. FERC.

an expert affidavit on competition issues which presented specific factual challenges to the Applicants' submissions and established the need for discovery and evidentiary hearing. OCC also explicitly requested, in the event that FERC refused to grant an evidentiary hearing, a "paper hearing" process with opportunity for discovery. OCC served data requests upon Applicants as soon as practicably possible after review of the Applicants' materials and prior to the filing of its intervention motion. Applicants unconditionally refused to respond to OCC's requests concerning competition issues. (Appendix A, attached).

OCC has, in short, taken every conceivable step to put forth material factual issues regarding competition that require, at the very least, a meaningful paper hearing. Yet the Commission does not even attempt to explain its denial of the hearing requests of OCC and others, or even refer to the issues posed by OCC. As such, the order is arbitrary and capricious. See General Motors v. FERC, supra, 656 F.2d at 791 (remanding FERC's denial of party's hearing request because the agency "did not adequately explain its denial").

Moreover, the Commission's actions offend basic notions of procedural fairness. As noted, OCC (and a number of other intervenors) expended considerable efforts and resources to obtain and present information challenging the Applicants' filings. The Commission, however, refused to compel the Applicants to respond to intervenors' discovery requests, declaring in its order that Applicants "were under no obligation

. . . to engage in discovery until the matter was set for hearing." (Slip op. at 43). Yet the same order refuses to set competition issues for hearing, placing OCC and other intervenors in a no-win, Catch-22 situation.

FERC's "summary disposition" on the merits of competition is unwarranted in the complete absence of evidentiary support for such determination. Under Section 313(b) of the FPA, the Commission's decision must be based upon "substantial evidence". 16 U.S.C. § 8521(b) (1988). The "substantial evidence" test requires that the evidence relied upon by the agency be based upon the "whole record." Consideration of the "whole record" demands, in turn, that interested parties have had the opportunity "to introduce adverse evidence and criticize evidence introduced by others." Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1258 (D.C. Cir. 1973). Here OCC has been deprived of the opportunity to discover data in the Applicants' possession which would enable it to counter fully the Applicants' case.

The Commission's unexamined reliance upon the remedial effect of the TST in this context has compounded the potential for competitive harm occasioned by the ESI order. The denial of a hearing and a resultant lack of a substantial agency record has also jeopardized the timely consummation of the merger, since resolution of procedural and substantive issues related to competition must now be deferred at least until the Commission acts on rehearing, and quite possibly until the outcome of any judicial review of a rehearing order. In order to minimize harm

from delay to both intervenors' and Applicants' interests, FERC should act on the rehearing requests of OCC and others as expeditiously as possible.

B. Inconsistency With Section 203 Precedent

As emphasized above, FERC in this case has, for all practical purposes, dispensed with an examination of the potential anticompetitive impact of the proposed merger on relevant markets for transmission and bulk power. In so doing, it has overturned, without notice or explanation, a well-developed body of agency and judicial caselaw applying Section 203 of the Federal Power Act.

The necessary threshold inquiry in any merger case is an assessment of the foreseeable anticompetitive effects that could flow from the proposed transaction. The basic legal standard applicable to mergers, Section 7 of the Clayton Act,[9/] "prohibits an acquisition or merger where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Utah Power & Light, 45 FERC ¶ 61,095 at 61,283 (emphasis added). The Commission must, as a first matter, determine "whether the merged company will have any greater market power than the two companies currently have as separate entities." Northeast Utilities, 56 FERC at 61, 998.

9/ 15 U.S.C. § 18 (1988).

The order's fixation upon the supposed remedial effects of the TST puts the proverbial cart before the horse. FERC "must compare the competitive situation which existed 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." Northeast Utilities, 56 FERC at 61,999. In Northeast Utilities, FERC specifically rejected the merging utilities' argument that "the presiding judge should have compared the competitive situation without a merger to the situation with its 'entire merger proposal,' including its [transmission access commitments]." Id. This is, however, precisely the approach taken by FERC in this proceeding. Although FERC on one hand professes to be concerned with "remedying the specific anticompetitive harms directly resulting from the proposed merger" (Slip op. at 59; emphasis in original), it has in fact not attempted to determine what anticompetitive injury might arise from an Entergy/GSU consolidation.

The order's failure to acknowledge its radical departure from precedent -- let alone provide a reasoned explanation for such -- constitutes arbitrary and capricious agency decisionmaking. See, e.g., National Black Media Coalition v. FCC, 775 F.2d 342,355 (D.C. Cir. 1985); American Federation of Government Employees v. Hoffman, 543 F.2d 930, 946 (D.C. Cir. 1976), cert. denied, 430 U.S. 965 (1977); International Union v.

NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972); Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

C. Failure to Distinguish Between Section 203 and 205 Contexts

FERC's order also fails to address the fundamental differences between Section 203 merger cases and Section 205 market-based rate cases which highlight why the transmission tariff approved in ESI cannot automatically moot out Section 203 market power concerns. First of all, FERC's market power analysis in a market-based rate case focuses on a comparison between cost-of-service rate regulation and market-based pricing (accompanied by transmission access conditions, if necessary), in order to compare the costs associated with traditional regulation with the likelihood that market power will be exercised under "relaxed regulation". In a merger case, by contrast, FERC must weigh against the potential exercise of market power not the ascertainable and substantial cost benefits of lessened regulation, but rather the often highly uncertain cost savings alleged to flow from a proposed merger. It is significant in this regard that the U.S. Department of Justice has stated that market-based pricing may be allowable in some markets where a merger would be found to be anticompetitive.[10/]

In addition, the order ignores the fact that while FERC can revoke a utility's right to sell power at market rates (e.g.,

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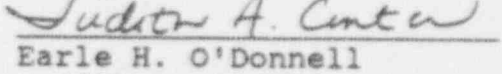
10/ U.S. Department of Justice, Competition in the Oil Pipeline Industry (1984), at 28-29.

upon a Section 206 complaint), it cannot revoke a merger approval (assuming compliance with the FERC-prescribed conditions). Although FERC approved ESI's market-based rates (in conjunction with the TST), it required Entergy to submit updated market analyses every three years and relied on other "regulatory backstops" as safeguards against the utility's ability to exercise market power even with the TST. Such Section 205 "backstops" are not available to discipline a utility's post-merger market power. Since FERC cannot "undo" a merger approval, consumers must continue to live with the consequences of an erroneous agency determination.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, Occidental Chemical Corporation respectfully requests that the Commission grant rehearing of its January 28, 1993 order and prescribe an evidentiary hearing to address competition issues raised by OCC and others.

Respectfully submitted,



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Attorneys for
Occidental Chemical Corporation

Dated: February 26, 1993

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **Request for Rehearing** by first class mail, postage prepaid upon all parties designated on the official service list in this proceeding.

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

Judith A. Center

Judith A. Center

Attorney for
Occidental Chemical Corporation

APPENDIX A

APPENDIX A

NEWMAN & HOLTZINGER, P.C.

[illegible] STREET N.W.

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Michael J. Bardee
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October 15, 1992

BY HAND DELIVERY

Earle H. O'Donnell, Esquire
Judith A. Center, Esquire
Sutherland, Asbill & Brennan
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004

RE: Entergy Services, Inc. and Gulf States Utilities Co.
FERC Docket Nos. EC92-21-000 and ER92-806-000

Dear Mr. O'Donnell:

This letter is a follow-up to our letter dated September 24, 1992 provided in response to your September 21, 1992 letter to Mr. Bouknight transmitting the First Set of Data Requests Propounded by Occidental Chemical Corporation ("OCC") in the above-referenced proceedings.

As you know, Applicants, Entergy Services, Inc. and Gulf States Utilities Company, have requested that the Federal Energy Regulatory Commission ("Commission") act on the applications without further proceedings. If the Commission believes that additional proceedings are necessary, Applicants have asked the Commission to set specified issues for consideration in a "paper" hearing.

Nevertheless, in order to assure that any proceedings (if there are any) ordered by the Commission will be conducted expeditiously, Applicants are willing to make a reasonable effort to respond to intervenors' questions. The extent to which each intervenor's requests can be accommodated depends, in part, on how extensive the requests are in aggregate. Where we conclude that a request involves significant burden, is of dubious relevance, or appears to implicate privileged or confidential material, we will defer that request until the Commission has acted.

Applicants believe that OCC's only legitimate interest in these proceedings is as a retail customer of Entergy and Gulf States. Accordingly, Applicants have requested, in its Answer to Motions to Intervene filed on October 13, 1992, that the Commission limit OCC's participation to matters that affect its interest as a retail customer of electricity, that is, the effect of the merger on costs and rates. Given this request, until the Commission rules on the scope of participation of OCC in these proceedings, Applicants will not respond to OCC data requests that seek information regarding transmission access or pricing or the effect of the merger on the existing competitive situation. However, Applicants will forward to OCC Applicants' responses to other intervenors' data requests without regard to the subject matter. If there are particular questions related to the effect of the merger on costs and rates that you wish to have given priority, please let us know what these are and we will try to accommodate you. We will make every effort to provide some responses by early November.

I request your assurance that neither you nor any representative of your client will claim, in any context, that the Applicants' willingness to respond to data requests in advance of the Commission's order prejudices the Applicants' position that the application should be acted upon without hearing or, in the alternative, with hearing procedures limited as requested in the Applicants' Motion for Consolidation, Expedited Action, and Limited Hearing Procedures. If you agree to provide this assurance, please sign in the space provided below and return to me one of the duplicate originals of this letter.

Sincerely,

Michael J. Rustum

Michael J. Rustum
Attorney for Entergy Services, Inc.

AGREED, AS STATED IN THE FINAL PARAGRAPH OF THE TEXT.

_____

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc. and Gulf States Utilities Company	))	Docket Nos. EC92-21-000 and ER92-806-000

MOTION OF
OCCIDENTAL CHEMICAL CORPORATION
FOR RECONSIDERATION AND TO REOPEN RECORD

Pursuant to Rules 212 and 716 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 212 and 716, Intervenor Occidental Chemical Corporation ("OCC") respectfully requests that the Commission reconsider that portion of its January 28, 1993 Order in this proceeding which determined that the proposed merger of Entergy Services, Inc. ("Entergy") and Gulf States Utilities Company ("GSU") (collectively, "Applicants") will not adversely affect competition in bulk power, transmission, and retail power markets. OCC relatedly requests, for good cause shown, that the Commission reopen the record of this proceeding in order to consider certain new facts, described herein, relevant to the proposed merger's competitive impact. In support of this Motion, OCC states as follows:

1. On January 28, 1993, the Commission issued an Order on Applications in this proceeding which summarily found that Applicants' proposed merger, when coupled with Entergy's "open-access" transmission tariff, would not adversely affect

competition. 62 FERC ¶ 61,073 at 61,374-376. The Order's competitive impact analysis focused exclusively upon the vertical market power implications of the proposed merger (with particular reference to alleged anticompetitive effects of the transmission tariff's point-to-point service), although FERC rejected in passing an intervenor's contention that the merger would create "horizontal territorial limitations" by eliminating competition between Entergy and GSU for wholesale loads. 62 FERC at 61,374 n.97. The Commission refused to order a hearing on any competitive issue.[1/] OCC and a number of other parties have filed requests for rehearing of the January 28 Order's determinations on competition.

2. Attached as Appendix A to this Motion is a copy of a Stipulation entered into between Entergy, GSU, and Texas Utilities Electric Company ("TU") regarding Texas Public Utility Commission Docket No. 11292, Application of Entergy Corporation and Gulf States Utilities Company For Sale, Transfer, or Merger. The attached Stipulation was admitted into evidence during the course of hearings in Docket No. 11292. However, this agreement -- which effectively resolved all issues in dispute between Entergy/GSU and TU in the Texas Public Utility Commission ("Texas PUC") merger proceeding -- was not included as part of the

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1/ The Commission also refused to hold a hearing on the Entergy "open-access" transmission tariff. Entergy Services, Inc., 58 FERC ¶ 61,234, order on reh'g, 60 FERC ¶ 61,168 (1992), appeal pending, Cajun Electric Power Coop., Inc. v. FERC, D.C. Cir. Nos. 92-1461, et al., filed October 23, 1992.

Settlement Stipulation and Agreement which has been submitted for review by the administrative law judge.[2/]

3. In the attached Stipulation, Entergy states that it would affirm under oath, inter alia, that: (1) none of the benefits of the proposed merger is dependent upon the Applicants selling electric power to any electric utility in the Electric Reliability Council of Texas ("ERCOT"), directly to any ultimate consumer in ERCOT, or through any ERCOT utility to any ultimate consumer; (2) Entergy "has no current plans to expand the sale of electric energy and/or capacity by its affiliates into wholesale or retail markets located, in whole or in part, within ERCOT"; and (3) Entergy "has no current plans to seek the interconnection of ERCOT with the Southwest Power Pool ("SPP"), or any other electric reliability council . . . ." GSU provides stipulations identical to (1) and (3) above.

TU, in turn, stipulates that "all disputed issues involved in this Docket which are of interest to TU Electric have been compromised and settled by this Stipulation."

4. The Stipulation between Applicants and TU was entered into more than a month after issuance of the Commission's Order on Applications. Thus, neither OCC nor any other party to

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2/ The Settlement Stipulation and Agreement was entered into on March 30, 1993 by Entergy, GSU, and the Texas PUC Staff. OCC and a number of other parties to the Texas PUC merger case are not signatories to the Settlement.

this proceeding could have raised the issue of the Stipulation before the Commission prior to expiration of the period for requesting rehearing of the January 28 order. The Stipulation, as discussed below, constitutes evidence which is highly relevant to the Commission's competition inquiry under Section 203 of the Federal Power Act ("FPA"). The Commission will reopen a record and grant reconsideration of an order in cases where important new information or developments demand that the Commission revisit its prior determinations. 18 C.F.R. § 385.716(c); see, e.g., Damson Oil Company and GHK Co., 56 FERC ¶ 61,151 (1991)(reopening and reconsideration of order in light of newly-submitted data); Gulf Oil Corp., 32 FERC ¶ 61,379 (1985); National Fuel Gas Supply Corp., 7 FERC ¶ 61,072 (1979). Accordingly, for the reasons set forth below, the Commission should reconsider its previous finding that the proposed merger will not adversely affect competition and reopen the evidentiary record to permit discovery on the critically important issues raised by the Entergy/GSU/TU Stipulation.

5. It is clear that FERC must take antitrust concerns into consideration in administering its responsibilities under Section 203 of the Federal Power Act. Gulf States Utilities Co. v. FPC, 441 U.S. 747, 757-58 (1973); Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959-961 (D.C. Cir. 1968). A proposed merger must conform to U.S. antitrust laws, including Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 7 of the

Clayton Act, 15 U.S.C. § 18. Section 1 of the Sherman Act specifically prohibits a "contract, combination . . ., or conspiracy in restraint of trade or commerce . . . .'"

The Entergy/GSU/TU Stipulation is on its face, persuasive evidence of a market allocation agreement which is offensive to Section 1 principles, and hence to the "public interest" criterion of FPA Section 203. Although cast as "stipulations" concerning "current plans" to market wholesale and retail electricity, the Applicants' statements strongly suggest the existence of an underlying understanding with TU not to compete with TU in certain markets -- an understanding which was reached in order to secure TU's acquiescence to the merger.[1/] It is thus highly likely that the merger will foreclose any future competition between Applicants and TU.

The U.S. Supreme Court "has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition . . . .'" United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972)(citations omitted). Any arrangement between actual or potential competitors to divide markets or allocate customers is regarded as per se unlawful under the

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[1/] Discovery is necessary to determine more precisely the terms of the Entergy/GSU/TU understanding. For example, it is almost inescapably apparent that Entergy and GSU provided TU with certain assurances regarding limitations on the geographic scope of their future electric sales activities, in return for TU's withdrawal of opposition to the merger. Discovery can further confirm and illuminate the existence of this anticompetitive quid-pro-quo.

antitrust laws. See, e.g., id.; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951). It also should be emphasized that such agreements "are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50 (1990).

The fact that Applicants and TU are utilities subject to certain regulation under state and federal law does not immunize them from the per se rule against territorial allocations, absent a state action exemption. See, e.g., Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co., 184 F.2d 552 (4th Cir.), cert. denied, 340 U.S. 906 (1950); Gainesville Utilities Dept. v. Florida Power & Light Co., 573 F.2d 292 (5th Cir.), cert. denied, 439 U.S. 966 (1978). The state action exemption is inapplicable in this instance. As pointed out above, the Stipulation has not been reviewed by the Texas PUC, and presumably will not be approved by the Texas PUC as part of the overall settlement agreement. Moreover, in any event, the wholesale market division issue raised by the Stipulation falls outside the scope of state regulatory jurisdiction. Of course, the fact that Applicants are regulated by FERC does not shield them from Section 1 per se scrutiny. Otter Tail Power Co. v. United States, 410 U.S. 366, 372-375 (1973). This Commission has acknowledged its obligation

to reject "covenant[s] not to compete" that violate "the specific condemnation of horizontal market allocation expressed in Topco. . . ." Arcadian Corporation v. Southern Natural Gas Co., 61 FERC ¶ 61,183 at 61,683 (1992). The profoundly anticompetitive nature of the kind of agreement evidenced by the Stipulation demands that FERC re-examine its previous finding that the proposed merger would not harm competition. The Commission promptly should undertake an evidentiary investigation of the Stipulation by initiating discovery and a hearing to explore the scope and terms of the territorial agreement reflected in the document.

WHEREFORE, for the reasons set forth above, Occidental Chemical Corporation requests that the Commission reconsider, in light of the Entergy/GSU/TU Stipulation, its determination that the proposed merger will not adversely affect competition, and that discovery and an evidentiary hearing be authorized to address the issues raised by the Stipulation.

Respectfully submitted,

Judith A. Center

Earle H. O'Donnell
Judith A. Center
Kathleen A. Foudy

DEWEY BALLANTINE
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for
Occidental Chemical Corporation

Dated: April 20, 1993

DOCKET NO. 11292

APPLICATION OF ENTERGY CORPORATION AND GULF STATES UTILITIES COMPANY FOR SALE, TRANSFER, OR MERGER	§ § § §	BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS

STIPULATION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

This Stipulation is entered into by and among Entergy Corporation ("Entergy"), Gulf States Utilities Company ("Gulf States") and Texas Utilities Electric Company ("TU Electric") (hereinafter referred to collectively as the "Parties"). This Stipulation is submitted to the Administrative Law Judge in an effort to compromise and limit issues among the Parties hereto. This stipulation should not be interpreted to mean that TU Electric concurs with the position taken by Entergy and Gulf States (hereinafter referred to collectively as the "Applicants") on any other issue involved in this Docket. The Stipulation binds each Party only for the purpose of resolving the issues involved in this Docket among the Parties hereto.

Entergy stipulates that its witness, Edwin Lupberger, if asked on the stand under oath, would state and affirm that:

1. None of the benefits of the proposed combination of the Applicants' systems (including, without limitation, the savings anticipated by Entergy to occur by reason thereof) relied upon by the Applicants in this Docket is dependent upon the Applicants, or any of their affiliates, selling electric energy and/or capacity in the future to: (i) any electric utility in the Electric Reliability Council of Texas ("ERCOT"), (ii) directly to ultimate consumer(s) in ERCOT, or (iii) through any electric utility in ERCOT to any electric utility or ultimate consumer(s) in Mexico or elsewhere.

2. Entergy has no current plans to expand the sale of electric energy and/or capacity by its affiliates into wholesale or retail markets located, in whole or in part, within ERCOT.

3. Entergy has no current plans to seek the interconnection of ERCOT with the Southwest Power Pool ("SPP"), or any other electric reliability council, through the construction of one or more AC interconnections or one or more additional DC interconnections.

4. Entergy has not considered a business combination with any electric utility or other person (other than Gulf States) operating within the State of Texas.

Gulf States stipulates that its witness, Joseph L. Donnelly, if asked on the stand under oath, would state and affirm that:

A. Gulf States has no current plans to seek the interconnection of ERCOT with the SPP, or any other electric reliability council, through the construction of one or more AC interconnections or one or more additional DC interconnections;

B. None of the benefits of the proposed combination of the Applicants' systems (including, without limitation, the savings anticipated by Gulf States to occur by reason thereof) relied upon by the Applicants in this Docket is dependent upon the Applicants, or any of their affiliates, selling electric energy and/or capacity in the future to: (i) any electric utility in the ERCOT, (ii) directly to ultimate consumer(s) in ERCOT, or (iii) through any electric utility in ERCOT to any electric utility or ultimate consumer(s) in Mexico or elsewhere.

TU Electric stipulates that all disputed issues involved in this Docket which are of interest to TU Electric have been compromised and settled by this Stipulation.

Therefore, the Parties agree that this Stipulation will be offered into evidence at the hearing on the merits in this Docket and, if it is admitted into evidence, TU Electric will withdraw its list of contested issues and will not participate further in this hearing on the merits in this Docket regarding any matter or issue, other than the right to any recross examination, if necessary, on the facts stipulated to above by Entergy and Gulf States in the event any other party in this Docket challenges such facts. If this Stipulation is not admitted into evidence, TU Electric retains the right to fully participate in the hearing.

Executed as of March 8, 1993, by the Parties hereto, by and through their undersigned duly authorized representatives.

ENTERGY CORPORATION

By: Carolyn Hudson

Date: March 8, 1993

GULF STATES UTILITIES COMPANY

By: Gail J. Johnson

Date: March 8, 1993

TEXAS UTILITIES ELECTRIC COMPANY

By: Dwight Lynn Hutton

Date: March 8, 1993

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of April, 1993 served, by first class mail, postage prepaid, the foregoing document upon each person listed on the Service List in this proceeding.

Judith A. Center

Judith A. Center