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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

~~DOCKETED~~
USNRC

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GULF STATES UTILITIES, *ET AL.*

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DOCKET NO. 50-458

LAFAYETTE, LOUISIANA
COMMENTS, PETITION TO INTERVENE
AND REQUEST FOR HEARING

Pursuant to the Commission's March 18, 1993 notice in above-captioned proceeding, in which Gulf States Utilities Co. ("GSU") seeks approval to transfer control of its ownership share of the River Bend Station to the Entergy Corporation ("Entergy"), the Lafayette Public Power Authority ("LPPA"), and the Lafayette, Louisiana Utilities System (collectively "Lafayette") petition to intervene as a party to the proceeding, comment on GSU's request, and request a hearing and related relief.

Communications regarding Lafayette's intervention should be addressed to:

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SUMMARY

In the interim since the antitrust conditions of GSU and Entergy nuclear licenses were last reviewed, there have been significant changes which require their reexamination and reconstruction at this time. First, of course, the transfer requested here is necessitated by the proposed merger of Entergy and GSU — a major development in the utility industry. Second, commitments rooted in a world in which Entergy operating companies were the prime movers must be revised to take account of a world of regional markets in which the operating companies are vehicles for Entergy's centralized control.

As further discussed below, Lafayette therefore requests that the Commission:

(1) Act to impose license conditions which clarify that Entergy as a whole must provide transmission service for competitors on a par with the service available to Entergy itself — i.e., network service. As a prelude to its merger, and to obtain FERC approval for market-based pricing of its power, Entergy filed a transmission tariff for through service over the Entergy system. However, the tariff's point-to-point service provisions enshrine a utility's size as a governing principle for pricing transmission. That is, transmission charges are dependent on the number of "utilities" involved in a transaction. The four Entergy companies (plus Entergy Power) are defined as a single utility, and can coordinate their dozens of generating units over a multistate region for a single price per kwh. This

flexibility is now expanded through merger with GSU. Meanwhile, coordination required by Lafayette and other smaller generators (*e.g.*, IPPs, QFs) will be met with multiple charges for electrically and economically equivalent transmission on Entergy's network. This discrimination is inconsistent with NRC antitrust license conditions long ago entered into by individual Entergy operating companies¹ and GSU, as well as basic antitrust principles.

(2) Confirm that Entergy's proposal to impose stranded generation investment costs on competitors who succeed in attracting Entergy customers is contrary to the express provision of NRC license conditions.

(3) Address the opportunity and incentive for generation affiliate preference and self-dealing embodied in Entergy's control of the transmission network.

The NRC notice states that the NRC will "consider the FERC [Entergy/GSU merger] proceeding to the maximum extent possible in resolving issues brought before the NRC." FERC, however, has summarily denied a hearing on competition-related issues. In doing so, it failed to address, *inter alia*, Entergy and GSU antitrust license commitments to this Commission.²

1. See, *e.g.*, *Louisiana Power & Light Co.*, 8 AEC 718 (ASLB 1974); *aff'd* 1 NRC 45 (1975), at 731-734.

2. Lafayette is seeking rehearing on, *inter alia*, these issues before FERC. However, there is no certainty that FERC will reconsider its position and/or take action on the rehearing petitions in the immediate future.

I. LAFAYETTE DEPENDS ON ENTERGY TRANSMISSION TO COMPETE WITH
ENTERGY IN THE SALE AND PURCHASE OF POWER

Lafayette owns and operates a municipal electric system that provides service at retail in and around Lafayette, Louisiana. Lafayette also sells power at wholesale to other utilities, with whom it also engages in coordination activities.³

Lafayette owns approximately 650 Mw of generation. Since its retail peak load approximates 320 Mw, Lafayette has considerable surplus generation which it seeks to market on an economic basis. For example, Lafayette is providing long-term firm power to serve the needs of Natchitoches, Louisiana, and the Louisiana Energy and Power Authority ("LEPA"). Lafayette has met with competition from Entergy companies in its pursuit of such sales.⁴ Lafayette also competes with Entergy and GSU on a day-to-day basis in the purchase and sale of economy energy and replacement power.

Lafayette is electrically interconnected with the Central Louisiana Electric Company ("CLECO") and GSU. It is totally dependent on the transmission provided by these utilities (and, through the proposed merger with GSU, the Entergy companies) for transmission. Because of the size of its load, Lafayette requires economic access to

3. LPPA is a political subdivision of the State of Louisiana, created by the City of Lafayette. LPPA was created for the purpose, *inter alia*, of acquiring and maintaining public power projects. LPPA is a 50 percent owner of the Rodemacher Unit No. 2, a coal fired unit located in Boyce, Louisiana.

4. For example, Lafayette, GSU and Entergy companies were among those who responded to recent requests for power by LEPA and the Municipal Energy Agency of Mississippi ("MEAM").

transmission in order to obtain the economies of coordination and joint generation ownership.⁵

In order to operate efficiently, Lafayette requires assurance that the costs it will pay for transmission are no more than those which are required to perform the electrical transaction. For example, where coordination does not impose additional costs on a transmission network, it should not be limited by the imposition of additional charges.

In order to compete with Entergy, Lafayette requires that Entergy not be permitted to use its transmission monopoly to prefer its generation affiliates. For example, where Entergy prices transmission to itself based on peak transmission use (and not the number of physically distinct delivery/receipt points involved) it cannot price transmission to Lafayette based on the number of delivery/receipt points involved. For example, where Entergy sets the profit level for non-firm transmission sales, there must be some way to assure that Entergy Power will not be favored over Lafayette and others. For example, when Entergy Power and Entergy Services are engaged in the daily planning of the Entergy transmission network, there must be some way to assure that the planners will not prefer Entergy generation. Lafayette and others cannot be told, after the fact, that their own transmission requests will call for new facilities – the costs of which will not be shared by Entergy.

5. Thus, for example, Lafayette seeks to enhance coordination opportunities through its membership, with other Louisiana municipal systems, in LEPA.

II. SIGNIFICANT CHANGES MERIT NRC SCRUTINY AND RECONSTRUCTION OF LICENSE CONDITIONS

As Entergy itself proclaims, the electric "industry and the regulatory environment are changing dramatically."⁶ The proposed Entergy/GSU merger, which necessitates the license transfer request here, exemplifies the dramatic and significant change since this Commission's last Entergy/GSU antitrust reviews. Moreover, when combined with the FERC's recent approval of Entergy's request to sell power at market based rates, the merger gives incentive, as well as opportunity, for Entergy to exercise its transmission monopoly.

In tandem with increasing size and ambition, Entergy has reorganized itself to reflect the reality that plans, decisions, and operations take place on a systemwide — and not company wide — basis. Entergy Chairman Lupberger explained on behalf of the merger (*id.*, at 16-17):

We have reviewed Entergy's organizational structure in order to identify changes that would enable it to benefit from the key factors expected to drive and shape the industry in the future. . . . With separate operating companies, we had three or more organizations performing exactly the same task. . . . We began by consolidating the operation of the system's four nuclear-fueled units in one company. . . . We augmented this approach by combining the planning, management and operation of the system's . . . fossil-fueled units . . . with the efforts of Entergy operations. In this way, one organization oversees the planning, operation and maintenance of all generation on the system.

We also have placed the retail operations conducted by the Operating Companies, including transmission, distribution, customer service and marketing activities, under the direction

6. Prepared Testimony of Edwin Lupberger, Entergy Chairman and CEO, FERC Docket Nos. EC92-021, *et al.*, at page 15.

of a single organization. In addition, we formed a functional unit that directs the collective technical, administrative and general office business functions for the system.

In short, license conditions entered into when the Entergy operating companies (and GSU) had some measure of autonomy must be altered to reflect the scale on which they now operate.

III. THE PROPOSED MERGER IS SET IN THE CONTEXT OF DECADES OF ANTI-COMPETITIVE CONDUCT BY THE APPLICANTS WHICH THIS COMMISSION HAS SOUGHT TO ADDRESS

Lafayette has struggled to maintain and develop its system in the face of efforts by the Entergy Companies and GSU to strangle its ability to operate in competition with them. Decisions by fora up to and including the United States Supreme Court have been required to rein these companies in. A brief summary of the historical background will put the present proposal in perspective.

In the late 1960's Lafayette attempted to join with the City Of Plaquemine, Dow Chemical's Louisiana division, and Louisiana rural electric cooperatives to pool their resources. Entergy and GSU fought these efforts tooth and nail. The outlines of their attempts to deny coordination to their competitors were summarized by the Supreme Court in *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747 (1973).⁷

7. In *Gulf States*, the Supreme Court affirmed the Commission's obligations to consider evidence of anticompetitive behavior under its "public interest" obligation. The Court stated, for example, at 752:

Cities, Dow, and LEC, then were forced to negotiate with the three utilities [CLECO, GSU, and LP&L] for the use of the

(continued...)

In 1974, in response to evidence presented by, *inter alia*, Lafayette, the Atomic Energy Commission imposed transmission and coordination commitments on LP&L, as part of the antitrust reviews of the Waterford nuclear unit. *In the Matter of Louisiana Power and Light Company*, 8 AEC 718 (1974), *supra*.

The Waterford commitments provide, *inter alia*, that LP&L (now Entergy) cannot limit transmission to service "between two entities" and cannot include charges for stranded generation investment to transmission customers such as Lafayette. As stated below, Entergy is in defiance of these commitments.

In 1976 GSU entered into an interchange agreement with Lafayette which provided, *inter alia*, for transmission access.

Since then, GSU and the Entergy systems have demonstrated that, prior commitments notwithstanding, their potential for anticompetitive behavior is not exhausted.

In 1982 Lafayette formally asked GSU to provide transmission to Mississippi Power & Light ("MP&L"), on behalf of a sale by Lafayette to municipal systems in Mississippi. MP&L stated its willingness to receive power from GSU. GSU, however,

7. (...continued)

utilities' lines to transmit their power. Cities contended that the three utilities continued, through the course of the negotiations, to block or limit the pool by agreeing only to provide transmission services to some of the pool members; by refusing to supply transmission facilities between pool members unless the 1968 pooling agreement were cancelled; and by demanding that LEC limit its power capacity to the wattage already planned, thus giving the three utilities the exclusive right to supply all further power needs of LEC's 12 cooperatives and precluding further expansion by LEC.

refused to provide transmission, stating as reason its own lack of interconnection agreement with MP&L. Lafayette was therefore required to seek an alternative for the sale that did not require GSU's transmission.⁸

In 1983 Lafayette was approached by Louisiana municipal distribution systems, who sought to switch service from GSU to Lafayette. GSU balked at providing transmission. Lafayette was required to resort to the NRC antitrust review process in order to obtain the requisite transmission commitments. When Lafayette finally did obtain these commitments, however, valued sales opportunities had been lost.

In 1983 Lafayette was also approached to sell power, through Plaquemine, to an industrial customer of GSU. GSU again refused to provide transmission. In 1984 GSU went to court to avoid its transmission obligation. GSU's action resulted in injunctive provision that permitted the sale to proceed; however, GSU refused to file the requisite rates with this Commission until 1988 — years after the service had begun.⁹

To prevent further competition from Lafayette (and others) GSU successfully lobbied the Louisiana legislature for legislative restrictions that preclude competition for GSU retail customers. *Id.*

GSU's obstruction of Lafayette dealings with Abbeville, New Roads, Plaquemine, St. Martinville, and Stauffer were documented by Lafayette in filings with

8. See, e.g., May 27, 1982 letter from T.A. Dallas, MP&L to A-E Naylor, Manager Power Interconnections, GSU; April 6, 1982 letter from Mr. Naylor to T.J. Labbe, Director of Utilities, City of Lafayette. These materials were presented to the Commission in connection with the 1983-84 antitrust review, as noted below.

9. These developments are documented in *GSU*, FERC Docket Nos. ER88-619 and 89-171, in which GSU's belated filing of the transmission rate was at issue.

the NRC, in the context of GSU's 1983-84 antitrust license review. *See* Lafayette letters to William Regan, Chief Site Analysis Branch, Office of Nuclear Reactor Regulation, of September 15, 1983, February 2, 1984, and March 26, 1984 in NRC Docket Nos. 50-458A and 50-459A (River Bend Station Units 1 and 2). In response to these filings GSU entered into negotiations for interchange agreements which provided for Lafayette service to entities such as Abbeville.

In the latter part of the 1980's Lafayette sought to enter into a transmission arrangement with LP&L. In 1988 LP&L sent Lafayette an interchange agreement which included provision for transmission services. The agreement that LP&L proceeded to file with the Commission, however, did not contain the transmission schedule. Notwithstanding Lafayette's need for the transmission and LP&L's evident commitment to provide it, LP&L never filed the schedule.¹⁰

IV. ENTERGY'S ANTITRUST COMMITMENTS MUST BE REVISED TO PROVIDE FOR NETWORK TRANSMISSION SERVICE THROUGHOUT THE ENTERGY SYSTEM

Entergy's transmission tariff relegates tariff users to "point-to-point" service. Delivery and receipt points are defined in terms of "utility."¹¹ For Lafayette, coordination with other utilities will require multiple transmission charges. For a single charge, Entergy may readily engage in electrically and economically equivalent coordination

10. This matter was raised by Lafayette in the Entergy transmission tariff and merger dockets; neither Entergy nor the Commission took note.

11. *See* Tariff, at 2(c).

among its dozens of generating units in a multistate region, and with numerous units of neighboring utilities.

Testimony filed by FERC staff in the FERC merger proceeding shows that Entergy expects nearly one-third of the (\$850 million) in claimed fuel savings from the merger to come from offsystem purchases by Entergy.¹² Presumably, this magnitude of purchases will involve numerous Entergy transactions with multiple utilities, with delivery/receipt points prone to constant shift. Entergy's will be able to pursue transactions at no extra transmission cost to itself; *i.e.*, it will charge itself based on the kwh actually transmitted – regardless of shifts in the receipt and delivery points. When other entities, such as Lafayette, seek to engage in similar transactions, however, they will be subject to transmission charges based on the number of transmission paths, without regard to the kwhs delivered. There are obvious anticompetitive effects of this discrepancy. First, transmission for a given mix of transactions will cost Lafayette more than Entergy. Second, as a consequence, Lafayette will not be competitive with Entergy for particular transactions; *i.e.*, Entergy will have a built in edge in competition.¹³

The definition of "point," in short, reinforces the benefits of Entergy's transmission monopoly, without legitimate technical or economic justification. Every time Entergy gobbles up another "utility" (here, GSU), Entergy further advantages itself (by

12. See FERC testimony of John K. Sammon, March 24, 1993, at 25.

13. Entergy's tariff also provides that Entergy will get a share of the savings from economy transactions engaged in by others over Entergy's transmission system. Furthermore, Entergy gets to negotiate the percentage of its take, providing unchecked opportunity to prefer deals by its affiliates.

expanding the ability to obtain the benefits of flexible coordination at a single price per kwh) over Lafayette.

Entergy's discriminatory treatment of its competitors is an exercise in transmission monopoly power. Entergy's "point-to-point" limitation is also at odds with long-standing antitrust license commitments made by Entergy to the Nuclear Regulatory Commission, at the specific request of Lafayette, among others.

In *Louisiana Power & Light Company*, 8 AEC 718 (ASLB 1974), *supra*, Lafayette long ago fought Entergy's efforts to limit transmission to Lafayette by invoking factors that are not grounded in operational or economic reality. In that proceeding LP&L (*i.e.*, Entergy), sought to impose a new transmission charge on Lafayette (but not itself) every time a physical delivery or receipt point was switched. Entergy even sought to impose a double charge for bidirectional transmission of a fixed amount of power over a single path.¹⁴ The AEC found this limited point to point service (which was termed "between two entities") to be anticompetitive. It declared that "[t]he limitation of 'between two entities' in [LP&L's] Commitment No. 5 is not an adequate provision designed to permit coordination (both operation and development) sufficient to overcome a situation inconsistent with the antitrust laws." LP&L, *supra* at 731-34.

The "between or among" language also appears in Grand Gulf license condition 5, for application to the MP&L system. Consistent with the Waterford and

14. That is, it wanted to charge twice for the right to ship, *e.g.*, 5 MW from point A to point B, and from point B to point A. Entergy sought to impose bidirectional charges under its tariff. Remarkably, FERC recently found that "Entergy's proposal to charge for power transmission in opposite directions is proper." "Order Accepting Rate Schedules, etc.," FERC Docket No. ER91-569-000, April 5, 1993, *slip op.* at 18.

Grand Gulf provisions, the GSU River Bend commitments refer to transmission "between two or more" (as opposed to "between two"). See Commitment No. 10.

In sum, the NRC has historically recognized that competitive fairness requires that transmission owning utilities provide competitors with transmission access on comparable terms – *i.e.*, if the transmission owner does not charge itself multiple times for differing transmission paths, it cannot charge competitors multiple times. While these principles plainly apply to GSU, LP&L, and MP&L, they do not expressly apply to Entergy, as such. Present operating reality renders the Entergy system as a whole the proper object of antitrust conditions. The NRC should therefore clarify that the "between or among" conditions which have been applied to the majority of Entergy companies now apply to Entergy as a whole. Any license transfer must accordingly be conditioned on Entergy commitment to permit Lafayette (and other Entergy competitors) to use Entergy's transmission on the same essential pricing terms which Entergy applies to itself.

V. THE STRANDED INVESTMENT PROVISION IN THE TRANSMISSION TARIFF IS CONTRARY TO ENTERGY LICENSE COMMITMENTS

Section 9(a)(3) of the Entergy transmission tariff requires transmission customers to pay Entergy the costs of Entergy's "stranded investment" resulting from use of the tariff.¹⁵ In approving the provision, FERC recognized that the stranded invest-

15. As stated in the August 24, 1992 Entergy supplemental compliance filing in FERC Docket No. ER91-569:

(3) . . . either the Customer or the Electric Utility that distributes Power and Energy that is transmitted under this Tariff (as the two of them may agree) shall reimburse any [Entergy] Company for the costs of any investment by such Company in

(continued...)

ment costs at issue are likely to be transmission, and not production, related.¹⁶ It is plainly anticompetitive to require a customer who seeks only transmission from Entergy to pay for Entergy's generation costs as well.¹⁷

In fact, Entergy's provision for generation related stranded investment is expressly contrary to the Waterford and Grand Gulf license conditions which define "cost" to provide that: "[n]o value shall be included for loss of revenues from sale of power at wholesale or retail by one party to a customer which another party might serve."¹⁸

The FERC approved the stranded investment provision, subject to case-by-case review. In no case, however, can it be justified where transmission-only customers are required to pay generation related investment.

15. (...continued)

production, transmission or distribution facilities that are unrecovered by the Company as a result of the provision of service under this Tariff. Costs subject to reimbursement shall include, without limitation, the costs of any unamortized investment in facilities that are either no longer utilized or not fully utilized by companies due to a change in the service of supply of power and energy from companies to another entity, as a result of companies' provision of service under this Tariff. Recovery of such costs is subject to review by the Commission.

16. That is, while the power supplier changes, the customer will presumably continue to buy transmission from Entergy.

17. To be clear, Lafayette recognizes that utilities who purchase generation may obligate themselves to pay for generation investment they leave stranded. Entergy, having failed to bargain for such arrangement with its generation customers, now wants to impose it by fiat on the transmission customers who compete with Entergy.

18. MP&L Condition 1(d); LP&L condition 1(b). Lafayette notes that the comparable provision in the River Bend license includes the language, "except as otherwise authorized by any regulatory authority having jurisdiction." See Definition "3" ("Cost").

In the FERC transmission docket, when Lafayette pointed out that this unprecedented and unlawful provision is expressly contrary to Entergy's NRC commitments. Entergy conceded that its stranded investment provision (for generation) is at odds with its license commitment. Nonetheless, consistent with the monopolist's prerogative, it made plain that it will extract litigation time and costs from Lafayette (and others) who seek to vindicate this commitments.¹⁹

VI. THE COMMISSION MUST ADDRESS AND CORRECT THE OBVIOUS AFFILIATE PREFERENCES EMBODIED IN ENTERGY'S TRANSMISSION MONOPOLY

The tariff and merger proposal expand the incentive and opportunity for Entergy to exercise transmission monopoly power on behalf of Entergy generation affiliates, to the detriment of non-affiliated generation suppliers.²⁰

For example:

19. Thus, Entergy stated:

Lafayette and LEPA assert that the recovery of stranded investment costs is prohibited by NRC license conditions. . . . Should a Company seek recovery of stranded investment costs in violation of NRC license conditions, a customer may seek review of the issue at that time . . . such matters should be the subject of an NRC determination. . . . Moreover, the conditions in the Companies' view do not preclude the recovery of all stranded investment costs.

"Answer of Entergy Services, Inc. to Motions to Reject or Modify Compliance Filing," Docket No. ER91-569, August 12, 1992.

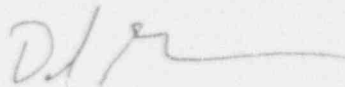
20. These include, of course, IPPs and QFs, as well as municipal systems such as Lafayette. The tariff deficiencies limit Lafayette's ability to coordinate with these further non-transmission owning sources of generation. By the same token, in limiting market opportunities for IPPs and QFs, the deficiencies enhance Entergy's monopoly power.

- ◇ The tariff permits Entergy to negotiate its profit level for non-firm transmission; what assurance is there that Entergy will not favor its affiliates?
- ◇ Tariff users must present a specific transaction to Entergy; there is no requirement that Entergy provide information needed by Lafayette (and others) to compare longer term alternatives for planning purposes. Such information is obviously available to Entergy's generation affiliates/components. What assurance is there that it will be available to Lafayette?
- ◇ The tariff presumes that Entergy will be allowed to charge some customers the incremental price for transmission additions. There is no protection to assure that the system will not be planned in a manner that assures that new investments benefit Entergy affiliates disproportionately, and that non-affiliates will be tagged with incremental prices.

WHEREFORE, in view of the foregoing it is respectfully requested that Lafayette be granted intervention in the proceeding, that a hearing be granted, that the Commission consider the issues and questions identified above, that it condition any license transfer on (1) Entergy's provision of transmission service to competitors, including network service, on non-discriminatory terms; (2) find that Entergy's proposal to require Lafayette and other transmission users to pay stranded generation related investment costs is contrary to antitrust commitments entered into with the Commission, and

(3) that it take such further action as found to be needed to address the (anti)competitive implications of GSU and Entergy's proposal to transfer the River Bend license.

Respectfully submitted,



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Dated: April 26, 1993

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CERTIFICATE OF SERVICE

~~SECRET~~
USNRD

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

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OFFICE OF SECRETARY
OF DEFENSE & NAVY
BRANCH

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



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