UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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| Electric Power Supply Association | Docket No. EL08-87-000 |

**MOTION TO INTERVENE AND PROTEST OF THE TRANSMISSION ACCESS POLICY STUDY GROUP**

On September 2, 2008, the Electric Power Supply Association ("EPSA") filed its Petition for Guidance Regarding "Control" and "Affiliation" ("Petition"). Pursuant to the Commission's September 8, 2008 Notice of Petition, as corrected, and Rules 211, 212 and 214 of the Commission's Rules of Practice and Procedure, the Transmission Access Policy Study Group ("TAPS") moves to intervene in this proceeding and protests EPSA's filing.

## I. EXECUTIVE SUMMARY

EPSA's Petition asks the Commission to rely on a single factor – the filing with the Securities and Exchange Commission ("SEC") of Schedule 13G – to establish lack of control or affiliation by investors owning less than 20% of the voting securities of publicly held companies for purposes of merger review and submission of information to demonstrate qualification for and disclose changes in status pertinent to market-based rate ("MBR") authority. In addition, it asks the Commission to "state that investments by entities upstream of a publicly-held company in entities not otherwise related to the publicly-held company will not be deemed to be within the knowledge and control of the publicly-held company's subsidiaries with MBR authorization, and, therefore, those MBR subsidiaries will not be required to file a notification of change in status or to

include generation or inputs to generation owned or controlled by other entities in future market power analyses." Petition at 2-3.

EPSA couches its Petition as a request for guidance under Rule 207(a)(5), 18 C.F.R. § 385.207(a)(5), of the Commission's Rules of Practice and Procedure, which is applicable to an "action which is in the discretion of the Commission…." Significantly, EPSA does not seek a "rule of general applicability" under Rule 207(a)(4), 18 C.F.R. § 385.207(a)(4). This procedural sidestep highlights the fundamental evasion attempted by EPSA: By this Petition, EPSA seeks to rewrite recent rulemakings (as well as policy statements), making a end-run around the regulatory process in which the Commission adopted a "totality of the circumstances" approach to assessing control, rather than the single factor presumption EPSA now urges to restrict filing obligations under Sections 203 and 205. ESPA seeks apparently unrebuttable, permanent presumptions that would dramatically reduce the information available to the Commission when it makes determinations central to its pro-competitive mission. For example, it would remove from MBR change in status reporting information as to inter-corporate relationships involving up to a fifth of a company's voting securities, without even requiring the filing at this Commission of the pertinent SEC Schedule 13G. *See* Petition at 23. And it would exclude from MBR filings and change in status reporting generation, transmission and inputs to generation that are held by the MBR seller's upstream parent.

For example, today three entities together control or have applied to control more than 50% of the stock of Calpine Corporation ("Calpine").[1] Under EPSA's Petition

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[1] Harbinger Capital Partners Master Fund I, Ltd. owns 16.2% of the common stock of Calpine Corporation (Calpine) (Harbinger Capital Partners Master Fund I, Ltd., Schedule 13D, Amendment No. 2 (May 21, 2008), *available at* http://www.sec.gov/Archives/edgar/data/916457/000091957408003441/d885189_13d-

potentially none of those relationships would be subject to Section 203 filing requirements or disclosure and consideration in Section 205 MBR filings and change of status reports. Nor would the generation, transmission, and inputs to generation owned or controlled by these "upstream" parents be considered as part of an MBR evaluation or change of status report. The Commission and intervenors would be effectively foreclosed from examining the totality of circumstances to determine whether these relationships may influence actions taken in electricity markets.

Given the current turmoil in our nation's financial markets, this is not the time to make it harder for the Commission and the public to understand and assess potential impacts of transactions on electricity markets in both the merger and market-based rate contexts. EPSA's generalized assertion that its proposed exemptions are needed to encourage investment hardly supports shielding information on relevant inter-relationships from the public view. Indeed, recent hedge fund filings belie any such contention.[2] Any burden claimed by EPSA pales compared to the burden placed on the Commission and intervenors to identify and expose these relationships if EPSA were to prevail.

Thus, the Commission should reject EPSA's collateral attack on recent rulemakings. It should adhere to its case-by-case approach to requiring disclosure of and

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a.txt); LS Power Development, LLC, Luminus Management, LLC, and their affiliates hold 15.9% of the common stock of Calpine and have applied in Docket No. EC08-126-000 for authorization to acquire up to 40% of the common stock of Calpine; and SPO Advisory Corp. and its affiliates own 16.4% of the common stock of Calpine (SPO Advisory Corp., Schedule 13D, Amendment No. 2 (Sept. 12, 2008), *available at* http://www.sec.gov/Archives/edgar/data/916457/000089183608000182/sc0087.txt).

[2] *See, e.g.*, Joint Application for Approval under Section 203 of the Federal Power Act and Request for Expedited Review, *LS Power Dev., LLC*, Docket No. EC08-126-000 (Sept. 24, 2008), (seeking Commission approval to increase Applicants' share of Calpine's common stock from approximately 15.9% to up to 40%).

evaluating all factors bearing on "control," consistent with precedent and its obligations under the Act. And the Commission should uphold its recently promulgated affiliate definition, rejecting EPSA's proposed presumption against knowledge of affiliate relationships and holdings of generation, transmission and inputs to generation. In short, the Commission should resist EPSA's requests to decrease transparency and impede the Commission's ability to ensure that jurisdictional sales and markets operate without distortion resulting from the exercise of market power.

## II. MOTION TO INTERVENE

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.[3] As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members have long been concerned about structural changes in the electricity industries that could adversely affect competition, rates or regulation, or could expose consumers to harm from unmitigated market power. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to market-based rates and mergers.

TAPS members' interests may be affected by this proceeding. TAPS' interests cannot adequately be represented by any other party, and its participation is in the public interest. TAPS should be granted intervention and made a full party to this proceeding.

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[3] TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power Inc. ("WPPI"). Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

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## III. PROTEST

### *A. EPSA's Substitution of a Single Factor for a Multi-Factored Consideration of Control for Section 203 Purposes Conflicts with Precedent and Undermines the Commission's Obligations under the Act*

EPSA proposes to reverse determinations recently made in rulemakings, policy statements, and individual cases by requesting that the Commission state that investments in publicly-held companies by investors owning less than 20% of their voting securities that make a Schedule 13G filing with the SEC will not be deemed to convey "control" or result in "affiliation" for Section 203 purposes. EPSA would effectively modify Orders 669, 669-A and 669-B, where the Commission granted blanket authorization for a holding company to purchase less than 10 percent of the outstanding voting securities of a public utility or a holding company covered by FPA Section 203(a)(2), conditioned on filing with the Commission of SEC Schedule 13G.[4] The Commission should reject

[4] Transactions Subject to FPA Section 203, Order No. 669, 71 Fed. Reg. 1348, 1365 (Jan. 6, 2006), [2001-2005 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,200, P 145 ("Order 669"), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422, 28,434-35 (May 16, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,214, PP 99, 103 ("Order 669-A"), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (July 27, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,225, *corrected*, 71 Fed. Reg. 45,736

EPSA's effort, through its Petition, to rewrite this rule by substituting 20% for 10%, and to permanently apply it for all Section 203 purposes.[5]

Commission policy on this subject is summarized in the June 26, 2008 deficiency letter in *Harbinger Capital Partners Master Fund I, Ltd.*, Docket No. EC08-59-000:

> In previous orders the filing of Schedule 13G with the SEC was only one of several factors that the Commission depended upon in determining that the proposed acquisitions of securities would not have an adverse effect on competition, rates, regulation and cross-subsidization.[2/] While the combination of factors that was relied upon differed among the *Investment Firm Orders*, in each case, in addition to the Schedule 13G filings, the Commission also relied upon a number of additional factors such as: (1) the functional separation and informational barriers between investing groups within each entity; (2) internal policies and controls designed to prevent such groups from aggregating their respective securities holdings in order to exercise control; (3) responsibilities of the entities regarding control as an advisor and fiduciary, as well as investment policies and restrictions disclosed to the entities' clients; (4) rules of self-regulating organizations, such as the New York Stock Exchange, to which the entities belong; (5) pledges to notify to Commission of any changes in intent with respect to controlling the relevant utility; and (6) quarterly reporting requirements of the entities' holdings of public utility securities.

[2/] *See, e.g., Legg Mason, Inc.*, 121 FERC ¶ 61,061 (2007); *Goldman Sachs Group, Inc.*, 121 FERC ¶ 61,059 (2007), *order on clarification*, 122 FERC ¶ 61,006 (2008); *Morgan Stanley*, 121 FERC ¶ 61,060 (2007), *order on clarification*, 122 FERC ¶ 61,094 (2008); *Capital*

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(Aug. 10, 2006).

[5] To the extent it goes beyond Section FPA Section 203(a)(2), EPSA's Petition is inconsistent with Orders 708 and 708-A, which established blanket authorization for purposes of Section 203(a)(1), recognizing as rebuttable the presumption that less than 10 percent of a utility's shares will not result in a change of control, and limiting the blanket authorization to instances where the acquirer and any associate or affiliate companies "in aggregate" would own less than 10 percent of the outstanding voting interests of that the public utility. Blanket Authorization Under FPA Section 203, Order No. 708, 73 Fed. Reg. 11,003, 11,006 (Feb. 29, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,265, PP 19-20 ("Order 708"), *on reh'g*, Order No. 708-A, 73 Fed. Reg. 43,066 (July 24, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,273, PP 10-11 ("Order 708-A").

> *Research & Mgnt. Co.*, 116 FERC ¶ 61,267 (2006) (collectively, *Investment Firm Orders*).

Even after finding lack of control based on the totality of factors, the Commission typically restricts authorization to a limited period (*e.g.*, three years) to balance the need for regulatory oversight, recognizing "our responsibilities under EPAct 2005 are relatively new and we are just starting to gain experience implementing revised section 203." *Capital Research & Mgmt. Co.*, 116 F.E.R.C. ¶ 61,267, P 46 (2006). *See also Legg Mason, Inc.*, 121 F.E.R.C. ¶ 61,061, P 31 (2007).

As described in the Commission's July 20, 2007 FPA Section 203 Supplemental Policy Statement,[6] the Financial Institutions Energy Group ("FIEG") had sought blanket authorizations under Section 203(a)(1) and (a)(2) in precisely the circumstances addressed by EPSA's Petition – for acquisitions of up to 20 percent of the voting interests in a public utility where the acquirer is eligible to file with the SEC a Schedule 13G demonstrating no intent to exercise control over the entity whose securities are being acquired – based on arguments that failure to grant the blanket authorizations would chill participation in the industry and reduce market liquidity. *See* P 30. The Commission rejected FIEG's request, explaining (P 41, footnote omitted):

> We also decline to grant a generic blanket authorization under sections 203(a)(1) and 203(a)(2) for acquisitions of up to 20 percent of the voting interests in a public utility where the acquirer is eligible to file with the SEC a Schedule 13G, which demonstrates no intent to exercise control over the entity whose securities are being acquired. While the Commission may consider eligibility to file a Schedule 13G with the SEC as part of an indication that an entity will not be able to assert control over a public utility,

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[6] FPA Section 203 Supplemental Policy Statement, 72 Fed. Reg. 42,277 (Aug. 2, 2007), F.E.R.C. Stat. & Regs. ¶ 31,253 (2007) ("Supplemental Policy Statement"), *order on clarification and reconsideration*, 122 F.E.R.C. ¶ 61,157 (2008).

> the Commission will not accept Schedule 13G eligibility as a definitive statement regarding control. The Commission will consider Schedule 13G eligibility as one factor in the analysis of whether an entity can assert control over a public utility.

The Commission's determination that Schedule 13G eligibility is only one of many factors to be considered in assessing control and affiliation for FPA Section 203 purposes is consistent with its broad interpretation of "control" as including "authority to influence all significant decisions, including the sale of power from the plant." Supplemental Policy Statement P 55. The Commission noted that "'control' has been found even where that control is not absolute or unfettered." P 51. It pointed to the Market-Based Rate Final Rule as providing that the Commission "will consider the totality of circumstances and attach the presumption of control when an entity *can affect* the ability of capacity to reach the market." P 53 (emphasis added). Thus, even the presumption that acquisition of 10% of the voting securities does not transfer control is limited to where "the facts and circumstances do not indicate that such companies would be able to directly or indirectly exercise a controlling influence over the management or policies of the public utility," as determined on a case-by-case basis. P 57.

In contrast, the SEC, for purposes (among other things) of Schedule 13G, defines control as: "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise." 17 C.F.R. § 240.12b-2. Applying that definition, courts have recently found control lacking where a trustee's actions could be vetoed by

another person.[7] This interpretation differs from the approach adopted by the Commission, which has found a manager to be controlling even though transactions exceeding $1 million were subject to trustee approval (Supplemental Policy Statement P 52), and found an owner of only one-third of the voting stock to possess control because of the authority to influence significant decisions (*Id*. P 55). The potential for different interpretations of "control" highlights the Commission's wisdom in requiring Schedule 13G eligibility to be considered as part of the totality of the circumstances. It should continue to do so for FPA Section 203 purposes.

### *B. EPSA's Collateral Attack on the MBR and Change in Status Rulemakings Should Be Rejected*

The Commission's Market-Based Rate Rulemaking has directly addressed the standard for control and affiliation, codifying an affiliate definition that uses a 10% (or less) voting interest threshold.[8] The rulemaking makes no exception for those holding up to 20% of the voting securities of publicly held companies that have made Schedule 13G filings with the SEC.

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[7] *See, e.g.*, *Waldman ex rel. Elliott Waldman Pension Trust v. Riedinger*, 423 F.3d 145, 152 (2nd Cir. 2005). In contrast, recent applications of *Chromalloy American Corp. v. Sun Chemical Corp*., 611 F.2d 240 (8th Cir. 1979), extensively relied upon by EPSA (Petition at 17-20), suggest a narrower interpretation of the SEC's control definition than EPSA advocates. *See, e.g., Telenor E. Invest AS v. Altimo Holdings*, 2008 U.S. Dist. LEXIS 23458, at *31 (S.D.N.Y. Mar. 24, 2008) (noting that control requires a fact-intensive inquiry and citing *Chromalloy* to support finding a purpose to control where "structural control" required less than acquisition of a majority of the Board seats).

[8] Order 697-A, P 182, codified in 18 CFR § 35.36(a)(9). While Order 697-A provided for use of a 5% standard for EWGs, in response to rehearing applications by EPSA, Mirant Entities and Reliant Energy, Inc. the Commission recently requested supplemental comments on a proposal to revise its regulations to apply the 10% threshold to EWGs as well. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 124 F.E.R.C. ¶ 61,213 (2008).

The relief EPSA seeks is contrary to the MBR Rulemaking's "totality of circumstances" approach for determining control, given changes in the industry (Order 697-A,[9] PP 147-48, footnotes omitted):

> In Order No. 697, the Commission concluded that the determination of control is appropriately based on a review of the totality of circumstances on a fact-specific basis. We explained that no single factor or factors necessarily results in control. We further explained that the electric industry remains a dynamic, developing industry, and no bright-line standard will encompass all relevant factors and possibilities that may occur now or in the future. If a seller has control over certain capacity such that the seller can affect the ability of the capacity to reach the relevant market, then that capacity should be attributed to the seller when performing the generation market power screens.
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> We determined that the circumstances or combination of circumstances that convey control vary depending on the attributes of the contract, the market and the market participants. Therefore, we concluded that it would be inappropriate to make a generic finding or generic presumption of control, but rather that it is appropriate to continue making our determinations of control on a fact-specific basis. We explained, however, that we continue our historical approach of relying on a set of principles or guidelines to determine what constitutes control. Thus, we stated that we continue to consider the totality of circumstances and attach the presumption of control when an entity can affect the ability of capacity to reach the market. We explained that our guiding principle is that *an entity controls the facilities when it controls the decision-making over sales of electric energy, including discretion as to how and when power generated by these facilities will be sold*.

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[9] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,268 ("Order 697-A"), *on reh'g*, Order No. 697-B, 124 F.E.R.C. ¶ 61,055 (2008) ("Order 697-B"), *petition for review filed sub nom. Mont. Consumer Counsel v. FERC*, No. 08-71827 (9th Cir. filed May 1, 2008).

EPSA did not seek rehearing of Order 697-A on this point,[10] and as recited in Order 697 EPSA had urged adoption of a totality of the circumstances approach to control.[11]

Control issues were also raised in the Changes in Status rulemaking, with some arguing that 10% voting interest should not be deemed sufficient to convey decision-making authority of electric energy. Order 652[12] declined to adopt a higher threshold for purposes of the change in status reporting or to otherwise narrow the acquisition of "control" that triggers a change in status report:[13]

> We believe that the Commission has given adequate specificity as to what constitutes control and the Commission will not, in this docket, further define or narrow the definition. Control of assets is a concept that this industry has dealt with for many years. The Commission is reluctant to provide a laundry list of agreements that may or may not constitute control of an asset. It is not possible to predict every contractual agreement that could result in a change of control of an asset. However, to the extent parties wish to propose specific definitions or clarifications to the Commission's historical definition of control, they may do so in the course

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[10] *See* Request for Rehearing and Clarification of Order 697-A of the Electric Power Supply Association (May 21, 2008), *available at* eLibrary Accession No. 20080521-5087.

[11] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904, 39,925 (July 20, 2007), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,252, P 176 ("Order 697") ("Accordingly, as suggested by EEI, EPSA and others, we will consider the totality of circumstances and attach the presumption of control when an entity can affect the ability of capacity to reach the market."), *clarified*, 72 Fed. Reg. 72,239 (Dec. 20, 2007), 121 F.E.R.C. ¶ 61,260 (2007), *on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,268 ("Order 697-A"), *on reh'g*, Order No. 697-B, 124 F.E.R.C. ¶ 61,055 (2008) ("Order 697-B"), *petition for review filed sub nom. Mont. Consumer Counsel v. FERC*, No. 08-71827 (9th Cir. filed May 1, 2008); Rulemaking Comments of the Electric Power Supply Association at 38 (Aug. 7, 2008), *available at* eLibrary Accession No. 20060807-5056.

[12] Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority, Order No. 652, 70 Fed. Reg. 8253 (Feb. 18, 2005), F.E.R.C. Stat. & Regs. ¶ 31,175 (2005) ("Order 652"), *order on reh'g*, 111 F.E.R.C. ¶ 61,143 (2005).

[13] Order 652, P 47. The Commission adhered to this approach on rehearing. *Reporting Requirement for Changes in Status For Public Utilities With Market-Based Rate Authority*, 111 F.E.R.C. ¶ 61,413, P 16 (2005).

> of the market-based rate rulemaking in Docket No. RM04-7-000.

Thus, the Changes in Status rule put the issue of control into the MBR rulemaking, where (as discussed above) the 10% threshold was generally adopted, with no exception carved out for those holding up to 20% of the voting securities of a public company where a Schedule 13G filing is made with the SEC.

EPSA's Petition would make an end-run around these rulemakings, substituting a single factor – the SEC filing of Schedule 13G – for the Commission's multi-factor approach to assessing control where more than 10% of the voting securities are held by one entity. EPSA would exclude information as to inter-corporate relationships involving those holding up to a fifth of a company's voting securities from the information to be disclosed in an MBR change in status report, *without even requiring the filing at this Commission* of SEC Schedule 13G. *See* Petition at 23. EPSA's proposal would make it difficult and unduly burdensome for the Commission and intervenors to identify interrelated companies that might merit consideration in particular cases, much less to expose all the implications of those interrelationships for electricity markets. It would reverse the fundamental principle that the burden to provide information should be placed on those in control of it[14] and make it effectively impossible for the Commission to consider the impact on MBR authorization of the acquisition of up to 20% of the voting securities by one or more entities that make Schedule 13G filings. Particularly where the

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[14] *E.g.*, *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 37 F.E.R.C. ¶ 61,149, at 61,357 (1986) (The adverse inference rule is "more than simply a principle for weighing evidence; it also affects the assignment of the burden of proof. The party having access to certain information may be given the burden of bringing it forward and will suffer the consequences of the adverse inference if it does not do so. This use of the adverse inference principle to assign the burden of proof is particularly common in regulatory proceedings, since the regulated entity ordinarily has exclusive access to information concerning its own

Commission has found change in status submissions to place a minimal burden on filers (111 F.E.R.C. ¶ 61,413, P 7), EPSA's generalized (and quite dubious[15]) claims about needing this new exemption to avoid discouraging investment cannot justify eliminating requirements for MBR filers to supply the information needed for the Commission to perform its market oversight duties, particularly given the continual changes in industry arrangements. *See* 111 F.E.R.C. ¶ 61,413, P 19. EPSA's proposal would dramatically reduce transparency at a time when the hazards of lack of transparency in financial markets grow more apparent each day, and would severely undermine the Commission's ability to fulfill its statutory obligations to monitor, on an ongoing basis, whether the factual predicates for market-based rates remain in place, as required by *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004), *cert. denied sub nom. Coral Power, L.L.C. v. California ex rel. Brown*, 2007 U.S. LEXIS 7865 (June 18, 2007), *cert. denied sub nom. California ex rel. Brown v. Coral Power, L.L.C.*, 2007 U.S. LEXIS 7866 (June 18, 2007).

### *C. The Commission Should Reject EPSA's Attempt to Evade Order 697-A's Affiliate Definition*

EPSA asks the Commission to "clarify that MBR entities are not required to identify or to consider in MBR filings or notices of change in status filings the generation, transmission or inputs to generation owned or controlled by upstream investors in the MBR entities' publicly held parent company." EPSA Petition at 27. This

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operations.")

[15] As noted *supra*, n.2, EPSA's claims are contradicted by a very recent hedge fund filing seeking Commission approval to increase Applicants' share of Calpine's common stock from approximately 15.9% to up to 40%. Joint Application for Approval under Section 203 of the Federal Power Act and Request for Expedited Review, *LS Power Dev.*, Docket No. EC08-126-000 (Sept. 24, 2008).

request is not even restricted to those parent companies that meet EPSA's proposed exemptions; rather, it would remove from MBR filing requirements the generation, transmission and inputs to generation owned and controlled by a holding company that holds an indisputably controlling interest in the MBR entity's publicly held stock. The Commission should reject EPSA's effort to fundamentally alter MBR requirements and frustrate the Commission's ability to perform its obligations to ensure the justness and reasonableness of jurisdictional rates.

Assessing the holdings and activities of an MBR seller's affiliates is a critical component of a seller's MBR eligibility. *See, e.g.*, Order 697, PP 22, 72, 290 (barriers to entry, horizontal screens, and RTOs, respectively); 18 C.F.R. §§ 35.37(d), 35.39, 35.42(a) (vertical market power, affiliate restrictions, and change in status reports, respectively). For example, the pivotal supplier test attached to Order 697 expressly covers the capacity of both the seller and its affiliates. Order 697, App. A.

Order 697-A's definition of affiliate encompasses:

> (A) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;
>
> (B) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company; [and]
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> . . .
>
> (D) Any person that is under common control with the specified company.

§ 35.36(a)(9)(A), (B), (D). This definition includes the very entities and interests that EPSA's Petition would exclude – generation, transmission or inputs to generation owned or controlled by upstream investors in the MBR seller's publicly held parent company.

To support its collateral attack on Order 697-A's affiliate definition, EPSA relies on language in Order 652 as restricting change of status filings to "changes in circumstances within the knowledge and control of the applicant." EPSA Petition at 27 (quoting Order 652, P 27). But Order 652's exclusion pertained to actions by wholly unaffiliated parties (*i.e.*, competitors), not affiliates whose actions are the subject of MBR filings and change in status reports (Order 652, P 27, emphasis added):

> We agree with EEI that the reporting obligation should extend only to changes in circumstances within the knowledge and control of the applicant. Accordingly, an applicant should not be required to report a change in circumstances based on *an action taken by a competitor* (such as a decision to retire a generation unit or take transmission capacity out of service) *or natural events* (such as hydro-year, higher wind generation or load disruptions due to adverse weather conditions).

Finally, EPSA's virtual impossibility argument (Petition at 28) misses the point that the MBR seller is in a far better position than the Commission or intervenors to identify changes in the evolving interrelationships that could enable the exercise of market power by the seller and its affiliates. Given the turmoil in today's financial markets, less transparency is not what the doctor ordered.

## CONCLUSION

For the reasons set forth above, EPSA's Petition should be denied.

Respectfully submitted,

*/s/ Cynthia S. Bogorad*

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September 30, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 30th day of September, 2008.

*/s/ Rebecca J. Baldwin*

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