

and that RECO's role would be that of an agent for BGS customers. PSE&G states that section 13.2 of the Agreement provides that "[E]ach BGS-FP Supplier shall at all times be deemed to hold title to electric energy until delivery to the retail meter of the Customer at which time title shall be deemed to pass to such Customer." Thus, PSE&G argues that Commission approval is not required in order for CEE to bid in the BGS auction to sell to RECO.

Alternatively, if the Commission does assert jurisdiction over BGS Agreements, PSE&G requests that it grant blanket waivers to all similarly-situated companies.

11. In response to PS&G's protest, Applicants state:

In view of the February 3, 2003 date for submitting bids in New Jersey's BGS auction, [Applicants] simply seek to clarify that the Commission does not have to resolve the wholesale-retail jurisdictional issue raised by PSE&G prior to February 3rd in order for CEE to participate in the RECO auction. It would suffice for the Commission to simply waive any affiliate-transaction limitations of [Applicants'] electric tariffs or codes of conduct insofar as they might apply. Granting such waivers prior to February 3rd would serve the public interest by enabling CEE to participate in the auction and thereby would increase overall participation and competition in the BGS auction. [Applicants] have no objection to PSE&G's alternative proposal that the Commission grant blanket waivers to permit participation in the BGS auction to all companies that are similarly situated to CEE and RECO.¹³

12. As noted above, Applicants' transmittal letter assumes that, if CEE is a successful bidder, the proposed transaction would involve a wholesale sale by CEE to its affiliate RECO that requires Commission approval. In these circumstances, we will assume (without deciding) that we have jurisdiction.¹⁴

¹³ Applicants' Answer at 2.

¹⁴ We note that the *pro forma* Agreements contain several indicia that would suggest a finding that entry by a successful bidder into the requisite BPU-approved supply agreement and performance thereunder will result in a wholesale sale. (The relevant provisions are the same in the BGS-FP Agreement and the BGS-HEP Agreement.) As an initial matter, the parties to the Agreements are the BGS Supplier (here, CEE) and the electric distribution company (here, RECO). There is no provision in the Agreements that establishes privity of contract between the retail customers and the BGS Supplier; retail customers cannot enforce the contract against the BGS Supplier, nor can the BGS Supplier enforce the contract against the retail customer. (E.g., BGS-FP Agreement, Article 2.1). Further, the electric distribution company (here, RECO) would execute the contract in its own name and be obligated to pay the BGS Supplier from its own funds. (E.g., BGS-FP Agreement, Article 2.2). The Agreements also provide that the agreement is a "legal and binding obligation of the Company [i.e., RECO]." (E.g., BGS-FP Agreement, Article 3.2). In addition, the "Company's performance under this agreement is not contingent upon the

The BGS competitive bid process described by Applicants alleviates the Commission's concerns regarding affiliate abuse. Therefore, we will grant Applicants' request for authorization for CEE to make sales to its affiliate RECO, pursuant to CEE's market-based rates tariff, as part of CEE's participation in the BPU-approved statewide auction process.

13. Because we believe that the BPU auction process alleviates our concerns as to affiliate abuse, the Commission would authorize similarly-situated public utilities (with Commission-approved market-based rate tariffs and with tariff prohibitions on affiliate sales absent prior Commission authorization) to make sales to their affiliates as part of their participation in the BPU-approved auction. Such similarly-situated public utilities must either make an appropriate section 205 filing¹⁵ or file a petition explaining why they believe we lack jurisdiction.¹⁶

The Commission orders:

(A) Applicants' application for authorization for CEE to make sales to its affiliate RECO, pursuant to CEE's market-based rates tariff, as part of CEE's participation in the BPU-approved statewide auction process is hereby granted, as discussed in the body of this order.

(B) The Secretary shall promptly publish this order in the **Federal Register**.

performance of [the retail] Customers or the ability of [the retail] Customers to pay rates;" the Company's non-payment, insolvency, illegality (including Federal Energy Regulatory Commission obligations), or material breach are all events of default for the Company and upon default, the BGS Supplier would receive damages from RECO, including liquidation and termination; and certain PJM penalties and costs are allocated among the BGS Supplier and the Company. (E.g., BGS-FP Agreement, Articles 3.2, 5.1 and 5.3). Further, the Agreements provide that to the extent that the Agreement is deemed to be subject to the Commission's jurisdiction, the standard of review for changes to any sections of the Agreement specifying the rate(s) or other material economic terms and conditions will be the *Mobile-Sierra* "public interest" standard of review. (E.g., BGS-FP Agreement, Article 11.2).

¹⁵ See *Aquila, Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

¹⁶ In the Prior Notice Order, the Commission advised that "[t]o the extent a utility remains uncertain, even after consulting this order and the Appendix, as to its obligation to file rates and charges for a particular transaction or type of transaction, it should assume the initiative to seek a specific ruling. The easiest and most efficient way to do this is to file the agreement pursuant to part 35 of the Commission's regulations * * * and simultaneously request the Commission to disclaim jurisdiction." See Prior Notice and Filing Requirements Under part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,977-78 (1993) (Prior Notice Order) (emphasis deleted).

By the Commission.

Magalie R. Salas,
Secretary.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL02-88-000, et al.]

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, and Nora Mead Brownell; Pacific Gas and Electric Company et al.; Order Partially and Fully Granting Rehearings and Partially Granting Complaints

Issued January 29, 2003.

In the matter of: ER02-1330-002, EL02-88-000, EL03-3-000 and ER02-1472-001, EL03-4-000 and ER02-1151-001, EL03-5-000 and ER02-1069-001, EL03-13-000 and ER02-2243-002, EL03-12-000; Pacific Gas and Electric Company, Wrightsville Power Facility, LLC v. Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Services, Inc., Entergy Services, Inc., Kinder Morgan Michigan, LLC v. Michigan Electric Transmission Company, LLC; Order Partially and Fully Granting Rehearings and Partially Granting Complaints.

1. In this order, we partially and fully grant the requests for rehearing and partially grant the complaints in the above-captioned proceedings and hold that the interconnection agreements (IAs) in these dockets must be modified to conform with our recent decision in *Duke Hinds II*.¹ Our holdings here benefit the public interest by assuring that the rates, terms, and conditions for interconnection service are just and reasonable, and provide the parties with a reasonable means to ensure the reliable operation, protection, and integrity of their transmission systems.

2. More specifically, we partially grant rehearing in *Pacific Gas and Electric Company*² (Docket No. ER02-1330-002) and find that the IA in this docket is unjust and unreasonable. We also partially grant the rehearings in *Entergy Gulf States, Inc.*³ (Docket No. ER02-1472-001); *Entergy Services, Inc.*⁴ (Docket No. ER02-1151-001); *Entergy Services, Inc.*⁵ (Docket No. ER02-1069-001); and fully grant the rehearing in *Entergy Services, Inc.*⁶ (Docket No. ER02-2243-002) and find that the IAs

¹ *Entergy Services, Inc.*, EL02-107-000, et al. (January 28, 2003) (*Duke Hinds II*).

² 101 FERC ¶ 61,079 (2002) (PG&E).

³ 99 FERC ¶ 61,234 (2002).

⁴ 99 FERC ¶ 61,097 (2002).

⁵ 99 FERC ¶ 61,077 (2002).

⁶ 100 FERC ¶ 61,397 (2002).