UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Acquisition And Disposition Of Merchant Generation Assets By Public Utilities	)	Docket No. PL04-9-000
Solicitation Processes For Public Utilities	)	Docket No. PL04-6-000
Market-Based Rates For Public Utilities	)	Docket No. RM04-7-000

POST-TECHNICAL COMMENTS OF INTERGEN SERVICES, INC.

The Federal Energy Regulatory Commission ("Commission") recently convened three separate Technical Conferences, addressing Market-Based Rates for Public Utilities (Docket No. RM04-7-000), Solicitation Processes for Public Utilities (Docket No. PL04-6-000), and Acquisition and Disposition of Merchant Generation Assets by Public Utilities (Docket No. PL04-9-000). As the Agenda for each Technical Conference indicated, recent changes in the market make the Commission's market power determinations of critical importance to assuring that a grant of market-based rates, or approval of proposed mergers or acquisitions under Section 203 of the Federal Power Act ("FPA"), will not allow applicants to exercise either horizontal or vertical market power. InterGen Services, Inc. ("InterGen") submits the following comments, urging the Commission to condition its approval of proposed transactions or applications for market-based rates on the applicant's adopting, where appropriate, structural mitigation measures to ensure that it cannot foreclose competitors and

thereby stifle competition.[1] The ability of an applicant to foreclose competitors from the wholesale market – whether through the applicant's continued control over transmission or through its control over wholesale purchases – can have a lasting detrimental impact on the development of competitive wholesale markets in the absence of adequate mitigation.

Whatever the causes of foreclosure, consumers in certain regions of the country clearly suffer from its impacts. Most striking are areas of the country where brand new, efficient, environmentally top-notch generation units sit idle while plants that burn as much as twice the fuel and overly pollute the environment are dispatched by incumbent utilities who have refused to open their markets to competition. Even more striking is the fact that utilities running these plants charge their consumers for their inefficiency, through fuel adjustment clauses that have increased annual power bills of electricity consumers.

These circumstances are indicative of uncompetitive markets, and whatever specific market screens are adopted should confirm these real-world scenarios. Thus, in circumstances where the exercise of market power clearly exists, the burden should be placed on Commission applicants – be it for a market-based-rate authorization or approval of an acquisition or merger – to (1) prove that there is some legitimate reliability or other compelling reason to explain the uneconomic dispatch of generation;

[1] These Comments are timely filed pursuant to the Commission's Notice Inviting Comments, issued in each of Docket Nos. PL04-6-000 and PL04-9-000. InterGen requests leave to file these comments one day out of time in Docket No. RM04-7-000. InterGen has prepared comments in all three interrelated dockets on a consolidated basis in an effort to conserve resources and to streamline the Commission's consideration of such comments. Thus, InterGen believes that good cause exists for the Commission to grant limited waiver of the filing requirements with respect to Docket No. RM04-7-000 deadline.

or (2) take appropriate remedial action, such as immediately joining an RTO with a working market and viable transmission options or taking other measures, e.g., instituting a rational competitive procurement process and/or economic dispatch. Importantly, such actions must be taken before Commission approval is granted, not after.

Finally, InterGen cannot overstate the need for the Commission to act now. Many of the hardships and financial crises facing the industry are directly attributable to the cumulative impact of unmitigated market power. All this industry requires to thrive is a climate where rational economic decisions are made. Neither InterGen, nor any other reputable market participant, is asking for a subsidy, but simply the opportunity to compete on a fair basis. In the comments that follow, InterGen will address some specific issues.

I. "Generation Market Power" Screens Should not Exclude Capacity Used to Serve Native Load Obligations

As the first of its four prongs of analysis in a market-based rate proceeding, the Commission seeks to identify whether a firm is able to exercise "generation market power" by applying two indicative screens, a "pivotal supplier screen" and an "uncommitted market share" screen.[2] Both of these screens effectively measure an applicant's ability to exercise horizontal market power. Moreover, as the Commission recognizes, the pivotal supplier screen is directed at testing whether an applicant has the ability to *unilaterally* exercise horizontal market power.[3] By contrast, the Commission intends its market share screen to be an indicator of overall market

[2] *AEP Marketing, Inc., et al.*, 107 FERC ¶ 61, 018, at P 71 (2004).

[3] *Id.*, at PP 72, 100-01.

"dominance," *i.e.*, a test not only for unilateral market power, but also for the ability to engage in coordinated behavior.[4]

A test for overall market dominance is rendered meaningless if native load obligation is subtracted in computing market share. Other commenters in the SMA proceedings have noted the potential problems associated with eliminating an applicant's native load obligation from the indicative screens, and InterGen will not reiterate those comments here, despite their continued relevance.[5] However, in the context of the Commission's current proposal, InterGen wishes to highlight certain key weaknesses of a screen in which even a portion of an applicant's native load is subtracted from market share.

The "indicative screens" defined by the Commission in its April 14, 2004 Order are inconsistent with the way in which relevant markets are defined in the Commission's Merger Policy Statement. In the Commission's Merger Policy Statement, the Commission identifies several different ways in which to measure a supplier's ability to supply a particular product to the market, without limiting the discussion to a suppliers' capacity excluding its native load obligation. In fact, the Commission states that "economic capacity" (including an applicant's native load obligation) is "the most important of the measures."[6] This is also consistent with the DOJ/FTC Horizontal Merger Guidelines, which specify that the capacity of a vertically integrated firm, even if it is used to supply the firms' own needs, should be included in the definition of a

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[4] *Id.*, at P 72.

[5] *Id.*, at PP 89-90.

[6] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, Stats. & Regs. ¶ 31,044 at 30,132 (1996) ("Merger Policy Statement"), *order on reconsideration*, 79 FERC ¶ 61,321 (1997).

relevant market.[7] It is one thing for the Commission to advance an analytical procedure to address a narrowly defined question of potential conduct, such as an applicant's ability to engage in a short-term physical withholding strategy, but it is quite another for the Commission to advance an alternative way of defining a market that is in conflict with the Merger Policy Statement.

In addition, excluding native load obligations will not only fail to capture companies that are dominant in their market, it will also fail to identify the companies which are most capable of exercising vertical market power by refusing to purchase at wholesale to meet native load obligations even when that power is cheaper. This market power allows a company to leverage its monopoly over retail service to exercise market foreclosure and screens which exclude native load will ignore this reality.

II. Market Foreclosure through the Exercise of Vertical Market Power

During the technical conferences, representatives of certain interest groups cautioned against the Commission adopting policies that would unduly interfere with a utility's resource options to meet its load obligations.[8] Other comments raised the specter that the imposition of limitations on a utility's ability to acquire distressed assets would simply further devalue those assets.[9] If this were to occur, such concerns might

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[7] *See Merger Guidelines*, Section 1.31, p. 11.

[8] Concerns about limiting a utility's resource options are misplaced. First, the purpose of these proceedings, collectively, is to consider the market power implications of the Commission's policies relating to specific types of jurisdictional transactions. Nothing the Commission does will compromise the legitimate development of resource portfolios. In any event, it is not unreasonable for the Commission to adopt pro-competitive policies the results of which encourage utilities to implement more efficient resource procurement strategies.

[9] These concerns are similarly misplaced to the extent they presume that acquired assets became distressed through operation of competitive markets, or that purchases by utilities take place in a competitive market. If entities are prevented from exercising market power to strand otherwise competitive generation, then many of the assets
(footnote continued)

merit consideration, but the Commission's primary focus in granting requests to sell power at market-based rates, or in approving individual Section 203 applications should not be on whether a particular transaction will enhance shareholder value or result in a low-cost resource option for a particular set of customers. Rather, the threshold inquiry should be on whether the transaction is attributable to the exercise of market power, or otherwise could facilitate a future exercise of market power and is consistent with the public interest, taking into account its competitive implications. Put simply, did the proposed transaction result from the applicant having used its market power to foreclose the wholesale market to competition, or will it increase the ability or incentive of the applicant to engage in such foreclosure in the future.

In assessing market foreclosure, the Commission should consider all forms of vertical market power, whether exercised through a market participant's control over transmission, its control over other necessary inputs (such as fuel), or its control over wholesale purchases (monopsony power). The Commission's procedure for assessing whether a transaction increases horizontal market power is well-established and consistent with the DOJ/FTC Horizontal Merger Guidelines. By contrast, the Commission's procedures for assessing – and remedying—the exercise of vertical market power are in much greater need of clarification and revision, given the specific characteristics of current wholesale electricity markets.

As explained below, the Commission has long recognized the harm to competition due to vertical market foreclosure in both a merger and market-based rate context, and historically has relied on the Open Access Transmission Tariff ("OATT")

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proposed to be acquired likely would not have become distressed in the first instance, thereby obviating concerns regarding further devaluation of such assets.

for the needed mitigation. For too long, however, the Commission has allowed transactions to proceed in good faith reliance upon, initially, OATT filings, and more recently upon promises to join a RTO. More recently, the Commission has deemed agreements to have certain market actions overseen by an independent monitor to be sufficient mitigation pending the applicants joining a RTO. Experience has shown, however, that the Commission has placed undue reliance upon these behavior-based mitigation measures, because they are entirely ineffective remedies for market foreclosure. In large parts of the country, there are no market structures to prevent foreclosure. As a result, competitive markets have not materialized and thousands of MWs of new, clean, efficient and cost-competitive generation sit largely idle, having been foreclosed from the market by owners of older, less-environmentally friendly, and higher cost generation.

The incentive of such owners to engage in activities that devalue the assets of their competitors is clear. Indeed, given that efficient, low heat-rate units sit idle, while some load serving entities routinely run their own inefficient, high heat-rate plants that are located within the same control area, it should not be surprising that hundreds of millions of dollars having nothing to due with increases in natural gas prices are flowing through fuel adjustment clauses to ultimate consumers. And while some like to argue that independent power producers made bad decisions building plants where there was a "surplus" of generation, certainly, all else being equal, consumers would benefit if wholesale market participants obtained power from plants with relatively low fuel costs. Yet, due to market foreclosure, consumers in many service areas ultimately pay the price for the uneconomic dispatch of generation that would be considered "surplus" in a competitive environment. Entities engaged in such foreclosure activity

should not be allowed to use Commission-approved transactions under Section 203 and 205 of the FPA to reap the benefits of, and then to further augment their market power by utilizing such a strategy.

Accordingly, the Commission should take a pragmatic approach to applications that are the product of, or facilitate, market foreclosure and adopt structural measures to mitigate that foreclosure before an application is approved. If a load serving entity is not presently operating within a fully-functioning RTO (*e.g.* a PJM-style market structure), the rebuttable presumption should be that *any* behavioral-based mitigation or after-the-fact market monitoring (even if performed by an independent body) will not effectively detect or prevent such entity from foreclosing its competitors. Consequently, Commission approval of proposed transactions must either be deferred until appropriate market structures in fact exist (a less than satisfactory approach given the already over-extended transition period to competitive wholesale markets), or alternatively, practical mitigation measures must be imposed as a condition to receiving any Commission approval. Such measures should include a requirement to economically dispatch competitive generation within a control area or relevant market, pursuant to some form of competitive solicitation process. The parameters of the mitigation would depend upon the specifics of the market. In any case, an economic dispatch requirement would prevent a market participant from foreclosing the wholesale market to competition by dispatching its own higher cost generation, despite the availability of abundant lower cost generation from competing suppliers. A PJM-style RTO simply would not accommodate such market foreclosure, and interim structural measures are critically required in the absence of such fully-functioning RTOs.

III. The Commission's Current Analysis

Because of the detrimental effects vertical market power can have on competition, the Commission requires that vertical market power mitigation be in place before a merger is consummated and as a condition of its approving a request for market-based rates.[10] Unfortunately, as recent transactions make clear, the measures the Commission has looked to in the past to provide that mitigation have not proven effective.

The Commission's reasonable expectations that its policies would lead to the development of organized, transparent wholesale markets have not borne true, and many merchant generators, that made investments in the expectation of such markets materializing, continue to falter and cannot withstand further delays in the implementation of structural mitigation. In Order No. 2000, the Commission itself concluded that its prior reliance on the existence of the OATT as mitigation had not provided effective mitigation. The Commission reached this conclusion based on its finding that the OATT did not change the incentives of the vertically-integrated utilities to favor their own generation. As a result, after *Order No. 2000*, the Commission began to condition mergers and facility acquisitions on membership in an RTO and on interim mitigation which attempted to put in place certain key elements of an RTO.[11] Now, the Commission is at a similar crossroads, as the promise of RTOs has, in certain areas of the country, given way to the resurgence of the vertically integrated utility model. The current resurgence has, in certain regions of the country, been undertaken on the backs

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[10] *Merger Policy Statement* at 30,136*; American Electric Power Co. and Central and South West Corp.,* 90 FERC ¶ 61,242 at 61,788 (2000) ("AEP"); *Ohio Edison Co., et al.*, 85 FERC ¶ 61,203 at 61,845 (1998).

[11] AEP at 61,789.

of merchant developers and, ultimately, at the expense of consumers who will suffer from the long-term consequences of stifling wholesale competition.

IV. Signs Evidencing The Exercise Of Vertical Market Power

In analyzing the relationship between functioning RTOs and vertical market power, the Commission should note the areas of the country where vertically integrated utilities are proposing to acquire distressed assets or affiliated generation. Those transactions are occurring in areas where an RTO is not in place or, if in place, not fully functioning.[12] Equally telling, despite the fact that many of the enterprises with "distressed assets" also have assets in regions of the country with RTOs in place, for the most part, the vertically integrated utilities in those regions are not clamoring to purchase those assets.[13]

The reason for this distinction is simple. Absent fully-functioning RTOs with well structured markets, an entity can exercise vertical market power either by foreclosing competitors' access to the transmission needed to reach wholesale markets, or by foreclosing suppliers from the market itself by refusing to purchase lower-cost

[12] *See* *American Electric Power Company and Central and Southwest Corporation*, 90 FERC ¶ 61,242 (2000); *Oklahoma Gas and Electric Company and McClain*, Docket No. EC03-131-000; *In the Matter of the Application of Arizona Public Service Company for a Hearing to Determine the Fair Value of the Utility Property of the Company for Ratemaking Purposes, to Fix a Just and Reasonable Rate of Return Thereon, To Approve Rate Schedules Designed to Develop such Return, and For Approval of Purchased Power Contract*, Docket No. E-01345A-03-0437 ("APS Rate Proceeding"); and *Georgia Power Company's Application for Certification of Southern Power's McIntosh Purchase Power Agreement and Savannah Electric and Power Company's Application for the Certification of Southern Power's McIntosh Purchase Power Agreement*, Docket No. 15392-U and Docket No. 15393-U (collectively "Georgia Power Affiliate Proceeding".)

[13] For the most part, "distressed assets" in RTO regions are part of a broader portfolio of assets, including assets in non-RTO regions.

competing generation.[14] Thus, vertically integrated utilities in these regions have both the opportunity and the incentive to acquire distressed assets to further foreclose the market in advance of an RTO. Conversely, when similar assets are available in regions with an RTO, they are not generally acquired by vertically integrated utilities, because in a competitive market regime, there is less incentive for a load serving entity's outright ownership of such assets.

In analyzing how vertical market power can be detected in these instances, the comments of Dr. David DeRamus are instructive. He states:

> A simple initial indicator of the potential market foreclosure may be the efficiency of the distressed asset itself - at the margin, if there is excess capacity in a workably competitive market, I would expect the *least* efficient unit to be the one most in danger of exiting the market, not the *most* efficient unit. Similarly, a transaction should not fundamentally change the extent to which a distressed asset is dispatched; if dispatching an asset is economic after the acquisition, I would expect that such dispatch should have been economic before the acquisition as well.[15]

InterGen believes that this type of change in dispatch – where the dispatch of the acquired unit increases significantly upon the consummation of the transaction --- is precisely what has occurred, and will continue to occur, with respect to future acquisitions of distressed assets. Indeed, thousands of MW of merchant generation (much of it currently classified as distressed) within Entergy's control area would have been dispatched, and would have displaced Entergy owned generation, if Entergy were to engage in a security constrained economic dispatch in its control area. While these

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[14] *See* Order No. 592 at 68,609; Comments by David W. DeRamus, Ph.D., FERC Docket No. RM04-7-000 at pp 2-3, filed June 30, 2004; Comments by David W. DeRamus, FERC Docket No. PL04-9-000 at pp 2-3 filed June 30, 2004.

[15] DeRamus Comments in Docket No. PL04-9-000 at 2.

merchant generators largely sit idle, thousands of MW of older, inefficient utility owned boilers continue to operate.

In Georgia and Arizona, the incumbent vertically integrated utility is attempting to expand its rate-base not through the purchase of third party distressed assets but though a merger with an affiliate that previously operated as a merchant power producer.[16] In both of those jurisdictions, other merchant generation sits idle. Thus, while, as noted above, some may argue that merchant problems are a function of bad business decisions, the reality is that the merchant generators made the same decision to build as did the merchant affiliate of the utility did – only without the safety net afforded by the regulated business. Not only does this regulatory "safety net" inherently shift risks from utility shareholders to ratepayers, (effectively a cross-subsidization of the unregulated business) but it will inexorably tilt the competitive landscape against merchant generators and thereby suppress both competition and investment.

As Dr. DeRamus noted in his comments, when a vertically integrated utility forecloses competing generators from the wholesale market by refusing to purchase their lower-cost generation, this constitutes the exercise of vertical market power, and in particular *monopsony* power.[17] Dr. DeRamus notes that monopsony power is often thought of as the exercise of market power by forcing prices down to uncompetitive levels; however, in this context it is the refusal to purchase any competing generation at all, despite its efficiency and cost advantages, that should be the driving concern in a market power analysis.

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[16] *See* APS Rate Proceeding and Georgia Power Affiliate Proceeding, *infra*.

[17] DeRamus Comments in Docket No. PL04-9-000 at 3.

V. Behavioral Remedies Are Not Effective To Address Vertical Market Power

Where the incentives and ability to exercise vertical market power and to foreclose competition exist – whether through control over transmission, control over inputs, or control over purchases -- the exercise of that vertical market power cannot be effectively detected or remedied by behavioral rules.[18] In the past, behavioral mitigation has primarily involved the adoption of various changes to market rules and in particular after-the-fact monitoring of a vertically integrated utility's behavior. To be sure, while such behavioral mitigation has its place in developed markets, they simply have not been proven to be effective in addressing the vertical market power concerns described above. It is precisely for this reason that Order No. 2000 recognized that structural changes were needed as well.

Today's business environment for electric power producers reinforces the necessity of structural remedies. For example, a utility can strategically affect the transmission available for competing generators by its own dispatch decisions. The decision to dispatch a utility-owned unit that is not otherwise economic may have the dual effect of eliminating the merchant's generator's economic sale to the utility and may also, as a result of an inefficient use of transmission resources, prevent a sale by the merchant generator to a third party. The acquisition of merchant generation, therefore, only will serve to exacerbate the market power problem by expanding the acquiring entity's fleet of generation and enhancing its ability and incentive to engage in uneconomic dispatch and foreclose independent competitors from participating in a

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[18] *Regional Transmission Organizations*, Order No. 2000, [1996-2000 Transfer Binder] FERC Stats. & Regs. ¶ 31,089 at 31,014 (1999); *order on reh'g*, Order No. 2000-A, [1996-2000 Transfer Binder] FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC,* 272 F.3d 607 (D.C. Cir. 2001); DeRamus Comments in Docket No. PL04-9-000 at 4.

more active and competitive wholesale market. This type of vertical market foreclosure cannot be adequately mitigated by simply establishing an independent market monitor.

Likewise, foreclosure by a refusal to purchase can be remedied only through a competitive procurement requirement, including appropriate amounts of available, lower-cost merchant generation in a utility's economic dispatch protocol. There is simply no legitimate downside to including lower-cost merchant generation in a utility's security-constrained economic dispatch protocol. If the merchant generation is the lowest cost reliable source of power, it will be – and should be -- selected. If not, the utility's own generation will be – and should be -- dispatched. Thus, an economic dispatch requirement is by no means a "forced purchase," but rather it merely requires a utility with market power to engage in rational purchasing decisions based on efficiency considerations alone – the same result that would emerge through the operation of an organized competitive market administered by an RTO, the same result that emerges in a wide range of competitive markets, and clearly the result that benefits consumers.

VI. Properly Structured Competitive Solicitations are the Essential Structural Solution to Mitigate Vertical Market Foreclosure.

As discussed above, behavioral approaches are ill-suited to either detect or mitigate market foreclosure. Moreover, behavioral remedies foster troublesome and costly after-the-fact litigation which does little or nothing to correct for market opportunities which have been extinguished through foreclosure. Below, InterGen recommends that the Commission condition mergers and facility acquisitions by utilities operating outside of fully-functioning RTOs (*i.e.*, areas without structural safeguards to deter or prevent transmission and market foreclosure) and condition

market-based rates of such utilities on structural mitigation of vertical market power which will be visible, ensure competitive outcomes and provide market confidence.

With respect to market foreclosure, utilities should be ordered to adopt a competitive procurement process for both short and long term power needs, including the requirement to include merchants in economic dispatch. The design and implementation of the competitive protocols should be overseen by an independent entity, open to a stakeholder process and approved by the FERC and relevant state commissions. The process could include a variety of products developed in coordination with state commissions. The independent entity should review all aspects of the procurement process on a day-to-day basis to ensure FERC, state commissions and market participants that the structural protocols have been adhered to and that the utility has not foreclosed merchants in favor of its own or its affiliates' generation or limited or unfairly discriminated on the basis of transmission access.[19]

VII. Recommendations

Although the Commission's Merger Policy Statement mentions monopsony power, the recent focus of the Commission's merger analysis has been on monopoly power. But, the recent past, in particular, has shown the extent to which utilities in some parts of the country have been able to use their monopsony power to further their monopoly power over generation, to the long-term detriment of competitive wholesale markets. Furthermore, although the Commission has taken the interim step of conditioning mergers and facility acquisitions on membership in an RTO, it has not

[19] InterGen also generally supports the comments and recommendations of Constellation Energy, filed in Docket No. PL04-6-000, on the need for an independently administered, competitively neutral and standardized solicitation process to preclude undue affiliate preference.

taken such interim steps with respect to its allowance of market-based rates, looking primarily at traditional monopolist tests. In analyzing market-based rate authority requests, the Commission applies qualitative tests to determine whether market power exists. The existing standards, in the context of the current competitive environment, focus too much on "pivotal supplier" type tests and too little on the buyer market power and the resulting ability of some utilities to foreclose competition through either strategic use of transmission or a refusal to purchase.

Redirecting the Commission's focus, particularly as to utilities and their affiliates operating in areas without a fully-functioning RTO , is appropriate in today's environment. The incentives to exercise horizontal market power that the Commission has recently focused on are greatest during periods of tight supply; thus, not only is the exercise of horizontal market power often intermittent, it can often be addressed through market monitoring and changes in specific market rules. In contrast, the incentives to exercise vertical market power can only be mitigated by changes in either the market structure or the regulatory structure. And unlike horizontal market power, vertical market power is not self-correcting through increased investment, even over the long-term; on the contrary, vertical market power exercised by foreclosing the market to competition is self-reinforcing. The Commission, therefore, should condition its approval of, mergers and facility acquisitions by utilities operating in regions without a fully-functioning RTO and of market-based rates for such utilities and their affiliates on structural mitigation of vertical market power, including a requirement that merchants be included in economic dispatch or other appropriate competitive solicitations. (See DeRamus Comments in Docket No. PL04-9, at 5).

Merchant generators are laboring in certain regions with no or inadequate competitive market structures to discipline opportunities for market foreclosure. Such generators might not survive much longer in the absence of structural market power mitigation in the very near term. Present circumstances warrant immediate, pragmatic action to foster competition. Generators reeling from market foreclosure cannot afford to continue awaiting the establishment and operation of fully functioning organized markets through voluntary RTO formation. Nor should the Commission rely upon other governmental agencies, such as retail public service commissions or the Department of Justice/Federal Trade Commission, to effectively and consistently enforce prudent purchase practices, let alone detect instances of vertical foreclosure in wholesale power markets regulated by the Commission.

Indeed, in commenting on the jurisdictional overlap between FERC and the antitrust agencies, Mr. Hilke, with the Federal Trade Commission, testified in these proceedings that:

> [w]hile the antitrust agencies will review mergers of independent generators with utilities, asset transfers may very well be outside of what the antitrust agencies consider to be actionable transactions. So, if FERC is not reviewing these transactions, either because of a policy decision or because of legislation, there may be no federal overview of asset transactions between affiliates and parents.[20]

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[20] Technical Conference Transcript at 46, FERC Docket No. PL04-9-000 (June 10, 2004).

Consequently, in addition to its legal obligation and authority to act under the FPA, practical considerations merit timely action by this Commission to prevent further market foreclosure from occurring on its watch.

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