UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Pacific Gas and Electric Company	Docket Nos.	ER02-1330-002 ER02-1330-003 ER02-1330-004 ER02-1330-005
Wrightsville Power Facility, L.L.C v. Entergy Arkansas, Inc.	Docket Nos.	EL02-88-001 EL02-88-003
Entergy Gulf States, Inc.	Docket Nos.	EL03-3-001 ER02-1472-003 ER02-1472-004 ER02-1472-005
Entergy Services, Inc.	Docket Nos.	EL03-4-001 ER02-1151-003 ER02-1151-004 ER02-1151-005
Entergy Services, Inc.	Docket Nos.	EL03-5-001 ER02-1069-003 ER02-1069-004 EL02-1069-005
Entergy Services, Inc.	Docket Nos.	EL03-13-001 ER02-2243-003 ER02-2243-004

Kinder Morgan Michigan, LLC

v. Docket No. EL03-12-001

Michigan Electric Transmission
Company, LLC

ORDER ON REHEARINGS AND
COMPLIANCE FILINGS

(Issued December 18, 2006)

1. This order addresses on rehearing our orders issued in *PG&E I*,[1] *PG&E II*,[2] and *Wrightsville*,[3] as well as the compliance filings submitted in response to those orders. These proceedings are being addressed together as they all concern common issues related to our order recently issued in *Duke Hinds III*,[4] among other issues. We first address the issues as they relate to Pacific Gas and Electric Company (PG&E) followed by our decisions as they relate to Entergy Services, Inc. (Entergy).[5]

2. For the reasons discussed below, we deny the requests for rehearing in part and grant clarification in part, as well as deny the requests for stay. Finally, we accept and direct modifications to the compliance filings submitted in these proceedings.

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[1] *Pacific Gas and Electric Company*, 101 FERC ¶ 61,079 (2002) (*PG&E I*).

[2] *Pacific Gas and Electric Company*, 102 FERC ¶ 61,070 (2003) (*PG&E II*).

[3] *Wrightsville Power Facility v. Entergy Arkansas, Inc.*, 102 FERC ¶ 61,212 (2003) (*Wrightsville*).

[4] *Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III*).

[5] Entergy filed on behalf of the Entergy Operating Companies, which include: Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States, Inc. (Entergy Gulf States), Entergy Louisiana, Inc., Entergy Mississippi, Inc. (Entergy Mississippi), and Entergy New Orleans, Inc. (collectively Entergy).

I. **Background**

3. In *PG&E I* (Docket Nos. ER02-1330-000 and ER02-1330-001), the Commission directed PG&E to modify a proposed interim crediting mechanism that PG&E proposed to apply to all generators, and specifically to several agreements between PG&E and Los Medanos Energy Center LLC (Los Medanos), subject to the outcome of the *Duke Hinds* proceeding.[6]

4. On January 28, 2003, the Commission issued *Duke Hinds II*. The Commission granted a complaint filed by Duke[7] against Entergy and found that Entergy was violating the Commission's long-standing transmission service pricing policy by unjustly and unreasonably charging Duke a transmission rate based on both the network average embedded costs and incremental costs. We required Entergy to revise the three Duke interconnection agreements (IAs) at issue and its future transmission rates to Duke accordingly.

5. In *PG&E II* (Docket Nos. ER02-1330-002, EL02-88-000, EL03-3-000, ER02-1472-001, EL03-4-000, ER02-1151-001, EL03-5-000, ER02-1069-001, EL02-13-000, ER02-2243-001, and EL03-12-000), the Commission issued a basket order addressing IAs that had provisions similar to those at issue in *Duke Hinds II*. The Commission partially granted the rehearing requests and complaints, finding that the IAs at issue in each proceeding were unjust and unreasonable, and needed to be modified to conform to *Duke Hinds II*.

6. In *Wrightsville* (Docket Nos. EL02-88-000, ER02-1472-001, ER02-1472-002, ER02-1151-001, ER02-1151-002, ER02-1069-001, and ER02-1069-002), the Commission addressed the issues raised in complaints and request for rehearing that had not been addressed in *PG&E II*, *i.e.*, issues that did not relate to customers' entitlements to transmission credits.

7. On November 17, 2006, the Commission issued *Duke Hinds III*, denying in part and granting in part rehearing of *Duke Hinds II*. In *Duke Hinds II*, the Commission granted Duke's complaint and found that Entergy was violating the Commission's transmission pricing policy by unjustly and unreasonably charging Duke a transmission

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[6] *See Entergy Services, Inc.*, 98 FERC ¶ 61,290 (2002).

[7] Duke Energy Hinds, LLC (Duke Hinds), Duke Energy Hot Spring, LLC (Duke Hot Spring), Duke Energy Southaven, LLC (Duke Southaven), and Duke Energy North America, LLC (collectively, Duke).

rate based on both the network average embedded costs and incremental costs, and directed Entergy to revise three IAs with Duke and its future transmission rates to be consistent with Commission policy. In addition, the order addressed Entergy's compliance filing made in response to *Duke Hinds II*, as well as the mechanics of the crediting mechanism for the contracts at issue.

II. Issues Involving PG&E

A. Requests for Rehearing of *PG&E I*

8. On November 25, 2002, PG&E, Calpine Corporation and Los Medanos (collectively, Calpine), and GWF Energy LLC (GWF) filed requests for rehearing (in Docket No. ER02-1330-002) of *PG&E I*. In addition, on October 24, 2003, Calpine filed a motion to lodge, requesting that the Commission take note of the Commission's order in *Pacific Gas and Electric Company*.[8]

9. PG&E requests rehearing of the direction in *PG&E I* that PG&E remove its reservation of rights concerning upgrades that can be shown to be not cost effective. PG&E states that it proposed that any California Independent System Operator Corporation (Cal ISO) or PG&E determination that a particular upgrade does not qualify for the credit because it is not cost-effective would be presented to the Commission for acceptance, if the generator agreed with the cost-effectiveness determination and the conclusion that a credit is not appropriate, or for resolution if there is disagreement. PG&E argues that the Commission's denial is at odds with the decision of the District of Columbia Circuit in *Atlantic City Electric Company v. FERC,*[9] which PG&E argues holds that the Commission does not have authority to direct parties to give up their statutory rights under section 205 of the Federal Power Act (FPA).[10]

10. On rehearing of *PG&E I*, Calpine: (1) challenges the Commission's determination that *PG&E I* should be subject to the outcome of *Duke Hinds*; (2) requests reconsideration of the determination that the 115 kV line interconnecting Los Medanos to PG&E is not a network upgrade; and (3) requests that PG&E be required to remove

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[8] 104 FERC ¶ 61,020 (2003). In this case, the Commission stated that breakers and associated facilities were beyond the point of interconnection and thus network facilities.

[9] 295 F.3d 1 (D.C Cir. 2002).

[10] 16 U.S.C. § 824d (2000).

monthly cost of ownership charge calculation for upgrades and refund amounts of such payments already made, plus interest.

11. GWF requests guidance as to when the crediting mechanism must apply to previously-filed IAs and to executed IAs that have not yet been filed with the Commission.

Commission Determination:

12. We will deny PG&E's request for rehearing. In *PG&E I*, we stated:

> PG&E did not define "cost-effective" in its proposed Crediting Mechanism and, if we were to permit such a provision, it may provide a disincentive to locate generation where it is most needed. The Cal ISO, under its tariff, has the authority to determine if upgrades are necessary and whether they provide a grid-wide benefit. Therefore we direct PG&E to remove from its proposed Crediting Mechanism, Section D, Reservation of Right To Assert That A Particular Upgrade Which Is Not Cost-Effective Does Not Qualify For A Credit.[[11]]

13. On rehearing, PG&E still has not provided a definition for the term "cost-effective." While PG&E retains its rights (except as limited contractually) to challenge crediting for specific facilities, in an appropriate proceeding, it has not justified its ambiguous proposal here and we will thus not grant PG&E's request for rehearing of this issue.

14. We disagree with Calpine that the 115 kV line is, in fact, a network upgrade rather than a sole-use facility. As we determined in *PG&E I*, it is before the point where Los Medanos connects with the grid. Calpine did not present any new arguments that would persuade us to change our classification of the 115 kV line.[12] This determination means

[11] *PG&E I*, 101 FERC &61,079 at P 42.

[12] We will allow Calpine's motion to lodge drawing our attention to our prior order but we will disallow its argument interpreting that order. We do not accept argument in a motion to lodge. *See, e.g.*, *Midwest Independent Transmission System, Operator, Inc.*, 100 FERC ¶ 61,292 (2002); *Duke/Louis Dreyfus L.L.C.*, 75 FERC ¶ 61,261 (1996). In any event, we find that the facts in the case cited are not relevant to the issue at hand; that case involved different facilities with a different point of interconnection to the grid.

that Los Medanos is not entitled to removal of the monthly cost of ownership charge and refunds of that charge for this facility. Accordingly, we will deny rehearing on these points. Given that we have, on rehearing of *Duke Hinds II*, reached the same conclusions regarding credits for network upgrades as we reach in this case, Calpine's request that we not make this proceeding subject to the outcome of *Duke Hinds* is moot.

15. We reject GWF's request for guidance as outside the scope of this proceeding. Notwithstanding that PG&E had requested that the Commission delay action in *PG&E I* until PG&E had come up with a generally-applicable interim crediting mechanism, PG&E did not file the generally-applicable crediting mechanism in this case. Rather, this case involves agreements between PG&E and Los Medanos, and PG&E's compliance filing satisfactorily addresses the crediting mechanism for that generator.

B. PG&E's Compliance Filing to *PG&E I*

16. In *PG&E I*, the Commission conditionally accepted for filing and directed PG&E to modify PG&E's proposed Interim Crediting Mechanism and several executed agreements between PG&E and Los Medanos, relating to the interconnection of the Los Medanos project.

17. On December 9, 2002 (in Docket No. ER02-1330-003), PG&E made a filing in compliance with *PG&E I* (First Compliance Filing).

18. In its compliance filing, PG&E changed the Generator Special Facilities Agreement: (1) revising Exhibit I to reflect the Commission's determination of which facilities are network and which are direct assignment; (2) revising Appendix A, which only recovers cost of ownership charges on the direct assignment facilities, to reflect the Commission's policy permitting transmission owners to recover the cost of ownership charges only on direct assignment facilities; and (3) adding the Interim Crediting Mechanism approved by the Commission in *PG&E I*.

19. PG&E states that it has modified its Interim Crediting Mechanism by: (1) modifying the Amortization for Term Credits to shorten the ten-year term for all network upgrades to five years; (2) deleting the Performance Obligation To Earn Credit Payment; and, (3) deleting the Reservation of Right to Assert a Particular Upgrade Which is not Cost Effective does not Qualify for Credit. It asserts that whether Los Medanos receives a credit for network upgrades will be determined by the Commission's action in the rehearing of *Duke Hinds II*.

20. Notice of PG&E's First Compliance Filing was published in the *Federal Register*, 67 Fed. Reg. 77,976 (2002), with comments, protests, and interventions due on or before

December 30, 2002. Calpine filed a timely motion to intervene and protest. Calpine raises the same issues in its protest as it raised in its rehearing request.

Commission Determination

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

22. We find that PG&E's First Compliance Filing complies with our directives in *PG&E I*, and will, therefore, accept it. As Calpine's challenges to the compliance filing are the same as its arguments on rehearing, we reject them for the reasons discussed above.

C. PG&E's Compliance Filing to *PG&E II*

23. In *PG&E II*, the Commission held that the Los Medanos IA was unjust and unreasonable and directed PG&E to revise the agreement consistent with *Duke Hinds II*. On February 27, 2003, as amended on February 28, 2003, PG&E made a compliance filing (Docket No. ER02-1330-005) in response to *PG&E II* relating to the interconnection of PG&E's transmission system and Los Medanos (PG&E Second Compliance Filing). In its compliance filing, PG&E proposes to modify Section D of the Interim Crediting Mechanism, First Payment Date, to provide that the first payment would be made to Los Medanos on March 31, 2003, which is 60 days after *PG&E II* issued, unless the Commission grants a stay of the effectiveness of *PG&E II*. PG&E also proposes to modify Section E of the Interim Crediting Mechanism, Whether [Los Medanos] Continues to Receive a Credit Will Turn on the Outcome of the Duke Hinds/[Los Medanos] Rehearing and Appeal Process to state: "On January 29, 2003, [the Commission] ruled that [Los Medanos] is entitled to a credit for network upgrades it has funded. PG&E has sought rehearing of that Order. Both PG&E and [Los Medanos] will be bound by the outcome of that process."

24. Notice of PG&E's filing was published in the *Federal Register*, 68 Fed. Reg. 11,827 (2003), with comments, protests, and interventions due on or before March 21, 2003. The Cal ISO and Calpine filed timely motions to intervene and comments.

25. Calpine states that it finds PG&E's proposed modification to Section E confusing and that it had discussions with PG&E in which they arrived at mutually acceptable alternative language. It asserts that PG&E agreed to revise Section E to read, in its entirety, as follows:

> PG&E's obligation to continue making payments to [Los Medanos] for network upgrades funded by [Los Medanos] is subject to the final administrative and, if applicable, judicial resolution of issues that are pending in FERC Docket No. ER02-1330. Similarly, [Los Medanos'] right to retain, and its possible obligation to refund to PG&E, any such credits paid by PG&E is subject to the outcome of the same process.[[13]]

26. With section E revised as quoted above, Calpine states that it finds acceptable the Interim Crediting Mechanism in PG&E's February 28, 2003 compliance filing.

27. The Cal ISO states that if a crediting mechanism must be in place, Cal ISO's concurrence should be sought for the delineation between direct assignment and network upgrade facilities. It states that it is an independent and disinterested party and can provide input on the appropriate delineation between the costs borne by generators and the costs that will ultimately be borne by customers through the crediting mechanism.

Commission Determination

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

29. We agree with Calpine that PG&E's proposed modification to section E is confusing, and direct PG&E to file the modification suggested by Calpine, within 30 days of the date of this order. However, we find that PG&E has modified the IAs at issue consistent with the Commission's policy in *Duke Hinds II.* Therefore, we accept PG&E's Second Compliance Filing, as modified by Calpine above. On Cal ISO's comments regarding delineation between direct assignment and network upgrade facilities, the identification of network upgrades is governed by the Commission's "at or beyond" policy as explained in *Duke Hinds II* and *Consumers*.[14]

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[13] PG&E March 31 Comments at 3.

[14] *Consumers Energy Co.*, 95 FERC ¶ 61,233 (*Consumers I*), *reh'g denied*, 96 FERC ¶ 61,132 (2001) (*Consumers II*), *petition for review pending sub nom. Entergy Services, Inc. v Federal Energy Regulatory Commission*, No. 01-1487 (D.C. Cir., November 9, 2001)) (C*onsumers*).

We also find that the compliance filing is consistent with *Duke Hinds III*. PG&E's filing was made pursuant to section 205 of the FPA rather than section 206. Accordingly, (continued)

III. Issues Involving Entergy

A. Requests for Rehearing of *PG&E II*

30. In *PG&E II*, the Commission partially and fully granted the requests for rehearing, and held that the IAs must be modified to conform to *Duke Hinds II*.

31. Entergy, Southern Company Services Inc. (Southern), PG&E, the Arkansas Public Service Commission and the Mississippi Public Service Commission, the Louisiana Public Service Commission, and Wrightsville Power Facility L.L.C. (Wrightsville) request rehearing of *PG&E II* (in Docket Nos. ER02-1330-004, EL02-88-001, EL03-3-001, ER02-1472-003, EL03-4-001, ER02-1151-003, EL03-5-001, ER02-1069-003, EL02-13-001, ER02-2243-003, and EL03-12-001).

32. In the requests for rehearing, all parties contend that *Duke Hinds II* was incorrect and that the Commission should not have relied on it for *PG&E II*. All of the parties argue that, in *Duke Hinds II* and *PG&E II*, the Commission violated the filed-rate doctrine and the rule against retroactive ratemaking by requiring transmission providers to provide credits to generators. They contend that the effect of the directed modifications in *PG&E II* will be to retroactively reduce the rates charged to generators for interconnection to the transmission system. The generators would thus not be paying the "filed rate" in violation of both the filed rate doctrine and the prohibition against retroactive ratemaking.

33. The parties further state that the Commission violated sections 211 and 212 of the FPA[15] by requiring all transmission customers to effectively subsidize the costs of interconnecting generators. They argue that, under these sections, the Commission may not directly or indirectly "socialize costs" for transmission interconnection. By using the "at or beyond" the point of interconnection test to classify facilities, the parties argue that the Commission continues to improperly perpetuate the socialization of interconnection costs, a policy, they state, which should be abandoned.

34. The parties also argue that the Commission incorrectly applied the just and reasonable standard of review, instead of the public interest standard of review, of the

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the retroactive ratemaking and prospective refunds issues addressed in *Duke Hinds III* are not applicable here.

[15] 16 U.S.C. §§ 824j, 824k (2000).

Mobile-Sierra doctrine.[16] They further contend that the Commission exceeded its authority by granting reparations via the reformation of contract terms. They finally argue that, contrary to the policy established in *AEP*,[17] the Commission improperly ordered the retroactive accrual of interest on transmission credits.

35. Cottonwood Energy Company, L.P. (Cottonwood) and Washington Parish Energy Center, LLC (Washington Parish), Entergy, and Wrightsville filed answers to various requests for rehearing.

Commission Determination

36. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we will reject the answers.

37. As the arguments for rehearing of *PG&E II* are substantively similar to the requests for rehearing recently addressed by the Commission in *Duke Hinds III*, we will deny these requests for rehearing for the reasons articulated in *Duke Hinds III*.[18]

B. Requests for Rehearing of *Wrightsville*

38. Entergy and Wrightsville request rehearing (in Docket Nos. EL02-88-003, ER02-1069-005, ER02-1151-005, and ER02-1472-005) of *Wrightsville*, issued on February 26, 2003,[19] in which the Commission addressed issues that had not been addressed in *PG&E II*.

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[16] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

[17] *American Electric Power Service Corporation*, 97 FERC ¶ 61,098 (2001) (*AEP*), establishing that interest will be calculated and paid on an interim basis applying to agreements filed after the issuance of *AEP* and continuing until the finalization of the interconnection proceeding in Docket No. RM02-1-000.

[18] *Duke Hinds III* at P 21-40.

[19] *Wrightsville*, 102 FERC ¶ 61,212(2003).

39. Entergy requests rehearing of *Wrightsville* for the same reasons it sought rehearing of *PG&E II,* and incorporates herein its request for rehearing of *PG&E II*.[20]

40. Wrightsville requests clarification or rehearing of *Wrightsville* on two counts. First, Wrightsville asks the Commission to clarify that, in *Wrightsville*, the Commission ordered Entergy to immediately refund to Wrightsville the entire amount that Wrightsville advanced to Entergy, $9.9 million (plus interest), to construct certain network upgrades that were necessary for reliability even in the absence of the interconnection of Wrightsville's power plant. Wrightsville argues that it demonstrated in its complaint that it was unjust and unreasonable, and inconsistent with Commission precedent in *New York Independent System Operator, Inc.*,[21] for Entergy to require Wrightsville to finance Network Upgrades that Entergy required to maintain its system's reliability and that Entergy would have made regardless of whether Wrightsville constructed its plant. Wrightsville claims that *NYISO* requires that a transmission provider finance the costs of Reliability Upgrades when the transmission provider has already identified that those Reliability Upgrades were needed as part of a load growth and reliability plan. Using data provided by Entergy, Attachment DB-6 of the Wrightsville complaint, Wrightsville argues that it demonstrated that the facilities in question were overloaded even without the Wrightsville plant, and had been scheduled to be upgraded as part of Entergy's existing expansion plan.

41. Wrightsville therefore requests that the Commission clarify that Entergy is responsible for the costs of Network Upgrades necessary for load growth and reliability, as the Commission directed in *NYISO*; Wrightsville does not want to receive credits for the amount advanced to Entergy for constructing the network upgrades, but rather seeks full reimbursement for the amounts provided for constructing the Network Upgrades consistent with Commission precedent in *NYISO*.

42. Second, Wrightsville requests that the Commission clarify that *Wrightsville* directed Entergy to pay interest on all tax gross-up advances to Wrightsville. Specifically, Wrightsville claims that it advanced to Entergy $9.1 million for tax gross up ($2.9 million for Interconnection Facilities that were misclassified and $6.2 million for Network Upgrades that Entergy classified as Optional System upgrades). Wrightsville claims that Entergy has not committed to pay interest on the $6.2 million related to

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[20] In its March 14, 2003 rehearing request, Entergy refers to our January 29, 2003 Order in *PG&E* as the "Wrightsville I order," and refers to our February 26, 2003 Order in *Wrightsville* as the "Wrightsville II order."

[21] 97 FERC ¶ 61,118 at 61,576 (2001) (*NYISO*).

Optional System Upgrades and asks the Commission to direct Entergy to repay interest on all of the tax gross-up advances, including both the $2.9 million which Entergy has agreed to pay and the $6.2 million for Optional System Upgrades which Wrightsville claims Entergy has declined to pay. If the Commission does not clarify these issues, then Wrightsville seeks rehearing of the Commission's failure to address these issues raised in its complaint.

43. On April 14, 2003, Entergy filed an answer to Wrightsville's motion for clarification or rehearing. On April 29, 2003, Wrightsville filed an answer to Entergy's April 14 Answer. On May 14, 2003, Entergy filed a limited answer to Wrightsville's April 29 Answer. On May 29, 2003, Wrightsville filed an answer to Entergy's May 14 Answer.

Commission Determination

44. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we will reject the answers.

45. Regarding Entergy's request for rehearing or *Wrightsville*, we will deny the request for the same reasons we deny Entergy's rehearing request of *PG&E II*, as discussed above.

46. Regarding Wrightsville's request for rehearing or clarification, we clarify that Entergy must give transmission credits consistent with our interconnection policy regarding reimbursement for funding network upgrades. However, we do not agree with Wrightsville that *NYISO* is on point; Wrightsville has not convinced us that Entergy would have constructed the facilities regardless of whether Wrightsville constructed its plant. The facilities in Entergy's Contingency Plan, which Wrightsville cites as support for its position, were network upgrades that Entergy had identified may be built within a three-to-five year time frame, if ever. Since Wrightsville's time frame was more immediate, it elected to fund construction of the facilities immediately in order to proceed with timely interconnection of its generator; Wrightsville could have waited until Entergy constructed these facilities, if ever, to accommodate Entergy's load growth. Accordingly, consistent with our interconnection policy, Wrightsville should receive transmission credits plus interest for funding construction of these facilities, rather than immediate reimbursement. In addition, if Wrightsville still disputes the classification of the

facilities, it now has the option of asking the recently-approved Independent Coordinator of Transmission to review Entergy's classification.[22]

47. Additionally, we clarify that Entergy must pay Wrightsville interest on all tax gross-up amounts from the time Entergy received the funds from Wrightsville to the time Entergy paid the funds to the U.S. Internal Revenue Service (IRS). In *Wrightsville*, the Commission noted that, in its answer, Entergy expressed willingness to provide Wrightsville with the direct payment of such tax gross-up interests that have not yet been paid by Entergy to the IRS, if that is how Wrightsville wants to receive such payments. The Commission concluded that Wrightsville's concerns had been resolved, and denied that portion of Wrightsville's complaint. In so ruling, we relied on Entergy's answer to the complaint where Entergy maintained that it "repeatedly has agreed to provide Wrightsville with interest on tax payments made by Wrightsville for Interconnection Facilities, if such payments have not been transferred yet to the IRS."[23] For tax gross up payments made by Wrightsville for Optional System Upgrades, we also relied on Entergy's answer, in which Entergy stated it pays such amounts directly to the IRS. Thus, we concluded that no amounts for interest were due to Wrightsville.[24] We continue to find that we correctly relied on Entergy's response to the Complaint as having fully resolved Wrightsville's concerns. However, to the extent that Entergy has not acted in accordance with its response to date, we direct Entergy to pay interest on all tax gross up amounts that Entergy has received from Wrightsville but has not yet paid to the IRS or that the IRS has refunded, as requested in Wrightsville complaint, and as agreed to by Entergy.

C. Entergy's Compliance Filing to *PG&E II* and *Wrightsville*

48. In *PG&E II*, the Commission directed Entergy to make a compliance filing to modify each of the IAs reclassifying the Interconnection Facilities identified therein as Required System Upgrades, and to provide transmission credits, with interest, on a going-forward basis for the costs of those previously-assessed and accepted direct-assignment

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[22] *See Entergy Services Inc.*, 115 FERC ¶ 61,095 at P 237-45 (2006)

[23] *Wrightsville* at P 16.

[24] We note that, in its answer, Entergy explained that, in the event that the IRS issues a refund for such taxes as the result of a favorable private letter ruling, which Entergy agreed to file, Entergy will forward to Wrightsville the entirety of the tax refund received in connection with the Optional System Upgrades, including any interest provided on such funds by the IRS.

rates. The Commission based its decision to reclassify all of the IAs at issue as Interconnection Facilities on the Commission's findings and directives in *Duke Hinds I*.

49. On February 28, 2003, Entergy submitted, under protest, a filing in compliance with *PG&E II* in Docket Nos. EL02-88-002 (Wrightsville IA), ER02-1472-004 (Cottonwood IA), ER02-1151-004 (Plum Point IA), ER02-1069-004 (Washington Parish IA), and ER02-2243-004 (Reliant Energy Choctaw IA) (collectively, Entergy Compliance Filing). In the Entergy Compliance Filing, Entergy states it modified each IA to provide that Interconnection Facilities' charges would be refunded in the form of transmission credits, with interest, and reclassified the Interconnection Facilities located at or beyond the point of interconnection as Required System Upgrades as directed in *PG&E II*. Entergy requests effective dates of September 22, 2000, December 2, 2000, February 8, 2002, May 11, 2001 and October 25, 2001, respectively for each of the IAs.

50. Entergy also states that its compliance filing is consistent with the requirements of *Wrightsville* where the Commission merely reaffirmed the finding in *PG&E II* requiring it to provide transmission credits, with interest, for the facilities initially identified as Interconnection Facilities in the IAs at issue.

51. Notice of Entergy's filing was published in the *Federal Register*, 68 Fed. Reg. 12,063 (2003), with comments, protests, and interventions due on or before March 21, 2003.

52. On March 21, 2003, Wrightsville filed a protest to the Entergy Compliance Filing, raising the same concerns that it raised in its request for clarification. Cottonwood filed a timely motion to intervene and protest. Reliant Energy Choctaw filed a motion to intervene and protest out-of-time. Entergy filed answers to each of these protests.

53. Cottonwood contends that its IA fails to state clearly that Entergy will provide interest on both Required System Upgrades and Optional System Upgrades and that this is contrary to the Commission's policies in *AEP* and *Duke Hinds II*. Cottonwood also states that the date proposed by Entergy to commence calculating interest on certain Required System Upgrades is incorrect and inconsistent with established Commission policy. Cottonwood contends that costs incurred for a 500 kV circuit breaker, classified as a Required System Upgrade as a result of a May 31, 2002 Order in this proceeding[25] should accrue interest as of the date that Cottonwood commenced paying Entergy for that additional circuit breaker.

[25] *Entergy Gulf States, Inc.*, 99 FERC ¶ 61,234 (2002).

54. Reliant Energy Choctaw protests the Entergy Compliance Filing, stating that the estimated cost for the Required System Upgrades used by Entergy is based on an old, preliminary study and not the latest, more accurate estimates available.

Commission Determination

55. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene serves to make Cottonwood a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy's answers and will, therefore, reject them. We will grant Reliant Energy Choctaw's motion to intervene out-of-time, given its interest in the proceeding and the absence of any undue prejudice or delay.

56. We find that Entergy has generally complied with *PG&E II*, and will accept the Entergy Compliance Filing, with the modifications discussed below. These modifications are necessary for the compliance filing to be consistent with our recent findings and clarifications in *Duke Hinds III*.

57. We agree with Cottonwood that Entergy should revise the IA to provide Cottonwood with interest on credits for Required System Upgrades and Optional System Upgrades starting on the refund effective date. This ruling is consistent with our clarification of *Duke Hinds III*.[26]

58. We also direct Entergy to revise the IAs consistent with our discussion in *Duke Hinds III* that Entergy must provide for transmission credits prospectively.[27] In *Duke Hinds III*, the Commission required that, if Entergy has not provided Duke with transmission credits, Entergy must provide refunds to Duke for the locked-in period starting September 9, 2002, up to the date when Entergy begins to provide transmission credits, as a lump-sum refund, with interest calculated in accordance with 18 C.F.R. § 35.19(a)(2)(ii) (2006).

59. In this case, we likewise direct Entergy to provide refunds for the period starting with the appropriate refund effective dates, for the locked-in period, up until Entergy

[26] *See Duke Hinds III* at P 37 and 53.

[27] *Id*. at P 55-60.

begins to provide transmission credits, with interest calculated in accordance with 18 C.F.R. § 35.19(a)(2)(ii), as a lump sum refund.

60. Reliant Energy Choctaw protests that the estimated cost for the Required System Upgrades used by Entergy is based on an old, preliminary study and not the latest more accurate estimates available. We disagree. There is no requirement that Entergy should update cost estimates. Each IA explicitly states that the costs listed are estimates and that the customer's final cost responsibility will be tied to the actual costs incurred.

IV. Requests for Stay

61. On February 28, 2003, PG&E requested an immediate stay of *PG&E II* pending rehearing and any appellate review of this order as well as rehearing and any subsequent review of *Duke Hinds II*.[28] PG&E alleges that it would suffer irreparable harm, absent a stay, due to a combination of factors such as California market dysfunction, PG&E's bankruptcy and the uncertainty of whether PG&E can recover any costs from Los Medanos, the generator in Docket No. ER02-1330. PG&E states that, in contrast, Los Medanos would not be harmed by granting a stay pending review because, if credits are ultimately required, credits must be paid with interest. PG&E states that a stay is reasonable due to the change in Commission policy following the issuance of the *Duke Hinds II* order, which could make PG&E responsible for $4 million in credits to Los Medanos. Calpine filed a response to PG&E's motion for stay asserting that PG&E's request falls short of meeting the Commission's requirements for consideration of a stay. Calpine argues that PG&E incorrectly asserts that the facts of the Los Medanos IAs are not the same as those presented in *Duke Hinds*. Further, Calpine asserts that PG&E will not suffer irreparable injury because the harm is purely economic, and is uncertain. Calpine adds that PG&E ignores the specific circumstances of Los Medanos.

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[28] On March12, 2003, Entergy requested an immediate stay of *Duke Hinds II, PG&E*, and *Wrightsville*, pending rehearing. Cottonwood Energy Company, L.P. and Washington Parish Energy Center, LLC, and Wrightsville filed answers to Entergy's request for stay.

Commission Determination

62. We will deny PG&E's request for stay.[29] To assure definiteness and finality in Commission proceedings, the Commission typically does not stay its orders.[30] However, the Commission may stay its action when "justice so requires."[31] The Commission considers: (1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.[32] The key here is irreparable injury to the moving party.[33] The standard for showing irreparable harm is strict. The DC Circuit has explained:

> [t]he injury must be both certain and great; it must be actual and not theoretical. . . .Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.[[34]]

63. Here, PG&E rests its request for a stay on the premise that, once it has paid credits, it may be impossible to recoup the amounts it has paid out. This argument is based on speculation. We are not persuaded of the merits of an appeal, nor of any certainty of irreparable harm suffered in the absence of a stay. Thus, we deny the request for a stay.

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[29] We will also dismiss Entergy's request for stay as moot, as we are now issuing orders on rehearing of *Duke Hinds II*, *PG&E II*, and *Wrightsville*.

[30] *See, e.g.*, *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,630–31 (1991) (*CMS Midland*), *aff's sub nom.*, *Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993); *Arkansas Louisiana Gas Co.*, 23 FERC ¶ 61,324 at 61,714 (1983) ("the Commission follows a general policy of denying motions for stays of its orders").

[31] 5 U.S.C. § 705 (2006).

[32] *CMS Midland*, 56 FERC at 61,131.

[33] *Id.*

[34] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

The Commission orders:

(A) The requests for rehearing are hereby granted in part and denied in part, as discussed in the body of this order.

(B) The requests for stay filed by PG&E and Entergy are hereby denied and dismissed, as discussed in the body of this order.

(C) PG&E's First Compliance Filing is hereby accepted for filing, as discussed in the body of this order.

(D) PG&E is hereby directed to modify its Second Compliance Filing, as discussed in the body of this order, within 30 days of the date of this order.

(E) Entergy is hereby directed to modify its compliance filing, as discussed in the body of this order, within 30 days of the date of this order.

(F) Entergy's compliance filing and PG&E's Second Compliance Filing, as modified in accordance with Ordering Paragraphs (D) and (E) above, are hereby accepted for filing.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.