

PENDING PETITION MEMO

Date: 9/26/2008

TO : OGC  
OAF  
OEEE  
OEGW

FROM: CENTRAL OPERATIONS

UTILITY: LS POWER DEVELOPMENT, LLC

SUBJECT: 08-E-1147

Petition of LS Power Development, LLC for a Declaratory Ruling  
Regarding the Acquisition of Common Stock of Calpine Corporation or,  
in the Alternative, Approval Under Section 70 of the PSL.

# NIXON PEABODY

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2008 SEP 26 PM 2: 25

September 26, 2008

## VIA HAND DELIVERY

Hon. Jaclyn A. Brillling  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350

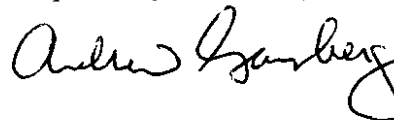
**Re: Case 08-E-\_\_\_\_\_ – PETITION OF LS POWER DEVELOPMENT,  
LLC FOR A DECLARATORY RULING  
REGARDING THE ACQUISITION OF COMMON  
STOCK OF CALPINE CORPORATION OR, IN  
THE ALTERNATIVE, APPROVAL UNDER  
SECTION 70 OF THE PUBLIC SERVICE LAW**

Dear Secretary Brillling:

Enclosed for filing with the Public Service Commission are an original and five copies of the Petition of LS Power Development, LLC ("LS Power" or "Petitioner") in the above-referenced proceeding.

Petitioner requests that the Commission issue a declaratory ruling that it need not review the proposed transaction under Section 70 because the transaction does not raise the potential for the exercise of market power or present the possibility of any adverse effect on captive New York ratepayers. The Petitioner respectfully requests that the Commission review the transaction in as expeditious a manner as is possible so that it can be considered at the Commission's meeting scheduled for November 12, 2008. Thank you for your consideration.

Respectfully submitted,



Andrew Gansberg

Enclosures

cc: Leonard Van Ryn, Esq.

**ORIGINAL**

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

**PETITION OF LS POWER DEVELOPMENT, LLC  
FOR A DECLARATORY RULING REGARDING  
THE ACQUISITION OF COMMON STOCK OF  
CALPINE CORPORATION OR, IN THE  
ALTERNATIVE, APPROVAL UNDER SECTION 70  
OF THE PUBLIC SERVICE LAW**

**Case 08-E- \_\_\_\_\_**

**VERIFIED PETITION FOR DECLARATORY RULING  
REGARDING ACQUISITION OF COMMON STOCK**

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*Attorneys for Petitioner  
LS Power Development, LLC*

Dated: September 26, 2008

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

PETITION OF LS POWER DEVELOPMENT, LLC  
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*Attorneys for Petitioner  
LS Power Development, LLC*

Dated: September 26, 2008

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**PETITION OF LS POWER DEVELOPMENT, LLC  
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Case 08-E- \_\_\_\_\_

**VERIFIED PETITION FOR DECLARATORY RULING  
REGARDING ACQUISITION OF COMMON STOCK**

**I. INTRODUCTION**

Pursuant to 16 NYCRR Part 8 of Rules and Regulations of the New York State Public Service Commission (“Commission”), LS Power Development, LLC (“LS Power” or the “Petitioner”) hereby petitions the Commission for a declaratory ruling that the indirect acquisition of up to an additional 20% of the common stock of Calpine Corporation, above the 20% previously authorized by the Commission, will not be reviewed, or further reviewed, under Section 70 of the Public Service Law because the proposed acquisition does not raise the potential for the exercise of market power nor would it cause any other adverse impact on captive New York ratepayers. Therefore, the *Wallkill* presumption<sup>1</sup> should be applied (*i.e.*, that Section 70 does not adhere to the transfer of ownership interests upstream from the owners/operators of New York competitive electric generation unless there is the potential for harm to the interests of captive ratepayers sufficient to overcome the presumption).

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<sup>1</sup> Case 91-E-0350, *Wallkill Generating Company, L.P.*, Order Establishing Regulatory Regime (issued April 11, 1994).

LS Power seeks, in the alternative, Commission approval under Section 70 in the event that a declaratory ruling is not issued by the Commission. Whether or not the Commission decides to issue a declaratory ruling or review the acquisition pursuant to Section 70, LS Power asks that its petition be considered expeditiously so that it can proceed to purchase Calpine common stock on the open market in a fashion that would minimize undue market price fluctuations and avoid adversely affecting the underlying economics of the transaction.<sup>2</sup>

## **II. BACKGROUND**

### **A. Description of LS Power Development, LLC**

LS Power and its affiliates develop independent power projects in the United States. LSP Cal Holdings I, LLC (“Cal I”), a Delaware limited liability company, is owned, directly and indirectly, by three limited partnerships: LS Power Equity Partners, L.P. (“LSP Equity Partners”), LS Power Equity Partners PIE I, L.P. (“LSP Equity PIE”), and LS Power Partners, L.P. (“LSP Partners I”) (collectively, “Fund I”). LSP Equity PIE holds its ownership interest in Cal I through one or more special purpose entities.

LSP Cal Holdings II, LLC (“Cal II”), a Delaware limited liability company, is owned, directly and indirectly, by three limited partnerships: LS Power Equity Partners II, L.P. (“LSP Equity Partners II”), LS Power Equity Partners II PIE, L.P. (“LSP Equity PIE II”), and LS Power Partners II, L.P. (“LSP Partners II”) (collectively, “Fund II”, and together with Fund I, the “Funds”). LSP Equity PIE II holds its ownership interest in Cal II through one or more special purpose entities.

LSP Equity Partners and LSP Equity PIE are both owned by LSP Partners I, as general partner, and by various passive limited partner investors. LSP Equity Partners II and LSP Equity

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<sup>2</sup> Because Calpine’s stock will be purchased on the open market, Calpine is not the transferor of such stock and is not a joint petitioner herein.

PIE II are both owned by LSP Partners II, as general partner, and by various passive limited partner investors. As the general partners of the Funds, LSP Partners I and LSP Partners II – not the passive limited partner investors – have ultimate control over the day-to-day activities of such entities. The passive limited partner investors do not have a role in running the Funds’ business portfolios or in the day-to-day operation of the Funds’ investments and, therefore, do not have any control, either directly or indirectly, over the day-to-day operations of its subsidiaries, including any generation project company directly or indirectly owned by any subsidiaries.

Each of LSP Partners and LSP Partners II is owned by (i) LS Power, as general partner; (ii) LS Power Associates, L.P. (“LSP Associates”, and together with LS Power and their controlled subsidiaries, the “LS Power Group”), as limited partner; and (iii) various passive limited partner investors. LSP Associates is a Delaware limited partnership owned by (i) LS Power, as general partner; and (ii) various passive limited partner investors. LS Power is a Delaware limited liability company wholly owned by members of the Segal family and associated entities.<sup>3</sup> LS Power is the principal operating company (*i.e.*, is the employer of the majority of the staff) of the LS Power Group, and, in its capacity as the general partner of LSP Associates, develops, owns and operates independent power projects in the United States.

## **B. Description of Calpine**

Calpine is a Delaware corporation engaged through subsidiaries in the development, financing, acquisition, ownership, and operation of independent power production facilities and

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<sup>3</sup> On September 24, 2008, LS Power and Luminus Management, LLC (“Luminus”) filed a joint application with the FERC requesting approval of their indirect acquisition of shares of common stock of Calpine, which together with any current ownership of such stock would represent up to 40% of Calpine’s common stock. Luminus is a Delaware limited liability company owned by certain trusts in which certain members of the Segal family (not the same as those controlling LS Power) have a beneficial interest. Luminus is affiliated with a number of investment companies that have no management or operational role in any of their investments in companies owning electric generation in New York. Luminus is not a stock corporation and is not an electric corporation; should this petition be granted, its share of Calpine stock will not exceed 10%.

the wholesale marketing of electricity in the United States and abroad. According to recent SEC filings, Calpine and its subsidiaries own or control nearly 24,000 MW of capacity, through 60 natural gas-fired power plants capable of producing approximately 23,000 MW and 17 geothermal facilities in the Geysers region of northern California capable of producing 725 MW.

LS Power owns less than 20% of the common stock of Calpine and has no control or responsibility for the day-to-day management of Calpine or its subsidiaries. However, despite LS Power's position that it does not control Calpine, Petitioner, out of an abundance of caution and in order to ensure timely approval has in prior filings, and in this Petition continues, for these purposes to attribute 100% of Calpine's generation assets to LS Power.

### **C. Indirect Interests In Other Generation**

#### **I. Dynegy**

LSP Partners I, LSP Associates, LSP Equity Partners, LSP Equity PIE, and LSP Gen Investors, L.P. (the "LSP Dynegy Shareholders") own, as a result of a transaction consummated on April 2, 2007,<sup>4</sup> all of the Class B voting securities of Dynegy, which represents approximately 40 percent of the outstanding voting securities of Dynegy (the "LSP Interest"). Dynegy, through various subsidiaries, provides electricity to wholesale customers throughout the United States. Through its energy business, the company owns and operates a diverse portfolio of energy assets, including power plants totaling more than 19,000 MW of generating capacity.

As part of their ownership interest in Dynegy, the LSP Dynegy Shareholders may elect up to three directors out of eleven members of the Board of Directors of Dynegy. The LSP Dynegy Shareholders may not vote for nor seek removal of the remaining eight directors. Nor may the LSP Dynegy Shareholders acting alone remove Dynegy's management.

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<sup>4</sup> Case 06-M-1305, *Dynegy, Inc. and LS Power Development LLC*, Declaratory Ruling on Review of a Merger Transaction (issued December 20, 2006) in which the Commission reviewed the transfer of an ownership interest in Dynegy's Class B voting securities to LS Power.

Dynegy, not any of the LSP Dynegy Shareholders, has ultimate control over the day-to-day activities of Dynegy's generation entities. The LSP Dynegy Shareholders do not have a role in running Dynegy's business portfolios or its day-to-day operations and, therefore, do not have any control, either directly or indirectly, over the day-to-day operations of its subsidiaries, including any generation project company directly or indirectly owned by any subsidiaries. It is the position of LS Power and Dynegy that the LSP Dynegy Shareholders do not individually or collectively control Dynegy.<sup>5</sup> Nonetheless, out of an abundance of caution and in order to ensure timely approval of this application, Petitioner has attributed, and continues for purposes of this Petition to attribute, 100% of Dynegy's generation assets to LS Power.

## **2. TransAlta Corporation**

LS Power previously obtained Commission approval to acquire up to 20% of the common stock of TransAlta.<sup>6</sup> TransAlta is a power generation and wholesale power marketing company incorporated under the laws of Canada, with two wholly owned subsidiaries, TransAlta Utilities Corporation and TransAlta Energy Corporation ("TransAlta Energy"), all of which are incorporated under the laws of Canada. TransAlta operates a portfolio of generation assets in Canada, the United States, Mexico, and Australia. TransAlta Energy, through its subsidiaries, owns a 90 MW interest in the 240 MW Saranac Facility (a federal QF) located in Plattsburgh, New York.

Currently, LS Power and its affiliates own and control less than 10% of the common stock of TransAlta, and have no control, directly or indirectly, over the day-to-day activities of TransAlta's generation entities, which remain under the control of TransAlta's management.

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<sup>5</sup> Although in the *Calpine* Ruling LS Power was determined to be an electric corporation, on February 21, 2008, LS Power filed a petition for rehearing asking that the Commission find that it should not be considered an electric corporation solely by reason of its 40% ownership interest in Dynegy's Class B voting securities. That petition is pending before the Commission.

<sup>6</sup> Case 08-E-0410, *LS Power Development LLC*, Declaratory Ruling on the Acquisition of Common Stock (issued May 27, 2008) ("*LS Power/TransAlta* Ruling").

Nonetheless, out of an abundance of caution and in order to ensure timely approval of this application, Petitioner has, solely for such purpose, attributed 100% of TransAlta's assets to LS Power.

### III. SUMMARY EVALUATION OF POTENTIAL COMPETITIVE IMPACTS

As previously indicated, LS Power has ownership interests in Dynegy, Calpine, and TransAlta. In this section, LS Power will review the generation capacity owned by these entities and related market power analyses conducted on behalf of LS Power.

Dynegy wholly owns or leases, indirectly, three electric corporations that are subject to the lightened regulatory regime fashioned by the Commission for generators operating in the competitive marketplace.<sup>7</sup> Dynegy Danskammer, L.L.C. leases, operates and has the right to the output from a 498 MW coal-, gas-, and oil-fired electric generating facility located in Newburgh, New York. Dynegy Roseton, L.L.C. leases, operates and has the right to the output from a 1,206 MW gas- and oil-fired electric generating facility located in Newburgh, New York. Sithe/Independence Power Partners, L.P. owns and operates a 982 MW electric generating facility located in Scriba, New York. Approximately 700 MW of the Sithe/Independence plant is committed under long-term contract until 2014 to Con Edison for the capacity market.

Calpine owns approximately 355 MW of generating capacity in NYISO, consisting of three Bethpage units (178 MW) and Stony Brook (56 MW), located on Long Island, and KIAC (117 MW) located in New York City.

The most recent LS Power transaction since approval of the acquisition of up to 20% of Calpine's stock, was the acquisition of up to 20% of the stock of TransAlta (*LS Power/TransAlta Ruling*). In Case 08-E-0410, *LS Power Development, LLC*, LS Power provided the affidavit of

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<sup>7</sup> Case 00-E-1643, *Dynegy Power Corporation, et al.*, Order Providing for Lightened Regulation (issued December 20, 2000); Case 02-M-1443, *Sithe Independence Power Partners, L.P.*, Order Providing for Lightened and Incidental Regulation and Granting a Certificate of Public Convenience and Necessity (issued January 23, 2003).

Julie R. Solmon from CRA International, Inc., evaluating the potential competitive impact on electricity markets of the acquisition of TransAlta stock, which was submitted to FERC in LS Power's application for approval of such acquisition under Section 203 of the Federal Power Act, and is attached hereto as Exhibit A. For purposes of the attached evaluation of competitive markets in the NYISO market, LS Power was deemed to be affiliated with 2,694 MW of generation owned by Dynegy, 355 MW owned by Calpine, and 132 MW owned by TransAlta.

As previously indicated, TransAlta owns a 37.5 percent share in the Saranac Facility (of 240 MW in total, TransAlta owns 90 MW) (all of which is committed under long-term contract). At the time of LS Power's petition in Case 08-E-0410 (April 17, 2008), TransAlta also owned the Binghamton generating facility (42 MW).<sup>8</sup>

The total installed capacity in NYISO is approximately 39,000 MW. TransAlta's 132 MW share represented 0.3 percent market share. Adding TransAlta's share to that of LS Power resulted in a combined share of 8.1 percent. The HHI change resulting from adding TransAlta's share to that of LS Power was only 5 points. Exhibit A, at 13. In its *LS Power/TransAlta* Ruling, the Commission found that the combined 8.1 percent share "is only slightly greater than that allowed in the Calpine Ruling and is insufficient to cause concern, especially given the restrictions and contingencies constraining LS Power's control over much of the capacity that comprises its ownership share . . . the change in the HHI index as a result of the transaction is only five points and is below the level needed to raise a concern that the transaction would significantly increase market concentration." *LS Power/TransAlta* Ruling, at 8-9.

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<sup>8</sup> TransAlta's subsidiary, IPP Energy LLC, has received FERC approval for the sale of the Binghamton generating facility to Binghamton Standard LLC. 123 FERC ¶62,004, *IPP Energy LLC et al.*, Order Authorizing Disposition of Jurisdictional Facilities (April 2, 2008). A petition for approval under Section 70 of the PSL for the sale of that facility is pending before the Commission in Case 08-E-0738, *IPP Energy LLC*.

Therefore, the proposed acquisition of 20% of TransAlta's stock (which occurred after the Dynegy and Calpine acquisition) was found not to result in a significant increase in market concentration.

#### **IV. THE REQUIREMENTS OF SECTION 70 OF THE PUBLIC SERVICE LAW**

Section 70 of the Public Service Law includes several provisions that apply to transfers of ownership interests in electric corporations. As to transfers of ownership interests in the assets of electric corporations, Section 70 provides that "no gas corporation or electric corporation shall transfer or lease its franchise, works or system . . . to any other person or corporation . . . without the written consent of the Commission." This provision also applies to transfers of controlling interests in entities upstream from the owners of New York competitive generation.<sup>9</sup> The proposed transfer in this case involves up to an additional 20 percent interest in Calpine's stock above the up to 20% previously authorized. The Commission has conducted reviews of transfers of at least a 30% ownership interest in an entity upstream from a New York operating subsidiary. *See, the Calpine Ruling, at 10.*

Two other provisions of Section 70 deal with the acquisition of stock in and by electric corporations. Section 70 provides that "no stock corporation of any description, domestic or foreign, other than a gas corporation or electric corporation . . . shall purchase or acquire, take or hold, more than ten per centum of the voting capital stock issued by any gas corporation or electric corporation organized or existing under or by virtue of the laws of this state" without Public Service Commission approval. Because LS Power is not a stock corporation, this provision does not apply to the proposed transaction.

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<sup>9</sup> Case 00-E-1585, *Sithe Energies, Inc.*, Order on Review of Stock Transfer and Other Transactions (issued November 16, 2000).

Under another stock acquisition provision of Section 70, no electric or gas corporation “shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, in this state or any other state . . . unless authorized [to do so] by the Commission.”

The Commission has determined that “LS Power is an electric corporation under PSL §2(13) by virtue of its holding company interests in New York generation facilities.” *Calpine* Ruling, at 16. On February 21, 2008, LS Power filed a petition for rehearing on this issue, asking that the Commission find that although LS Power holds a 40 percent interest in Dynegy’s Class B voting stock, LS Power should not be considered a company “owning, operating or managing any electric plant” under Section 2(13) of the Public Service Law. LS Power, therefore, has asked that the Commission determine that it is not an “electric corporation.” If LS Power is determined not to be an “electric corporation,” this stock acquisition provision of Section 70 would not apply to the proposed transaction. Because the petition for rehearing is currently pending before the Commission, however, LS Power is submitting this Petition in the event the Commission does not issue a favorable decision on rehearing.

## **V. THE WALLKILL PRESUMPTION**

In *Wallkill Generating Company, L.P.*<sup>10</sup> the Commission established a presumption that it generally need not apply Section 70 oversight to upstream transfers of ownership interests in lightly regulated wholesale electric generation facilities unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption. The Commission

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<sup>10</sup> Case 91-E-0350, *Wallkill Generating Company, L.P.*, Petition on Regulation, Order Establishing Regulatory Regime (April 11, 1994) (“*Wallkill*”).

has applied the *Wallkill* presumption to a number of transactions involving the upstream transfer of controlling interests in wholesale generation facilities.<sup>11</sup>

Even though the proposed transaction involves the acquisition of up to an additional 20% of Calpine's stock, above the 20% previously authorized by the Commission, both the ownership transfer provision of Section 70 of the Public Service Law and its stock acquisition provisions have recently been determined to be subject to the *Wallkill* presumption. See *Calpine* Ruling, at 17. In that Ruling, the Commission noted its policy that the scrutiny given to filings made by lightly regulated entities owning generators selling at wholesale could be reduced to the minimum necessary to promote the public interest. The Commission further stated:

... The stock acquisition provisions of §70 may therefore be treated similarly to the transfer provision of that statute, with the level of scrutiny applied to the acquisition transactions properly defined through use of the *Wallkill* presumption.

The market power analyses presented above for the purposes of evaluating the effect of the Calpine stock transactions as ownership transfer transactions consequently adhere to the stock acquisition transactions as well.

*Id.*, at 17-18.

The market power analysis presented by LS Power for its acquisition of up to 20 percent of Calpine's stock conservatively assumed that LS Power would control production from "both the existing 2,686 MW of upstate New York generation in which it holds a 40% partial ownership interest, and the 361 MW of Calpine generation located in Long Island and New York City in which it will hold a 20% ownership interest . . . ." *Calpine* Ruling, at 12. The Commission found that under those conservative assumptions, LS Power's total ownership share

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<sup>11</sup> See, e.g., Case 07-E-0288, *Astoria Energy LLC, et al.*, Declaratory Ruling on Review of an Ownership Interest Transfer and Making Other Findings (issued May 22, 2007); Case 05-E-1095, *TransCanada Power (Castleton) LLC, et al.*, Declaratory Ruling on Transfer of Ownership Interests and Order Providing for Lightened Regulation (issued January 26, 2006); Case 04-E-1364, *Sithe Energies, Inc., et al.*, Declaratory Ruling on Review of Stock Transfers (issued January 14, 2005); Case 00-E-1585, *Sithe Energies, Inc., et al.*, Order on Review of Stock Transfer and Other Transactions (issued November 16, 2000).

would amount to 3,047 MW of generation, or less than 8% of the 39,000 MW NYISO market. The Commission referred to its earlier rulings in *Sithe II*, *Astoria Gen* and *Astoria Energy*, noting that “7% and lesser levels of market concentration are generally insufficient to cause concern, especially given the restrictions and contingencies constraining LS Power’s control over much of the capacity that comprises its ownership share.” *Id.*<sup>12</sup>

The Commission went on to say:

A more detailed analysis of the potential for the exercise of market power confirms that LS Power will lack that capability after the Calpine stock distribution transaction is concluded. The change in the HHI index state-wide as a result of the transaction is only ten points, far below the level needed to raise a concern that the transaction would significantly increase market concentration. In the NYISO’s state-wide capacity market, the HHI change is even smaller, at six points.

*Id.* The Commission further analyzed the likelihood that LS Power would attempt to execute an economic withholding strategy in any New York ICAP market for the purpose of increasing payments for the capacity not withheld. The Commission found that LS Power is “highly unlikely” to embark upon a withholding strategy in either the New York Control Area, the Long Island or New York City ICAP markets. *Id.*, at 13-14. After analyzing each of these markets and the size of Calpine’s generation interests in those markets, the Commission concluded that “LS Power will not be able to exercise horizontal market power as a result of its acquisition of interests in Calpine.” *Id.*, at 14.

The same restrictions and contingencies constraining LS Power’s control over the Dynegy capacity are operative here. Nevertheless, as shown in Exhibit A hereto, the HHI change associated with deeming LS Power to be affiliated with the 2,694 MW of generation

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<sup>12</sup> Since the *LS Power/TransAlta* Ruling, the Commission has determined that a 9.7% share of the approximately 39,000 MW of NYISO installed capacity resulting from Harbinger’s acquisition of up to 25% of the common stock of Mirant Corporation was insufficient to cause concern given the restrictions and contingencies constraining Harbinger’s control over much of the capacity that comprised its ownership share. Case 08-E-0397, *Harbinger Capital Partners Master Fund I, Ltd., et al.*, Declaratory Ruling on the Acquisition of Common Stock (issued June 23, 2008).

owned by Dynegy and the 355 MW owned by Calpine is only 5 points. Exhibit A, at 13. Moreover, the combined generation share of LS Power and TransAlta of 3,181 MW (combining the capacity of Dynegy, Calpine, and TransAlta) represents only an 8.1% share of the approximately 39,000 MW of NYISO installed capacity.

This analysis demonstrates that no horizontal market power concerns are raised by the combination of the generating assets operated by companies in which LS Power has ownership interests, including Dynegy, Calpine, and TransAlta. Moreover, neither LS Power nor Calpine exercise control over monopoly electric delivery facilities, and neither has ownership interests in fuel supplies, fuel transportation systems, or other inputs into the production of electric generation supply within the NYISO markets. Based on these facts, the Commission found in the *Calpine* Ruling (at p. 14), that the potential for the exercise of market power other than horizontal market power was not presented. Therefore, there are no vertical market power concerns arising out of the proposed transaction.

Because the market power analysis contained in Exhibit A was performed based on the conservative assumptions that LS Power would control production from all of the New York generating capacity owned by Dynegy, Calpine, and TransAlta, the acquisition of an additional 20% of Calpine stock, above the 20% previously authorized, would not by itself impact the findings presented in Ms. Solomon's affidavit submitted as part of the FERC Section 203 application filed on September 24, 2008. That affidavit, attached hereto as Exhibit B,<sup>13</sup> examined any changes in circumstances that have occurred subsequent to LS Power's acquisition of TransAlta stock and concluded that such changes would produce no additional competitive effects that have not already been reviewed and accepted by FERC. Exhibit B, at 7.

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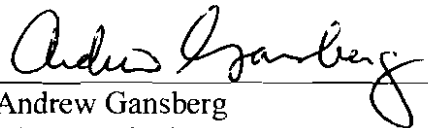
<sup>13</sup> The resumes referred to in Exhibits A and B have not been included herein.

For these reasons, the Commission should determine that the *Wallkill* presumption applies to the proposed transaction and that no review (or no further review) pursuant to Public Service Law, Section 70 is necessary.

## **VI. CONCLUSION**

For the reasons set forth above, Petitioner respectfully requests that the Commission issue a Declaratory Ruling finding that the *Wallkill* presumption applies to the proposed acquisition by LS Power of up to an additional 20% of Calpine's stock, above the 20% previously authorized by the Commission, and that no review (or no further review) under Section 70 of the Public Service Law is necessary, or in the alternative, approve the proposed transaction pursuant to Section 70.

Respectfully submitted,



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Tel: (518) 427-2650  
Fax: (518) 427-2666

*Attorneys for Petitioner  
LS Power Development, LLC*

Dated: September 26, 2008  
Albany, New York

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

**PETITION OF LS POWER DEVELOPMENT, LLC  
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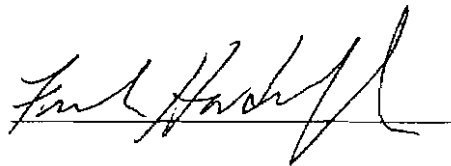
Case 08-E- \_\_\_\_\_

**VERIFICATION**

Frank Hardenbergh, being duly sworn according to law, upon his oath, deposes and says:

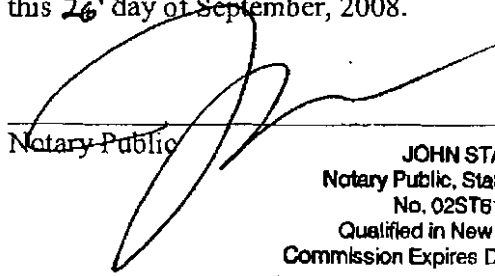
1. I am Vice Chairman of LS Power Development, LLC, and am authorized to make this Verification on behalf of LS Power Development, LLC.

2. I have read the contents of the foregoing Petition and hereby verify that the statements contained therein as they relate to LS Power Development, LLC are true and accurate to the best of my knowledge and belief.



Sworn to and subscribed before me  
this 26<sup>th</sup> day of September, 2008.

Notary Public



JOHN STAIKOS  
Notary Public, State of New York  
No. 02ST6138839  
Qualified in New York County  
Commission Expires December 27, 2009

## **EXHIBITS**



Applicant to increase prices in the electricity market. The potential vertical market power effects arise from barriers to entry that might undercut the presumption that long-run generation markets are competitive and, more generally, the potential to use control over fuel supplies, fuel transportation facilities, or electric transmission to exert vertical market power by increasing rivals' costs.

## SUMMARY OF CONCLUSIONS

My analysis indicates that the Transaction does not raise competitive concerns for the following reasons:

The horizontal effect of the Transaction, resulting from the combination of generation, is *de minimis* in all relevant geographic markets. There are only three common markets in which both LS Power and TransAlta own or control more generation, and, in each of these markets, one or both parties own or control a *de minimis* amount of generation. The three relevant markets are New York Independent System Operator Inc. ("NYISO"), California Independent System Operator Corporation ("CAISO"), and the Bonneville Power Administration ("BPAT") balancing authority. See Table 1 below. Because the "merging entities do not currently conduct business in the same geographic markets" or the "extent of business transactions in the same geographic markets is *de minimis*," none of these markets require a horizontal Competitive Analysis Screen as I demonstrate affirmatively herein.<sup>2</sup>

- In NYISO, a market with approximately 39,000 MW of installed capacity, TransAlta owns 132 MW of generation, clearly a *de minimis* amount of total generation in the market. Approximately 3,000 MW of generation in NYISO, or about 8 percent of installed capacity, may be attributable to LS Power through its affiliation with Dynegy and Calpine. However, because TransAlta owns such a small share (0.3 percent) of capacity in NYISO, the extent of business transactions in the same geographic markets clearly is *de minimis*.

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of Calpine's common stock by certain LS Power and Luminus affiliates such that Calpine and its subsidiaries can be regarded as "affiliates" of Applicants.

- In CAISO, a market with approximately 56,000 MW of installed capacity, TransAlta owns 175 MW of generation. All of the output of this generation is committed under long-term contract to third-parties, and, in any event, it clearly represents a *de minimis* amount of generation in CAISO. Approximately 9,300 MW of generation in CAISO may be attributable to LS Power through its ownership interest in Dynegy and Calpine, however all but about 4,000 MW of this generation is committed under long-term contract to third-parties or subject to Reliability Must Run (“RMR”) contracts. LS Power is thus affiliated with generation net of long-term sales in CAISO equivalent to about 7 percent of installed capacity. Because TransAlta owns such a small share (about 0.3 percent) of capacity in CAISO, the extent of business transactions in the same geographic markets clearly is *de minimis*.
  
- In BPAT, a market with approximately 23,000 MW of installed capacity, TransAlta owns 1,662 MW of generation, or 7 percent of installed capacity. 615 MW of generation in BPAT, less than 3 percent of installed capacity, may be attributable to LS Power through its affiliation with Calpine, a *de minimis* amount. Moreover, Calpine has a long-term firm transmission reservation to move 536 MW of the output of its generation in BPAT to the California-Oregon Border (“COB”) and Nevada-Oregon Border (“NOB”). Post-Transaction, LS Power may be attributed up to a 10 percent market share in BPAT, but the extent of business transactions in the same geographic markets with TransAlta clearly is *de minimis* as discussed in more detail below.

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<sup>2</sup> 18 C.F.R. § 33.3(a)(2)(i) (2007).

**Table 1: Generation Owned by LS Power (including Dynegy), Calpine and TransAlta  
(Summer Ratings, US Only)**

Balancing Authority Area	LS Power		Calpine		TransAlta		Total Installed Capacity
	MW Owned	MW Net of LT Sales	MW Owned	MW Net of LT Sales	MW Owned	MW Net of LT Sales	
<b>RTG</b>							
PJM	3,696	2,461	75	57			NA
ISO-NE	944	944	506	506			NA
NYISO	2,694	2,694	355	275	132	42	39,000
MISO	4,410	3,770	2,025	471			NA
ERCOT	-	-	7,235	7,035	114	-	72,000
CAISO	4,038	1,020	5,249	3,041	175	-	56,000
<b>WECC</b>							
BPAT	-	-	615	615	1,662	1,662	23,000
PSCO	-	-	884	-	-	-	NA
NEVP	537	494	-	-	-	-	NA
SRP	580	580	-	-	-	-	NA
WALC	570	-	550	495	-	-	NA
<b>SPP</b>							
CSWS	-	-	1,194	1,194	-	-	NA
MPS	-	-	620	620	-	-	NA
OKGE	-	-	1,144	1,144	-	-	NA
<b>SERC</b>							
EES	-	-	1,932	1,932	-	-	NA
LGEE	495	495	-	-	-	-	NA
DUK	-	-	841	-	-	-	NA
SCEG	-	-	465	465	-	-	NA
SOCO	1,074	159	466	230	-	-	NA
TVA	-	-	2,236	1,612	-	-	NA
<b>FRCC</b>							
TEC	-	-	868	377	-	-	NA
<b>Hawaii</b>							
Hawaii	-	-	-	-	5	-	NA
<b>Total</b>	<b>19,035</b>	<b>12,617</b>	<b>27,259</b>	<b>20,068</b>	<b>2,088</b>	<b>1,704</b>	<b>NA</b>

The Transaction also raises no horizontal issues in markets outside of NYISO, CAISO and BPAT, and, indeed, in all other markets, the effect of the transaction is *de minimis*. LS Power, through its ownership interest in Dynegy and Calpine, has generation throughout the United States, as shown in Table 1 above. However, TransAlta owns generation in only four U.S. mainland markets,<sup>3</sup> the NYISO, CAISO and BPAT markets already addressed, and in Electric Reliability Council of Texas (“ERCOT”), a market that is not jurisdictional to the Commission. In any event,

<sup>3</sup> TransAlta also owns 5 MW of generation in Hawaii. As discussed below, TransAlta also owns generation in Canada and Mexico. None of this ownership alters my conclusion that no competitive concerns are raised by the Transaction.

ERCOT does not raise any competitive issues because TransAlta's share of installed generation in ERCOT (0.2 percent) is *de minimis*.

The Transaction creates no vertical market power issues. There are no issues related either to electric transmission ownership and operation, or to the combination of electric generation assets and fuel supplies or fuel delivery systems. Applicants and their affiliates own no electric transmission assets other than those necessary to connect their generation to the grid. TransAlta also does not own any electric transmission assets other than those necessary to connect their generation to the grid. LS Power has no ownership interest in fuel supplies, fuel transportation systems or other inputs to electricity products in the relevant markets, although an affiliate of Calpine has limited intrastate natural gas operations in Northern California.<sup>4</sup> TransAlta owns two surface coal mines in Alberta, and one in the United States that previously served its Centralia plant in the BPAT balancing authority but is now shut down. To the extent any affiliates of LS Power or TransAlta own or market natural gas that is used as an input in electricity production, Congress and the Commission previously has determined that the gas commodities markets are competitive.<sup>5</sup> There are no other barriers to entry that raise concerns. Neither affiliates of Applicants nor TransAlta has dominant control over generating sites in any relevant market. In short, none of the vertical concerns that the Commission typically considers exists with respect to the Transaction and hence it does not create or enhance vertical market power.

Based upon the analyses I have conducted, summarized above and detailed more fully below, I conclude that the proposed Transaction will not adversely affect competition.

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<sup>4</sup> Calpine Fuels Corporation ("CFC") owns in excess of 400 miles of gathering and transmission pipelines that are used exclusively to supply Calpine's gas-fired facilities. Given that these assets are dedicated to Calpine's use and cannot be used to transport gas for other suppliers, there are no competitive concerns raised by Calpine's ownership of these assets. To the extent any of the Applicants has contracts for firm, interstate or intrastate gas transportation, supply associated with such contracts is committed for use by their gas-fired generating facilities.

<sup>5</sup> Natural Gas Wellhead Decontrol Act of 1989, Pub.L. No. 101-60, 103 Stat. 157 (1989) ("Natural Gas Wellhead Decontrol Act of 1989"); Natural Gas Policy Act of 1978, section 601(a)(1), 15 U.S.C. § 3431 (2000) ("Natural Gas Policy Act of 1978") (deregulating the wellhead price of natural gas); *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations*, Order No. 636, 57 FR 13267 (Apr. 16, 1992), FERC Stats. & Regs. Regulations Preambles January 1991-June 1996 ¶ 30,939 (Apr. 8, 1992) (granting market-based rates for other sales for resale of natural gas).

## DESCRIPTION OF APPLICANTS AND TRANSALTA

### LS Power

LS Power and its affiliates develop independent power projects in the United States. LS Power Equity Partners, a \$4.3 billion investment vehicle focused on the power industry, has purchased and sold a number of power plants in recent years. The Application has a complete description of the relevant LS Power entities.

Through indirect subsidiaries, LS Power currently owns approximately 1,100 MW of generating capacity in the United States (consisting of the West Georgia plant in the Southern Company Services, Inc. ("SOCO") balancing authority and the Apex plant in the Nevada Power Company ("NEVP") balancing authority).<sup>6</sup>

LS Power indirectly owns approximately 40 percent of Dynegy's outstanding voting securities. Dynegy primarily engages in wholesale sales of electricity throughout the United States. Through its various subsidiaries and affiliates, Dynegy owns, leases or operates a diverse portfolio of energy assets, including power plants totaling approximately 19,000 MW of generating capacity. For purposes of my analysis, I have assumed that 100 percent of Dynegy's generating capacity should be attributed to LS Power.

Similarly, LS Power, in conjunction with its affiliate Luminus,<sup>7</sup> owns in excess of 10 percent of Calpine's common stock. Calpine and its affiliates are primarily engaged in the development, ownership, and operation of independent power production facilities and in the wholesale marketing of electricity in the United States. For purposes of my analysis, I have assumed that 100 percent of Calpine's affiliated generating capacity should be attributed to LS Power.

Exhibit JRS-2 provides a list of the generating units deemed affiliated with LS Power, including Dynegy and Calpine.

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<sup>6</sup> LS Power has a pending sale of an additional power plant, Sugar Creek, to Northern Indiana Public Service Company. *Northern Indiana Public Service Company* 122 FERC ¶ 62,183 (2008). I have not included the Sugar Creek facility in my analysis here, but its inclusion would not be relevant since TransAlta does not own any generation proximate to Sugar Creek.

## **Luminus**

Luminus is a Delaware limited liability company, owned by certain trusts of which certain members of the Segal family (not the same as those controlling LS Power) have a beneficial interest. The Application has a complete description of Luminus.

## **TransAlta**

TransAlta is a power generation and wholesale marketing company headquartered in Alberta, Canada. TransAlta operates a portfolio of generation assets in Canada, the United States, Mexico, and Australia. TransAlta has two entities with market-based rate authority: TransAlta Centralia Generation LLC, which owns and operates the Centralia plant located in Washington State, and TransAlta Energy Marketing Corp. (US) ("TEMUS"), which has interests in other U.S.-based generation assets. The Application has a complete description of TransAlta.

Exhibit JRS-2 provides a list of the generating units in North America affiliated with TransAlta.<sup>8</sup>

## **FRAMEWORK FOR THE ANALYSIS**

Market power is the ability of a firm profitably to maintain prices above competitive levels for a significant period of time. Market power analysis of a merger proposal examines whether the merger would cause a material increase in the merging firms' market power or a significant reduction in the competitiveness of relevant markets. The focus is on the effects of the merger, which means that the merger analysis examines those business areas in which the merging firms are competitors. This is referred to as horizontal market power assessment. In most instances, a merger will not affect competition in markets in which the merging firms do not compete. For purposes of my analysis, I treat the proposed Transaction as a merger that will combine the assets attributed to LS Power with those owned and operated by TransAlta. In the context of the proposed Transaction, therefore, the focus is properly on those markets in which LS Power and

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<sup>7</sup> Luminus does not own any other utility assets.

<sup>8</sup> Not included in this exhibit are TransAlta's generation assets in Australia, and two planned generating facilities in Canada, one in New Brunswick and one in Alberta.

TransAlta are actual or potential competitors. The analysis is intended to measure the adverse impact, if any, of the elimination of a competitor as a result of the combination in relevant markets.

Potential vertical market effects of a merger relate to the merging firms' ability and incentives to use their market position over a product or service to affect competition in a related business or market. For example, vertical effects could result if a merger created an opportunity and incentive to operate electric transmission in a manner that created market power for the generation activity of the merged company that did not exist previously. The Commission has identified market power as also arising from dominant control over potential generation sites or over fuel supplies and delivery systems. Such dominant control could undercut the presumption that long-run generation markets are competitive and could injure competition by raising rivals' costs.

Understanding the competitive impact of a merger requires defining the relevant market (or markets) in which the merging firms participate. Participants in a relevant market include all suppliers, and in some instances potential suppliers, who can compete to supply the products produced by the merging parties and whose ability to do so diminishes the ability of the merging parties to increase prices. Hence, determining the scope of a market is fundamentally an analysis of the potential for competitors to respond to an attempted price increase. Typically, markets are defined in two dimensions: geographic and product. Thus, the relevant market is composed of companies that can supply a given product (or its close substitute) to customers in a given geographic area.

In December 1996, the Commission issued Order No. 592,<sup>9</sup> the "Merger Policy Statement," which provides a detailed analytic framework for assessing the horizontal market power arising from electric utility mergers (the Appendix A analysis). This analytic framework is organized around a market concentration analysis. The Commission adopted the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") *Horizontal Merger Guidelines* for

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<sup>9</sup> *Inquiry Concerning the Comm'n's Merger Policy Statement Under the Federal Power Act*, FERC Stats. & Regs. ¶ 31,044 (1996) ("Order No. 592"), *reh'g denied*, 79 FERC ¶ 61,321 (1997) ("Merger Policy Statement").

measuring market concentration levels by the HHI.<sup>10</sup> On November 15, 2000, the Commission issued its Revised Filing Requirements Under Part 33 of the Commission's Regulations,<sup>11</sup> which affirmed the screening approach to mergers consistent with the Appendix A analysis set forth in the Merger Policy Statement, and codified the need to file a Competitive Analysis Screen and the exceptions therefrom. Specifically, the Commission's regulations require a "delivered price test" ("DPT") to measure Economic Capacity, defined as energy that can be delivered into a destination market at a delivered cost less than 105 percent of the destination market price. The screening test also provides for an analysis of Available Economic Capacity, defined as energy over and above that is required to meet native load and other long-term obligations that meets the delivered price test. If a proposed merger raises no horizontal market power concerns (*i.e.*, passes the Competitive Analysis Screen), the inquiry generally is terminated with respect to horizontal market power.

Both the Merger Policy Statement and the Commission's Revised Filing Requirements provide that a screen analysis (or filing of the data needed for the screen analysis) is not required where applicants do not sell products in the same geographic markets or the extent of their business transactions in the same geographic markets is *de minimis*.<sup>12</sup>

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<sup>10</sup> To determine whether a proposed merger requires further investigation because of a potential for a significant anti-competitive impact, the DOJ and FTC consider the level of the HHI after the merger (the post-merger HHI) and the change in the HHI that results from the combination of the market shares of the merging entities. Markets with a post-merger HHI of less than 1000 are considered "unconcentrated." The DOJ and FTC generally consider mergers in such markets to have no anti-competitive impact. Markets with post-merger HHIs of 1000 to 1800 are considered "moderately concentrated." In those markets, mergers that result in an HHI change of 100 points or less are considered unlikely to have anti-competitive effects. Finally, post-merger HHIs of more than 1800 are considered to indicate "highly concentrated" markets. The *Guidelines* suggest that in these markets, mergers that increase the HHI by 50 points or less are unlikely to have a significant anti-competitive impact, while mergers that increase the HHI by more than 100 points are considered likely to reduce market competitiveness. (See U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (April 2, 1992), amended 1997.)

<sup>11</sup> *Revised Filing Requirements Under Part 33 of the Comm'n's Regulations*, FERC Stats. & Regs. ¶ 31,111 (2000) ("Order No. 642"), order on reh'g, 94 FERC ¶ 61,289 (2001).

<sup>12</sup> Order No. 592 at 30,113 provides: ". . . it will not be necessary for the merger applicants to perform the screen analysis or file the data needed for the screen analysis in cases where the merging firms do not have facilities or sell relevant products in common geographic markets. In these cases, the proposed merger will not have an adverse competitive impact (*i.e.*, there can be no increase in the applicants' market power unless they are selling relevant products in the same geographic markets) so there is no need for a detailed data analysis."

The Commission's regulations provide that a Competitive Analysis Screen need not be filed if the applicant "[a]ffirmatively demonstrates that the merging entities do not currently conduct business in the same geographic

## Relevant Product Markets

The Commission generally is concerned with the following relevant product markets: non-firm energy, short-term capacity (firm energy), long-term capacity, and certain ancillary services.<sup>13</sup>

Both Economic Capacity and Available Economic Capacity are used as measures of energy in conducting the DPT. Economic Capacity is the energy from generating capacity owned or controlled by potential suppliers that can be economically delivered to the destination market. Available Economic Capacity is economic capacity in excess of that required to meet native load and other long-term obligations. Under both measures, capacity that is attributed to a market participant is that capacity controlled by it that can reach the destination market, taking transmission constraints and costs into account, at a price no higher than 105 percent of the destination market price.

The Commission's current policy does not specify required analyses of capacity markets as such. The Commission has determined that long-term capacity markets are presumed to be competitive, unless special factors exist that limit the ability of new generation to be sited or receive fuel.<sup>14</sup>

Insofar as ancillary services are concerned, the Commission's regulations require an analysis of relevant ancillary services markets (specifically, spinning and non-spinning reserves and imbalance energy) "when the necessary data are available."<sup>15</sup>

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markets or that the extent of the business transactions in the same geographic markets is *de minimis*." 18 C.F.R. § 33.3(a)(2)(i).

<sup>13</sup> See 18 C.F.R. § 33.3(c)(1).

<sup>14</sup> The market for long-term capacity generally does not need to be analyzed because the Commission has concluded as a generic matter that the potential for entry ensures that the long-term capacity market is competitive. See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, FERC Stats. & Regs., ¶ 31,036 at 31,657 (1996); see also *Atlantic City Elec. Co.*, 80 FERC ¶ 61,173 (1997) (finding that the merger "will not affect competition in the long-term capacity market" in light of "an analysis showing that there are no barriers to entry to the long-term capacity market and that Applicants would be unable to erect and maintain any barriers to entry"). The presumption that long-term capacity markets are competitive can be overcome if the applicants have dominant control over power plant sites or fuel supplies and delivery systems. This exception is addressed below.

<sup>15</sup> Order No. 642 at 31,884.

### **Relevant Geographic Markets**

Traditionally, the Commission has defined the relevant geographic markets as centered on the applicants and, for transmission-owning entities, on control areas (now balancing authority areas) directly interconnected with the applicants (*i.e.*, first-tier control areas). Both Order No. 592 and the Revised Filing Requirements continue to define the relevant geographic market in terms of control areas (or destination markets) in which applicants control generation and first-tier destination markets.<sup>16</sup> Further, in a merger context, the Commission considers as potential additional destination markets other entities that historically have been customers of the applicants.<sup>17</sup>

## **IMPACT OF THE TRANSACTION ON COMPETITION**

### **Horizontal Market Power**

Consistent with the guidance in the *Merger Policy Statement* and the Revised Filing Requirements, I examined the relevant markets in which LS Power (and generation affiliated with LS Power) and TransAlta both own or control generation. The results of this analysis are summarized in Table 2 below.

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<sup>16</sup> Order No. 592 at 30,119; 18 C.F.R. § 33.3(c)(2).

<sup>17</sup> 18 C.F.R. § 33.3(c)(2).

**Table 2: U.S. Markets in Which LS Power and TransAlta Own or Control Generation**

Balancing Authority Area	Presumed Ownership/Control of Generation Assets		Overlap ( <i>de minimis</i> )
	LS Power	TransAlta	
PJM	✓		
ISO-NE	✓		
NYISO	✓	✓	✓
MISO	✓		
CAISO	✓	✓	✓
ERCOT	✓	✓	✓
BPAT	✓	✓	✓
PSCO	✓		
CSWS	✓		
MPS	✓		
OKGE	✓		
EES	✓		
DUK	✓		
SCEG	✓		
TVA	✓		
TEC	✓		
NEVP	✓		
SRP	✓		
LGEE	✓		
SOCO	✓		
WALC	✓		
Hawaii		✓	

As shown in Table 2, there are 21 markets in which LS Power is deemed to be affiliated with generation: PJM Interconnection, LLC (“PJM”), ISO New England Inc. (“ISO-NE”), NYISO, Midwest Independent Transmission System Operator, Inc. (“MISO”), CAISO, ERCOT, BPAT, Public Service Company of Colorado (“PSCO”), Central and Southwest Services (“CSWS”), Aquila Networks – MPS (“MPS”), Oklahoma Gas & Electric (“OKGE”), Entergy Services, Inc. (“EES”), Duke Power Company (“DUK”), South Carolina Electric & Gas Company (“SCEG”), Tennessee Valley Authority (“TVA”), Tampa Electric Company (“TEC”), NEVP, Salt

River Project (“SRP”),<sup>18</sup> LG&E Energy Transmission Services (“LGEE”), SOCO, and Western Area Power Administration – Lower Colorado (“WALC”). TransAlta owns generation in only four of these markets: NYISO, CAISO, ERCOT and BPAT, as well as in Hawaii.

I demonstrate affirmatively below that the extent of business transactions in these common markets is *de minimis*, and hence no full Competitive Screen Analysis is required.

**NYISO**

In NYISO, LS Power is deemed to be affiliated with 2,694 MW of generation owned by Dynegy and 355 MW owned by Calpine. TransAlta owns a 37.5 percent share in the Saranac Facility (240 MW in total, 90 MW share), all of which is committed under long-term contract, and owns Binghamton Cogeneration (42 MW).<sup>19</sup> NYISO has about 39,000 MW of installed generation,<sup>20</sup> and hence TransAlta’s 0.3 percent market share is *de minimis*. The HHI change, based on installed capacity is only 5 points, providing further evidence that the extent of business transactions in the same market is *de minimis*. The combined share of LS Power and TransAlta is about 8 percent. See Table 3 below. Inclusion of imports would further reduce the respective shares.

**Table 3: Effect of Transaction in NYISO**

	MW	Share
LS Power Affiliates	3,049	7.80%
TransAlta	132	0.34%
Other	35,927	91.87%
Total	39,108	100.00%
HHI Change: 5		

<sup>18</sup> Dynegy’s Arlington Valley facility is located in the DECA, LLC - Arlington Valley (“DEAA”) balancing authority, which is a generating-only balancing authority consisting solely of the Arlington Valley facility. DEAA is directly interconnected to the SRP balancing authority, so I treat the unit as located in the SRP area.

<sup>19</sup> I understand that TransAlta is in the process of selling Binghamton Cogeneration.

<sup>20</sup> NYISO’s 2007 Load and Capacity Data.  
[http://www.nyiso.com/public/webdocs/services/planning/planning\\_data\\_reference\\_documents/2007\\_GoldBook\\_PUBLIC.pdf](http://www.nyiso.com/public/webdocs/services/planning/planning_data_reference_documents/2007_GoldBook_PUBLIC.pdf)

## CAISO

In CAISO, LS Power is deemed to be affiliated with 4,036 MW of generation owned by Dynegy and 5,249 MW owned by Calpine. However, approximately 3,000 MW of Dynegy's generation and 2,200 MW of Calpine's generation is committed under long-term contracts or RMR agreements. Thus, only approximately 4,000 MW of generation deemed to be affiliated with LS Power in CAISO is available to compete in the market. TransAlta owns 175 MW in CAISO, consisting of a 149 MW share of generation located in the Imperial Irrigation District balancing authority (located within CAISO), plus 26 MW located in the Arizona Public Service Company ("AZPS") balancing authority area but dynamically scheduled into the CAISO. All of TransAlta's generation in CAISO is committed under long-term contracts. CAISO has about 56,000 MW of installed generation,<sup>21</sup> and hence TransAlta's 0.3 percent market share is *de minimis*. The HHI change, based on installed capacity (and ignoring long-term commitments) is only 10 points, providing further evidence that the extent of business transactions in the same market is *de minimis*.<sup>22</sup> See Table 4 below. Inclusion of imports would further reduce the respective shares.

Table 4: Effect of Transaction in CAISO

	MW	Share
LS Power Affiliates	9,284	16.53%
TransAlta	175	0.31%
Other	46,706	83.16%
Total	56,165	100.00%
HHI Change: 10		

## BPAT

In BPAT, LS Power is deemed to be affiliated with 615 MW of generation owned by Calpine, and TransAlta owns 1,662 MW of generation. BPAT has about 23,000 MW of installed

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<sup>21</sup> *Master CAISO Control Area Generating Capability List*, as of January 15, 2008, <http://www.caiso.com/14d4/14d4c6c961cc0.xls>

<sup>22</sup> If I had taken into account the long-term commitments with respect to the generation deemed to be affiliated with LS Power, its share of installed capacity in CAISO falls to 7 percent.

generation,<sup>23</sup> and LS Power's 2.7 percent market share is *de minimis*. The HHI change, based on installed capacity is only 39 points (see Table 5 below), within the safe harbor threshold, but substantially overstating the effect of the transaction as discussed below. In any event, the post-Transaction share is below 10 percent.

**Table 5: Effect of the Transaction in BPAT**

	MW	Share
LS Power Affiliates	615	2.69%
TransAlta	1,662	7.26%
Other	20,621	90.06%
Total	22,898	100.00%
HHI Change: 39		

The effect of the Transaction in BPAT is overstated based on the foregoing analysis for the following reasons. First, import capability into BPAT and the Pacific Northwest is quite extensive, on the order of 11,000 to 12,000 MW.<sup>24</sup> Including this import capability reduces LS Power's market share to 1.8 percent, TransAlta's market share to 4.9 percent, and hence the combined post-Transaction market share to less than 7 percent and the HHI change to 18 points. Second, arguably, the U.S. portion of the Northwest Power Pool ("NWPP") is a more relevant geographic market to consider in the context of generation in BPAT. The NWPP is comprised of multiple small balancing authorities, plus BPAT with its extensive transmission system that facilitates the delivery of power from the hydro systems to loads throughout the NWPP. Additionally, BPAT is home of the liquid trading point at Mid-Columbia ("Mid-C") where much of the wholesale sales activity in the Pacific Northwest is transacted. As shown in Table 6 below, NWPP has about 48,000 MW of installed generation,<sup>25</sup> and hence LS Power's 1.3 percent market share is *de minimis*. The HHI change, based on installed capacity is only 9 points, providing further evidence that the extent of

<sup>23</sup> Based on data reported in *WECC Existing Generation and Significant Additions and Changes to System Facilities, 2005 - 20015, July 2006*.

<sup>24</sup> Based on WECC Adverse Operational Transfer Capability ("OTC"), *WECC 2006 Power Supply Assessment*, May 9, 2006, <http://www.wecc.biz/modules.php?op=modload&name=Downloads&file=index&req=viewsdownload&sid=56>.

business transactions in the same market is *de minimis*, and the post-Transaction market share is below 5 percent.

**Table 6: Effect of Transaction in U.S. NWPP**

	MW	Share
LS Power Affiliates	615	1.27%
TransAlta	1,662	3.43%
Other	46,212	95.30%
Total	48,489	100.00%
HHI Change: 9		

Additionally, Calpine has a long-term firm transmission reservation to move 536 MW of the output of its generation in BPAT to COB and NOB, suggesting that its participation is likely to be oriented toward CAISO. I also reviewed data in the Electric Quarterly Reports (“EQR”) of the relevant power marketing arms of TransAlta (TEMUS) and LS Power’s deemed affiliate (Calpine Energy Services). In 2007, both entities report sales at the BPAT point of delivery. Sales reported by TEMUS are to a number of different buyers where the specific point of delivery location is noted as being in BPAT (but not Mid-C). However, nearly all of the sales reported by Calpine Energy Services, specify a specific delivery location of either Mid-C or “COB N/S”, suggesting that these sales are not remaining in BPAT and hence Calpine may not be competing directly with TransAlta. This further supports my conclusion that the extent of business transactions in the same geographic market (BPAT) is *de minimis*.

**Other Markets**

In ERCOT, TransAlta owns 114 MW of generation. ERCOT’s installed generation is 72,000 MW,<sup>26</sup> and hence TransAlta’s market share clearly is *de minimis*.

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<sup>25</sup> NERC’s 2007 Long-term Reliability Assessment (2007-2016), October 2007. [ftp://www.nerc.com/pub/sys/all\\_updl/docs/pubs/LTRA2007.pdf](ftp://www.nerc.com/pub/sys/all_updl/docs/pubs/LTRA2007.pdf)

<sup>26</sup> Report on the Capacity, Demand, and Reserves in the ERCOT Region, System Planning, December 2007, Summer Assessment Update <http://oldercot.ercot.com/tmaps/ListMaps.cfm?GroupID=36> (Password needed).

TransAlta owns approximately 500 MW in Mexico (see Exhibit JRS-2), but I understand that the two generating plants do not participate in U.S. markets and are in the process of being sold to InterGen Global Ventures B.V.

TransAlta owns approximately 5,600 MW of generation in Canada, consisting of approximately 700 MW located in Independent Electricity System Operator (“IESO”) in Ontario, approximately 4,900 MW located in the Alberta Electric System Operator (“AESO”), and 55 MW in Saskatchewan. The IESO is directly interconnected to NYISO and MISO, but TransAlta’s share of installed generation in IESO is only about 2 percent,<sup>27</sup> sufficiently small that no concerns should be raised of the effect of the Transaction on competition in NYISO and MISO where LS Power is deemed to be affiliated with generation. AESO is two wheels away from BPAT and three wheels from CAISO, and competes with generation located in the British Columbia Transmission Corporation balancing area for export into the United States.

#### **Vertical Market Power**

The Transaction does not raise any competitive concerns with regard to vertical market power.

First, there are no electric transmission market power concerns raised by the Transaction. Neither LS Power nor its deemed affiliates, nor TransAlta, is affiliated with an electric utility with a franchised service territory. Likewise, LS Power and TransAlta own no transmission facilities other than those necessary to interconnect their generation to the transmission grid.

Second, the Commission also considers whether applicants have the ability to erect barriers to entry by other suppliers in terms of such things as 1) control of sites for new capacity development other than those that may exist at the sites being acquired; 2) control of fuel inputs to generation; and 3) control of any equipment suppliers or facilities used to transport fuels or other inputs to generation.

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<sup>27</sup> Ontario Power Generation has about 22,000 MW of generation in IESO (<http://www.opg.com/power/>) and represents about 70 percent of total generation in IESO. ([http://www.ieso.ca/imoweb/siteShared/power\\_system.asp?sid=ic](http://www.ieso.ca/imoweb/siteShared/power_system.asp?sid=ic))

Neither LS Power nor TransAlta have dominant control over generating sites in any relevant market.

LS Power does not have any ownership interest in fuel supplies, fuel transportation systems or other inputs to electricity products in the relevant markets, although, as noted earlier, Calpine is affiliated with intrastate gathering and transmission pipelines in California that are used exclusively to supply Calpine's gas-fired facilities. Given that these assets are dedicated to Calpine's use and cannot be used to transport gas for other suppliers, there are no competitive concerns raised by Calpine's ownership of these assets. TransAlta owns two surface coal mines in Alberta, and one in the United States that previously served its Centralia plant in the BPAT balancing authority but has since been shut down. To the extent LS Power affiliates or TransAlta have contracts for firm, interstate or intrastate gas transportation, supply associated with such contracts is committed for use in their gas-fired generating facilities. There are no other barriers to entry that raise concerns. Thus, none of the vertical concerns that the Commission typically considers exists here and hence the Transaction do not create or enhance vertical market power.

## **CONCLUSION**

The market power analyses discussed herein demonstrate that the Transaction will not have anti-competitive effects in any relevant market. No other relevant concerns exist with respect to competition issues.

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

LS Power Development, LLC )  
Luminus Management, LLC )

Docket No. EC08-\_\_-000

AFFIDAVIT

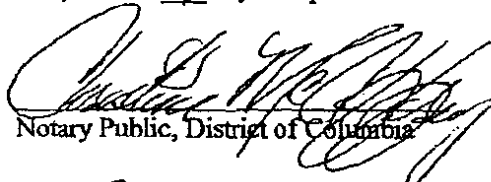
District of Columbia

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JULIE R. SOLOMON being duly sworn, deposes and states: that she prepared the Affidavit and Exhibits of Julie R. Solomon and that the statements contained therein and the Exhibits attached hereto are true and correct to the best of her knowledge and belief.

  
Julie R. Solomon

SUBSCRIBED AND SWORN TO BEFORE ME, this the 4 day of April 2008.

  
Notary Public, District of Columbia

Printed Name: Christine McCaffrey  
My Commission Expires: October 14, 2012

CHRISTINE McCAFFREY  
NOTARY PUBLIC  
DISTRICT OF COLUMBIA  
My Commission Expires  
October 14, 2012



UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

LS Power Development, LLC ) Docket No. EC08-\_\_\_\_-000  
Luminus Management, LLC )

AFFIDAVIT OF JULIE R. SOLOMON

INTRODUCTION

My name is Julie R. Solomon. I am a Vice President at CRA International, Inc. (“CRA”). My business address is 1201 F Street, N.W., Suite 700, Washington, DC 20004-1204. A large portion of my consulting activities involves electric utility industry restructuring and the transition from regulation to competition. I have been involved extensively in consulting on market power issues concerning mergers, other asset transactions and market-based rate applications. I have filed a number of affidavits before the Federal Energy Regulatory Commission (“Commission”) in connection with electric utility mergers, the purchase and sale of jurisdictional assets, applications for market-based rates, and triennial updates. My resume is attached as Exhibit JRS-1.

I have been asked by counsel for LS Power Development, LLC (“LS Power”) and Luminus Management, LLC (“Luminus”, and together with LS Power, the “Applicants”) to evaluate the potential competitive impact on electricity markets of a transaction under which Applicants increase their equity share in Calpine Corporation (“Calpine”) in excess of 20 percent (the “Transaction”). The Commission previously approved Applicants’ request to own, collectively, up to 20 percent of Calpine’s common stock.<sup>1</sup> The instant request is to allow ownership up to 40 percent. As discussed herein, I previously submitted testimony in connection with Applicants’

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<sup>1</sup> *Calpine Corporation and Its Public Utility Subsidiaries et al.*, 122 FERC ¶ 62,238 (2008) (“Calpine Order”).

prior acquisition of the common stock of Calpine<sup>2</sup> and their proposed acquisition of the common stock of TransAlta Corporation (“TransAlta”).<sup>3</sup>

My affidavit considers the potential horizontal and vertical market power effects of the Transaction. The potential horizontal market power effects are those arising from the assumed combination of the electric generating assets owned or controlled by LS Power and, for the purposes of this analysis, its assumed affiliates, including Calpine,<sup>4</sup> which theoretically could enable Applicants to increase prices in the electricity market. The potential vertical market power effects arise from barriers to entry that might undercut the presumption that long-run generation markets are competitive and, more generally, the potential to use control over fuel supplies, fuel transportation facilities, or electric transmission to exert vertical market power by increasing rivals’ costs.

#### **SUMMARY OF CONCLUSIONS**

My analysis indicates that the Transaction does not raise competitive concerns and does not require any detailed analysis above and beyond that accepted by the Commission in the Calpine Order.

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<sup>2</sup> *Id.* and Affidavit of Julie R. Solomon on behalf of Calpine and its jurisdictional public utility subsidiaries in Docket No. EC08-39, January 22, 2008 (“January 22<sup>nd</sup> Calpine Affidavit”).

<sup>3</sup> Affidavit of Julie R. Solomon on behalf of LS Power and Luminus in Docket No. EC08-67, April 8, 2008 (“April 8<sup>th</sup> TransAlta Affidavit”).

<sup>4</sup> For purposes of this analysis I have assumed that LS Power should be attributed (i) Dynegey Inc.’s (“Dynegey”) generation assets by virtue of the ownership of approximately 40 percent of Dynegey’s outstanding Class B common stock by certain LS Power affiliates such that Dynegey and its subsidiaries can be regarded as “affiliates” of LS Power; and (ii) TransAlta generation assets by virtue of the proposed ownership of up to 20 percent of TransAlta’s common stock by certain LS Power and Luminus affiliates such that TransAlta and its subsidiaries can be regarded as “affiliates” of Applicants. The proposal to acquire up to 20 percent of TransAlta’s common stock is pending before the Commission in Docket No. EC08-67. In addition, as discussed below, Calpine’s generation assets (including those owned by its affiliates, Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P., collectively “Harbinger”) have already been attributed to Applicants by virtue of the ownership of in excess of 20 percent of Calpine’s common stock by certain LS Power and Luminus affiliates such that Calpine and its subsidiaries can be regarded as “affiliates” of Applicants.

The Commission previously authorized the transaction under which Applicants could purchase up to 20 percent of Calpine's common stock.<sup>5</sup> The premise of the market power analysis conducted in connection with that prior transaction was that the interests in Calpine held by LS Power and Luminus were treated as though LS Power and Luminus became affiliates of Calpine. In other words, for purposes of the previous market power analysis, it was conservatively assumed that in acquiring 20 percent of Calpine's common stock, LS Power and Luminus were, in effect, acquiring control over Calpine. Thus, any increase in Applicants' investment in Calpine has, in effect, already been taken into account in the previous analysis.<sup>6</sup> Since the prior analysis assumed a transaction that resulted in Applicants being attributed 100 percent of Calpine's generation, there is no material change resulting from the instant Transaction.

Since the Commission approved the acquisition of Calpine securities, LS Power and Luminus filed an application seeking approval to acquire up to 20 percent of the common stock of TransAlta. In seeking such approval, Applicants again assumed for purposes of the market power analysis that they were affiliated with Calpine (*i.e.*, they were under common control) and that the acquisition of common stock in TransAlta put TransAlta's generation under common control with LS Power, Calpine, Harbinger and Dynegy. The application remains pending before the Commission and, hence, Applicants have not yet acquired in excess of 10 percent of TransAlta's common stock. As I discuss below, and as demonstrated in an affidavit I submitted in connection with that pending application,<sup>7</sup> the affiliation of TransAlta with LS Power does not raise market power concerns. Moreover, the analysis relevant to the proposed acquisition of TransAlta stock does not change as a result of the instant Application to acquire additional Calpine common stock.

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<sup>5</sup> Calpine Order. The distribution of shares was consummated on March 19, 2008.

<sup>6</sup> See January 22<sup>nd</sup> Calpine Affidavit and Calpine Order.

<sup>7</sup> April 8<sup>th</sup> TransAlta Affidavit.

## ANALYSIS

### *Prior Acquisition of Calpine Common Stock*

As noted in my January 22<sup>nd</sup> Calpine Affidavit in connection with Applicants' acquisition of up to 20 percent of Calpine's common stock, "I have assumed, for purposes of this analysis, that the Transaction would convey 'control' over Calpine to LS Power such that the Transaction could be regarded as resulting in a combination of their respective assets."<sup>8</sup> The Commission acknowledged this approach as well: "Applicants state that, out of abundance of caution, the collective ownership interests in Calpine held by LSP Development and Luminus are treated as though LSP Development and Luminus are affiliates...Applicants ask that the Commission assume such affiliation without ruling on this question."<sup>9</sup> On the basis of the application (and with no protests filed), the Commission concluded that the transaction was consistent with the public interest and, hence, authorized the transaction.<sup>10</sup>

Given the basis for the approval of the prior transaction (*i.e.*, the assumption that LS Power and Luminus were obtaining "control" over Calpine), in the absence of any material change in circumstances no further analysis should be required to reach the conclusion that the acquisition of an additional share of Calpine stock raises no market power issues.

### *Changes in Circumstance Since March 2008*

To the best of my knowledge, there have been no material changes in the market facts on which I relied in conducting the analysis presented in my January 22<sup>nd</sup> Calpine Affidavit. I identified the following changes in Applicants' affiliated owned or controlled generation of which I am aware, none of which would materially affect my prior analysis:

- Dynegy closed on the sale of the 825 MW (summer rating) Rolling Hills generating facility located in PJM Interconnection, LLC ("PJM").

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<sup>8</sup> January 22<sup>nd</sup> Calpine Affidavit at note 2.

<sup>9</sup> Calpine Order at 1-2 (footnote omitted).

<sup>10</sup> *Id.* at 8 and Ordering Paragraph (1).

- Calpine signed a three-year contract, effective January 1, 2009, with the Tennessee Valley Authority (“TVA”) to sell 500 MW of output from its 749 MW (summer rating) Morgan Energy Center located in the TVA balancing authority area. Calpine also signed a five and a half-year contract, effective July 1, 2009, with a group of Georgia electric cooperatives to sell the full output of its 236 MW (summer rating) Santa Rosa Energy Center located in the Southern Company Services, Inc. (“SOCO”) balancing authority area.
- Harbinger is in the process of selling its affiliated 1,146 MW (summer rating) Redbud facility located in the Oklahoma Gas & Electric (“OKGE”) balancing authority area to a third-party.<sup>11</sup>
- As already noted, LS Power and Luminus filed an application seeking approval to acquire up to 20 percent of the common stock of TransAlta.<sup>12</sup>

Of these changes, only the proposed TransAlta investment has the potential to materially affect the previous analysis upon which the Commission relied in the Calpine Order. The other changes involve the sale of generation or the sale of output of generators, and hence merely reduce the generation portfolio assumed to be under common ownership.

***Proposed Acquisition of 20 Percent Share of TransAlta***

As I demonstrated in my April 8<sup>th</sup> TransAlta Affidavit, from a starting point in which Applicants already were assumed to have common ownership with the generation of Dynegy, Calpine and Harbinger, the horizontal effect of the addition of generation owned by TransAlta would be *de minimis*.

- Approximately 80 percent of TransAlta’s U.S. fleet of 2,100 MW of generation, 1,662 MW, is located in the balancing authority of the Bonneville Power Administration (“BPAT”), where LS Power owns no generation but Calpine owns 615 MW of generation. As I demonstrated, TransAlta’s share of installed capacity in BPAT is 7 percent, Calpine’s is less than 3 percent, and Calpine has a long-term transmission reservation to move 536 MW of its generation in BPAT to the California-Oregon Border (“COB”) and Nevada-Oregon Border

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<sup>11</sup> This facility was included in my prior analysis as if owned by Calpine. The sale was approved by the Commission in *Oklahoma Gas and Electric Company and Redbud Energy LP*, 124 FERC ¶ 61,239 (2008).

<sup>12</sup> *Joint Application of LS Power Development, LLC and Luminus Management, LLC*, Docket No. EC08-67, filed April 8, 2008 and supplemented April 17, May 13, July 1, and July 30, 2008.

("NOB"). I concluded that the extent of business transactions in the same geographic market clearly is *de minimis*.

- In the New York Independent System Operator Inc. ("NYISO"), where TransAlta owns 132 MW of generation, approximately 3,000 MW of generation may be attributable to LS Power through its affiliation with Dynegy and Calpine. Because TransAlta owns such a small share (0.3 percent) of capacity in NYISO, the extent of business transactions in the same geographic market clearly is *de minimis*.
- In the California Independent System Operator Corporation ("CAISO"), TransAlta owns 175 MW of generation, all of the output of this generation is committed under long-term contract to third-parties, and, in any event, represents a *de minimis* amount of generation in CAISO. LS Power is affiliated with generation net of long-term sales in CAISO equivalent to about 7 percent of installed capacity in CAISO. Because TransAlta owns such a small share (about 0.3 percent) of capacity in CAISO, the extent of business transactions in the same geographic market clearly is *de minimis*.<sup>13</sup>

I also demonstrated that there were no vertical market power issues raised by the proposed acquisition by LS Power and Luminus of TransAlta shares and, hence, concluded that the proposed transaction would not adversely affect competition.

Although the Commission has not yet approved the LS Power/Luminus application to acquire the shares of TransAlta, the instant Application has no effect on the pending application concerning TransAlta (because the pending application already assumed that Applicants, in effect, "controlled" all of the affiliated Dynegy, Calpine and Harbinger generation). The Commission presumably will make the determination with respect to LS Power's and Luminus's acquisition of TransAlta common stock from the same base facts – *i.e.*, Applicants assumed to have common ownership with the generation of Dynegy, Calpine and Harbinger – whether or not Applicants' investment share of Calpine is 20 percent or 40 percent.

Similarly, the pending application concerning TransAlta has no effect on the instant Application (because I already demonstrated in my April 8<sup>th</sup> TransAlta Affidavit that the addition

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<sup>13</sup> TransAlta also owns 114 MW of generation in Electric Reliability Council of Texas ("ERCOT"), where Calpine also owns generation. Since TransAlta's generation represents less than 0.2 percent share of installed generation in ERCOT, the extent of business transactions in the ERCOT market also is *de minimis*.

of TransAlta's generation to a portfolio that included all of Calpine's generation as well as that owned by LS Power, Dynegy and Harbinger did not raise market power concerns). Based on the relevant facts, the Commission's inquiry in connection with the instant Application should start with the assumption that Applicants already have common ownership with the generation of Dynegy, Calpine and Harbinger by virtue of their 20 percent investment in Calpine. Thus, the increase in LS Power's and Luminus's share of Calpine common stock has no incremental effect.

To the extent LS Power or Luminus were to acquire shares in excess of 10 percent in other generation-owning companies, my understanding is that a separate application under Section 203 of the Federal Power Act would be filed with the Commission, including the requisite competitive analysis.

For all these reasons, I conclude that the proposed increase in LS Power's and Luminus's share of Calpine common stock has no additional competitive effects that have not already been reviewed and accepted by the Commission.

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

LS Power Development, LLC )  
Luminus Management, LLC )

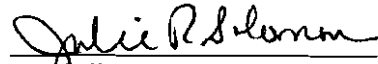
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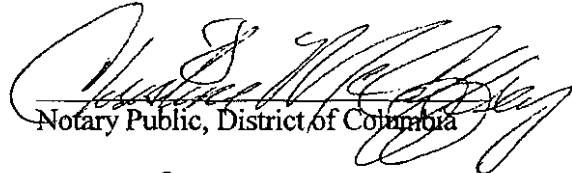
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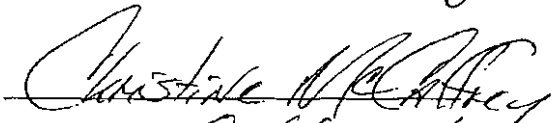
JULIE R. SOLOMON being duly sworn, deposes and states: that she prepared the Affidavit and Exhibits of Julie R. Solomon and that the statements contained therein and the Exhibits attached hereto are true and correct to the best of her knowledge and belief.

  
Julie R. Solomon

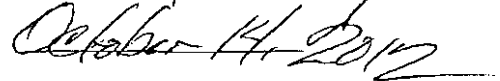
SUBSCRIBED AND SWORN TO BEFORE ME, this the 24 day of September 2008.

  
Notary Public, District of Columbia

Printed Name:



My Commission Expires:



CHRISTINE McCAFFREY  
NOTARY PUBLIC  
DISTRICT OF COLUMBIA  
My Commission Expires  
October 14, 2012

