

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:     **Robert Pitofsky, Chairman**  
                          **Sheila F. Anthony**  
                          **Mozelle W. Thompson**  
                          **Orson Swindle**  
                          **Thomas B. Leary**

_____	)	
In the Matter of	)	
	)	
<b>Entergy Corporation,</b>	)	
a corporation,	)	
	)	<b>C-3998</b>
and	)	
	)	
<b>Entergy-Koch, LP,</b>	)	
a limited partnership.	)	
_____	)	

**DECISION AND ORDER**

The Federal Trade Commission ("Commission") having initiated an investigation of the formation of Respondent Entergy-Koch, LP, by Respondent Entergy Corporation and Koch Industries, Inc. ("Koch"), and Respondents having been furnished thereafter with a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Koch and Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Contribution Agreement for Entergy-Koch, LP, dated as of May 26, 2000, as amended and restated effective January 31, 2001, between Koch Energy, Inc., Koch Industries International Limited, Entergy Power International Holdings Corporation, EK Holding I, LLC, EK Holding II, LLC, and Entergy Trading & Marketing, Limited, if consummated, would violate Section 5 of the Antitrust Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional finding and issues the following Decision and Order (“Order”):

- a. Respondent Entergy is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 639 Loyola Avenue, New Orleans, Louisiana 70113.
- b. Koch is a privately held corporation organized, existing and doing business under and by virtue of the laws of Kansas, with its office and principal place of business located at 4111 East 37th Street North, Wichita, Kansas 67220.
- c. Respondent EKLP is a limited partnership, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 20 East Greenway Plaza, Houston, Texas 77046.
- d. The Antitrust Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents and the proceeding is in the public interest.

## ORDER

### I.

**IT IS ORDERED** that, as used in this Order, the following definitions shall apply:

- A. “Entergy” means Entergy Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Entergy Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. “Koch” means Koch Industries, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Koch Industries, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “EKLP” means the limited partnership, currently known as Entergy-Koch, LP, that is to be formed pursuant to the Contribution Agreement for Entergy-Koch, LP, dated as of May 26, 2000, as amended and restated effective January 31, 2001, between Koch Energy, Inc., Koch Industries International Limited, Entergy Power International Holdings Corporation, EK Holding I, LLC, EK Holding II, LLC, and Entergy Trading & Marketing, Limited, and was the subject of a June 21, 2000, application before FERC, Docket No. EC00-106-000. EKLP shall include directors, officers, employees, agents and representatives, predecessors, successors, and assigns of EKLP; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by EKLP (including Gulf South or any of its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Gulf South), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. EKLP shall not include any Person who acquires any share capital, equity or other ownership interest in Gulf South Pipeline or in any particular segment of the Gulf South Pipeline if: (a) that Person has no share capital, equity or other ownership interest, direct or indirect, in Entergy; and (b) Entergy has no share capital, equity or other ownership interest, direct or indirect, in that Person.
- D. “Commission” means the Federal Energy Regulatory Commission.
- E. “Covered Facility” means any electric power generating facility (or any portion thereof) or local natural gas distribution facility that:
1. uses, distributes, stores, or transports natural gas; and
  2. is owned (partially or wholly, directly or indirectly), operated, or controlled by an Entergy subsidiary that is subject to a State Regulator's rules governing the recovery of the cost of buying the Relevant Product.
- Covered Facility shall also include any facility (or any portion thereof) at which an Entergy subsidiary subject to regulation by any State Regulator has a contractual right to store natural gas.
- F. “Daily Purchases” means any contract to purchase the Relevant Product having an initial term of:
1. twenty-four (24) hours; or

2. forty-eight (48) hours if the purchase is for a holiday and the following business day; or
  3. seventy-two hours (72) if the purchase is for Saturday, Sunday, and Monday; or for a holiday that precedes and/or follows a weekend.
- G. “EBB” means electronic bulletin board.
- H. “Entergy-Website” means an address on the worldwide web owned, operated or controlled by Entergy, currently located at [www.entergy.com](http://www.entergy.com).
- I. “FERC” means the Federal Energy Regulatory Commission.
- J. “Force Majeure Event” means an event or occurrence or circumstance beyond the reasonable control of, and without the fault or negligence of, Entergy, which may include acts of God, labor disputes (including strikes), floods, earthquakes, storms, fires, lightning, epidemics, wars, riots, civil disturbances, sabotage, acts of public enemy, explosions, curtailments, orders, regulations or restrictions imposed by governmental, military, or lawfully established civilian authorities, or any other event or cause which is beyond Entergy's reasonable control. A Force Majeure Event does not include an act of negligence or intentional wrongdoing.
- K. “Gulf South” means the Gulf South Pipeline Company, LP (formerly known as Koch Gateway Pipeline Company), which currently owns Gulf South Pipeline.
- L. “Gulf South Pipeline” means the pipeline that was formerly known as the Koch Gateway pipeline. Gulf South Pipeline is an interstate natural gas pipeline running through parts of the states of Texas, Louisiana, Mississippi, Alabama and Florida and is being contributed to EKLP.
- M. “Implementation Trustee” means any Person appointed by the Commission pursuant to Paragraph III. of this Order.
- N. “Long-Term Purchases” means any contract to purchase the Relevant Product having an initial term longer than three (3) months.
- O. “Person” means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- P. “Relevant Product” means natural gas delivered to a Covered Facility or Transportation to a Covered Facility.

- Q. “Relevant Product Specifications” means the terms included in an agreement to buy Relevant Product, which may include, but are not limited to, average daily and maximum daily volumes required; the duration of requirement; delivery pressure; type of service (types of services are often referred to in the industry as “firm,” “no-notice,” or “interruptible”); the priority of gas supply or transportation in the event of a disruption; the right to vary the volume taken during any day; the location(s) of the receipt and delivery points, including the need to take natural gas at multiple delivery points; and the procedures that determine the time at which a shipper must identify the amount of gas that is to be delivered and received at particular points (sometimes referred to as nomination procedures).
- R. “Respondents” means Entergy and EKLP, individually and collectively.
- S. “RFP” means a written request for proposal to sell Relevant Product, which shall, for the purpose of complying with the terms of this Order, include at least the following information:
1. the criteria that suppliers of Relevant Product must satisfy to be eligible for consideration; and
  2. the Relevant Product Specifications, as reviewed by the Implementation Trustee.
- T. “Short-Term Purchases” means any contract to purchase the Relevant Product having an initial term longer than Daily Purchases and less than or equal to three (3) months.
- U. “State Regulators” means the Mississippi Public Service Commission, the Louisiana Public Service Commission, and the Council of the City of New Orleans.
- V. “Transaction Date” means the date upon which Entergy obtains any interest, direct or indirect, in Gulf South Pipeline.
- W. “Transportation” means the movement of natural gas by pipeline and includes storage, exchange, backhaul and displacement.

**II.****IT IS FURTHER ORDERED** that:

- A. Entergy and EKLP shall:
1. comply with Paragraph II.C. of this Order within fifteen (15) business days of the later of the Transaction Date or the date on which the Commission accepts the Consent Agreement, excluding Paragraphs II.C.2.f. and II.C.3.d. of this Order;
  2. comply with Paragraphs II.C.2.f. and II.C.3.d. of this Order within forty-five (45) business days of the later of the Transaction Date or the date on which the Commission accepts the Consent Agreement;
  3. begin to implement all other terms of Paragraph II. of this Order upon the later of the Transaction Date or the date on which the Commission accepts the Consent Agreement;
  4. provide a copy of this Order to the officers and directors of Entergy and EKLP, to the employees of Entergy responsible for the purchase of Relevant Product, and to the employees of EKLP responsible for direct marketing to Covered Facilities, within ten (10) days of the later of the Transaction Date or the date on which the Commission accepts the Consent Agreement; and
  5. unless otherwise specified in this Order, comply fully with all other terms of Paragraph II. of this Order within one hundred and twenty (120) days of the later of the Transaction Date or the date on which the Commission accepts the Consent Agreement.
- B. Entergy shall prepare a written plan for all Long-Term Purchases before issuing an RFP and for all Short-Term Purchases before requesting proposals as required in Paragraph II.C.2.a. of this Order (individually or collectively “portfolio supply plan”). Each such portfolio supply plan shall include, but not be limited to:
1. a statement of the goals for Long-Term Purchases and Short-Term Purchases, as applicable, and an analysis setting forth the reasons for selecting the volume requirement and degree of reliability and flexibility requirements for Relevant Product (all such analyses shall include or list all calculations, workpapers and databases relied upon to develop the portfolio supply plan);

2. Relevant Product Specifications, as reviewed by the Implementation Trustee, and the reasons for selecting the Relevant Product Specifications;
  3. storage injection and withdrawal requirements; and
  4. estimated location-specific transportation charges and natural gas price differentials from an established trading area (*e.g.*, Henry Hub) to each Covered Facility for which a Relevant Product is being solicited.
- C. Entergy shall enter into any agreement to buy any Relevant Product in the following manner:
1. For Long-Term Purchases:
    - a. Entergy shall request proposals to supply Relevant Product using an RFP;
    - b. at least thirty (30) days before buying any Relevant Product under a contract whose term is one (1) year or longer, Entergy shall:
      - (1) post each RFP on the Entergy-Website; and
      - (2) provide a copy of every RFP to every natural gas pipeline connected to any Covered Facility included in the RFP and request that each such pipeline post all RFPs on that pipeline's EBB and website;
    - c. at least fourteen (14) days before buying any Relevant Product under a contract whose term is more than three (3) months but less than one (1) year, Entergy shall:
      - (1) post each RFP on the Entergy-Website; and
      - (2) provide a copy of every RFP to every natural gas pipeline connected to any Covered Facility included in the RFP and request that each such pipeline post all RFPs on that pipeline's EBB and website;
    - d. EKLP shall ensure that Gulf South posts on its EBB each RFP within twenty-four (24) hours of receiving any such RFP from Entergy and before submitting any proposal to Entergy;

- e. Entergy shall provide an RFP to any potential supplier who requests one; and
  - f. Entergy shall consider all proposals received for Relevant Product from any potential supplier.
2. For Short-Term Purchases:
- a. Entergy shall request proposals to supply Relevant Product by publishing on the Entergy-Website an announcement of its intention to buy Relevant Product at various receipt and delivery points and the Relevant Product Specifications that would enable potential suppliers to determine whether they could satisfy Entergy's requirements for Relevant Product; *provided, however,* that Entergy shall publish announcements to buy Relevant Product for a term of at least one (1) month at least seventy-two (72) hours before considering any proposal;
  - b. prior to considering any proposal, Entergy shall provide a copy of every such announcement to every natural gas pipeline connected to any Covered Facility included in the request and shall request that each such pipeline post each announcement on that pipeline's EBB and website;
  - c. upon request, Entergy shall provide to any potential supplier the specific terms and conditions for supplying Relevant Product, including the Relevant Product Specifications;
  - d. EKLP shall ensure that Gulf South posts each announcement on its EBB before submitting any proposal to Entergy;
  - e. Entergy shall consider all proposals received for Relevant Product from any potential supplier;
  - f. Entergy shall create a written or electronic log that documents the date, time, seller, and terms of all offers received (where such offers include price, delivery dates, delivery location, and delivery specifications), and indicates the selected proposal(s); and
  - g. notwithstanding any of the provisions of Paragraph II.A. of this Order, Entergy shall not enter into any agreement with EKLP for Short-Term Purchases of Relevant Product whose term is automatically renewable unless that agreement is entered into pursuant to the terms of Paragraph II.C.2. of this Order.



3. For Daily Purchases:
  - a. Entergy shall request proposals to supply Relevant Product by publishing on the Entergy-Website an announcement of its intention to buy Relevant Product at various receipt and delivery points;
  - b. upon request, Entergy shall provide to any potential supplier the specific terms and conditions for supplying Relevant Product;
  - c. Entergy shall consider all proposals received for Relevant Product from any potential supplier; and
  - d. Entergy shall create a written or electronic log that documents the date, time, seller, and terms of all offers received (where such offers include price, delivery dates, delivery location, and delivery specifications), and indicates the selected proposal(s).

For purposes of Paragraph II.C. of this Order, the initial term of any agreement to purchase Relevant Product shall be determined without reference to whether the contract can be renewed automatically without notice so long as the price term or price formula cannot change upon such automatic renewal.

*Provided, however,* that Entergy may suspend complying with the requirements of Paragraphs II.B. (Short-Term Purchases only), II.C.2, and II.C.3 if:

- (1)(a) there was a Force Majeure Event preventing Entergy from complying with the terms of this Order;
  - (b) there was an unexpected loss of an Entergy owned, operated or controlled electric generation unit not fueled by natural gas that resulted in Entergy buying an unexpected amount of Relevant Product; or
  - (c) there was an unexpected disruption in a power purchase commitment that resulted in Entergy buying an unexpected amount of Relevant Product; and
- (2) Entergy is exerting reasonable best efforts to expeditiously return to full compliance with its obligations under Paragraphs II.B. (Short-Term Purchases only), II.C.2, and II.C.3.

Entergy shall bear the burden of proof with regard to demonstrating that its non-compliance was caused by any of the events identified above and that it was exerting

reasonable best efforts to expeditiously return to full compliance with its obligations under Paragraphs II.B. (Short-Term Purchases only), II.C.2, and II.C.3.

- D. For any Long-Term Purchases or Short-Term Purchases, Entergy shall, upon request by a State Regulator, within thirty (30) days of such request, prepare a written analysis for the time period requested by any State Regulator explaining how any winning proposal by EKLP satisfies the goals set forth in the applicable portfolio supply plan when measured against other comparable proposals.
- E. Entergy shall submit a copy of this Order to each State Regulator within ten (10) days of the later of the Transaction Date or the date on which the Commission accepts the Consent Agreement.
- F. Entergy shall notify (in writing or electronic mail, with return receipt request) each of the suppliers of Relevant Product with which Entergy regularly does business of the posting requirements of this Order within ten (10) days of the later of the Transaction Date or the date on which the Commission accepts the Consent Agreement.
- G. Entergy and EKLP shall retain, for a period of five (5) years from the date of its creation or use, all plans, analyses, materials referenced in or supporting any plan or analysis, RFPs, announcements, logs, requests, notifications to suppliers of Relevant Product and return receipts, responses, proposals or any other documents, materials or other information called for, required by or relied upon to comply with Paragraph II. of this Order.
- H. Entergy shall, within thirty (30) days, comply with any request by any State Regulator for documents, materials or other information required to be retained by Paragraph II. of this Order where such request is related to the recovery of the costs of purchasing Relevant Product.
- I. The purpose of this Order is to establish a competitive and transparent process to prevent Entergy from having the ability to evade rate regulation by the State Regulators as alleged in the Commission's Complaint in this matter. Nothing in this Order is intended to preempt otherwise applicable state law, or alter the provisions governing the public disclosure of Entergy confidential information submitted to any State Regulator pursuant to state law contained in any agreement between Entergy and any State Regulator.

**III.**

**IT IS FURTHER ORDERED** that Stephen P. Reynolds shall serve as Implementation Trustee to monitor Respondents' implementation of Paragraphs II.B. and II.C. of this Order, which Implementation Trustee shall have the rights, duties, and responsibilities as described below:

- A. Within ten (10) business days of signing the Consent Agreement, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Implementation Trustee all the power and authority necessary to permit the Implementation Trustee to monitor Respondents' implementation of Paragraphs II.B. and II.C. of this Order, in a manner consistent with the purposes of this Order.
- B. The Implementation Trustee shall have the power and authority to monitor Respondents' implementation of Paragraphs II.B. and II.C. of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Implementation Trustee in a manner consistent with the purposes of this Order in consultation with the Commission.
- C. The Implementation Trustee shall have full and complete access to all personnel, books, records, documents, and facilities of Respondents related to Respondents' implementation of Paragraphs II.B. and II.C. of this Order or to any other relevant information, as the Implementation Trustee may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to Respondents' obligations under Paragraphs II.B. and II.C. of this Order. Respondents shall provide such financial or other information as such Implementation Trustee may reasonably request and shall cooperate with the Implementation Trustee. Respondents shall take no action to interfere with or impede the Implementation Trustee's ability to perform his responsibilities or to monitor Respondents' implementation of Paragraphs II.B. and II.C. of this Order.
- D. Respondents may require the Implementation Trustee to sign a confidentiality agreement prohibiting the disclosure of any information gained as a result of his role as Implementation Trustee to anyone other than the Commission.
- E. The Implementation Trustee shall serve, without bond or other security, at the cost and expense of EKLP, on reasonable and customary terms commensurate with the Implementation Trustee's experience and responsibilities. Respondents shall indemnify the Implementation Trustee and hold the Implementation Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Implementation Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities,

losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Implementation Trustee.

- F. The Implementation Trustee shall have no responsibility or obligation for the operation of, or the right to operate, Respondents' businesses.
- G. The term of the Implementation Trustee shall end one year from the later of the Transaction Date or the date on which the Commission accepts the Consent Agreement, or earlier if the Implementation Trustee certifies to the Commission that Respondents have put in place adequate procedures in accordance with Paragraphs II.B. and II.C. of this Order and the Commission accepts such certification.
- H. If the Commission determines that the Implementation Trustee has ceased to act or failed to act diligently or is otherwise unable to perform his or her duties, the Commission may appoint a substitute Implementation Trustee who shall have all the rights, duties, powers, authorities, and responsibilities described in Paragraph III. of this Order. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed substitute Implementation Trustee within five (5) business days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Implementation Trustee, Respondents shall be deemed to have consented to the selection of the proposed substitute Implementation Trustee. Within five (5) business days after the appointment of the substitute Implementation Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the substitute Implementation Trustee all the power and authority necessary to permit the substitute Implementation Trustee to monitor Respondents' implementation of Paragraphs II.B. and II.C. of this Order, in a manner consistent with the purposes of the Order.
- I. The Commission may on its own initiative or at the request of the Implementation Trustee issue such additional orders or directions as may be necessary or appropriate to assure Respondents' compliance with the requirements of this Order, in a manner consistent with the purposes of this Order.
- J. The Implementation Trustee shall report in writing to the Commission concerning Respondents' compliance with the Order thirty (30) days after execution of the trustee agreement and every ninety (90) days thereafter until the Implementation Trustee's term expires.

**IV.**

**IT IS FURTHER ORDERED** that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in such Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

**V.**

**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date Entergy and EKLP execute the Consent Agreement, within ninety (90) days thereafter, and annually thereafter until termination of this Order, Entergy and EKLP shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying and have complied with this Order. Entergy and EKLP shall include in their compliance reports a full description of the efforts being made to comply with this Order, including, but not limited to, the efforts being made to assure that anyone responsible for implementing or supervising the compliance with any requirement of Paragraph II. of this Order understands that requirement and understands the purpose of this Order.
- B. Respondents shall describe in detail and provide supporting documentation for all events implicating the proviso of Paragraph II.C. in the next compliance report required to be filed with the Commission pursuant to Paragraph V. of this Order or within thirty (30) days of a Commission request.

**VI.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Entergy and EKLP, Entergy and EKLP shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Entergy and EKLP relating to any matter contained in this Order; and

- B. Upon five (5) business days' notice to Entergy and EKLP and without restraint or interference from them, to interview officers, directors, or employees of Entergy and EKLP, who may have counsel present, regarding any such matters.

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on January 31, 2007.

By the Commission, Commissioner Anthony recused.

Donald S. Clark  
Secretary

SEAL

ISSUED: January 31, 2001