

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc.

)

Docket No. EL99-57-000

MOTION TO INTERVENE AND PROTEST OF
AQUILA ENERGY MARKETING CORPORATION

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or the "Commission"), 18 C.F.R. Sections 385.211, 385.214 (1998), and the Notice of Filing issued by the Commission on April 7, 1999, Aquila Energy Marketing Corporation ("Aquila") respectfully files this motion to intervene and protest.

At issue in this proceeding is the petition of Entergy Services, Inc. ("Entergy") for a declaratory order regarding Entergy's proposed "Transco." Aquila urges the Commission to reject Entergy's request as incomplete and premature. At a minimum, the Commission should defer consideration of the Entergy application until after the conclusion of its Regional Transmission Operator ("RTO") Notice of Proposed Rulemaking ("NOPR") process.

Aquila and its parent UtiliCorp United Inc. have long supported the establishment of independent regional transmission entities. Aquila's pending complaint against Entergy in Docket No. EL98-36-000 highlights the problems inherent in leaving control over transmission in the hands of vertically integrated

FERC DOCKETED

MAY - 5 1999

ORIGINAL

utilities. However, given its overwhelming lack of specificity, Entergy's petition does nothing to establish an acceptable independent transmission entity, and will only waste valuable Commission staff time and resources. The Commission's time and attention would much more profitably serve the cause of developing viable independent transmission entities by proceeding with the Commission's much-anticipated RTO rulemaking proceeding.

I. MOTION TO INTERVENE

Aquila is a power marketer authorized by the Commission to engage in sales for resale at negotiated rates. ^{1/} Aquila is a wholly-owned subsidiary of UtiliCorp United Inc. Aquila markets wholesale electricity across the nation in many markets, including Entergy and its surrounding area. Aquila makes firm and interruptible wholesale sales of power to entities within Entergy's transmission system. In order to make such sales, Aquila or its customers must obtain transmission service from Entergy under Entergy's open access transmission tariff.

On June 23, 1998, in Docket No. EL98-36-000, Aquila filed an amended and restated complaint against Entergy, explaining that Entergy has refused multiple requests for transmission service by Aquila in violation of the Commission's open access policies as set forth in Order Nos. 888, 888-A, 888-B, and

^{1/} Aquila Power Corp., 74 FERC ¶ 61,138 (1996).

888-C. On March 30, 1998, Aquila had filed an initial complaint against Entergy which described certain actions taken by Entergy in August and September 1997 denying access by Aquila to transmission for wholesale sales to customers within the Entergy system. As Aquila explained, although the transmission requests at issue were solely for non-firm service at off-peak periods, Entergy denied the requests on the grounds that Entergy had reserved all of the ATC at the critical Union Electric ("UE") interface for its own reliability needs and to accommodate its projected growth of native load. Having been denied access at the UE interface, Aquila was forced to find another access point into the Entergy system, at higher cost, in order to complete the sales in question.

Subsequently, in May 1998, Entergy took additional actions to block specific sales of power by Aquila to customers within Entergy's system. In addition, on May 27, 1998, the Commission issued two orders that underscore the unlawful nature of Entergy's actions. ^{2/} As a result of such developments, on June 23, 1998, Aquila filed its amended and restated complaint to present the new facts and to address the recent Commission orders. Aquila's complaint is still pending before the Commission. ^{3/}

^{2/} Wisconsin Public Power Inc. SYSTEM v. Wisconsin Public Service Corporation, 83 FERC ¶ 61,198 (1998); Morgan Stanley Capital Group v. Illinois Power Co., 83 FERC ¶ 61,204, order on reh'g, 83 FERC ¶ 61,299 (1998).

^{3/} Also pending before the Commission is Entergy's proposal in Docket No. ER98-4410-000 to amend its open access tariff to permit it to reserve large blocks of

[Footnote continued]

Because Aquila is a customer under Entergy's open access transmission tariff and because Aquila would be a transmission service customer of any entity that owns or controls Entergy's transmission system, Aquila is directly affected by the matters at issue in this proceeding. Because no other party can adequately represent Aquila's interests in this proceeding, Aquila's intervention is in the public interest and should be granted.

II. DESIGNATION OF REPRESENTATIVES FOR SERVICE

The names and mailing addresses of the persons who should be served with communications concerning this petition and all future matters in this proceeding are:

John P. Mathis
John R. Lilyestrom
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

[Footnote continued]

interface capacity as "Capacity Benefit Margin". Aquila has protested Entergy's proposed amendment as another attempt by the Entergy transmission function to improperly favor the Entergy merchant function to the competitive detriment of third parties such as Aquila.

Laurie J. Hamilton
Vice President – Regulatory Services
UtiliCorp United Inc.
10700 East 350 Highway
Post Office Box 11739
Kansas City, Missouri 64138

Aquila requests that the above names be placed on the Commission's official service list in this proceeding.

III. PROTEST

Aquila and its parent UtiliCorp United Inc. have publicly supported, since the outset of the Commission's efforts to require open-access transmission, the establishment of large, regional independent transmission entities. / UtiliCorp looks forward to the opportunity to address these issues again in response to the Commission's anticipated RTO NOPR. However, given the ill-timed nature of the Entergy proposal and the fatal lack of detail, Commission consideration of these issues in this proceeding will simply waste valuable Commission resources and will not further the development of efficient and optimal RTO's. For these reasons, Aquila urges the Commission to reject Entergy's petition at this time, or, at a minimum, to defer consideration of the petition until after the issuance of a final

/ Indeed, UtiliCorp advocated such action by the Commission in its comments on the original March 1995 Notice of Proposed Rulemaking in Docket No. RM95-8-000 et al. (Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Service by Public Utilities).

rule in the RTO rulemaking proceeding.

A. Consideration of Entergy's Hypothetical and Incomplete Transco Proposal Conflicts with and Could Interfere with the Commission's RTO NOPR

Entergy acknowledges, at page 4 of its petition, that the Commission is currently considering a Notice of Proposed Rulemaking on RTO policy. It urges the Commission to proceed with the petition regardless of the status of the RTO NOPR. Aquila believes that such an approach will be counterproductive. At this stage, the Commission should consider hypothetical issues regarding RTO formation in a generic proceeding open to all potential market participants, and not in response to a strawman proposal forwarded by a single transmission operator.

Entergy suggests that a Commission order on its petition could be used as a marketing device to attract other potential Transco participants. It seems likely, however, that any entity considering joining the Entergy Transco will delay such a decision until after the Commission issues a final rule in a generic RTO proceeding, no matter what the Commission does in response to Entergy's petition. Moreover, Entergy's petition contains no information with respect to cost allocation and transmission rate issues that are likely to be the most significant issues affecting an entity's decision as to whether to join the Entergy Transco.

Aquila is not suggesting that the Commission should delay consideration of a complete RTO filing if it were to receive such a filing during the

pendancy of the RTO NOPR. However, Entergy's filing presents the Commission with nothing remotely resembling a complete RTO proposal. Entergy has not identified a single other member of its Transco. ⁵⁷ It has not included a transmission tariff, and thus has failed to address such key issues as cost allocation and transmission pricing. The petition includes a form of LLC Agreement, but indicates that the agreement is intended as a "starting point for negotiations with other members." Thus, no matter what the Commission concludes, Entergy clearly anticipates further modifications to its proposal.

Entergy argues that the Commission has considered other RTO proposals in a two-step process. That is only superficially correct, because in every prior case, virtually all of the transmission providers that planned to participate in the RTO were known to the Commission at the time of the initial application. The initial applications for all other RTO's also included significantly more detail regarding the proposed governance of the RTO. While Entergy includes a form of LLC Agreement with its filing, it states repeatedly that the agreement is expected to change as the transco is developed. None of the other RTO applications has called on the Commission to endorse the approach of the RTO based on the type of vague, hypothetical information that is proffered in Entergy's petition. Indeed,

⁵⁷ A fundamental issue regarding the reasonableness of an RTO proposal is the geographic scope of its membership. The Commission has no basis for considering this issue with respect to the Entergy Transco.

given the lack of specificity in the petition, a Commission decision in this docket will do little or nothing to obviate the need for at least two further Commission decisions on the Entergy RTO.

Entergy's proposal presents the Commission with a fundamental question, i.e., whether the Commission wants to foster a process for developing RTO's where as single transmission owner decides to form an RTO, receives the Commission's blessing for the RTO, and then markets the proposal to others transmission operators. Aquila believes that the Commission should not endorse such an approach. Aquila supports a process for development of voluntary RTO's that involves all market participants, including all transmission operators and potential transmission customers. Only then can the Commission be assured that an RTO will protect the interests of all market participants.

B. On its Face, the Entergy Proposal Fails the Commission's Independence Requirement

The first of the ISO principles adopted by the Commission in Order No. 888 is that "[t]he ISO's governance should be structured in a fair and non-discriminatory manner." ^{6/} The Commission has further explained that this

^{6/} Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Stats. & Regs., Regulations Preambles ¶ 31,036, at p. 31,635, at 31,730-31 (1996) ("Order No. 888"), order on reh'g, FERC

[Footnote continued]

independence principle is the "bedrock upon which an ISO must be built." Id. As proposed, Entergy's Transco fails this requirement. The fundamental flaw with the proposal is that Entergy is currently the only participant. The Commission cannot count on Entergy's attracting other members during the Commission's consideration of a generic RTO policy. Pointedly, Entergy has not indicated that it will not proceed with its Transco if it fails to attract other participants, and it seems apparent that Entergy intends to proceed regardless of those contingencies.

Thus, for purposes of ruling on the Entergy petition, the Commission must assume that Entergy will be the only Transco participant. Under such circumstances, Entergy would hold 100 percent of the ownership interests in the Transco, and Entergy and its shareholders would receive all of the profits of the Transco under any performance-based transmission rate structure. This fact alone provides sufficient cause for concern. As Commissioner Massey noted in his recent article in the Electricity Journal (March 1999) at page 16, "I am concerned . . . that

[Footnote continued]

Stats. & Regs., Regulations Preambles ¶ 31,048 (1997) ("Order No. 888-A"), order on motions for clarification, 81 FERC ¶ 61,248 (1997) ("Order No. 888-B"), order on rehearing, 82 FERC ¶ 61,046 (1998) ("Order No. 888-C"). The Commission explained that "an ISO should be independent of any individual market participant or any one class of participants . . . The ISO's rules of governance . . . should prevent control, and appearance of control, of decision-making by any class of participants." Id.

Id. Atlantic City Electric Co., 77 FERC ¶ 61,148, at 61,574 (1996).

transcos may draw narrow boundaries that are intended to fine-tune their monopoly power. The boundaries they draw may be an attempt to achieve control over key gateways of transmission commerce and to serve as a tollkeeper to adjacent power markets."

Entergy's proposal reveals just how realistic those fears are. On its face, for example, it lacks even the appearance of independence. Entergy would select the executive search firm for purposes of selecting the Transco's Board of Directors and Entergy would select the members of the Board from the candidates proposed by the search firm. Moreover, pursuant to Section 5.11(b)(vii) of the form of LLC Agreement attached to the Entergy petition, Entergy would have the unilateral ability to remove or add members to the Board. In other words, if Entergy were displeased with the actions of certain members of the Board, Entergy would have the unilateral right to dismiss those members or to appoint new members in order to dilute the voting power of the objectionable members. ^{2/}

The practical effect of Entergy's proposal, therefore, would be to create

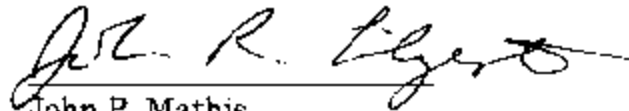
^{2/} The LLC Agreement requires that the members representing at least 75 percent of the relative ownership interests in the Transco agree before a member of the Board can be removed or a new member can be added. Given the size of the Entergy system, it could add several smaller transmission owners to the Transco, and Entergy would still retain the unilateral ability to remove or add members of the Board. Indeed, even if Entergy's own membership interests in the Transco are less than 75 percent, transmission owners with similar incentives could still have the ability to add or remove members of the Board.

a separate transmission company, wholly owned by Entergy, staffed by former Entergy employees, and overseen by a Board of Directors hand picked by Entergy and serving entirely at the whim of Entergy. Such a structure is at the opposite end of what might be considered "independent." Given the history of Entergy's transmission function's actions favoring its own merchant function to the detriment of third party competitors, such a minimal separation of the Entergy generation and transmission operations will do little, if anything, to ensure nondiscriminatory access to the Entergy transmission system.

Moreover, the Commission cannot possibly conclude that Entergy's proposed Transco structure satisfies the Commission's independence requirement without knowing the scope of membership in the Transco. A broadly constituted Transco with multiple transmission owner and non-transmission owner members could indeed satisfy the Commission's independence requirement. However, if the Transco's membership is limited to Entergy alone or to Entergy and a few other transmission owners with disproportionate influence over the Transco's behavior, Entergy's proposal cannot pass the Commission's independence test. In any event, the Commission should not be called upon to draw such a line in the abstract. Entergy should be required, at a minimum, to complete the membership in its Transco before asking the Commission to endorse the Transco's governance.

WHEREFORE, Aquila respectfully requests that it be permitted to intervene in and be a party to the proceedings in this docket and any docket that may be consolidated with it. Aquila further requests that the Commission reject Entergy's petition as incomplete and premature, or, at a minimum, defer consideration of the petition until after the completion of the Commission's RTO rulemaking.

Respectfully Submitted,



John P. Mathis

John R. Lilyestrom

Hogan & Hartson L.L.P.

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5600

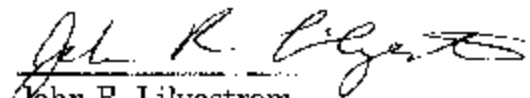
Counsel For Aquila Energy Marketing
Corporation

May 5, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 5th day of May, 1999.



John R. Lilyestrom
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004