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April 28, 1999

VIA FEDERAL EXPRESS

The Honorable David P. Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Entergy Services, Inc.
Docket No. EL99-57-000

Dear Mr. Boergers:

Enclosed for filing please find the original and 14 copies of the Motion to Intervene and Comments of Dairyland Power Cooperative in the above-referenced docket. Please return the extra copy stamped to show your receipt of the filing to me in the enclosed envelope.

Thank you.

Sincerely,

WHEELER, VAN SICKLE & ANDERSON, S.C.


Jeffrey L. Landsman

JLL:klb
Enclosures
cc: Service List
Bruce Staples

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**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Energy Services, Inc.

) Docket No. EL99-57-000

**MOTION TO INTERVENE AND COMMENTS
OF DAIRYLAND POWER COOPERATIVE**

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.214), Dairyland Power Cooperative ("Dairyland") hereby moves to intervene in the above-captioned docket. In support of its Motion, Dairyland states the following:

1. Dairyland requests that the following persons be included on the official service list in this proceeding, and that all communications concerning this Motion be addressed to the following persons:

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Vice President - Transmission
Dairyland Power Cooperative
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2. Dairyland is a non-profit generation and transmission electric cooperative (G&T) headquartered in La Crosse, Wisconsin. Dairyland is owned by 27 rural electric distribution cooperatives, for which Dairyland provides wholesale electric service for resale to end-use consumers at retail. Dairyland has no retail load. Dairyland owns generating units totalling 979 MW and nearly 3300 miles of transmission line ranging from 34.5 kV to 161 kV. Dairyland is a member of the Mid-Continent Area Power Pool ("MAPP").

3. The outcome of this filing by Entergy Services, Inc., may have a substantial impact on Dairyland as the owner of transmission facilities. In addition, as a potential user of the transmission systems involved in this proceeding, Dairyland has a substantial interest in the outcome of this proceeding that is distinguished from an interest common to the public or ratepayers and cannot be adequately represented by any other party. Dairyland's timely intervention is appropriate and in the public interest.

COMMENTS OF DAIRYLAND POWER COOPERATIVE

On April 5, 1999, Entergy Services, Inc., on behalf of the Entergy Operating Companies (together "Entergy"), filed with the Commission a Petition for Declaratory Order Regarding Compliance of Transco Proposal With Applicable ISO Principles. Entergy's Petition asks the Commission to issue a declaratory order that its "Transco proposal is consistent with all relevant ISO principles, especially those involving independence, governance, and conflicts of interest." Entergy Petition, p. 2. Entergy acknowledges that the Commission is contemplating issuing a Notice of Proposed Rulemaking on regional transmission organization policy (Entergy Petition, p. 4), but states that Commission guidance on its Transco proposal is needed now so that other transmission owners will commit their time and resources to participate in developing a Transco. Entergy Petition, p. 2.

Dairyland does not take a position at this time on the merits, generally, of ISOs versus Transcos.¹ However, as explained below, Dairyland believes Entergy's Transco proposal, as filed, fails to demonstrate that it meets all the Commission's principles for ISOs, in particular Principle Nos. 1 and 2, set forth in Order No. 888.² As such, the Commission should decline to issue the declaratory order requested by Entergy. Moreover, if the Commission were to find that Entergy's Transco proposal does in fact meet ISO Principle Nos. 1 and 2, Dairyland believes the result of the Commission's action will be to discourage participation by other transmission owners in Entergy's Transco proposal. This effect will negatively impact competition in bulk power supply markets.

ISO Principle No. 1: The ISO's governance should be structured in a fair and non-discriminatory manner.

In Order No. 888, the Commission explained ISO Principle No. 1 as follows:

The primary purpose of an ISO is to ensure fair and non-discriminatory access to transmission services and ancillary services for all users of the system. As such, an ISO should be independent of any individual market participant or any one class of participants (e.g., transmission owners or end-users). A governance structure that

¹ The Commission should, however, contrast Entergy's filing with the filing on March 19, 1999, with the Commission of the Application of the FirstEnergy Operating Companies for Transfer of Transmission Facilities to American Transmission Systems, Inc. under Section 203 of the Federal Power Act, Docket No. EC99-53-000 ("Application"). In its filing, FirstEnergy does not claim that the transfer of the transmission facilities of the FirstEnergy Operating Companies to its wholly-owned subsidiary (American Transmission Systems, Inc.) would constitute a transfer to a regional transmission organization ("RTO") meeting the Commission's ISO Principles. Rather, FirstEnergy's filing makes it clear that the transfer is a step toward the ultimate transfer to an RTO. Application, p. 25. As the pre-filed testimony of Stanley F. Szwed (p. 3) in Docket No. EC99-53-000 explains, FirstEnergy's proposed transfer "is an important first step towards FirstEnergy's participation in an independent regional transmission company."

² Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. 31,036 (1996) (hereinafter "Order No. 888").

includes fair representation of all types of users of the system would help ensure that the ISO formulates policies, operates the system, and resolves disputes in a fair and non-discriminatory manner. The ISO's rules of governance, however, should prevent control, and appearance of control, of decision-making by any class of participants.³ (Emphasis added.)

As Entergy acknowledges, independence is the "bedrock upon which an ISO must be built."⁴ The Commission explained in Order No. 888-A:

[C]ertain bedrock principles must be met to ensure non-discriminatory transmission services. We reaffirm our view that ISO Principles 1 (independence with respect to governance) and 2 (independence with respect to financial interests) are fundamental to ensuring that an ISO is truly independent. . . .⁵

Entergy claims that its Transco proposal complies with this ISO "independence" principle because the Transco, which is being structured as a limited liability company ("LLC"), will be managed by an "independent Managing Board." Entergy Petition, pp. 9-10. Entergy notes that Entergy Operating Companies and other Member Companies that transfer ownership or lease their transmission assets will receive "passive ownership interests" in the LLC in proportion to the value of the transmission assets contributed. *Id.* Entergy states that the "only limited 'rights'" the Entergy Operating Companies and Member Companies will have are those rights spelled out explicitly in the LLC Agreement and its Certificate of Formation. Entergy Petition, p. 10.

However, until the Commission knows the number and type of Member Companies that will participate in the Transco, the Commission cannot determine that ISO Principle No. 1 has

³ Order No. 888 at 31,730-731.

⁴ Entergy Petition, p. 7; *Atlantic City Elec. Co.*, 77 FERC ¶61,148 at 61,574 (1996).

⁵ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities; Recovery Of Stranded Costs By Public Utilities And Transmitting Utilities, "Order on Rehearing," Order No. 888-A, 62 Fed. Reg. 12274 (March 14, 1997), FERC Stats. & Regs. Preambles ¶ 31,048, at 30,249 (1997) (hereinafter "Order No. 888-A").

been met. Depending on the number and type of Member Companies, the "limited" rights of the Entergy Operating Companies and Member Companies can prevent the Transco proposal from meeting ISO Principle No. 1.

The "limited" rights of the Entergy Operating Companies and Member Companies are really not so limited. In its present form, Entergy's Transco proposal calls for the Member Companies to elect the Managing Board from a slate of candidates chose by an independent executive search firm.⁶ If Member Companies consisting only of transmission owners elect the Managing Board, the Board will be entirely chosen by transmission owners. This by itself prevents the Transco proposal from complying with ISO Principle No. 1. Moreover, it appears from the LLC Agreement (Appendix 2) that each of the five Entergy Operating Companies would be a separate Member Company in the Transco. Thus, since a Majority Vote is required to choose the executive search firm,⁷ the Entergy Operating Companies would control the selection of the executive search firm unless the Transco included at least six Member Companies other than Entergy Operating Companies. Likewise, if a Majority Vote is required to elect members of the Managing Board,⁸ the Entergy Operating Companies would control the

⁶ Entergy Petition, p. 11; see also, Appendix 2, Exhibit 2. The Petition indicates that Entergy "will not oppose use of an appropriately structured stakeholder committee to make the final board selection if the Commission believes such a process is critical to ensure independence." Entergy Petition, p. 11. Entergy does not explain why stakeholders cannot participate directly in the board selection process, and no detail is provided on how a stakeholder committee would be selected.

⁷ Appendix 2, Exhibit 2. This analysis assumes each of the Member Companies (including the Entergy Operating Companies) have equal voting rights based on each Member Company owning an equal Percentage Interest in the Transco. Until more is known about who will be Member Companies of the Transco, it is not possible to know how voting rights will actually be allocated.

⁸ Although the Board Selection Process (Appendix 2, Exhibit 2) specifies the executive search committee will be selected by a Majority Vote, the Process does not specify the type of vote necessary to elect the Board. Section 1.5 (b) of the LLC Agreement (Appendix 2)

selection of the Board unless the Transco included at least six Member Companies other than Entergy Operating Companies.

The voting structure of Entergy's Transco proposal could allow the Entergy Operating Companies to control other aspects of the Transco. The actions requiring Member consent are set forth in Section 5.11 (b) of the LLC Agreement (Appendix 2). These actions all require a Super Majority vote of the Members (75% of the aggregate Percentage Interests of those Members entitled to vote).⁹ Without knowing the size and number of the Member Companies of the Transco, it is not possible to determine to what extent the five Entergy Operating Companies will have the ability to exercise a veto. But assuming that the Member Companies have equal voting rights, the Transco would need to include at least 15 Member Companies other than Entergy Operating Companies to preclude the Entergy Operating Companies from being able to exercise a veto.

Entergy points to several instances in which the Commission has accepted the independent board approach for ISOs. Entergy Petition, pp. 21-22. Importantly, however, in accepting the independent board approach for ISOs, the Commission nevertheless ensured that the ISO members (including a broad spectrum of stakeholder interests such as cooperatives, municipal utilities, transmission-dependent utilities, and power marketers) exercised whatever authority the

states: "Unless otherwise expressly set forth in this Agreement, any vote of the Member (sic) shall be deemed to require the affirmative vote of a Super Majority of the Members." Schedule A to the LLC Agreement defines "Super Majority of the Members" to mean 75% of the aggregate Percentage Interests of those Members entitled to vote. Thus, it appears that a Super Majority vote is required to elect the Board. If so, the five Entergy Operating Companies will be able to veto the selection of Board Members unless the Transco includes 15 Member Companies other than Entergy Operating Companies. Again, this analysis assumes that the Member Companies have equal voting rights. See footnote 6, supra.

⁹ Again, if only transmission owners become Member Companies, only transmission owners will exercise voting rights.

ISO had over the independent board. The Commission did not accept provisions that allowed one group, i.e., transmission owners, to exercise authority over the independent board. For example, the Midwest ISO proposal originally provided that while all members of the ISO would participate in selecting the ISO's independent board, the Owners' Committee would have the right to unseat the Board for unauthorized acts. The Commission rejected giving this authority to the Owners' Committee and required that the participation of all ISO members should be permitted in any action to unseat the Board.¹⁰

It is apparent that without knowing who the Member Companies of the Transco will be, Entergy is unable to demonstrate, and the Commission cannot find, that the Transco proposal complies with ISO Principle No. 1.¹¹ There is simply not enough information to determine whether there will be a sufficient number of Member Companies that are not Entergy Operating Companies to eliminate the dominance of the Entergy Operating Companies, or whether there will be a sufficient number of Member Companies that are not transmission owners to eliminate the dominance of transmission owners.

Entergy states that its goal, which it contends can be greatly facilitated by the Commission issuing the requested declaratory order, is to convince other transmission-owning entities to join the Transco. Entergy Petition, p. 15. Dairyland believes Entergy's stated goal will be undermined if the Commission issued a declaratory order stating that the Transco proposal in its current form meets the independence requirement reflected in ISO Principle No.

¹⁰ *Midwest Independent Transmission System Operator, Inc.*, 84 FERC ¶62,138 at 62,151 (1998).

¹¹ In fact, it may be that if only transmission owners can become Member Companies, a Transco structured like that in Entergy's proposal can never comply with ISO Principle No. 1. As the Commission stated in Order No. 888-A: "ISO governance that is disproportionately influenced by transmission owners, unless they have fully divested their interests in generation, is not consistent with ISO Principle 1." Order No. 888-A at 30,250.

1. Other transmission-owning entities will be reluctant to join a Transco that will likely be dominated by the Entergy Operating Companies. Entergy states that it is not seeking the Commission's approval to transfer assets to the Transco under section 203 of the Federal Power Act ("FPA"), 16 U.S.C. §824b(a), or approval under section 205 of the FPA, 16 U.S.C. §824(d). The Commission should decline to issue a declaratory ruling that the Transco proposal meets ISO Principle No. 1 until a specific proposal is presented demonstrating clear compliance with this Principle.

ISO Principle No. 2: An ISO and its employees should have no financial interest in the economic performance of any power market participant. An ISO should adopt and enforce strict conflict of interest standards.

As the Commission stated in Order No. 888, "To be truly independent, an ISO cannot be owned by any market participant."¹² (Emphasis added.) Entergy's Transco proposal clearly and unambiguously provides for an LLC that will be owned by the Member Companies.¹³ The Member Companies will receive passive ownership interests in the LLC in proportion to the value of the transmission assets contributed by the Member Companies. Entergy Petition, pp. 9-10. This ownership interest of the Member Companies clearly violates ISO Principle No. 2.

Entergy contends that because the ownership interest is "passive," with the Member Companies having only "limited" rights as spelled out in the LLC Agreement, the Transco will

¹² Order No. 888 at 31,731.

¹³ In contrast to an LLC owned by transmission-owning Member Companies, a Transco could be created as a cooperative with all transmission users being eligible for membership. Another alternative structure for a Transco would be a stock corporation with publicly traded stock and strict limitations on the amount of stock that could be owned by any market participant. Both of these alternative structures for a Transco are more likely to be truly independent from transmission owners than an LLC owned by transmission-owning Member Companies.

be financially independent. As explained above, the rights of the Member Companies, and in particular the Entergy Operating Companies, are not as "limited" as they may appear at first blush. Moreover, the ownership interest of the Member Companies in the LLC creates a situation where the primary duty of the "independent" Board is to maximize economic returns for the owners rather than fulfilling the primary purpose of an ISO, to wit: ensuring "fair and non-discriminatory access to transmission services and ancillary services for all users of the system."¹⁴

Contrary to Entergy's assertion that the Transco board will have only a "nominal" fiduciary role to the transmission owners which are the Transco members, and would have obligations to the Member Companies similar to the obligations of an ISO board to its members,¹⁵ the Transco LLC structure would make that fiduciary obligation far more than nominal. An LLC board has a direct fiduciary responsibility to the LLC, and derivatively, to the LLC members, to maximize the economic return for the members through the LLC enterprise. Just like a corporate board of directors, an LLC board has as its primary role the direction of the enterprise to maximize the return to the owners; any other role is secondary and must not be allowed to conflict with the primary role. Indeed, Section 5.17 of the LLC Agreement expressly provides that "Except as otherwise provided in this Agreement, each Director and Officer shall have a fiduciary duty of loyalty and care to the Company similar to that of directors and officers of business corporations. . . ."¹⁶

¹⁴ Order No. 888 at 31,730.

¹⁵ Entergy Petition, p. 24.

¹⁶ Appendix 2.

Fairness to the users of the Transco transmission system could be a Transco board principle only in so far as it would be consistent with the goal of economic return. Use of an LLC for the Transco will unavoidably result in a conflict of interest for its board if a decision which would be "fair" to transmission users would not necessarily provide the optimal return to the transmission owners--the Transco's Member Companies. Put another way, use of the LLC structure for the Transco would automatically and unavoidably bias Board decisions in favor of a higher return to the Member Companies.

Finally, because of the way regional transmission groups ("RTGs") are structured, the Commission indicated in Order No. 888 that it would give considerable deference to RTGs in the areas of planning, dispute resolution, and transmission pricing, and in other decisionmaking areas.¹⁷ ISOs that meet the financial independence requirement reflected in ISO Principle No. 2 similarly offer the Commission an opportunity to exercise light-handed regulation. But a Transco that is not truly independent and that has the primary purpose of maximize returns for the Transco's owners as opposed to ensuring fair and non-discriminatory access to transmission services and ancillary services for all users of the system will continue to require close regulation by the Commission and state regulators.

¹⁷ Order No. 888 at 31,855.

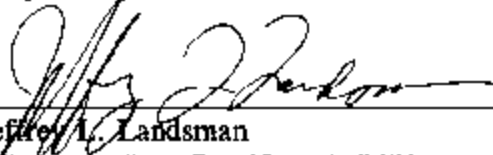
CONCLUSION

In its present form, the Entergy Transco proposal does not demonstrate compliance with the independence requirements of the Commission's ISO Principle Nos. 1 and 2. The Commission should decline to issue the declaratory order requested by Entergy.

WHEREFORE, based on the foregoing, Dairyland respectfully moves to intervene in this proceeding to participate with full party status.

Dated this 28th day of April, 1999.

Respectfully submitted,



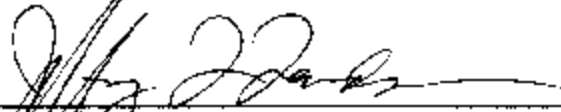
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COUNSEL FOR DAIRYLAND POWER
COOPERATIVE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on those parties listed on the official service list compiled by the Secretary for these proceedings.

Dated at Madison, Wisconsin, this 28th day of April, 1999.



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