



The Large Public Power Council

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FEDERAL ENERGY
REGULATORY COMMISSION

May 5, 1999

Secretary
Federal Energy Regulatory Commission
888 First St. NE
Washington, DC 20426

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

Dear Sirs:

Enclosed for filing are an original and 14 copies of a Motion to Intervene, Protest, and Request to Dismiss filed on behalf of the Large Public Power Council in the above captioned proceeding.

Copies of all papers filed in this proceeding should be sent to the Large Public Power Council's representative at the following address:

Frank McCamant
Chair, LPPC Competition Task Force
C/o Lower Colorado River Authority
Austin, TX 78703

Please contact Mr. McCamant at 512-473-4001 if there are any questions.

Sincerely,


Vincent J. Tobin

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MAY - 5 1999

AT

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

FILED
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FEDERAL ENERGY REGULATORY COMMISSION

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Entergy Services, Inc.)
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Docket No. EL99-57-000

**MOTION TO INTERVENE, PROTEST AND REQUEST TO DISMISS OF
THE LARGE PUBLIC POWER COUNCIL**

INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Rule Nos. 212 and 214, of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 214 (1998), the Large Public Power Council ("LPPC") hereby moves to intervene in this docket, protests the filing and moves for its dismissal.

Coming on the eve of the Commission's plans to initiate a generic rulemaking governing appropriate guidelines for the institution of Regional Transmission Organizations ("RTOs"), Entergy's filing ("the Filing") has been made with the apparent intent of short-circuiting the national debate undertaken by the Commission. Bereft of meaningful detail, and with no evidence of regional support, Entergy's filing should be treated as nothing more than an early-filed set of comments in the generic docket, masquerading as an independent proposal. The Commission has been clear that it will not issue declaratory orders on inchoate proposals proffered in the abstract. Nor is it correct to use the declaratory order procedure, in which parties' individual rights are adjudicated, in order to address generic issues that are properly resolved in a rulemaking under the Administrative Procedure Act ("APA"). 5 U.S.C. § 551, *et seq.*

On the merits of the filing, Entergy falls short of demonstrating that it has satisfied the Commission's key criterion for evaluating an Independent System Operator ("ISO"), i.e., that the organizations's structure assures its independence from the interests of

particular market participants. Entergy's proposal leaves ownership of the Transco wholly in the hands of its sponsor, at this point Entergy alone, an entity with an avid interest in generation sales in the Transco's market. However they are chosen, the Entergy Transco's board members will have primary fiduciary responsibility to their corporate shareholders that nothing in the documentation accompanying the filing appears meaningfully to ameliorate. Whether a Transco with the ownership structure of the type proposed by Entergy could pass muster is a matter best reserved for generic consideration.

IDENTITY AND INTEREST OF MOVANT

The LPPC is a trade organization that includes the following members: Austin Energy, Chelan County (Public Utilities District #1), Colorado Springs Utilities, Jacksonville Electric Authority, Knoxville Utilities Board, Los Angeles Department of Water and Power, Lower Colorado River Authority, Memphis Light, Gas and Water Division, Municipal Electric Authority of Georgia, Nashville Electric Service, Nebraska Public Power District¹, New York Power Authority, Omaha Public Power District, Orlando Utilities Commission, Puerto Rico Electric Power Authority, Sacramento Municipal Utility District, Salt River Project, Santee Cooper, Seattle City Light, Snohomish County (Public Utilities District #1), Tacoma Public Utilities: Light Division. Together, these entities serve a total of approximately 8,440,167 customers and report annual electric revenues in excess of \$14 billion.

The LPPC was among the first trade organizations to support the movement for open access transmission service and each of its members are vitally interested in the success of that framework in order to conduct their transmission business and competitive generation purchases and sales. The LPPC has an interest in these proceedings that cannot be adequately represented without its intervention.

¹ The Nebraska Public Power District takes no position with respect to Entergy's filing.

PROTEST AND REQUEST FOR DISMISSAL

I. The Issues on Which Entergy Asks the Commission to Pass Are Not Properly Subject To Declaratory Order.

A. Entergy's Filing Asks the Commission to Pass on a Hypothetical Proposal with the Apparent Aim of Prejudging Issues Appropriately Resolved in a Rulemaking.

Entergy's filing reflects no input from segments of the industry, no consensus of would-be participants or stakeholders, nor even a proposal to which the Company itself will necessarily remain committed. Entergy itself notes that it does not seek approval under the Federal Power Act ("FPA") in this case for its proposal.² If the Commission issues the order requested, the Company would then seek to involve other transmission owners, following which, Entergy concedes its proposal may change. As Entergy itself notes, "...it is likely that, as additional transmission owners are brought in as members, and input received from stakeholders, certain provisions of the Transco may change to reflect additional input and to address concerns that may arise."³

Rule 207 of the Commission's Rules of Practice and Procedure⁴ provides that a declaratory order is available to resolve a "controversy" or remove uncertainty. The Commission commented only recently in *Dominion Resources* that it will not use a declaratory order to opine on "proposals that are proffered in the abstract."⁵ Further, in

² Filing, p. 4.

³ Filing, p. 4, fn. 4

⁴ 18 C.F.R. § 385.207 (1998).

⁵ 85 FERC ¶ 61,069, at 61,268 (1998). This authority is consistent with time-honored precedent in the federal court system. See *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937); *Electric Bond & S. Co. v. Securities and Exchange Commission*, 303 U.S. 419, 443 (1938); *See Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). See also *Transcontinental Gas Pipe Line Corporation*, 76 FERC ¶ 63,009 (1996).

Texas Eastern Transmission Corporation,⁶ the Commission held that it would be wrong to employ the declaratory order procedure in order to establish rules or binding norms that are properly the subject of a Commission rulemaking. In *Texas Eastern*, the applicant for a declaratory order, much like Entergy, sought to establish a new rule governing certain certificate application procedures at the same time the Commission was contemplating a rulemaking in order to revisit the applicable rules. Elucidating a bright line forbidding the use of the declaratory order procedure in this context, the Commission held that the “[t]his adjudicatory proceeding is not the proper forum for such rulemaking activity.”⁷

Entergy itself acknowledges that its proposal is incomplete,⁸ and further indicates it is well-aware of the Commission’s plans to institute generic proceedings in order to consider whether, among other things, a Transco structure will fulfill the Commission’s objectives for Regional Transmission Organizations. The combination of these factors suggests an effort to circumvent the Commission’s rulemaking process. The Commission’s regulations and precedent strongly counsel against entertaining this effort.⁹

making plain the applicability of such decisions to Commission procedures.

⁶ 62 FERC ¶ 61,196 (1993).

⁷ *Id.* at 62,390.

⁸ As discussed below, Entergy itself notes that its proposal fails to include a tariff, advance procedures for congestion management or non-pancaked rates across its proposed system. Filing, pp. 25-26, 31.

⁹ Despite Entergy’s invocation, the Commission’s phased consideration of ISO proposals in the past is inapplicable. In *Central Hudson Gas & Electric Corporation, et al.*, 83 FERC ¶ 61,357 (1998) (NYISO) *New England Power Pool*, 79 FERC ¶ 61,374 (1997) (“NEPOOL”) and *Atlantic City Electric Company, et al.*, 77 FERC ¶ 61,148 (1996) (PJM ISO), the Commission responded to comprehensive restructuring proposals that had been fully vetted by all interested stakeholders. In *Pacific Gas & Electric Company*, 77 FERC ¶ 61,204 (1996), interested stakeholders were also consulted in the preparation of the filing, while the phased approach was designed specifically to accommodate State legislation. By contrast, Entergy comes to the Commission without even

Entergy's Filing Lacks Critical Detail Necessary in Determining its Merits.

Entergy's Filing lacks much of the detail essential for the Commission to consider it as a *bona fide* proposal for implementation of a Transco structure. The Filing reflects no input from any of the stakeholder groups interested in transmission access. Nor can the filing even be taken to represent what may eventually be the consensus of those transmission owners who choose to cooperate with Entergy in pursuing its proposal. As noted, Entergy reserves the option to modify the proposal in all respects as it elicits input from other transmission owners with whom it may seek to coordinate.¹⁰

Equally important, on the issue that is central to the preliminary judgment Entergy seeks - whether the Transco structure is consistent with the Commission's "independence" principle - Entergy refuses even to specify whether the Transco board members will be appointed by transmission owning "member companies," or by an "appropriately structured" stakeholder committee.¹¹ As discussed below, Entergy's primary position confounds any common sense conception of an independent board, while its fallback position fails to specify what the Company believes would be an "appropriately structured" stakeholder committee.

Further, Entergy fails to advance a proposed tariff, or a ratemaking proposal to eliminate rate pancaking across associated systems, as is required by the Commission's third ISO principle. While Entergy is certainly right in deferring this discussion until it

so much as the participation of as-yet unidentified transmission owners it indicates will join its proposal.

¹⁰ Filing, p. 4.

¹¹ Entergy "proposes to have the Member Companies select the board members..." but states that it "...will not oppose the use of an appropriately structured stakeholder committee to make the final board selection." Filing, p. 11.

brings together a larger group of Member Companies,¹² the Company's failure to have engaged in wider discussions, to date, should have counseled against filing the proposal prematurely.

Similarly, Entergy acknowledges that it fails to advance a proposal for identifying and managing system constraints.¹³ While the Commission has repeatedly recognized that congestion management is a core ISO function,¹⁴ and held that successful congestion management is critical to ensuring a robust generation market,¹⁵ Entergy is nevertheless silent on its plans, again deferring to meetings of Member Companies and stakeholders that have yet to take place.

Entergy Is Wrong in Asserting That What Has Been Advanced Satisfies the Commission's Fundamental Independence Principle.

Entergy's claim to having satisfied the Commission's requirement that regional transmission organizations act independently of any market participant rests on the assertions: (1) that the Transco will have an "independent" Board, and (2) that the Transco owners would be "passive."¹⁶ Transco officers and employees would be bound by a Code of Conduct admonishing them to function "without adverse distinction or preference to any Member or Market Participant."¹⁷

¹² Filing, p. 26.

¹³ Filing, p. 31.

¹⁴ *Midwest ISO*, 84 FERC ¶ 61,231 at 62,163 (1998).

¹⁵ See *Champion International Corporation and Bucksport Energy, L.L.C. v. ISO-New England, Inc. et al.* 85 FERC ¶ 61,142 (1998), *New England Power Pool*, 85 FERC ¶ 61,141 (1998).

¹⁶ Filing, pp. 20-24.

¹⁷ Filing, pp. 12-13.

Entergy's proposal would appear to fall substantially short of the Commission's mark. The Company's assurance that the Transco Board will be independent of particular market interests, and the corporate owners "passive," hardly ensures that result. Delaware corporate law (the state in which Entergy proposes to establish its Transco), is quite clear that corporate board members bear a primary fiduciary responsibility to advance shareholders' financial interests. Director activities benefitting non-shareholder interests are limited to those that benefit the shareholders in the long-run. See Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1282 n. 29 (Del. 1989) (citing Revlon v. MacAndrew & Forbes Holdings, Inc., 506 A.2d 173, 182-184 (Del. 1986) for the proposition that there be some rationally related benefit accruing to the shareholders). This responsibility would not be mitigated by Entergy's fall-back procedure for the appointment of directors by an "appropriate stakeholder committee," a concept to which Entergy says it would accede if necessary. Whether appointed by Entergy or not, Board members will nevertheless owe their primary loyalty to Entergy, an entity strongly identified with market interests (particularly generation) as to which the Commission has directed ISO management to remain independent.¹⁸

The ISO board and management structures that have been approved by the Commission are dramatically different from Entergy's proposal. The ISO boards in each case presented to date either comprise representatives of all stakeholder groups or are appointed by such groups,¹⁹ while the Commission has satisfied itself that board members'

¹⁸ Entergy's Limited Liability Company Agreement ("LLCA") agreement does provide that the Transco shall consider bids for the purchase of Transco shares from parties other than the initial transmission owners. Yet, the agreement further provides that "the Board may accept or reject Bids based upon the best interests of the company." See Attachment 2, p.7, section 3.3. With no obligation to dilute transmission owner interests, there is certainly no assurance that the Transco will be owned or controlled by anybody other than Entergy.

¹⁹ *Central Hudson Gas & Electric Corporation, et al.*, 83 FERC at 62,407; *New England Power Pool*, 79 FERC at 62,585 ("NEPOOL"); *Atlantic City Electric Company, et al.*, 77 FERC ¶ 61,148 (1996); *Pacific Gas & Electric Company*, 77 FERC at 61,796 (1996).

independence may be assured through a fair selection process.²⁰ Yet unlike Entergy's Transco, the ISOs have no corporate affiliation with the stakeholders, and are not financially beholden to them. Accordingly, ISO board members have responsibilities substantially different from those that will be shouldered by the Entergy Transco's board members. For this reason, Entergy is wrong to liken its proposal to the independent boards approved in the ISO context.²¹ The Entergy Transco's Board would appear to be independent in name only.²²

Further complicating matters, the LLC Agreement attached to Entergy's proposal states that the LLC may enter into an agreement with a Member (at this point, Entergy) on an "arms length basis," but fails to specify a process to assure compliance with that restriction.²³ Given the fact that the LLC will in all likelihood be populated by former Entergy employees, self-dealing of this sort is particularly concerning.

Similarly, the LLC Agreement states that a member of the board of directors is not precluded "from serving the Company in any other capacity and receiving compensation therefor."²⁴ Again, the probability that the Transco will be managed by former Entergy officials raises the concern that such employment may interfere with director independence.

Had Entergy negotiated its proposal with interested stakeholders, as have previous ISO sponsors, the parties may have been able to negotiate procedures relating to the appointment, background and duties of the Transco Directors in order to alleviate

²⁰ *NEPOOL*, 79 FERC at 62,585.

²¹ Filing, p. 21.

²² Entergy's citation to Order No. 888 (Filing, p. 24) for the proposition that ISO boards have a "fiduciary duty to transmission owners" identical to duty a corporate board member owes to its shareholders is just not correct.

²³ Filing, Attachment 2, p. 18, section 5, 19.

²⁴ Filing, Attachment 2, p. 11, section 5.7.

these concerns. Yet, without such input, Entergy's proposal raises a host of unanswered questions regarding the Directors' conflicting obligations that should be taken up in the upcoming generic debate.²⁵

Entergy Is Wrong in Asserting There Are Compelling Reasons to Treat the Issues Raised by the Filing Outside the Commission's Forthcoming Generic Proceeding.

Entergy asks the Commission to issue the requested declaratory order by the end of July, 1999. The Company asserts that it will file a full-fledged Transco proposal within the ensuing 18 months, i.e., by February, 2001.²⁶ Entergy argues that by issuing the requested order, the Commission will accelerate the development of a regional transmission organization. Acknowledging the Commission's plans to issue a Notice of Proposed Rulemaking on regional transmission organizations, Entergy claims that issuance of the declaratory order and Entergy's ensuing experience would provide valuable information for the development of the Commission's policy.²⁷ Entergy adds that enabling it to develop a Transco following issuance of a declaratory order would dovetail with the implementation of retail access programs in 2001 and 2002 in the regions in which Entergy operates.²⁸

None of this counsels anything other than a decision to consider the merits of Entergy's position on the Transco structure in the context of the forthcoming NOPR.

²⁵ The Directors' conflicting obligations could well be played out in connection with the procedure for their removal under Section 5.7 of the LLCA. That section specifies that Directors may be removed "for Cause," while Schedule A defines "Cause" to include the failure to perform substantially a Directors' responsibilities. In the context of fully negotiated ISO filings, questions over the circumstances in which Directors' may be removed has been subject to extensive debate.

²⁶ Filing, pp. 2-4

²⁷ Filing, p. 5.

²⁸ Filing, p.3.

While it is possible that awaiting the outcome of the Commission's generic procedure would call for Entergy to delay its plans for some modest period, Entergy points to no significant or irreparable harm that would result. The only harm that Entergy even intimates is a delay in the implementation of a Transco past the date on which regional retail access plans will be implemented. Yet, retail access plans have been successfully implemented in various regions of the Country without the implementation of an ISO or regional transmission structure.²⁹ Moreover, it is quite possible that an effort to develop a Transco filing simultaneously with the implementation of retail access could delay both processes, since many of the same parties would be involved in both efforts. In any event, it certainly cannot be assumed that permitting Entergy to proceed as it wishes will have the effect of facilitating retail access implementation.

CONCLUSION

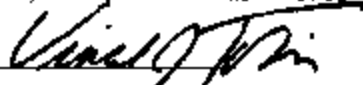
Commission rules and precedent counsel strongly against entertaining Entergy's request for declaratory order. The merits of Entergy's case for the approval of a Transco in the form proposed are debatable, at best. The issues raised by the filing are generic in nature and should be taken up in the context of the Commission's forthcoming rulemaking.

Respectfully submitted,

LARGE PUBLIC POWER COUNCIL.

Frank McCamant

Chair, Competition Task Force

By 

²⁹

See e.g., *Niagara Mohawk Power Corporation*, 81 FERC ¶ 61,180 (1997); *Consolidated Edison Company of New York, Inc.*, 81 FERC ¶ 61,361 (1997).