

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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MAY 5 1999
FEDERAL ENERGY REGULATORY COMMISSION

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

MOTION TO INTERVENE AND COMMENTS OF THE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Pursuant to Commission Rules 211 and 214, the National Rural Electric Cooperative Association ("NRECA") hereby submits its motion to intervene and comments in this docket.

The issue of independent governance of regional transmission organizations is of critical importance to NRECA. Thus, NRECA appreciates the stated goal of Entergy Services, Inc. ("Entergy") of obtaining guidance from the Commission for establishing a truly "independent" transmission provider. Although NRECA does not oppose Entergy seeking guidance from the Commission on a structure that it purportedly intends to become an independent Transco, the amorphous nature of Entergy's request is inappropriate for a proceeding under Commission Rule 207 (a)(2).

As explained herein, the amorphous "facts" underlying the petition ("Petition") of Entergy Services, Inc. ("Entergy") for a declaratory order in this docket are materially uncertain insofar as they are expressly subject to substantial, even total, change. Even as stated, the "facts" appear to conflict with ISO principles of independence, governance and conflicts of interest. NRECA requests that the Commission deny Entergy's Petition without prejudice to Entergy later filing a concrete and modified proposal.

In support of its motion, NRECA states the following:

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At

1. NRECA Interest

NRECA is a not-for-profit national service organization. It represents approximately 1,000 rural electric cooperatives ("RECs") providing service to more than 32 million consumers in 46 states. Kilowatt-hour sales by RECs amount to 7.4% of total electricity sales in the United States, and produce revenues of over \$14 billion. RECs own approximately 32.8 million kilowatts of installed electric capacity, or 4.5% of all capacity in this country.

In this docket Entergy asks the Commission to declare that its proposal for a Transco is consistent with ISO principles involving independence, governance and conflicts of interest. Numerous NRECA members sell or receive power over facilities that would be subject to Entergy's proposal. Thus, NRECA has a clear interest which cannot be represented by other parties and which justifies the granting of this motion to intervene.

2. Communications

All pleadings and orders concerning this docket should be addressed to the following NRECA representatives:

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3. Entergy's Petition

Entergy explains that it has filed its Petition to determine with certainty whether its plans for a Transco are consistent with FERC ISO principles involving ISO independence, governance, and conflicts of interest. Those principles were first articulated by the Commission in Order No. 888¹ and have been applied by the Commission in individual ISO proceedings. E.g. Midwest Independent Transmission System Operator, Inc., 84 FERC ¶ 61,231 (1998). Based on the response Entergy receives from the Commission, Entergy says it "will then" provide final, detailed plans. Entergy requests a FERC response by the end of July 1999.

Entergy's Petition states that the Transco will be a Limited Liability Company, or LLC, that will be managed and governed by an "independent" seven-member board with "no ties" to Entergy, its operating companies, or any of the other current transmission-owning entities that decide to join the Transco. The slate of potential board members would be selected by a nationally-recognized search firm. Entergy's stated preference is to have board members selected only by Entergy and other member companies absent Commission objection.

The member companies would each have a so-called "passive" ownership interest in the LLC and would have no rights to manage the LLC, according to the Petition. Entergy contemplates that the member companies will transfer their transmission assets, either through transfer of ownership or lease, to the LLC.

¹ "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities," Reg. Preambles, FERC Stats. & Regs. ¶ 31,036 at 31,730-32 (1996).

4. Entergy's Amorphous Proposal

By petitioning for a declaratory order pursuant to Commission Rule 207(a)(2), Entergy is asking the Commission to provide the relief afforded by that rule, which is “to remove uncertainty.” Entergy expects the Commission to opine whether provisions in the proposal, when viewed against Commission precedents, are acceptable. As explained below, the Commission is unable to provide such relief because the proposal is itself completely uncertain and subject to change.

Commission Rule 207(a)(2) is intended to resolve uncertainties as to the application of the Commission's regulations and policies to facts. Here, there are no facts. Only Entergy, not the Commission, can provide that factual certainty, and it has not done so.

For example, Entergy says that it is “continuing to iron-out a number of details regarding the proposed terms and conditions of the Transco.” Unfortunately, Entergy does not explain what is on the ironing board. One must therefore assume that virtually every aspect of the proposal is subject to material change. Thus, intervenors cannot be reasonably expected to submit meaningful comments nor can the Commission be expected to issue a meaningful decision.

Of the items subject to potential change, perhaps the most critical is the “Limited Liability Company Agreement” (the “LLC Agreement”), attached to Entergy's Petition at Appendix 2. The LLC Agreement is important because it purports to contain the details underlying the Transco's alleged independence and compliance with related ISO principles.

Although the LLC Agreement is styled as an “Agreement,” it has not yet been agreed to by anyone, nor is it intended to be anything more than a draft. It is explicitly subject to change as stated in footnote 1 on page 1 of the LLC Agreement:

“This draft Limited Liability Company Agreement is being provided at this time for informational purposes only. This draft is what Entergy intends to use as a starting point for negotiations with other potential members. The draft LLC Agreement is subject to change and a final Limited Liability Company Agreement will be filed with FERC when the section 203 and 205 filings are made.”

(Emphasis added.)

Even if the draft LLC Agreement were a finalized and executed document (which it is not), such finalization would not foreclose changes because the LLC Agreement contains explicit provisions for making changes. Even the definition section in the LLC Agreement defines the LLC Agreement as one which may be “amended, restated or supplemented from time to time.”

The Commission typically issues declaratory orders that are subject to the facts before it. Here there are no facts. Thus, the Commission should either decline to act or deny the petition without prejudice to its being refiled, with real facts, at a later date.

5. Entergy Tries “Swimming Without Going Near Water”

To the extent the Commission chooses to consider Entergy’s Petition notwithstanding the lack of a concrete factual foundation, we note aspects of the proposal that appear inconsistent with independence.

To create the impression that the proposed Transco will be independent, Entergy states that the LLC will be managed and governed by a seven-member board with “no ties to Entergy, its Operating Companies or any of the other current transmission-owning entities that decide to join the Transco (hereinafter the “Member Companies”).” (Emphasis added.)

For Entergy to suggest that there will be “no ties” is akin to suggesting that they can swim without going near water. Cf. Transwestern Pipeline Company v. FERC, 747 F.2d 781, 786 (D.C. Cir. 1984). Entergy and the other member companies will literally own the

Transco. Entergy's ownership in the Transco will continue to be included on its consolidated tax return. Entergy wants to select the search firm that will choose the slate of potential board members. Entergy then wants to select the board members from that slate. The use of a third party search firm does not appear contemplated beyond selection of the original slate.

Once board members are selected, there does not appear to be a provision precluding them (or other Transco employees) from receiving gifts from Entergy and other owners, other than gifts of securities. In addition, the Transco is to be staffed by former employees of Entergy and other transmission owners.

Once the Transco is up and ongoing, the LLC Agreement authorizes Entergy and other transmission owners who contribute transmission assets to the Transco to play a continuing role. For example, the LLC Agreement (at Management 5.8) provides that, in the event of board vacancies, the members who contributed transmission assets, rather than the "independent" board, may in certain instances vote on the selection of new board members.

Entergy proposes to stay involved in other ways. For example, Entergy and the other member companies are to select the independent public accounting firm to audit books and records as provided by the LLC Agreement (at Books and Records 1.2). In addition, the LLC Agreement does not definitively state that the accounting firm may not provide commercially sensitive information to Entergy and others about third parties using the transmission system, nor does it provide that the accounting firm should not be one routinely engaged by Entergy or the other transmission owners.

Even in draft form, there is no doubt that the proposal contemplates continuing ties between Entergy and the LLC-Transco. Entergy will likely negotiate changes even after it

receives a declaratory order. As stated earlier, the draft LLC Agreement states that it is merely a “starting point for negotiations with other potential members.” Is it reasonable to believe that potential member companies with whom Entergy negotiates will want less control or more control? Simple logic suggests the latter.

6. Relation to the RTO Rulemaking


Given Entergy’s amorphous proposal, the Commission should either deny Entergy’s Petition, hold the Petition in abeyance and consider it as part of the forthcoming RTO rulemaking, or not act on the Petition until after the Commission completes that rulemaking. If, however, the Commission chooses to grant the Petition, the Commission should make its order expressly subject to subsequent Commission action in the forthcoming RTO rulemaking. Confusion and inconsistency will likely result if the Commission substantively rules on Entergy’s Petition separate from the broad policy discussion and findings in such a rule.

7. Conclusion

WHEREFORE, NRECA respectfully requests the Commission to grant NRECA's motion to intervene in this docket, with all the rights conferred by that status, to deny Entergy's Petition, and to grant such other relief as requested herein.

Respectfully submitted,

NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION

By 

Wallace F. Tillman
Chief Counsel

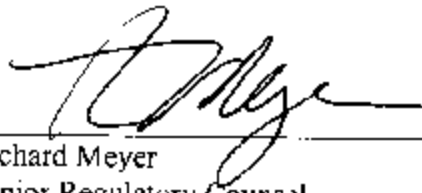
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May 5, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th of May, 1999, served the foregoing document upon each person designated on the official service list compiled by the Secretary of the Commission in Docket No. E1.99-57-000 by depositing copies thereof in the United States mail, first class postage prepaid.



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