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BEFORE THE FEDERAL ENERGY
REGULATORY COMMISSION

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REGULATORY
COMMISSION

ENTERGY SERVICES, INC.

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DOCKET NO. EL99-57-004

MOTION FOR REHEARING OF INDUSTRIAL CONSUMERS

Under Rule 713 of the Federal Energy Regulatory Commission Rules of Practice and Procedure, the Electricity Consumers Resource Council (ELCON), the American Iron and Steel Institute (AISI), and the Chemical Manufacturers Association (CMA) (collectively, Industrial Consumers) hereby move for rehearing of the Federal Energy Regulatory Commission's order of July 30, 1999 granting the Petition for Declaratory Order filed by Entergy Services, Inc. (Entergy).

I. NOTICES AND COMMUNICATIONS

Notices and communications should be addressed to:

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II. SUMMARY OF REHEARING REQUEST

FERC's July 30, 1999 Order summarily changes a critical FERC restructuring policy with respect to the governance and essential attributes of transmission grid managers. FERC has approved the concept that a for-profit Transco owned 100% by transmission owners can serve as a Regional Transmission Organization (RTO)--over the strenuous objection of state regulators and a broad spectrum of intervenors. FERC should grant rehearing for the following reasons:

(1) Entergy's for-profit Transco will have an inherent conflict of interest that precludes its functioning as a fair and efficient RTO. For-profit Transcos cannot serve the role of impartial grid managers because the Transco's primary duty is to maximize Transco revenues for the benefit of its shareholders. FERC gave insufficient consideration to problems raised by the Entergy Transco's fiduciary duty to its shareholders and failed to respond to significant comments. A profit-making Transco cannot "police" the grid on an impartial basis, especially if it assumes the role of NERC's security coordinator. A for-profit Transco cannot make efficient and impartial decisions involving the tradeoff between new transmission and generation facilities, and generation redispatch because it has an incentive and a duty to shareholders to favor its transmission and generation operations. A large independent non-profit RTO is a structural requirement to create workable competitive markets. FERC's Order does not explain how Entergy Transco can achieve the same impartiality.

(2) FERC has previously adopted a policy of approving independent not-for-profit entities (ISOs) as grid managers. In proceedings arising under Section 203 and Section 205 involving independent system operators, FERC has adopted a "rule" that the entity managing the grid may not be owned by any market participant. In providing that Entergy's

Transco may serve as a grid manager, FERC abruptly reversed its prior policy because the Entergy Transco may be owned 100% by Entergy. FERC offered no rationale for departing from its prior administrative policy and precedent. The Administrative Procedure Act (APA) requires that agencies explain departures from prior precedent. FERC failed to reflect reasoned consideration of alternatives proposed by Industrial Consumers and other intervenors which would allow establishment of for-profit Transcos under the umbrella of independent grid managers.

(3) In approving a passive ownership structure, FERC ignored comments by the expert antitrust authority, the Federal Trade Commission (FTC). FTC has warned of serious concerns about the potential for discrimination because the Entergy Transco board must take actions that favor their passive owners. FTC urged that a not-for-profit independent RTO is needed to manage the grid on a truly independent basis. The ability of Entergy Transco to discriminate against existing and new generators that are the Transco's potential competitors for relieving congestion must be structurally eliminated by establishing an independent RTO. Behavioral remedies such as codes of conduct will not work. FERC ignored these comments.

FERC has given short shrift to other warning signs that Entergy Transco will not have sufficient independence from its "passive owners," raised by state commissions and transmission customers as well as by Industrial Consumers.

(4) It was arbitrary and capricious for FERC to approve the governance of the Entergy Transco when many of its structural features conflict with the objectives and attributes proposed for regional grid managers in FERC's pending RTO NOPR. The Entergy Transco proposal contravenes the RTO NOPR objectives because there will still be (a) incentives to discriminate; (b) need for FERC oversight of a monopolist transmission company; (c) inefficiency/unfairness in decisions related to relieving transmission congestion; and (d) an RTO

that is too small to broaden geographic markets and mitigate market power.

(5) It is arbitrary and capricious for FERC to use the Declaratory Order vehicle in lieu of the pending RTO rulemaking. Entergy's Petition for a Declaratory Order sketches the vague outline of a future Transco-based RTO structure. FERC should not allow Entergy, through the stratagem of a declaratory order procedure, to obtain pre-approval of its governance before FERC's RTO rulemaking, which will consider among its principal topics whether passive ownership satisfies principles of independent governance and whether Transcos may appropriately function as impartial grid managers given inherent conflicts of interest.

III. ARGUMENTS FOR REHEARING

A. The Entergy Transco Cannot Serve As RTO Because The Board's Primary Duty Is To Optimize Shareholder Value

Industrial Consumers and other intervenors pointed out to FERC that Entergy Transco is incapable of serving as impartial grid manager because the Transco's board has, as its mandate, optimization of shareholder value. The Transco board has a duty to act in the best interest for the corporation and, unlike an independent grid manager, cannot act in the best interest of all users of the grid.

Below we explain (a) the Entergy Transco Board must act to promote its corporate self-interest and may not act for the "collateral" consideration of the best interest of the grid; (b) decisions relating to transmission congestion and security coordination create conflict between the Transco's interest and the grid's best interest; (c) FERC's dismissal of the fiduciary duty concern was superficial and fails to reflect reasoned consideration.

1. The Duty of the Transco's Board Is To Maximize Transco Revenues Not To Serve Impartially the Best Interests of the Grid

It is the responsibility of a board of directors to manage or direct the management

of the business and affairs of the corporation.¹ “In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders. Directors are expected to make decisions on significant corporate policies involving risk evaluation, assumption or avoidance. These decisions may include ‘enterprise’ decisions such as corporate acquisitions, sales of assets, entering new lines of business or expanding old ones, declaring dividends, capital investments, incurring debt, issuing stock, and the like.” See Balotti, Delaware Corporations/Businesses Organizations, 4-118 (1999 Supp.). The board’s “duty of loyalty embodies both an affirmative duty to protect the interests of the corporation and an obligation to refrain from conduct that would injure the corporation and its stockholders or deprive them of profit or advantage.” Folk on Delaware General Corporation Law, at § 141.2. In Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939), the Delaware Supreme Court held that a board of directors must avoid divided loyalty in discharge of its duties:

While technically not trustees, [corporate officers and directors] stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, preemptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation or to deprive it of profit or advantage which his skill and ability might properly bring to it, or enable it to make in the reasonable and lawful exercise of its powers. The rule requires an undivided and unselfish loyalty to the corporation and demands that there shall be no conflict between duty and self interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.

Leaving aside the concern that the Transco will favor the economic interest of

¹ See 8 Del. C. § 141(a). Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179 (Del. 1986); Aronson v. Lewis,

passive owners, the Transco like any other corporation would have a duty to maximize revenue for shareholders, rather than to pursue objectives “collateral” to the Transco in the public interest.

In Blankenship v. Boyle,² trustees of a United Mine Workers of America Welfare & Retirement Fund had maintained excessive funds in interest-free accounts in a union-owned bank. The trustees used these assets to buy stock in utility companies and then required the utilities to burn union-mined coal. The beneficiaries challenged the prudence of both the lack of return from the interest-free accounts and the securities purchase. The trustees defended their actions by pointing out that the pension fund was partially supported by contributions from coal owners on a per ton basis so that forcing the utilities to burn union-mined coal was intended to increase contributions. Second, they contended that the investment preserved union jobs. The court held for the beneficiaries, basing its holding on a breach of the duty of loyalty: “The fund was acting primarily for the collateral benefit of the Union and the signatory operators in making the most of its utility stock acquisitions rather than acting solely in the interest of the beneficiaries.”

A Transco Grid Manager will face a conflict in duty. The board of directors of Entergy Transco would invite shareholder challenge if, instead of endeavoring to maximize transmission revenues to sustain a constraint (e.g., by overselling ATC to take advantage of the dichotomy between contract paths and loop flows), it redispatched generation. Aggrieved shareholders may allege that the Transco’s board subordinated its profit-maximizing duty by favoring collateral objectives. Inevitably, Entergy Transco-as-RTO will be forced to chose between maximizing shareholder returns and subordinating its profits in the interest of efficient

² 473 A. 2d 805, 811 (Del. 1984); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939); 329 F. Supp. 1089 (D.D.C. 1971).

and impartial grid management which benefits all other market participants.

2. FERC Failed To Consider The Potential For Conflict Between Transco Corporate Objectives And Duties Of The RTO As Impartial Grid Manager

(a) Transmission Constraints

Transcos have an inherent conflict in taking decisions about how to relieve congested transmission interfaces on load pockets or whether to expand transmission facilities. As the FTC observed in the Mississippi Entergy Docket and in its comments to FERC in this Docket: "To a considerable degree, expansions of transmission capacity and new or expanded generation within a load pocket are substitutes for each other in relieving such load situations."³ A Transco could take advantage of a load pocket for delaying in its response to a request to connect a new generator to the grid within the pocket so that it could collect the maximum rates for longer periods than it would otherwise for the increased use of its transmission capacity from outside the load pocket. "By contrast, an ISO would have no ownership incentives to favor one type of asset over another."⁴

An independent not-for-profit grid manager, when confronted with congestion, will be able to help the market make tradeoffs between the need for new transmission facilities, new generation or redispatch at least cost. In contrast, Transcos compete with gencos to relieve transmission congestion. Therefore, a Transco will not have any incentive to select a more efficient generation-based option which provides counterflows and diminish its business. When it comes to a decision whether to expand the transmission system, a for-profit Transco will decide on the narrow basis of its own shareholder interests whether and how to address the constraint. Such self-interest must always motivate the Entergy Transco to favor a transmission

³ FTC Comments in Docket No. 99-57.

⁴ Id.

solution to a congestion problem when a generation solution might be more cost-effective. The independent not-for-profit grid manager model will have no bias in preferring a particular outcome, particularly if the grid manager can effectively relegate the resolution of such decisions to the marketplace. FERC failed to give adequate consideration to comments pointing out this conflict and to consider whether the alternative RTO paradigm was preferable.

(b) Security Coordination Functions

Another area of conflict relates to Entergy's proposal to serve as security coordinator. Standards of conduct do not provide the requisite assurance that security coordinators will exercise independence. Structural separation and other regulatory safeguards are needed because standards of conduct are insufficient to avoid subtle manipulation of NERC's operating policies. Separation of security coordinators from transmission affiliates will avoid a flurry of complaints and need for continued monitoring of behavior.

3. FERC's Superficial Treatment Of The Fiduciary Duty Issue Is Woefully Deficient

FERC's order in Entergy dismisses concerns that the Transco's Board will owe a fiduciary duty to shareholders which will undermine its independence and its obligations to act in the best interests of the grid. FERC ignores the arguments of Industrial Consumers and FTC that in decisions such as relieving congestion there will be a conflict that the Entergy Transco Board is obligated to resolve in favor of the corporation. FERC implies that there is no "independence" problem unless "applicants find that Delaware law requires board members' fiduciary duty to extend even to Member Companies' non-transmission interest." Order at 11(emphasis added). As noted above, Transco's Board will have a duty to maximize shareholder returns. It is FERC, not applicants, which must be satisfied that a proposed RTO is structured to achieve regulatory objectives and to perform impartially its duties as RTO. Industrial Consumers cited two

instances related to the Transco's core business of managing transmission assets where the fiduciary duty of the Board may conflict with efficient impartial and reliable grid management: (i) relieving congestion and (ii) security coordination.

FERC, like other agencies, has an obligation under the Administrative Procedure Act to consider material comments submitted by interested members of the public. See Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). FERC has failed to do so here.

B. FERC Has Significantly Revised the ISO Independence Criteria Without Providing A Reasoned Explanation

FERC has adopted a rule, Order 888, which states that "to be truly independent, an ISO cannot be owned by any market participant." 61 Fed. Reg. 21540 (1996). To date, FERC has never approved an ISO whose owners are affiliated with a market participant. The Entergy Transco order revises this rule in a fashion which would allow Entergy to own 100% of the Transco and allow Entergy and its shareholders to receive 100% of the Transco's profits under the performance-based rate structure that Entergy favors.

FERC must provide a reasoned explanation of the rationale for its decisions, especially with respect to decisions which depart from established precedent. As the D.C. Circuit held Sithe/Independence Power Partners v. FERC, 165 F.3d 944, 949-950 (D.C. Cir. 1999):

The Commission proposed to re-affirm its "matching" policy in the orders on review, see 76 F.E.R.C. at 62,458, but concluded that Sithe had failed to establish a violation thereof. In so holding, however, FERC neither provided a clear explanation of its rationale nor revealed the data and assumptions underlying its findings. On the record before us, therefore, we are unable to satisfy

ourselves that the Commission engaged in reasoned decision making and reached conclusions supported by the record. Indeed, we are unable to penetrate the logic of FERC's orders to ascertain whether FERC in fact departed from established policy and precedent and, if so, whether it justified that departure. Cf. Northern States, 30 F.3d at 180 ("The Commission must be able to demonstrate that it has 'made a reasoned decision based upon substantial evidence in the record.' ") (quoting Town of Norwood, 962 F.2d at 22); Hatch v. FERC, 210 U.S. App. D.C. 100, 654 F.2d 825, 834 (D.C. Cir. 1981) ("An agency must provide a reasoned explanation for any failure to adhere to its own precedents.").

When FERC changed its "independence" criteria it was in effect changing an established rule, albeit via an adjudicatory proceeding. In this context it was incumbent upon FERC to "respond[] in a reasoned manner to significant comments received." United States Satellite Broadcasting Co. v. FCC, 740 F.2d 1177, 1188 (D.C. Cir. 1984); *see also, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 & n.58 (D.C. Cir.), cert. denied, 434 U.S. 829, (1977).

FERC has failed to explain its departure from precedent or to reflect consideration of intervenors' alternative proposals that concerns about abuse of market power would be relieved if Entergy Transco were subsumed under an independent RTO.

C. FERC Ignored The Concerns Of The Federal Trade Commission And Of Industrial Consumers About Passive Ownership of RTOs by Transmission Owning Utilities.

1. FERC Has Ignored FTC's Concerns About Entergy Transco's Independence

A primary risk posed by vertical integration is that the transmission provider will attempt to favor its own affiliated generation or marketing functions. Operational unbundling is therefore necessary to mitigate market power.

The FTC intervened on May 27, 1999 in the FERC Entergy docket and stated:

As presently devised, the ownership structure of the proposed Transco is unlikely to provide sufficient safeguards against discrimination in transmission access. The proposal also provides no mechanism for addressing the competitive concern about bias toward transmission (and against generation) in alleviating load pockets, and about delays in solutions to transmission congestion generally. For these reasons, FERC may wish to consider an alternative to the proposed Transco, such as an ISO.

FTC warned that “behavioral rules leave in place basic incentives (created by ownership of generation assets) to discriminate against transmission. In particular, the Transco’s management would know that its owners (Entergy and others) would benefit from certain of the Transco’s practices that favor Entergy’s generation assets, such as understating available transmission capacity to independent generation sources.” Detecting and documenting discriminatory practices by a Transco could be difficult “because such transactions are very sensitive to timing and nuance.” The FTC’s “experience in enforcing the antitrust laws and in monitoring deregulation and restructuring of regulated industries strongly supports a preference for operational separate or divestiture in unbundling services.” Potential market entrants “are likely to perceive a continued risk of discrimination in transmission services based on past experience in the industry” and therefore shy away from actually entering the market. These perceived risks do not exist under an ISO structure.

FERC cannot excuse its rejection of FTC’s May 27, 1999 comments on the basis that the comments were filed after the intervention date because Industrial Consumers brought FTC’s concerns about the Entergy Transco proposal to FERC’s attention in our timely intervention. We advised FERC that FTC’s Bureau of Economics had intervened in a proceeding before the Mississippi PSC concerning the proposed Entergy Transco where FTC warned of “potential vertical and horizontal threats to competition for Entergy’s proposal:”

Even if Entergy's proposal were likely to be an effective substitute for operational separation or divestiture, potential entrants are likely to perceive a continued risk of discrimination in transmission services based on past experience in the industry. This perceived risk of discrimination is likely to lead to less entry into generation and less competition under a Transco regime than under an ISO regime.⁵

FERC ignored FTC concerns and in fact, did not even acknowledge FTC's position. FERC cannot ignore these comments as insubstantial given their source.

2. FERC Has Given Short Shift to Danger Signals Suggesting That The Entergy Transco Will Not In Fact Be Independent Of Entergy

Entergy's original proposal would have compounded the felony of passive ownership by allowing Entergy to hand-pick members of the Transco Board from among the finalists selected by the executive search firm. Based on adverse comments, Entergy retreated from the proposal. However, Entergy continues to seek the unilateral ability to remove or add members to the Board.⁶ Further, the Entergy Transco will be staffed by former Entergy employees. Entergy member companies intend to provide services to the Entergy Transco (Petition, p. 10). Entergy has been the subject of several complaints alleging that it has discriminated in providing transmission access.⁷

While other ISOs have involved stakeholders in the planning process, in an effort to demonstrate ab initio fairness and openness to all market participants, Entergy has not similarly engaged in a stakeholder process. FERC has failed to explain why it has uniquely exempted Entergy from a requirement to be responsive to stakeholders and seek their input on

⁵ APPA attached FTC's August 28, 1998 comments in Mississippi Docket No. 96-UA-389 to APPA's May 9 filing.

⁶ LLC Agreement, § 6.11(b)(vii).

⁷ See Aquila Power Corp. v. Entergy, Docket No. EL 98-36; Clarksdale PUC v. Entergy, Docket Nos. EL 98-72 and EL 95-73; So. Miss. Elec. Power Ass'n v. Entergy, Docket No. EL 8-74; Sam Rayburn G & T

structure and governance.

Taken in combination, these warning signs suggest the need for heightened scrutiny of Entergy Transco independence. Reconsideration is warranted to provide an opportunity for FERC to give careful consideration to whether Entergy Transco will have the requisite independence.

D. It Is Arbitrary And Capricious For FERC To Approve The Entergy Transco When A For-Profit Transco Will Conflict With Many RTO Objectives And Functions

A for-profit Transco is not an appropriate vehicle to discharge the objectives that FERC has announced to achieve efficiency in bulk power transmission and to avoid real and perceived discrimination in transmission. FERC has failed to give reasoned consideration to the critical question whether a private sector board can carry out public sector functions. FERC has acted arbitrarily and capriciously in making this precipitous judgment instead of waiting for the outcome of the RTO rulemaking, especially given apparent conflict between the Entergy approval and FERC's RTO objectives.

The RTO NOPR identifies categories of transmission-related impediments to a competitive wholesale market, including problems related to operating efficiency and incidents of real or perceived discrimination.⁵ FERC has received complaints of discriminatory practices by utilities designed to favor their own interests including (1) calculation and posting of ATC in a way that favors the transmission owner, (2) standard of conduct violations, (3) discriminatory implementation of line loading relief and other congestion management tools, and (4) difficult-to-use OASIS sites. RTO NOPR, 64 Fed. Reg. 31399-31407. FERC notes that the perception of discrimination can be almost as pernicious as the reality of discrimination due to the dampening

Elec. Corp. v. Entergy, Docket No. EL 99-6.

effect on competition. Id. at 31403.

The Entergy Transco conflicts with key functions and attributes that FERC proposes for RTOs in the pending NOPR:

(1) RTO NOPR Objective: RTOs will remove incentives and opportunities for transmission owners to discriminate:

An RTO would have no financial interests in any power market participant, and no power market participant would be able to control an RTO. This separation will eliminate the economic incentive and ability for the transmission provider to act in a way that favors or disfavors any market participant in the provision of transmission service. Accordingly, ATC calculations can be made in an unquestionably objective manner, OASIS sites can be equally relied upon by all transmission market participants.

64 Fed. Reg. 31409.

Entergy Order: FERC's Entergy decision does not reconcile, or even address, the inconsistency between allowing Entergy to serve as security coordinator and RTO objectives.

(2) RTO NOPR Objective: RTOs will reduce the need for extensive FERC oversight. 64 Fed. Reg. 31407.

Entergy Order: If an independent not-for-profit corporation serves as an RTO, FERC should be able to lessen regulatory oversight. FERC failed to respond to the comments of Industrial Consumers that the Entergy Transco cannot be subject to light-handed regulation because it is a monopolist.

(3) RTO NOPR Objective: FERC identifies the planning and coordination of necessary transmission additions and upgrades as a key RTO function. The NOPR states that an RTO must be responsible for planning necessary transmission additions and upgrades, and for

⁸ Docket No. RM 99-2, 64 Fed. Reg. 31392 (June 10, 1999)

coordinating such efforts with state regulators. 64 Fed. Reg. 31428.

Entergy Order: The for-profit Transco is a poor vehicle to accomplish these ends because it may make economically inefficient trade-offs between generation dispatch, transmission pricing, and siting of new facilities to serve its own ends – all in the pursuit of maximizing revenue for its shareholders.

(4) RTO NOPR Objective: RTOs should have sufficient scope and regional configuration to permit the RTO to effectively perform its functions. RTOs should not be drawn in a manner that facilitates exercise of market power. RTOs should be large enough to encourage geographic trading over a large area. 64 Fed. Reg. 31392.

Entergy Transco: Entergy has proposed a Transco which may have no other participants. FERC's July 1999 Entergy decision approves an RTO of limited configuration, without a commitment to join a larger regional RTO.

E. FERC Acted Arbitrarily And Capriciously In Approving The Transco's Governance Via A Declaratory Order

1. FERC Should Resolve Precedential Issues Related To Transcos As RTOs Through Rulemaking

FERC's choice to proceed by declaratory order is arbitrary and capricious. FERC has in effect resolved that a for-profit Transco may serve as RTO without benefit of the comments FERC has requested in its pending rulemaking. Thus FERC has resolved issues such as passive ownership with inadequate consideration.

FERC has departed from its past precedent which provides that a declaratory judgment is not the proper form to establish a new rule. In Texas Eastern Transmission Corp., 62 FERC ¶ 61,196 (1993), FERC stated that "an adjudicatory forum is not the proper forum for rulemaking activity." FERC rejected Texas Eastern's request for a declaratory order to change

certificate application procedures and at a time when FERC was considering a rulemaking on the topic.

FERC has also departed from its own precedent which provides that the Commission will not utilize the declaratory order vehicle to approve “proposals proffered in the abstract.” Dominion Resources, 85 FERC ¶ 61,268 (1999). By jumping to the head of the line, Entergy has obtained, by declaratory order, approval that a for-profit entity may serve as RTO, pre-judging a critical issue in the RTO rulemaking.

2. FERC Has Allowed Entergy Advance Approval Of Its Governance Structure Based On A Sketchy Filing Without Providing The Type Of Information Required Of Past ISO Applicants

For no compelling reason, FERC has excused Entergy from the detailed demonstration required of Cal ISO, NY ISO, PJM, and NEPOOL.⁴ In past ISO proceedings, FERC required a knowledge of participants in the ISO; here there is no basis for FERC to know which entities will participate or to determine whether the Entergy Transco “RTO” will have adequate size and scope to mitigate market power.

Entergy’s application provided little or no information on key issues related to the pricing of services, treatment of reliability and congestion management. FERC dismisses the many comments that it received protesting the sketchy nature of the petition by saying that its declaratory order approval is limited to governance. Entergy will be required to make a more detailed Section 205 filing before final approval. However, FERC made no effort to explain why a partial, inchoate proposal sufficed for Entergy, while other ISO applicants were required to make a detailed filing to demonstrate the fairness of their governance process.

3. By Agreeing To Entergy’s Piecemeal Filing Procedure, FERC Fails To

⁴ Pacific Gas & Elec., 77 FERC ¶ 61,204 (1996); PJM, 77 FERC ¶ 61,148 (1996); NEPOOL, 79 FERC ¶ 61,374 (1997); Central Hudson (NY ISO), 83 FERC ¶ 61,357 (1998).

Optimize RTO Formation

As Industrial Consumers urged in our initial comments, FERC has ample authority under Sections 203 and 205 to condition Entergy's requested approvals on commitments by Entergy to eliminate rate pancaking, join a large regional RTO, and take other actions that will forward the establishment of efficient bulk power markets. FERC has approved Entergy's skeletal application without insisting on conditions that would mitigate exercise of market power and broaden geographic markets. This is a poor precedent for restructuring filings because FERC has failed to impose a panoply of conditions to further grid regionalization. A far lesser level of commitment has been demanded of Entergy than of other ISO applicants. FERC has approved Entergy's Transco proposal:

- without any commitment by Entergy to provide open access at non-pancaked rates pursuant to a single grid-wide tariff. Compare ISO principle 3 and Entergy Petition, p. 29.
- without any commitment by Entergy to explain how the Transco will ensure short-term reliability. Compare ISO principle 4 and Entergy Petition, p. 33.
- without any commitment by Entergy to develop a congestion management proposal. Compare ISO principle 6 and Entergy Petition, p. 35.
- without a sufficient market monitoring commitment. Compare Cal ISO monitoring plan that would identify attempts to create transmission power and anomalous market behavior (Pacific Gas & Elec., 81 FERC ¶ 61,122 (1997)) with Entergy's more limited proposal to monitor compliance with the rules established in the Transco's operating manual and tariff (Entergy Petition, p. 4).

IV. CONCLUDING PROCEDURAL OBSERVATIONS

While paying lip service to the concerns of state commissions in a hearing process leading up to the RTO NOPR, FERC ignored the opposition of four state commissions to Entergy's proposal. The comments of the Arkansas, Louisiana, Texas and Mississippi commissions expressed concern about independent governance, and Entergy's failure to involve stakeholders in the process of formulating its proposal. FERC should grant reconsideration to provide reasoned consideration of the objections and concerns identified by state regulatory commissions, Entergy transmission customers, Industrial Consumers and other intervenors.

The Entergy Transco Order is a critical step in FERC restructuring because it sets future FERC policy in advance of the RTO NOPR proceeding. Industrial Consumers urge that FERC act promptly to grant rehearing of the Entergy Transco Order. If, however, FERC denies rehearing, it should do so promptly to enable timely judicial review. FERC should avoid the protracted timetable followed in First Energy and Order 888, where FERC's delay deprived parties of the opportunity to obtain prompt judicial review.

Respectfully submitted,



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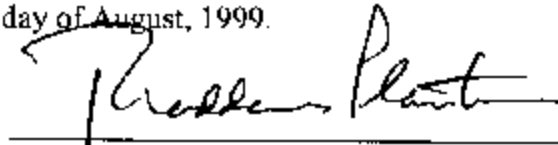
Counsel for Industrial Consumers

Dated: August 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Rehearing of Industrial Consumers was today mailed to parties on the service list of this proceeding by U.S. mail, postage prepaid.

Dated at Washington, D.C., this 27th day of August, 1999.



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