

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

FILED IN THE SECRETARY
39 MAY - 5 11 30
FEDERAL ENERGY
REGULATORY COMMISSION

Energy Services, Inc.)

Docket No. EL99-57-000

**MOTION TO INTERVENE, PROTEST
AND MOTION FOR SUMMARY DENIAL OF THE
TRANSMISSION DEPENDENT UTILITY SYSTEMS**

Pursuant to Rules 211, 212 and 214 of the Federal Energy Regulatory Commission's (Commission or FERC) Rules of Practice and Procedure, 18 C.F.R. Sections 385.211, 385.212 and 385.214, and the April 7, 1999 "Notice of Filing" in the above-noted docket, the Transmission Dependent Utility Systems (TDU Systems) hereby move to intervene, protest, and seek summary denial of the filing made herein. In support of their Motions and Protest, the TDU Systems state as follows:

I.

MOTION TO INTERVENE

The following rural electric cooperatives are members of the TDU Systems: Alabama Electric Cooperative, Inc.; Arkansas Electric Cooperative Corporation; Golden Spread Electric Cooperative; Kansas Electric Power Cooperative, Inc.; North Carolina Electric Membership Corporation; Seminole Electric Cooperative, Inc.; and South Mississippi Electric Power Association. Through their member distribution cooperatives and other wholesale customers, these generation and transmission (G&T) cooperatives serve over 2.5 million metered accounts in seven states.

The TDU Systems are moving to intervene both jointly as a group, and in their individual capacities. In addition, certain of the TDU Systems are filing separate motions

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to intervene and protests in this docket to protect their individual interests. Because the TDU Systems are an *ad hoc* group, they request waiver of Rule 203(b)(3) of the Commission's Rules, 18 C.F.R. Section 385.203(b)(3), to permit them to place more than two names on the service list being established in this docket.

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On April 5, 1999, Entergy Services, Inc. (Entergy) tendered for filing a "Petition for Declaratory Order Regarding Compliance of Transco Proposal with Applicable ISO Principles" (Petition). In its Petition, Entergy asks the Commission to issue an order finding that its proposal to create an affiliated transmission company (Transco) meets the independence criterion set out for Independent System Operators (ISOs) in Order No. 888 and its progeny. Entergy requests that the Commission issue the order Entergy seeks by the end of July 1999.

While some of the TDU Systems own and/or operate discrete transmission facilities, all of them rely on the transmission systems of neighboring investor-owned public utilities to transmit the power required to serve their member distribution cooperatives and other wholesale customers. They also compete against these same investor-owned utilities for wholesale loads, and in some cases for retail loads. They anticipate increased competition with them for retail loads as retail access is implemented in the states the group members serve. Thus, the TDU Systems have a multi-faceted relationship with their investor-owned utility (IOU) transmission providers -- they are both customers and competitors. If they cannot obtain transmission service on terms and conditions comparable with their transmission providers, they cannot compete with these same providers (or other favored competitors) for wholesale and retail customers.

The TDU Systems therefore have a keen interest in proceedings before this Commission that may impact the future course of transmission access policies. They have come together to participate in such dockets so they can advocate policies and procedures that will ensure they obtain transmission service on fair and equitable terms.

The instant docket raises an important transmission-related issue of first impression for the entire electric industry: whether a for-profit transmission company that is wholly-owned by a public utility holding company also owning generation and distribution facilities in the same region can meet the "independence" criterion for ISOs set out in the Commission's Order No. 888. The Commission's rulings in this docket could well affect the development of ISOs or other Regional Transmission Organizations (RTOs) in many regions of the country. For this reason, the TDU Systems have a direct interest in the outcome of this docket, an interest that cannot be effectively represented by

any other party. This interest justifies the granting of the TDU Systems' joint and several motion to intervene.

II.

PROTEST AND MOTION FOR SUMMARY DENIAL

The TDU Systems are located in areas of the country that have yet to see the implementation of ISOs or other RTOs. They favor the speedy development of strong, effective and fully independent RTOs. Such RTOs are necessary if this Commission is going to fulfill the promise it made to the industry in Order No. 888 to ensure that public utilities provide fully comparable open access transmission services. So long as a wholesale transmission provider can favor its own generation over that of a third-party generator in the provision of transmission service, that service will not be fully comparable.

To attain the goal of truly comparable open access transmission service, the TDU Systems believe that the Commission will have to require fundamental structural change. Simply put, the Commission will have to mandate public utility participation in strong, effective and fully independent RTOs.

The Entergy Petition illustrates perfectly why reliance on the voluntary formation of RTOs will not work. Entergy understands that the Commission wants to see RTOs formed in all regions of the country, but that it may lack the political will to mandate them. Entergy therefore holds out before the Commission the carrot of forward movement on RTOs in a region of the country where progress on RTOs to date can be best described as glacial. All the Commission has to do is declare that Entergy's proposal meets the independence criterion of its ISO principles. Entergy requests the Commission

not to hold its Petition in abeyance, pending the soon-to-come Notice of Proposed Rulemaking (NOPR) on RTOs, because to do so “will likely delay, not foster, the development of a Regional Transmission Entity in the Southeast.” Petition at 4. The implied threat underlying its request is clear—there will no progress on the RTO front in the Southeast unless the Commission gives Entergy the declaratory order it seeks, and does so immediately.

The TDU Systems would like to see the development of RTOs in the Southeast as much, if not more, than the Commission does. The ultimate consumers served by several of the TDU Systems would benefit from a properly constructed RTO in the region Entergy now serves. Nonetheless, they are asking the Commission summarily to deny Entergy’s Petition. The Transco that Entergy proposes would not be independent, and would not serve as a sound platform for the development of a Southeastern RTO. Rather, it would continue, if not permanently institutionalize, Entergy’s domination over both transmission and generation in the region. The Entergy Transco would make it even more difficult for transmission dependent entities such as the TDU Systems to serve their own wholesale and retail loads effectively.

A. The Entergy Transco Would Not be Independent.

Entergy acknowledges in its Petition (at 6) that “in its initial discussions with other transmission-owning entities who may be interested in joining the Transco, and with state regulatory commissions, the “independence” issue has been consistently raised as an important threshold issue regarding the formation of a proposed Transco.” It is not hard to see why. Any rational industry observer that reviews the proposal would be compelled to conclude it fails to meet the independence criterion for ISOs that the

Commission announced in Order No. 888 and has fleshed out in a series of orders dealing with various ISOs.

Entergy proposes to form a limited liability company (LLC) that would be owned by those "Member Companies" transferring transmission assets to the LLC. At this time, the only such entities appear to be the Entergy Operating Companies.¹ They would take back what Entergy terms "passive ownership interests" in the LLC, but would nonetheless reserve the right to veto a substantial number of management decisions. See, e.g., LLC Agreement, Section 5.10(a) and Section 5.11(b). Entergy states that the Transco would be managed by an independent Managing Board, but it wants to have the Member Companies select the initial Board Members from a slate of candidates developed by a search firm that the Member Companies would also choose. Petition at 9.² Moreover, the Member Companies would reserve the right to remove a Director "for cause," subject to FERC approval. LLC Agreement, Section 5.8(a).

If the Member Companies have the rights to both select the initial LLC Managing Board members and to remove them, the Board members are bound to be attentive to the interests and opinions of the Member Companies as they manage the LLC. Indeed, one

¹ Entergy states that it and other supporting stakeholders would "aggressively market to other transmission-owning entities the commercial attractiveness of this structure and encourage them to commit their assets and employees to a regional transmission company." Petition at 15. It does not appear, however, that Entergy contemplates the investing public itself would ever have the opportunity to purchase equity interests in the Transco. Rather, it would be a "closely held" LLC. Current Member Companies would also have the right to make matching bids for additional interests the Board might offer to bring in new Member Companies. LLC Agreement, Section 3.3(b).

² Entergy states that "if the Commission believes such a process is critical to independence," it would not oppose having a "structured stakeholder committee" make the initial board member selections. Petition at 9-10. If this approach were used, however, Entergy says that the selection of the representative stakeholder committee would itself be "subject to negotiation among the relevant parties." *Id.* at n. 11. Given Entergy's grudging consent "not to oppose" such a stakeholder committee, TDU Systems do not hold out high hopes that the negotiations to form this committee would go smoothly. Entergy's avowed preference for having its affiliates select the supposedly independent Board members is one more clue that Entergy does not fully appreciate the independence concept.

industry wag has already suggested that the Board would run the Transco “independently” of Entergy in the same way that the Manager of the New York Yankees runs his team “independently” of George Steinbrenner.

Entergy also discloses in a footnote that “Entergy’s ownership interest in the Transco will continue to be included on Entergy’s financial disclosure documents and its consolidated tax return.” Petition at 28, n. 25. There is no surer sign of continuing affiliation and control than the inclusion of the Entergy Transco ownership interest in Entergy’s consolidated tax return. The income (or losses) attributable to this ownership interest will be set off against those of Entergy’s other affiliates to determine the overall tax liability of the Entergy family of companies. The Entergy Transco would be an integral part of the Entergy enterprise, and its financial performance would affect all of the other affiliates in the Entergy holding company system.

Finally, Entergy also attaches to its application as Exhibit 1 elaborate “Standards of Conduct” which purport to ensure that the “Company” (the Transco) will operate free of the control, or the appearance of control, by a Member Company or other market participant. Entergy acknowledges that Transco employees would have to abide by a Code of Conduct complying with Order No. 889, because “the Transco could technically be an affiliate of the Member Companies.” Petition at 22. The very fact that such standards of conduct would be necessary underscores the already obvious--the Transco Entergy proposes is not the structural remedy that the industry needs to ensure truly non-discriminatory and fully comparable open access transmission.

If the Commission approves the blueprint set out in the Entergy Petition, it will forever be in the “conduct police” business. It will have to exercise continuing oversight

over the Entergy Transco (and other entities like it) to ensure that it is not favoring its sister Entergy companies in its operations, as the Commission must now monitor transmission providers for compliance with the Order No. 889 Standards of Conduct. But experience teaches that the Commission will never have the resources necessary adequately to police the behavior of transmission providers, especially large multi-state organizations such as the Entergy Transco. What is needed is a structural solution that fully separates generation from transmission, ensuring comparable treatment of all generators because none are affiliated with the transmission provider.

B. Assuming Entergy's Proposal Indeed Achieves Independence, It Is Not Superior to An ISO.

Assuming for the sake of argument that Entergy is correct, and that the Managing Board of the Entergy Transco would be fully independent of Entergy and its Operating Companies, one has to wonder what Entergy would have accomplished by doing so. Entergy presents its Transco proposal as a superior alternative to an ISO, but it is not clear how it is.

For at least the last year, Transco adherents have been faulting ISOs for separating the ownership of transmission assets from their operation. According to this theory, transmission assets must be managed by the same entity that owns them, if the proper "synergies" and "incentives" are to be achieved. ISOs have been derided as being ineffective and inefficient because the management of the ISO does not have any direct financial interest in the transmission business, and hence is not motivated to operate the transmission assets under its control in the most efficient manner.

Interestingly enough, if the Entergy Transco's Managing Board were indeed totally independent of the Transco's owners, then the Entergy Transco would suffer from many of these same purported flaws. The Managing Board would not have to be responsive to the owners, because all of the owners would be "passive," supposedly having no role in management, and instead leaving all these decisions to the Board.³ If the Board is not responsible to the owners for the performance of the Transco, then one has to ask what incentive the Transco's Managing Board has that the Board of an ISO does not to ensure that the transmission assets are efficiently utilized and profits maximized. Entergy even invites this question when it notes that "the board will have a nominal fiduciary role towards the holders of the passive economic interest, just like an ISO has a fiduciary duty to the transmission owners." Petition at 21.

The answer is, of course, that the owners of the Entergy Transco in fact would not sit back "passively" and tolerate poor management of their assets. They would step in and exercise control, just as George Steinbrenner steps in when the Yankees perform poorly. This is why the Entergy Transco as proposed would not be independent. The \$64,000 question the Commission must ask is whether the owners of the Transco would also step in to exercise control, in obvious or subtle ways, if the Managing Board of the Transco had the temerity to operate the Transco in such a way as to threaten the profitability of the Member Companies' other lines of business. TDU Systems believe that the temptation to do just that would be very high. The Commission should not put the Member Companies in the way of such temptation. Instead, the Commission should

³ In some respects, Entergy's proposed LLC looks like a limited partnership with all the partners being limited partners. This begs the question—who is the general partner that actually manages the enterprise? It appears that Entergy intends to have the Managing Board be the equivalent of the general partner, but the Managing Board has no ownership interest in the enterprise.

make clear that when it says independence, it means it, by summarily denying the Entergy Petition.

C. The Entergy Transco Proposal Also Suffers From Other Defects That Merit Its Rejection.

Entergy's proposed Transco also suffers from numerous other deficiencies that make it an inappropriate RTO model for this Commission to encourage. Among its many problems are the following:

- The proposal currently covers only Entergy's own facilities, when what the industry needs is a rationally configured Southeast RTO. Despite Entergy's claims that other transmission providers are indeed interested in its model, none have come forward to date.
- The proposal appears to be premised on the availability of performance-based rates (PBR), yet Entergy provides no clues as to what type of PBR mechanism it desires. Petition at 15, 29.
- The "Annual Regional Planning Summit Process" laid out in Appendix 4 amounts to no more than a "notice and comment" planning model. It falls far short of the joint planning process needed to ensure that new transmission facilities are planned to maximize the benefits of the system for all consumers in the entire region.
- The proposal provides virtually no detail about how congestion management and ancillary services would be provided. Given Entergy's dominant position in the generation markets that would be served by the Entergy Transco, there is almost infinite potential for mischief in these technical but important areas.
- Given the affiliate relationship between the Entergy Transco and Entergy, the market monitoring plan set out in Appendix 3 takes on a certain surreal quality. Apparently the Entergy Transco is to monitor whether it is unduly favoring other Entergy affiliates in its operation of the transmission system, and report to the Commission if it finds it is indeed doing so. An ISO, as an independent, not-for-profit entity, may perhaps appropriately take on certain market monitoring functions. But TDU Systems question whether an affiliated, for-profit entity such as the Transco Entergy proposes here should have any role in market monitoring, with the possible exception of gathering data for the Commission's use.

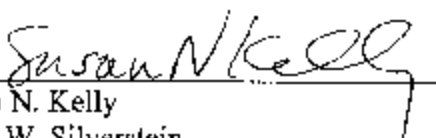
III.

CONCLUSION

Entergy urges this Commission to grant its petition for declaratory order, arguing that "in reviewing a proposal to create an ISO or a Transco, it is not the Commission's role to determine the best solution that could be devised; rather, it is only necessary that the approach chosen is a just and reasonable one." Petition at 17. TDU Systems, for their part, do not think the Commission's role is so limited, and urge the Commission to aim higher, taking an active role in shaping the transmission sector of the electric industry to ensure that the needed structural reforms are made. But in fact, the Commission need not go so far here. It need only examine the Entergy Transco proposal closely to find that it is not just and reasonable. To the contrary, it is a recipe for institutionalizing transmission market power in the Southeast. TDU Systems accordingly request the Commission summarily to deny the Entergy Petition.

Respectfully Submitted,

TRANSMISSION DEPENDENT UTILITY SYSTEMS

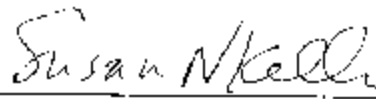
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May 5, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of May, 1999, served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding, by depositing copies in the United States mail, first-class postage prepaid.



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