

ORIGINAL

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc.

Docket No. EL99-57-000

OFFICE OF THE SECRETARY  
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FEDERAL ENERGY REGULATORY COMMISSION

APPLICATION FOR REHEARING OF THE  
TRANSMISSION DEPENDENT UTILITY SYSTEMS

Pursuant to Section 313(a) of the Federal Power Act ("FPA")<sup>1/</sup> and Rule 713 of the Commission's Rules of Practice and Procedure<sup>2/</sup>, the Transmission Dependent Utility Systems ("TDU Systems")<sup>3/</sup> hereby request rehearing of the "Declaratory Order" issued in Docket No. EL99-57-000 on July 30, 1999 ("July 30 Order").

**I. SPECIFICATION OF ERRORS**

1. The Commission erred in holding that "[p]assive ownership of a transmission company by one or more market participants is acceptable if designed, in all respects, to meet the independence and other requirements of the ISO principles." July 30 Order, *mimeo* at 15.

2. The Commission erred in ruling on the passive ownership issue discussed in No. 1

<sup>1/</sup> 16 U.S.C. § 825l(a).

<sup>2/</sup> 18 C.F.R. § 385.713.

<sup>3/</sup> 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; Old Dominion Electric Cooperative; Seminole Electric Cooperative, Inc.; and South Mississippi Electric Power Association. Old Dominion Electric Cooperative has joined the TDU Systems since the filing of their motion to intervene in this docket.

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above before all interested parties had the opportunity to file comments on this issue in the Notice of Proposed Rulemaking on Regional Transmission Organizations in Docket No. RM99-2-000 ("RTO NOPR"), 64 Fed. Reg. 31390 (June 10, 1999).

## II. ARGUMENT

### A. **A For-Profit Transmission Company That Is Wholly-Owned By A Public Utility Holding Company Also Owning Generation Facilities Cannot Meet The "Independence" Criterion For ISOs Set Out In Order No. 888 Or The RTO NOPR.**

#### 1. Independence

The Commission to date has not insisted on one organizational form for RTOs. But the Commission has made clear that RTOs need to be independent:

Market participants must be assured that the RTO will provide transmission access to all market participants on a fair and non-discriminatory basis. The Commission believes that it is a prerequisite for achieving fair, open and competitive power markets. An RTO needs to be independent in both reality and perception. As we have said before in the context of ISOs, we think that "the principle of independence is the bedrock upon which the ISO must be built."<sup>4/</sup>

The Transco Entergy proposes in its petition would have the Commission bend, if not shatter, the independence criterion for ISOs and RTOs. The TDU Systems urge the Commission to take a firm line on the issue of independence; otherwise its effort to foster effective RTOs will fail.

Complete independence of the RTO from all power market participants is going to be required if RTOs are to be successful. Such a "clean break" is needed to ensure compliance with Order No. 888's mandate that public utilities provide fully comparable open-access transmission

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<sup>4/</sup> RTO NOPR, 64 Fed. Reg. 31390 at 31413 (June 10, 1999).

services.<sup>5/</sup> Independence cannot be satisfied if the wholesale transmission provider may be inclined to favor its affiliated generation over that of a third-party generator in the provision of transmission services.

Under Entergy's proposal, the only entities proposing to form the LLC to date have been the Entergy Operating Companies themselves. Although these "Member Companies" would take only "passive" ownership interests in the LLC, they would still have the power to veto certain management decisions.<sup>6/</sup> They would also be the entities to which the LLC's management would owe a duty of care and duty of loyalty. A management beholden to any subset of market participants could well be distracted by the participants' other investments in managing the enterprise.

If market participants are permitted to have ownership interests in a for-profit transco, then there will be no "clean break," either in perception or reality. The management of a for-profit transco will have the obligation to manage the entity to maximize and protect the stakeholders' interests. However, stakeholders who are also market participants would have a competing interest in advancing their assets in generation markets. The essential conflict that would be created can be eliminated only through the creation of a fully independent transco.

## 2. De Minimis Ownership

In the RTO NOPR in Docket No. RM99-2-000, the Commission asked, "whether one percent is an appropriate de minimis ownership interest and, if not, what would constitute the appropriate de minimis ownership for purposes of establishing independence." RTO NOPR at

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<sup>5/</sup> See, e.g., Comments of the U.S. Department of Justice, Docket No. RM99-2-000, filed August 17, 1999 at p. 2-3.

<sup>6/</sup> Entergy Petition at 20.

33,728. To truly establish independence, there ideally should be no cross-ownership. If the Commission permits such cross-ownership, it should be kept to a very low level. The TDU Systems, in their RTO NOPR comments, agreed with the Commission that a one percent level would be an acceptable standard. They argued that the same level should apply to all ownership interests, due to the difficulty in determining a “passive” ownership interest from an “active” one.<sup>7/</sup>

In Entergy’s proposal, as currently structured, there would be one hundred percent ownership of the transco by incumbent transmission generation owners. This is the polar opposite of the one percent de minimis standard proposed by the Commission for RTOs. The Commission would effectively be torpedoing the independence criterion for RTOs before the ship even leaves the harbor if it permits Entergy’s Transco to be owned one hundred percent by market participants with generation interests, be those interests “passive” or “aggressive.”

### 3. Enforcement

If it permitted substantial passive ownership by market participants in a Transco, the Commission would have to police each such market participant’s ownership interests. The Commission would have to monitor the conduct of both the market participants and the Transcos in which they have an ownership interest, to ensure that there is no unduly discriminatory

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<sup>7/</sup> Initial Comments and Accompanying Affidavit of Dr. Martin J. Blake on Behalf of TDU Systems, Docket No. RM99-2-000, at p. 40. The problem of just what constitutes a “passive ownership interest” is not a simple one. The Commission does not attempt to define clearly either in the RTO NOPR or the July 30 Order what “passive ownership” is (not to mention the fact that the issue is still open for comment in the RTO NOPR docket). If the Commission persists in holding that passive interests can meet the ISO/RTO independence criterion, it will have to be prepared to deal on a case-by-case basis with endless variations on such “passive” interests, and to determine which ones are indeed “passive,” and thus qualified for special treatment.

behavior. The Commission itself effectively admits in the RTO NOPR that this would be a very difficult task:

. . . [A]ffiliated transmission entities that are not independent of market participants would continue the regulatory need for detailed and hard to enforce codes of conduct. If we permit RTOs to be affiliated with one or more market participants, we believe that the Commission may have to devote considerable regulatory resources to “chasing after conduct” (i.e., allegations of favoritism). If our experience with functional unbundling as well as with affiliated natural gas pipelines provides any lessons, we will probably find it necessary to issue detailed rules that deal with internal corporate matters relating to organizational responsibilities, corporate communications, etc. For this reason, the existence of affiliated transmission entities also could make it difficult to pursue light-handed regulation.<sup>[8/]</sup>

Absent complete separation of generation from transmission, the Commission will have no choice but to monitor the daily activities of transco owners in the business affairs of their affiliated transcos. If passive ownership by market participants is permitted, as Entergy proposes, then the Commission will have no choice but to march on continuous “border patrol,” a task for which the Commission has neither the time nor the resources.

#### 4. Passive Ownership

Just how “passive” an interest in the transco is depends upon the law of the state where the entity is organized and the terms of the relevant business agreements. In its application to the Commission for preliminary approval, Entergy proposes to form an LLC organized under the laws of Delaware. However, regardless of the nature of the “passive interests,” black letter law dictates that managers shoulder a fiduciary duty to advance member/shareholder interests, including “passive” ownership interests.<sup>9/</sup>

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<sup>8/</sup> 64 Fed. Reg. 31390 at 31415 (June 10, 1999)(footnote omitted).

<sup>9/</sup> See, Mills Acquisition Co. v. MacMillan, 559 A.2d 1261, 1282, n. 29 (Del. 1989) (citing (continued...))

For example, section 409 of the Uniform Limited Liability Company Act (1995) (the “Act”), states that managers of member-managed LLC’s owe a fiduciary duty of loyalty and care to non-managing members. Accordingly, the more extensive the “passive” ownership interests, the greater the potential that the business of the transco will be conducted for the specific benefit of these owners. Entergy’s current proposal would have incumbent transmission owners with generation interests owning one hundred percent of the Transco. This structure invites undesirable entanglements.

At bottom, the Commission would be naive to believe that the LLC managers of the Entergy Transco would not allow their actions *ever* to be influenced by the potential impact that their decisions would have on the Entergy family of companies’ generation interests. Regardless of any “protections” that may be put in place on paper to guard against undue discrimination, it nonetheless is a fact that the managers of a for-profit LLC Transco would have an affirmative duty to manage and direct the affairs of the Transco to enhance the value of the members’ interests. It would be easier “for a rich man to enter into the kingdom of God,” than for a Transco owned one hundred percent by incumbent transmission owners to operate totally free of their influence.<sup>10/</sup>

**B. It Is Premature For The Commission To Issue A Declaratory Order On Entergy’s Transco Petition Before All Interested Parties Have Had An Opportunity To File Comments In The RTO NOPR Docket.**

As Commissioner Massey stated in his dissent to the July 30 Order, the Commission’s

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<sup>9/</sup> (...continued)  
Revlon v. MacAndrew & Forbes Holdings, Inc., 506 A.2d 173, 182-184 (Del. 1986).

<sup>10/</sup> *C.f.*, Matthew 19:24, (“It is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of God.”)

ruling on passive ownership interests is also premature. At the time the July 30 Order was issued, industry participants had not filed their initial comments on the RTO NOPR in Docket No. RM99-2-000. Reply comments are not due until September 29, 1999. In that docket, the Commission asked for comments on whether the Commission should prescribe a different standard for market participant ownership in the case of passive ownership of an RTO.<sup>11/</sup>

However, the Commission then inexplicably went ahead and issued the July 30 Order ruling on the Entergy petition, without awaiting the comments of interested parties in Docket No. RM99-2-000 on this very issue. Having asked for the industry's input on the issue, it is indeed strange for the Commission to totally disregard its earlier request for input and give Entergy the green light to develop its *one hundred percent transmission interest owned* Transco proposal.

Many in the industry have taken the July 30 Order as a signal that the Commission is not serious about its proposed independence criterion for RTOs. If this is incorrect, the Commission should act to dispel this impression on rehearing.

### III. CONCLUSION

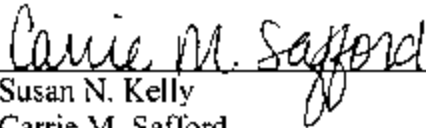
For the reasons stated above, the TDU Systems respectfully requests that the Commission grant rehearing of the July 30 Order. On rehearing, the Commission should either: (1) reverse its holding on the passive ownership issue; or (2) find that its holding on this issue was premature in light of the pending rulemaking in Docket No. RM99-2-000, and therefore invalid.

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<sup>11/</sup> 64 Fed. Reg. 31390 at 31414-31415.

Respectfully submitted,

TRANSMISSION DEPENDENT UTILITY  
SYSTEMS

  
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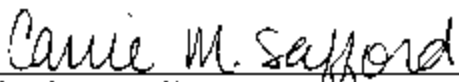
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August 27, 1999

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each of the parties shown on the official service list compiled by the Secretary in this proceeding, by depositing copies thereof in the first class mail, postage prepaid.

Dated at Washington, D.C. this 27<sup>th</sup> day of August, 1999.

  
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