

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc.

Docket No. ER91-569-023

Motion to Intervene and Comments of the
Electricity Consumers Resource Council
(ELCON)

The Electricity Consumers Resource Council (ELCON) respectfully requests to intervene in the above captioned docket. ELCON is the national trade group representing large industrial consumers of electricity. ELCON member companies operate major manufacturing facilities and generate or cogenerate electricity in all Entergy retail service territories. ELCON member companies also operate similar facilities in many of Entergy's "first-tier" markets.

On August 9, 2004, Entergy Services, Inc. (ESI), on behalf of Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc., (collectively, Entergy) submitted a compliance filing under protest pursuant to the Commission's orders issued on April 14, 2004 in Docket No. ER96-2495-016, et al, 107 FERC ¶ 61, 018 and July 8, 2004 in Docket No. ER96-2495-018, et al., 1008 FERC ¶ 61,026.

On August 17, 2004, Occidental Chemical Company (Occidental) filed a motion to intervene, a motion for issuance of deficiency order to Entergy and to extend protest and comment period, and motion to initiate a Federal Power Act Section 206 proceeding and set a refund effective date. Occidental is an ELCON member.

Entergy's filing reports that Entergy passes the pivotal supplier prong of the market power test but that within its control area, Entergy fails the market share screen. Entergy proffered a delivered price test analysis which it passes for available economic capacity which takes account of native load obligations.

ELCON agrees with Occidental that the Commission must initiate a Section 206 investigation to examine whether Entergy can continue to charge market-based rates. In the April 14 Order (¶ 209), the Commission ruled that:

[f]ailure to pass either of the indicative screens (which, as noted above, creates a rebuttable presumption of market power) *will constitute a prima facie showing that the rates charged by the applicant pursuant to its market-based rate authority may have become unjust and unreasonable and that continuation of the applicant's market-based rate authority may no longer be just and reasonable.* Accordingly, in the order addressing the applicant's failure of the indicative screen(s), the Commission will institute a section 206 proceeding to examine whether the applicant may continue to charge market-based rates. That order will establish a refund effective date pursuant to the provisions of section 206.

The Commission need not prejudge whether Entergy's DPT analysis will pass muster when scrutinized by intervenors and FERC. Under the terms of the Order, the next stage of the process for an entity that fails the two-prong screen is a Section 206 investigation unless the entity offers mitigation.

Entergy may not agree with FERC's Order and may seek to appeal it to the courts, but unless and until the Order is stayed, Entergy must comply with the Order.

ELCON strongly agrees with FERC's statement in its April 14, 2004 Order, 107 FERC ¶ 61,018, ¶ 25: "Market-based rate authority is not a right. The Commission may grant such

authority under the FPA only to applicants who demonstrably lack market power.” As FERC correctly notes in its July 8, 2004 Order:

143. As an initial matter, the Commission has a responsibility under the FPA to ensure that jurisdictional rates in the wholesale markets are just and reasonable. Our responsibility is to ensure that sellers not charge unjust and unreasonable wholesale rates, and that the market structures and market rules governing public utility sellers, and affecting the wholesale rates of such public utility sellers, do not result in, wholesale rates that are unjust, unreasonable, unduly discriminatory, or preferential.

144. The FPA requires that all rates charged by public utilities for the transmission or sale for resale of electric energy be “just and reasonable.” Where there is a competitive market, the Commission may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy this requirement. n136 Consistent with our precedent, the Commission authorizes sales of electric energy at market-based rates only if the seller and its affiliates do not have, or have adequately mitigated, market power in the generation and transmission of such energy, and cannot erect other barriers to entry by potential competitors. n137 Thus, where a market-based rate applicant is found to have market power (e.g., after reviewing an applicant’s Delivered Price Test), it is incumbent upon the Commission either to reject such rates or to ensure that adequate mitigation measures are in place to ensure that the rates are just and reasonable.

n136 Cf. Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870 (D.C. Cir. 1993) (discussing “just and reasonable” rate requirement of Natural Gas Act).

n137 See, e.g., Heartland Energy Servs., Inc., 68 FERC P 61,223 at 62,060 (1994); Louisville Gas & Elec. Co., 62 FERC P 61,016 at 61,143-44.

NOTICES AND COMMUNICATIONS

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Respectfully submitted,

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Dated: August 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments were today mailed to parties on the service lists of these proceedings by U.S. mail, postage prepaid.

Dated at Washington, D.C., this 30th day of August 2004.

/s/ Jennifer Morrissey

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