

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

<hr/>	)	
<b>AEP Power Marketing, Inc., AEP Service Corporation, CSW Power Marketing, Inc., CSW Energy Services, Inc., and Central and South West Services, Inc.</b>	)	<b>Docket Nos. ER96-2495-015, ER97-4143-003, ER97-1238-010, ER98-2075-009, and ER98-542-005 (Not consolidated)</b>
	)	
<b>Entergy Services, Inc.</b>	)	<b>Docket No. ER91-569-009</b>
	)	
<b>Southern Company Energy Marketing L.P.</b>	)	<b>Docket No. ER97-4166-008</b>
<hr/>	)	

**MOTION TO INTERVENE AND COMMENTS OF  
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL**

The Electricity Consumers Resource Council (“ELCON”) offers the following comments in connection with FERC’s November 20, 2001 Order on Triennial Market Power Updates and Announcing New, Interim Generation Market Power Screen and Mitigation Policy.

ELCON commends the Commission for undertaking a long-overdue reexamination of the “hub-and-spoke” market power screen. On January 25, 1990, ELCON filed comments expressing concerns over application of the simplistic 20-percent market screen test in the Public Service of Indiana (“PSI”) case, Docket No. ER89-672-000. Twelve years ago ELCON advocated that FERC refrain from using a 20-percent market share (i.e., that a dominant firm is one that has a 20 percent or greater share of the market) as a reliable measure of market power. ELCON opposed the use of such bright-line rules with precedential implications in the context of an individual rate filing. FERC responded that ELCON need not be concerned about

FERC setting such a precedent because FERC understands that a 20-percent-share market power screen by itself would not indicate lack of market power:

[W]e do not believe that any one type of evidence is sufficient for this analysis, and we will not rely on any mechanical market share analysis to determine whether a firm has market power. Thus, PSI's market share is not, in itself, sufficient to guarantee that PSI lacks market power. Market concentration figures alone do not demonstrate the existence, or lack, of market power, . . .

Public Service Company of Indiana, Inc., 87 FERC ¶ 61,214 (June 28, 1990). At long last, FERC is proposing to update the screen to recognize the reality of transmission constraints and reflect that some “pivotal” suppliers are critical to specific markets.

FERC proposes to abandon the hub-and-spoke screen in favor a supply margin assessment (“SMA”). The SMA test differs in two respects from the hub-and-spoke screen (whether a seller had a market share of 20 percent). It takes into account transmission constraints and focuses on whether a seller is “pivotal” in the market, i.e., has capacity exceeding the market’s supply margin (defined as surplus capacity above peak demand). Suppliers with “pivotal” capacity must undertake mitigation measures to prevent physical and economic withholding. However, sales into an RTO or ISO with FERC-approved market monitoring and mitigation will be exempt from the SMA. Such sales will instead be governed by specific thresholds and mitigation measures to prevent withholding approved for the market in question.

ELCON offers the following comments on FERC’s proposed new policy:

- RTOs are at an early incipient market stage and it is premature to waive the SMA screen and rely on market mitigation measures to be adopted and implemented by fledgling RTOs;

- The RTO market monitoring function is an after-the-fact safeguard and does not obviate the need for application of the SMA up front;

- Demand-Response is critical to mitigate market power.

I. RTOs Are Too Underdeveloped To Waive The SMA Test And Rely On RTO Mitigation Measures and Market Monitoring Units

The SMA market power screen should be applied in all areas of the country, even those with FERC-approved RTOs, because as yet there are not workably competitive wholesale markets in any region. While RTOs are an important and essential pre-condition to large competitive wholesale markets, the mere formation of RTOs does not guarantee that the initial RTO market design will be flawless, or that all forms of market power are mitigated.

FERC's last comprehensive examination of the bulk power markets occurred in November 2000 when FERC Staff issued reports on bulk power markets in the Northeast, Midwest, Southeast, and Texas ("ERCOT"). FERC Staff identified a multitude of market problems and flaws with respect to every region but Texas. The flaws included market design, problems with transmission access, transmission load relief ("TLR") curtailment, calculation of available transmission capacity ("ATC"), and lack of standardized protocols, among other deficiencies. The Staff summarized an overall picture of an industry in transition: "The issues pertain to regulatory or structural uncertainty, the uneven pace of change, and complex market designs that are still in flux. This, combined with a period of unprecedented economic growth and heavy demand on electricity, means that there is a great deal of stress on the current bulk power markets." Staff Report to the Federal Energy Regulatory Commission on the Bulk Power Markets In the United States, Nov. 1, 2000, p. 3.

Despite recent valiant efforts by the Commissioner to whip RTOs into shape, the current bulk power markets remain dysfunctional. In the wake of the California debacle, FERC has temporarily postponed efforts to forge a single western RTO. In the Midwest, State Commissioners filed on November 30, 2001 a scathing indictment of the status quo expressing the need for a single Midwest RTO in lieu of the Alliance-Midwest ISO “Inter-RTO Cooperation Agreement.”<sup>1</sup> The outcome of the Southeast RTO mediation has been a stalemate between proponents of the Collaborative Governance Model and SeTrans Model, with significant opposition to FERC’s initiative expressed by several State Commissioners. The Northeast RTO Mediation has also fallen short of a single RTO. Market participants remain divided about the efficacy of PJM as a platform for all of the Northeast and the issue of governance has proved especially contentious.

We appreciate FERC’s concern with the pace of RTO development. Chairman Wood has expressed frustration that most of the map of the United States that he keeps on his desk is “largely white” -- the only shaded areas are Texas, California, and the Northeast where there are RTOs and allegedly functioning wholesale markets.<sup>2</sup> However, ELCON disagrees that there are functioning wholesale markets even in Texas, California and the Northeast.<sup>3</sup>

FERC has recognized the insufficient size and membership of RTOs to date and for this reason sought to forge larger regional entities as a Commission priority. Apart from the question of geographic scope, FERC is grappling with such fundamental RTO organizational

---

<sup>1</sup> The filing was made in response to FERC’s November 9, 2001 request to various state commissions to comment concerning RTO formation in the Midwest.

<sup>2</sup> Remarks of Chairman Wood at September 26, 2001 FERC meeting.

<sup>3</sup> See Industrial Consumers submission of affidavits describing problems in the PJM markets, November 26, 2001, Docket No. RM01-12.

questions as whether a for-profit transco can be an RTO and about the division of responsibility between for-profit and not-for-profit entities in RTO governance. FERC recently initiated a docket inviting comments on RTO functionalities and market design. RTOs are in a very early state of development and confidence in their ability to prevent market power abuse is to date a leap of faith.

FERC's concern to incent RTO formation may lead FERC to waive the SMA screen where power is sold into an ISO or RTO with Commission-approved market monitoring and mitigation. FERC commissioners' remarks at the November 20, 2001 meeting reflect concern to offer "carrots" as rewards for RTO membership. Given the lack of workably competitive wholesale markets and the immature development of RTOs to date, we believe that it is not appropriate to dispense with the FERC SMA screen when power is sold into RTOs. There is too great a risk that the generators and other suppliers can abuse the fledgling and imperfect RTOs that now exist as a shield to escape the more searching screen for market power that FERC proposes to adopt. In addition, RTO markets will likely use bid-based market devices that are more prone to gaming, especially if a robust demand response is absent from the short-term markets.

It is not sufficient for FERC to approve untested market monitor proposals to have confidence that regions with RTOs will be workably competitive. First, the market monitoring proposals are likely to need substantial revision based on actual experience. Second, market monitoring by definition is an after-the-fact remedy when the Commission's goal should be to adopt ex ante screens to avoid market power.

The appropriate structure for an MMU has not yet been agreed, much less has an adequate design been validated. While all panelists during RTO Week agreed that MMUs should be independent of RTOs and report to FERC, details remain to be filled in about what are the MMU's responsibilities, how much information should be collected and shared with FERC, how the MMU should be managed, and which markets should be monitored. The California situation does not give comfort that having an MMU in place is sufficient to address market power concerns because California's MMU gave advance warning of problems in the California market which were effectively ignored.

RTOs are works in progress; the institution of market monitoring that is a critical RTO functionality is likewise evolving. FERC should apply the new SMA screen in every area of the country, because none has in place a workably competitive wholesale market which obviates the need for a stringent market power screen, consistently applied.

## II. The Importance of Demand-Response To Mitigate Market Power Has Been Recognized

ELCON urges FERC to move ahead on demand-response to mitigate market power. As Richard Cowart, formerly with the Vermont PSC, observed during RTO week:

The single most important act that FERC can take to moderate market power of generators is to structure market rules and transmission tariffs to develop the demand side of the market. FERC should explore every opportunity to reveal customers' demand curves and deliver the economic and reliability advantages of distributed and demand side resources to the grid.

This Commission has repeatedly observed, in the past year or so, that bringing demand side to the trading floor is essential to reveal the demand curve and put balance back into the markets. This is a very encouraging development. I just want to emphasize how important that same act is to controlling the exercise of market power. Trying to control market power without a meaningful demand side response is like trying to steer a car at

high speed with a flat front tire. No matter how tight your grip is on the steering wheel, it's going to be a bumpy ride. You're going to be swerving, and there's a good chance you'll go off the road.

We've learned the hard way that supply side bidding rules concentration ratios, open access rules are just not enough to eliminate generator market power. We've learned the hard way that running around after the fact with market investigations, price caps, and administrative price reformations, however necessary they might be in tough circumstances, is difficult and contentious and adds uncertainty to the market.

Comments of Richard Cowart, Director, The Regulatory Assistance Project, RTO Week, Afternoon Session, October 19, 2001. Professor Hogan and Professor Joskow agreed with Rich Cowart about the importance of demand bidding in their presentations during RTO Week.

On October 3, 2001, the FTC Bureau of Competition Staff issued a report titled "Competition and Consumer Perspectives on Electric Power Regulatory Reform." The FTC Staff stressed that policies are needed in retail and wholesale markets that will increase demand-side responsiveness. FTC characterizes the lack of demand-response as "one hand clapping."

The FTC Staff Report observes that to date: "None of the restructured wholesale markets (California, New York, New England and the Mid-Atlantic states) allow retail or wholesale buyers to participate through flexible supply and pricing requests in wholesale electricity spot markets, although...these markets are starting to allow such participation." FTC Staff Report, p. 37. FTC Staff comments that "[e]nhanced demand-side response can be expected to moderate wholesale spot market prices and price volatility, as well as improve reliability for electricity." Id. at 38. The FTC Staff Report notes the benefits of demand-response:

Increasing the price sensitivity of demand also will help to constrain existing or potential market power in generation. This is

true because a price increase will be less profitable for generators if it is passed through and retail buyers respond by reducing their consumption by a significant amount.

Id. at 41. All retail customers, not just large industrial load, will benefit:

Large retail customer participation in wholesale markets, coupled with variable retail pricing, would benefit all retail customers, because the average price paid by all customers decreases as peak demand is reduced. These programs increase system reliability, mitigate the potential for price spikes during periods of peak demand and supply scarcity, and increase the opportunity for retail suppliers to add value to commodity reselling, as well as indirectly reduce the environmental impacts of electricity production. Moreover, real-time, demand-side participation by wholesale buyers and large retail customers of electricity can potentially mitigate existing electricity supplier market power and increase incentives to attract customers by lowering prices.

Id.

A competitive market must have both a supply and demand side. There cannot be a wholesale-only market that is workably competitive. ELCON urges FERC to expedite demand-response as an important tool to mitigate market power.

### III. Good Cause Exists For ELCON's Motion For Late Intervention

ELCON is a party to ER91-569 but requests leave to intervene in each of the relevant subdockets. Good cause exists for this intervention:

(i) ELCON members have operations in the regions served by AEP, Entergy and Southern Companies and will be directly affected by the outcome;

(ii) The November 20, 2001 Order announces a new phase of the proceeding in that the three applicants' market power will be assessed under a new set of rules, the SMA

test. Because the proceeding is entering a new phase, no party will be prejudged by ELCON's intervention;

(iii) FERC should adopt a liberal standard for inviting comments from interested parties because FERC is changing its standard prospectively with respect to SMA.

FERC's web site refers to FERC's November 20 Order as adopting a "new policy" on market power screen and mitigation which FERC states will have generic effect as an interim policy beyond the three applicants, Entergy, Southern and AEP. By analogy, FERC granted liberal intervention late in the Southern Companies proceeding, 87 FERC ¶ 61,214 (1999), when FERC proposed to revise the reporting obligations for utilities selling at market-based rates. When FERC previously reexamined the hub-and-spoke metric for measuring market power in the context of revising FERC's merger policy, Docket No. RM96-6, FERC sought comments from all stakeholders. Liberal intervention is thus appropriate to allow interested parties to offer comments with respect to FERC's prospective application of a new generic and industry-wide SMA standard replacing the prior hub-and-spoke rule.

#### CONCLUSION

For the foregoing reasons, ELCON's motion for late intervention should be granted.

#### DESCRIPTION OF INTERVENOR

The Electricity Consumers Resource Council ("ELCON") is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable, and efficient electricity

supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. The member companies of ELCON consume approximately five percent of all electricity in the United States.

NOTICES AND COMMUNICATIONS

Notices and communications should be addressed to:

Dr. John Anderson  
Executive Director  
Electricity Consumers Resource Council  
1333 H Street, N.W.  
The West Tower 8<sup>th</sup> Floor  
Washington, D.C. 20005

Sara D. Schotland, Esq.  
Cleary, Gottlieb, Steen & Hamilton  
2000 Pennsylvania Avenue, N.W.  
Suite 9000  
Washington, D.C. 20006

Respectfully submitted,

/s/ Sara D. Schotland

Sara D. Schotland  
CLEARY, GOTTLIEB, STEEN &  
HAMILTON  
2000 Pennsylvania Avenue, N.W.  
Suite 9000  
Washington, D.C. 20006-1801  
202-974-1500

Dated: December 21, 2001

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Intervene and Comments of the Electricity Consumers Resource Council were today mailed to parties on the service list of this proceeding by U.S. mail, postage prepaid.

Dated at Washington, D.C., this 21<sup>st</sup> Day of December, 2001.

/s/ Kari Vander Stoep

Kari Vander Stoep  
Law Clerk  
Cleary, Gottlieb, Steen & Hamilton  
2000 Pennsylvania Avenue, N.W.  
Suite 9000  
Washington, D.C. 20006-1801  
(202) 974-1500