

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

)	
Investigation Of Terms And Conditions)	
Of Public Utility Market-Based)	Docket No. EL01-118-000
Rate Authorizations)	
)	

**COMMENTS OF
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL**

The Electricity Consumers Resource Council (“ELCON”) applauds FERC for taking the courageous and much-needed step of tackling the problem of market power and potential anti-competitive behavior in bulk power markets.

Unchecked market power is harmful to the continued development of competitive power markets. ELCON applauds the Commission in its investigation to prevent the potential for exertion of market power through appropriate screens that gauge concentrations of power generation facilities and/or affiliations with transmission owners. ELCON asserts that the Commission already has sufficient power to act to curb anti-competitive behavior or exertion of market power. The key element, of course, is having sufficient resources to review data, monitor markets and act when significant discrepancies are recognized. When the gas industry was in a similar transition in the 1980s, the Commission’s enforcement office and hotline were instrumental in early identification and resolution of problems in dealing with marketing affiliates of interstate natural gas pipelines. This early identification and resolution of issues was significant in remedying market structure problems early or in curbing undesired behavior.

ELCON strongly supports the Commission's focus on standardized market design with objectives of equal access to transmission, mechanisms for both supply and demand response and participation in markets, increased efficiency on transmission grids, and increased competition in the wholesale power market. ELCON continues to believe that viable demand response programs where load participates in the provision of ancillary services or energy provides an excellent, timely balance in markets. To the extent that the market structure provides for a "balance" of power amongst buyers and sellers, ELCON believes that this will be a significant and timely step forward in providing its members with needed tools to operate in bulk power markets.

ELCON supports the Commission in acting to screen applicants where potential market power exists prior to the grant of market-based rate authority in tariffs. ELCON believes that this upfront assessment should identify the entities that have the potential to exert market power and should be beneficial in curbing market power and minimizing the potential for undue gains or gaming. This should be beneficial as the market continues to evolve and as the Commission and industry work on market structure to "get the rules right."

ELCON applauds the Commission in scheduling work on market structure during the first half of 2002. Good market structure and rules should prevent or minimize the opportunity for gaming. Gaming is behavior that would not have been permitted or possible under a tariff or market rules, had the designers of the tariff or rules anticipated the behavior and were able to preclude it from being exercised in the first place.

There is the potential for gaming in transitional markets with new forms being tested by dominant market players. Most forms of gaming are associated with the economic or physical withholding of generation or transmission.

FERC has appropriately initiated a proceeding under the auspices of Section 206 of the Federal Power Act to protect consumers from excessive rates and charges resulting from anticompetitive behavior and abuse of market power.

ELCON wishes to focus on two key aspects of the Order. ELCON agrees with FERC that if anticompetitive behavior (such as physical and economic withholding) is occurring in the wholesale power markets, then FERC has an obligation to correct such behavior through the imposition of refund obligations and other appropriate remedies. A key aspect for ELCON members is that the Commission act swiftly, yet accurately, and in a manner that does not undermine continued development of the bulk power market.

Equally important is FERC's recognition that it has a duty to correct flawed market structures: "Our responsibility is to assure that sellers do not charge unjust and unreasonable wholesale rates, and that the market structures and market rules governing public utility sellers nationwide, and affecting the wholesale rates of such public utility sellers, do not result in, or have the potential to result in, wholesale rates that are unjust, unreasonable, unduly discriminating or preferential."¹

¹ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, Order Establishing Refund Effective Date and Proposing to Revise Market-Based Rate Tariffs and Authorizations, 97 FERC ¶ 61,220, slip op. at 3 (Nov. 20, 2001).

ELCON believes that all existing wholesale markets-- even those sponsored by functioning ISOs -- are seriously flawed as most markets do not permit rapid demand response. It would be preferable to correct market structures and assess the potential for market power prior to the grant of market-based rate authority. However, so long as these market design flaws exist, mitigation policies are needed to avoid harm to consumers. Limitation of the opportunities to exert market power amongst dominant players coupled with the potential for refunds or penalties should be a deterrent to the exercise of market power, and an incentive for action amongst market participants to improve market structures and eliminate the design flaws.

FERC has been reluctant to address some needed corrections due to doubts about the extent of its jurisdiction or about federal-state relations, e.g., need to apply the open-access tariff requirement to all bundled retail loads. While ELCON believes that the full extent of FERC's jurisdiction over all interstate transmission will shortly be confirmed by the U.S. Supreme Court in the pending Enron litigation, other design flaws fall squarely within FERC's jurisdiction, e.g., misallocation of financial transmission rights, or the absence of demand-response in short-term wholesale markets.²

1. Consumers Must Have A Seat At The Table To Aggressively Address Market Design Flaws

As FERC proceeds in this Docket and related dockets (such as Electricity Market Design and Structures, RM01-12-000), FERC should consider whether there are aspects of ISO or RTO governance that have allowed abuses of market power to flourish.

² During RTO Week numerous speakers advocated demand-response in the form of customer load changes and self-generation. FERC has recognized the need for demand-response in its Western Market Orders. The FTC Staff's Bureau of Competition urged demand-response initiatives in order to mitigate market power. A good prototype of demand-response has proved itself in the New York ISO Market Day Ahead Demand Response

Within the existing ISOs, the composition of stakeholder advisory committees effectively excludes customers who would agitate to change the status quo. This under-representation of customers as a stakeholder group perpetuates market flaws that allow unfettered exercise of market power.

As businesses and market participants, with both loads and resources, industrial end-users have a direct stake in market evolution and can be expected to make a strong commitment to RTO activities that advance this evolution. Industrial end-users need separate and distinct representation within the stakeholder advisory committee to effectively advocate market design features and business practices that support demand response and participation in markets for ancillary services and transmission congestion. Industrial consumers typically take service at transmission-level voltages, own or operate their own substation, and cogenerate or self-generate power using waste products as fuel. The dispatch/redispach policies of RTOs, interconnection requirements, and backup power needs are extremely important issues to them. No other stakeholder group has the same active business interest in fostering pro-competitive market design. It is an irony that consumers have been underrepresented in RTO governance when FERC's paramount statutory duty, and indeed its *raison d'être* under the Federal Power Act, is to protect consumers. As part of the Commission's section 206 investigation, we would urge FERC to consider expanding the role of end-use customers in RTO governance processes if the Commission expects such processes to be a front-line defense against the exercise of market power by suppliers.

2. FERC Should Not Assume That Having RTOs Will Solve All Market-Power Problems

Program and the Emergency Demand Response Program. Demand-response qualifies as a sale for resale and thus there is no jurisdictional bar to FERC's action to incorporate effective demand-response to RTO designs ab initio.

The existence of RTOs gives no assurance that there are no market power problems.

The U.S. Department of Justice has served on PJM Civil Investigative Demand (CID) No. 21506, relating to investigation of the PJM capacity market. The Pennsylvania PUC has posted on its web site (<http://puc.paonline.com>) a notice that it has launched an investigation into wholesale electricity markets. The action cites the Report of the Market Monitoring Unit that “concluded, based on its analysis, that there was an exercise of undue market power, as defined below, in the PJM capacity credit markets during the first quarter of 2001. The exercise of such market power was by a single entity, acting unilaterally. The result of the exercise of market power was that the price in the capacity credit markets during this interval was higher than it would have been in a competitive market.”

RTOs will not eliminate market power abuse. RTOs are only one step in a long march.

3. Response to EEI’s December 13, 2001 Filing

The Edison Electric Institute (EEI) has filed a “Motion to Intervene, Motion to Vacate, or in the Alternative to Stay the Commission’s November 20, 2001 Order and Request for Rulemaking.” EEI’s December 13, 2001 filing applies both to Docket No. EL01-118 and to the AEP/Southern/Entergy proceeding, Docket No. ER96-2495.

ELCON offers the following views in response to EEI’s filing:

As a substantive matter, ELCON strongly disagrees that the Commission’s orders in this docket and ER96-2495 will harm retail customers. As the leading voice of industrial

retail customers, ELCON believes that industrial retail customers will on balance benefit from FERC's active enforcement of Section 206 authority. We believe that FERC's investigation into the Western Markets debacle makes the case that design flaws in the California markets and instances of gaming such as economic withholding and leaning on the California ISO injured all consumers.

ELCON also disagrees with EEI's statement that FERC's Orders will "harm EEI members who are actively participating in RTOs" and "add greatly to the uncertainty about the rules for transmitting utilities." To the contrary, FERC's pending implementation of a single set of rules on market design promises to add certainty to the obligations of utilities and other RTO and market participants.

Significantly, EEI's comments decry FERC's Market Power Orders, but offer no constructive suggestion as an alternative. FERC is correct that the status quo is unacceptable. FERC needed to announce a clear set of expectations with respect to market-rate authority. FERC needed to add to its "toolbox" of measures to correct market power abuse.

As a procedural matter, EEI laments the pending of several important dockets and the alleged insufficiency of notice and the inadequacy of time to comment. Publication in the Federal Register on Nov. 27, 2001, constitutes legal notice.³ The docket has already received wide spread coverage in the trade press. EEI is on notice of these dockets and can publicize them to its members via its EEI electronic alerts. FERC had broad authority to choose adjudication or rulemaking as a vehicle for changing policy provided that there is broad

³ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 66 Fed. Reg. 59,241 (Nov. 27, 2001).

opportunity for comment (e.g., open or liberal intervention). Just last week, the D.C. Circuit confirmed FERC's procedural latitude in the Public Util. Dist. No. 1 case, 2001 U.S. App. LEXIS 26369 (Dec. 11, 2001). EEI's procedural protest rings hollow. Neither EEI, nor its affiliate The Alliance of Energy Suppliers, nor the numerous individual public utility members of EEI, lack the resources to participate effectively in multiple dockets.

DESCRIPTION OF ELCON

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
The Electricity Consumers Resource Council
1333 H Street, N.W.
The West Tower, 8th 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
CLEARLY, 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 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 21st 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