

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Southern Company Services, Inc.

Docket No. ER97-4166-015

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 Southern retail service territories. ELCON member companies also operate similar facilities in many of Southern's "first-tier" markets.

On August 9, 2004, Southern Company Services, Inc., (SCS) acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Power Company, (collectively, Southern Companies) submitted generation market power screens and other analysis performed for Southern Companies in compliance with the Commission orders issued on April 14, 2004 and July 8, 2004 in Docket No. ER96-2495-016, et al., 107 FERC ¶ 61,018 in Docket No. ER96-2495-018, et al., 108- FERC ¶ 61, 026.

Southern's Market Power Screen Report purports to "demonstrate beyond all reasonable doubt, that Southern Companies lack both the potential and the ability to exercise market power in the markets in which they participate." Compliance Filing, Volume I, SC-4. However,

Southern applied six sets of screens to its markets—the two interim screens required by FERC and four customized screens developed by Southern’s consultant in contradiction of the April 14 Order. The screens were applied to Southern’s control area and twelve neighboring “first-tier” control areas. Southern passed the Pivotal Supplier Analysis but failed the Market Share Analysis when applied to its own control area. However, it passed the four screens it customized for this purpose.

On August 23, 2004, the Alabama Electric Cooperative, Inc. (AEC) filed a motion for extension of time; request for expedited ruling; and motion for summary rejection of Southern’s Market Power Screen Report. AEC contends that most of Southern’s filing is “a non-compliant departure from, or arguments against, the market power screens adopted by the Commission” in its April 14 Order.

Comments

ELCON supports the motions of AEC and require Southern to submit its compliance filing in compliance with the April 14 Order. Upon submission of the corrected compliance filing, ELCON urges the Commission to immediately initiate an investigation into whether Southern should continue to have market-based authority pursuant to Section 206 of the Federal Power Act and establish a refund effective date sixty days after notice of its order initiating such investigation.

ELCON believes that a strong argument can be made that the promulgation of Market Behavior Rules and market power mitigation mechanisms did not kept pace with past approvals of requests for market-based rates. The outcry from utility, affiliate and independent generators to the potential application of any interim screens is indicative—to us—of the sense of

entitlement within the generator sectors for market-based rates in the absence of workably competitive markets. Thus, given that the wholesale markets are far from perfect, and prone to discrimination and manipulation, a strong case can be made that being more restrictive with MBR authorization may improve overall market performance for consumers by creating an economic incentive for structural reforms such as RTOs as an alternative or complement to mitigation.¹ Vertically-integrated utilities should not both benefit from competition by having the ability to sell uncommitted capacity at MBRs, and yet exercise market power raising the specter that the utility may stifle competition in their own backyards. For these reasons alone it is imperative that the Commission initiate a “206” investigation.

Southern Companies expresses its opposition to FERC’s market power screens. The proper remedy for Southern is not to ignore the screens but rather to seek judicial redress. Unless and until a stay is obtained, Southern must comply with FERC’s Order.

ELCON agrees with AEC’s comments that a compliance filing is not an appropriate vehicle to challenge Commission directives: The purpose of the compliance filing is to respond to FERC’s specific directives. See Sierra Pacific Company, 80 FERC, ¶ 61, 376 (1997); El Paso Elec., 89 FERC, ¶ 61, 181 (1999).

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:

¹ ELCON strongly supports the use of cost-based rates as the default mitigation mechanism because rates based on cost-of-service will “hold harmless” both consumers and producers. Opposition to default rates suggests that generators are benefiting from market-based rates that are consistently in excess of cost of service. This flies in the face of what competition was supposed to achieve.

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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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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