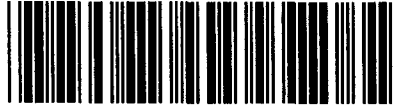




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Item Number: 173

Addendum StartPage: 0

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PUBLIC UTILITY COMMISSION
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APPLICATION OF ENTERGY	§	PUBLIC UTILITY COMMISSION
GULF STATES, INC. FOR	§	
CERTIFICATION OF AN	§	OF TEXAS
INDEPENDENT ORGANIZATION	§	
FOR THE ENTERGY	§	
SETTLEMENT AREA IN TEXAS	§	

ORDER

This Order denies the petition of Entergy Gulf States, Inc. (EGSI) for certification of an independent organization for the Entergy Settlement Area of Texas (ESAT).¹ As discussed below, the Commission determines that EGSI's proposal does not meet the requirement set forth in PURA² § 39.151(b) that the independent organization shall be "sufficiently independent of any producer or seller of electricity that its decisions will not be unduly influenced by any producer or seller." As a result, the Commission determines that the delay of retail competition in ESAT in Docket No. 24469³ shall continue until EGSI joins a Federal Energy Regulatory Commission (FERC)-approved regional transmission organization (RTO) or another independent organization that meets PURA § 39.151(b) and the criteria set forth in the Commission's preliminary order issued in this proceeding.⁴ The Commission also directs EGSI to consider joining the Southwest Power Pool RTO. Further, the Commission determines that efforts to develop another interim solution shall cease, and the current customer choice pilot project shall be terminated.

¹ ESAT is the portion of the Entergy Control Area contained within the borders of Texas that provides service for competitive retailers in Texas. ESAT does not include load served by non-opt-in entities (i.e., municipally owned utilities and electric cooperatives that do not offer customer choice).

² Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-64.158 (Vernon 1998 & Supp. 2004) (PURA).

³ *Staff's Petition to Determine Readiness for Retail Competition in the Portions of Texas within the Southeastern Reliability Council*, Docket No. 24469, Order (Dec. 20, 2001).

⁴ Preliminary Order (Mar. 15, 2004).

I. Background

PURA § 39.001 provides that it is in the public interest to implement a competitive retail electric market in Texas that allows each retail customer to choose the customer's provider of electricity and that encourages full and fair competition among all providers of electricity. In 2001, just before the start of retail electric competition directed in Senate Bill 7,⁵ the Commission delayed the start of competition in ESAT through its order in Docket No. 24469. At that time, the Commission determined that the ESAT area was not ready for full retail competition for a variety of reasons, including issues related to independence of the system operator and the lack of market protocols governing transmission access and wholesale and retail operating procedures.⁶ The Commission, however, allowed the customer choice pilot project to continue in this area even though no retail electric providers or customers were participating in it at that time.

In Docket No. 27273, the Commission subsequently determined that it may be appropriate to implement retail competition under an "interim solution" (i.e., retail competition without a FERC-approved regional transmission organization (RTO)) in ESAT.⁷ The Commission opined that it "seeks to introduce competition as quickly as possible, but [that] it is essential to complete the necessary groundwork in a way that will lead to a successful and fully functional market—even under an interim solution."⁸ The Commission recognized that there are key milestones to be accomplished that could affect the viability, timing, and nature of competition under an interim solution. The

⁵ Act of May 27, 1999, 76th Leg., R.S.(codified at Tex. Util. Code Ann. Ch. 39).

⁶ Docket No. 24469, Final Order at 5.

⁷ *Proposal for Interim Solution for Retail Open Access in Entergy Gulf States, Inc.'s Settlement Area of Texas and Request for Commission Action*, Docket No. 27273, Order on Rehearing at 2-3 (July 28, 2003).

⁸ *Id.* at 3.

resolution of the ESAT market protocols in Docket No. 25089⁹ was the first such milestone and was a fundamental element in establishing a market structure and rules that will support retail competition for all customer classes. The second milestone involves certification of an independent organization under PURA § 39.151, the subject of this docket. This independence proceeding was envisioned to be completed before the beginning of a “re-invigorated” pilot project under the new market protocols and a final determination of market readiness in ESAT.¹⁰

On November 26, 2003, EGSI filed the application which is the subject of this docket. Specifically, EGSI’s petition requested that the Commission certify the Entergy Transmission Organization (ETO) as the independent organization under PURA § 39.151(c) and approve the installation of a non-affiliated oversight entity referred to as the third-party overseer (TPO). EGSI proposed that the third-party overseer remain in place until the earlier of: (1) a FERC-approved independent entity is in place that can assume the overseer’s responsibilities; or (2) a FERC-approved entity is in place that can assume all of ETO’s independence responsibilities under PURA § 39.151(a). If the Commission were to reject EGSI’s independence proposal, the company suggested that the Commission cease all efforts to implement retail competition without a FERC-approved RTO.

II. Discussion

A. Independence

An independent organization is fundamental to the competitive market structure contemplated by PURA Chapter 39. This view is supported by the essential nature of the functions that the independent organization is charged with performing. These functions are:

⁹ See Market Protocols for the Portions of Texas within the Southeastern Electric Reliability Council, Docket No. 25089, Final Order (Sept. 9, 2003), *see also Entergy Services, Inc.*, FERC Docket No. ER04-35-000, 105 FERC ¶ 61,318, Order Accepting Revised Tariff Sheets as Modified (Dec. 22, 2003).

¹⁰ Docket No. 27273, Order on Rehearing at 3-4.

- 1) ensuring access to the transmission and distribution system for all buyers and sellers of electricity on non-discriminatory terms;
- 2) ensuring the reliability and adequacy of the regional electrical network;
- 3) ensuring that information relating to a customer's choice of retail electric provider is conveyed in a timely manner to the persons who need that information; and
- 4) ensuring that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region.¹¹

PURA § 39.151(b) provides that an independent organization “is sufficiently independent of any producer or seller of electricity that its decisions will not be unduly influenced by any producer or seller.” In its preliminary order addressing the scope of this proceeding, the Commission determined that the following criteria shall be considered to determine whether an entity is “sufficiently independent” under PURA § 39.151(b): 1) the independent organization's decisions are not controlled or dominated by any market participant or market segment; and 2) the independent organization has day-to-day operational control over the facilities involved. The Commission also determined that it is appropriate to consider the FERC criteria for RTO independence in determining whether an entity is sufficiently independent under PURA.¹² These criteria require the independent entity to have a decision-making process that is independent of control by any market participant or class of participants.¹³ In addition, the independent entity, its employees, and any non-stakeholder directors must not have any financial

¹¹ See PURA § 39.151(a).

¹² See Preliminary Order at 8, *see also Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 810 (Jan. 6, 2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,089 at 31,061 (1999); order on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,092 (2000) (codified at 18 C.F.R. pt. 35.34) (Order No. 2000).

¹³ Order No. 2000 at 31,061.

interest in any market participants, and the entity must have exclusive and independent authority to file changes to its transmission tariff.¹⁴

The proposal set forth by EGSI provides that ETO, which is a business unit within the Entergy Corporation and an affiliate of EGSI, would serve as the independent organization for the ESAT area under PURA § 39.151. In addition, EGSI proposed that a third-party overseer, a non-affiliated entity, would serve as a separate oversight entity to provide the Commission and market participants “further assurance that ETO’s independence functions are followed and implemented without undue discrimination or preference.”¹⁵ EGSI asserted that ETO meets the functions set forth in PURA § 39.151(a) to: (1) ensure non-discriminatory access to the transmission and distribution systems; (2) ensure the reliability and adequacy of the regional electric network; and (3) ensure accurate settlements relating to electricity production and delivery.¹⁶ Moreover, EGSI pointed out that ETO is physically and functionally separate from generation and sales in ESAT and operates under various codes of conduct that prohibit influence that would threaten independence.

Several parties, including Commission Staff, Texas Industrial Energy Consumers, Office of Public Utility Counsel, and Cities challenged EGSI’s proposal. These parties alleged that ETO, as an affiliate of the wholesale and retail providers within Entergy Corporation, was not sufficiently independent pursuant to PURA § 39.151 or the criteria set forth in the Commission’s preliminary order. Moreover, the opposing parties argued that ETO does not meet these criteria because an affiliate within Entergy Corporation would still have day-to-day operational control of the transmission system.¹⁷ Commission Staff testified that the proposal was “critically and incurably deficient” and that the proposal for a third-party overseer does not cure this deficiency and is not a substitute for

¹⁴ *Id.* at 31,063, 31,075.

¹⁵ Application of Entergy Gulf States, Inc. for Certification of an Independent Organization for the Entergy Settlement Area of Texas at 17 (Nov. 29, 2004).

¹⁶ The other function set forth under PURA § 39.151(a), ensuring timely conveyance of customer registration information, is handled statewide by the Electric Reliability Council of Texas.

¹⁷ Hearing on the Merits Tr. at 145-46 (June 3, 2004).

non-affiliate control of the transmission system.¹⁸ Moreover, parties pointed out that EGSI has had no success in procuring a “substantially independent” entity to serve as the TPO,¹⁹ and that under the proposal, the TPO would have only twice-a-month visits to the TPO facility.²⁰

The Commission finds that true independence—in “both perception and reality”²¹—is not only warranted but crucial to the ultimate success of retail competition in this area. As Staff has emphasized, independence is “not simply a veneer that can be placed on an existing utility operation.”²² Moreover, the role of an independent organization in ensuring non-discriminatory access to the grid and in engendering confidence of market participants must be sustainable.

The Commission finds that EGSI’s independence proposal falls short of being sustainable and does not meet the criteria contained PURA § 39.151(b) or the Commission’s preliminary order. EGSI’s proposal does not relinquish day-to-day operational control to an independent entity, nor does ETO fulfill the requirements for being “sufficiently independent.” By having an affiliate, within the same corporate structure as the utility and its competitive affiliates, with control of the transmission system, EGSI’s proposal falls far short of what is envisioned for independence under the statute. While behavioral remedies, such as codes of conduct and functional separation, are important, they are not sufficient to ensure independence as long as the structure still provides both the incentive and ability to discriminate against market participants or segments. Further, it is unclear whether a third-party overseer, if one could be employed, would provide an additional level of independence because it would have limited oversight of ETO. Therefore, the Commission denies EGSI’s application.

¹⁸ See Direct Testimony of Adrienne G. Brandt, Staff Ex. 1 at 4-11.

¹⁹ See Tr. at 116-20.

²⁰ *Id.* at 123.

²¹ Order No. 2000.

²² Staff’s Brief on Additional Threshold Legal/Policy Issue at 12 (Feb. 17, 2004).

B. Transition to Competition

As discussed above, in the event the Commission rejects EGSI's independence proposal, EGSI requested that the Commission cease immediately all interim-solution efforts to implement retail competition and determine that retail competition will not begin until the certification of a power region that includes this region.²³ EGSI also sought Commission guidance on whether to continue maintaining a state of readiness for the existing pilot project in ESAT.

At this time, the Commission finds that it is appropriate to cease the pursuit toward an interim solution and to terminate the existing pilot project in ESAT. The Commission is concerned about the mounting expenses incurred by EGSI to maintain a state of readiness in the pilot project, which has no participants, and to engage in various activities and proceedings to develop an interim solution. The Commission recognizes that conditions have changed considerably since the Commission and market participants started actively pursuing efforts to institute competition in ESAT. The Commission's efforts to explore an interim solution were premised on that market ultimately being governed by a FERC-approved RTO—a premise that succumbed to the demise of the proposed SeTrans RTO in the Southeastern U.S. shortly after EGSI's filed its independence proposal in this docket. Given the current state of the market, the Commission finds that it is appropriate to continue the delay of retail competition as set forth in Docket No. 24469 until EGSI joins a FERC-approved RTO or another independent organization that meets PURA § 39.151(b) and the criteria set forth in the Commission's preliminary order.

The Commission does not want to categorically exclude a non-RTO independent entity from ever becoming an independent organization for purposes of PURA § 39.151. PURA does not require a FERC-approved RTO as a condition of retail competition.²⁴ However, independence can best be met through the establishment of a single,

²³ See PURA § 39.152.

²⁴ See, e.g., *id.* § 39.151(m), see also *Public Utility Commission of Texas Staff Petition to Determine Readiness for Retail Competition in the Portions of Texas within the Southeastern Reliability Council*, Docket No. 24469, Preliminary Order at 4 (Sept. 17, 2001).

unaffiliated entity that has day-to-day operational control of the grid, decision making that is not controlled by any market participant or market segment, lack of financial conflicts of interest, and tariff authority under the Federal Power Act.²⁵

And while the Commission determines that it is appropriate to cease the pursuit towards an interim solution, this decision does not mean that EGSI should not give any consideration to or make any efforts towards retail competition. As a practical matter, the Commission finds that EGSI's efforts would be best directed at joining an RTO to establish these conditions of independence and other critical market structures for competition. Therefore, the Commission directs EGSI to seriously consider joining the Southwest Power Pool (SPP). Several parties to this proceeding identified the benefits of such an arrangement; these benefits include satisfaction of independence criteria, greater standardization and economies of scope, elimination of rate "pancaking" within the RTO footprint, regional transmission planning, and, ultimately, a transition to market-based congestion management and procurement of ancillary services.²⁶ Joining an RTO, specifically, SPP, which is already in development and approved by FERC on a conditional basis, may also help ensure that the Legislature's goal of enabling customers to receive retail electric choice is realized in a prudent and timely manner. In the event that EGSI's negotiations with SPP are successful, the Commission is hopeful that some of the existing groundwork that has been laid, such as the market protocols (or at least portions thereof), will ultimately be able to facilitate the transition to competition in ESAT.

Just as the Commission is unwilling, as a matter of law, to foreclose non-RTO methods for establishing independence in ESAT, the Commission is also unwilling to determine in this docket that retail competition should not begin until a power region that includes ESAT is certified as a qualified power region (QPR) under PURA § 39.152. As the Commission has previously held, PURA contemplates that retail competition could begin before QPR certification and provides specific customer protections in such a

²⁵ 16 U.S.C.A. § 824 (West 2000).

²⁶ See Direct Testimony of Ali Al-Jabir, TIEC Ex. 1 at 20-21; Staff's Statement of Position (May 12, 2004).

situation.²⁷ Moreover, based on the record in this proceeding, the Commission is unable to make such a finding. This does not mean, however, that the Commission contemplates moving forward with retail competition before QPR certification.

III. Findings of Fact and Conclusions of Law

The Commission adopts the following Findings of Fact and Conclusions of Law:

A. Findings of Fact

Procedural History

1. On November 26, 2003, Entergy Gulf States, Inc. (EGSI) filed an application for certification of an independent organization for the Entergy Settlement Area of Texas (ESAT).
2. The following parties participated in this docket: Entergy Gulf States, Inc. (EGSI); Alliance for Retail Markets (ARM); Cities; Commission Staff; East Texas Cooperatives; Entergy Solutions Ltd., Entergy Solutions Select Ltd., and Entergy Solutions Essentials (Entergy Solutions); Office of Public Utility Counsel (OPC); Reliant Resources, Inc. (Reliant); Texas Industrial Energy Consumers (TIEC); and TXU Retail Energy Company (TXU Energy).
3. On March 25, 2004, the Commission issued its Preliminary Order in this proceeding.
4. On May 26, 2004, EGSI filed its proof of notice in this proceeding.
5. On June 3, 2004, the Commission held a hearing on the merits to consider EGSI's application.

EGSI's Application

6. EGSI's application requested the certification of the Entergy Transmission Organization (ETO) as the independent organization under PURA § 39.151(c) for

²⁷ See Docket No. 24469, Preliminary Order (Sept. 13, 2001), *see also* PURA §§ 39.202(m) & 39.152(e).

ESAT and approval of the installation of a non-affiliated oversight entity referred to as the third-party overseer. EGSI proposed that the third-party overseer remain in place until the earlier of: (1) a Federal Energy Regulatory Commission (FERC)-approved independent entity is in place that can assume the overseer's responsibilities; or (2) a FERC-approved entity is in place that can assume all of ETO's independence responsibilities under PURA § 39.151(a).

7. ETO is a business unit of Entergy Services, Inc., which is a wholly owned subsidiary of Entergy Corporation. Entergy Services, Inc. is also an affiliate of EGSI and the other Entergy Operating Companies (i.e., Entergy Louisiana, Entergy Arkansas, Entergy Mississippi, and Entergy New Orleans).
8. Entergy Corporation engages in wholesale merchant and competitive retail operations in Texas.
9. Under EGSI's independence proposal, ETO, an affiliate of EGSI and its competitive affiliates, would retain control over the day-to-day operations of the Entergy transmission system.
10. ETO's annual operating and capital budgets are developed by ETO in conjunction with the Entergy Operating Companies (including EGSI). Ultimate approval of ETO's budget is the responsibility of the Entergy Corporation Board of Directors. ETO has no board of directors.
11. ETO's decision making is ultimately controlled by a market participant (Entergy Corporation) in ESAT.
12. ETO's employees are eligible for incentive payments offered to all Entergy employees and have the option to purchase Entergy stock.
13. A third-party overseer has not been identified or selected by EGSI.
14. The anticipated costs of implementing EGSI's independence proposal are unreasonable because they are incremental costs that could be avoided by a truly independent organization.

B. Conclusions of Law

1. The Commission has jurisdiction over the parties and subject matter of this proceeding pursuant to the Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 14.101, 32.001, 39.102-.104, and 39.151 (Vernon 1998 & Supp. 2004) (PURA).
2. This petition was processed in accordance with the requirements of PURA and the Administrative Procedure Act, TEX. GOV'T. CODE ANN. §§ 2001.001-.902 (Vernon 2000 & Supp. 2004) (APA).
3. Appropriate notice of this proceeding was provided in compliance with P.U.C. PROC. R. 22.54 and 22.55 and the APA §§ 2001.051-.052.
4. EGSI is an "electric utility," as defined by PURA § 31.002(6).
5. EGSI's petition does not meet the criteria of PURA § 39.151(b) that an independent organization be "sufficiently independent of any producer or seller of electricity that its decisions will not be unduly influenced by any producer or seller."
6. It is reasonable to continue the delay of retail competition in the ESAT area until EGSI joins a FERC-approved RTO or another independent organization under PURA § 39.151(b) and the criteria set forth in the Commission's preliminary order issued in this proceeding.
7. It is reasonable to terminate the current customer choice pilot project initiated pursuant to PURA § 39.104.

IV. Ordering Paragraphs

1. EGSI's application is denied. Efforts to develop an interim solution in the ESAT area shall cease and the current pilot project shall be terminated.
2. The delay of retail competition in the ESAT area shall continue until EGSI joins a FERC-approved RTO or another independent organization under PURA § 39.151(b) and the criteria set forth in the Commission's preliminary order

issued in this proceeding at met. Nothing in this Order should be construed to supercede the requirement for the Commission to determine EGSI's readiness for retail competition in a market-readiness proceeding pursuant to the Commission's orders in Docket Nos. 24469 and 25089.

3. All motions, applications, and requests for entry of specific findings of fact and conclusions of law, and other requests for relief, general and specific, if not expressly granted herein are denied.

SIGNED AT AUSTIN, TEXAS the 9th day of July 2004.

PUBLIC UTILITY COMMISSION OF TEXAS



JULIE PARSLEY, COMMISSIONER



PAUL HUDSON, CHAIRMAN



BARRY T. SMITHERMAN, COMMISSIONER