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Public Service Commission

December 20, 2001

VIA ELECTRONIC FILING

The Honorable David P. Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, D.C. 20426

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

Dear Mr. Boergers:

Forwarded herewith is the Florida Public Service Commission Notice of Intervention and Motion for Stay and Request for Rehearing in the above-captioned proceedings.

Sincerely,

/ s /

Cynthia B. Miller, Esquire
Bureau of Intergovernmental Liaison

/ s /

Harold McLean, Esquire
General Counsel

CBM:tf

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

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

**FLORIDA PUBLIC SERVICE COMMISSION
NOTICE OF INTERVENTION**

Pursuant to Rule 214(a)(2) of the Federal Energy Regulatory Commission (FERC) Rules of Practice and Procedure, the Florida Public Service Commission (FPSC) hereby files its Notice of Intervention.

COMMUNICATIONS

Pursuant to Rule 203(b)(3) of the Federal Energy Regulatory Commission (FERC) Rules of Practice and Procedure, the following persons are designated for receipt of communications and service on this proceeding:

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INTERVENTION

This proceeding affects Gulf Power Company, a retail-serving electric utility subject to regulation by the FPSC. The FPSC, pursuant to Chapters 350 and 366, Florida Statutes, is given the authority to regulate electric utilities within the State of Florida and to exercise the police power of the state for the protection of the public welfare. Section 366.015, Florida Statutes, encourages participation by the FPSC in Federal agencies' proceedings that affect those utilities over which the FPSC has primary regulatory jurisdiction.

WHEREFORE, the FPSC has timely filed this notice of intervention.

Respectfully submitted,

/ s /

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Harold McLean, Esquire
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DATED: December 20, 2001

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

AEP Power Marketing, Inc., AEP Service Corporation, CSW Power Marketing, Inc., CSW Energy Services, Inc., and Central and South West Services, Inc.)	Docket Nos., ER96-2495-015, ER97-4143-003, ER97-1238-010, ER98-2075-009, and ER98-542-005
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)	
Entergy Services, Inc.)	Docket No. ER91-569-009
)	
Southern Company Energy Marketing L.P.)	Docket No. ER97-4166-008

**FLORIDA PUBLIC SERVICE COMMISSION
MOTION FOR STAY AND REQUEST FOR REHEARING**

Pursuant to 18 CFR § 385.713 (2000), the Florida Public Service Commission (FPSC) hereby files this request for a rehearing of the Order issued November 20, 2001, in the above dockets.

In addition, the FPSC seeks a stay of the Order. A stay is warranted because the January 4, 2001, compliance date does not allow for the FERC otherwise to undo or defer the consequences of the Order.

The alleged errors in the “Order on Triennial Market Power Updates and Announcing New Interim Generation Market Power Screen and Mitigation Policy” are: (1) the FERC issued this order changing its policy in an arbitrary and capricious manner; (2) the FERC did not sufficiently explain its new policy; and (3) the potential ramifications of the policy were not considered and the FERC did not follow “reasoned decision making.”

- (1) The FERC issued this order changing its policy in an arbitrary and capricious manner.

The Order concedes, at page 6, that the FERC has historically applied one type of analysis to market power determination. Pursuant to that approach, the FERC allows power

sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot create other barriers to entry.

Since beginning to grant market-based rates to public utilities in the 1980s, the Commission primarily focused on the applicant and employed the “hub-and-spoke” analysis to determine whether an individual entity and its affiliates have the ability to exercise generation market power for a “hub-and-spoke” analysis, the applicant computes its market share of installed and uncommitted generation in a particular market.

Now, the FERC “has concluded that, because of significant structural changes and corporate realignments that have occurred and continue to occur in the electric industry, our hub-and-spoke analysis no longer adequately protects customers against generation market power in all circumstances.” The FERC announced that it intends to undertake a generic review of markets and market power in general, but “we have developed a Supply Margin Assessment (SMA) screen to be used pending completion of a generic rulemaking.”

Adequate notice was not provided prior to this change. There is an inherent unfairness in changing a fundamental policy without reasonable notice and an opportunity to be heard. This procedural defect is significant and results in the denial of due process.

As Commissioner Breathitt’s dissent states: “My primary concern with this interim mechanism is that the SMA, and the mitigation measures required of those utilities that fail the screen **have been cobbled together very quickly without the benefit of industry comment.**” [emphasis added] She also believes that the FERC’s broad-based inquiry into its market power analysis is the appropriate path to take. Otherwise, this interim action is “to the detriment of a sensible replacement of the hub-and-spoke method.”

The FPSC recognizes that FERC's order is intended to enhance competition in the wholesale electric market. The FPSC fully supports the FERC's goal of creating a fully competitive wholesale electric market. To that end, the FPSC has recently approved a Regional Transmission Organization for peninsular Florida.

(2) The FERC did not sufficiently explain its new policy.

In addition to the procedural defects cited above, the FPSC has a number of technical issues with the SMA approach that should be addressed prior to full implementation. Given the paucity of information contained in the Order, the FPSC does not understand the intricacies of the SMA screen and how it will be applied under a variety of conditions. For example, in the discussion of the three companies (Southern, AEP, and Entergy), the order defines the threshold for a utility to be "pivotal" and thus trigger market power concerns if "its capacity exceeds the market's surplus of capacity above peak demand—that is, the market's supply margin." The Order appears to illustrate this idea by calculating the 2000 peak demand for each utility and comparing this number to the installed capacity (including imports). If any utility has more total installed capacity than the supply margin, it is deemed to have market power.

This approach creates a number of methodological concerns that need to be further explored. Take for example, the definition of "peak demand." Is this the firm peak demand net of interruptible and demand-side managed loads? Is this a projected or actual demand? Is the peak demand weather normalized? The point is that by its nature the measurement of peak demand needs to be clarified, otherwise it results in a variable standard that changes from

year-to-year or based on variations in temperatures, load, and installed resources. Presumably, since this new SMA test is being applied under the auspices of the Triennial Market Power Updates, the results of the SMA test are supposedly invariant for at least three years. It is difficult to understand this new test.

- (3) The potential ramifications of the policy were not considered and the FERC did not follow reasoned decision making.

It appears that the FERC did not consider the potential ramifications of this new approach. A potential concern with this methodology results in the identification of more and more utilities as having market power depending on the margin reserves getting smaller. For example, if actual data are used to calculate the peak load, and it is an unseasonably hot or cold peak day, the actual margin reserve could be very small, in theory down to hundreds of megawatts. In this case, the SMA net captures smaller and smaller utilities and ultimately a single large power plant could represent owned capacity greater than the calculated margin reserve. Theoretically, the SMA could ultimately be applied to single generator owners which would force all market participants into cost-based rates. We question whether the FERC wants to be responsible for determining production costs for specific plants to ensure cost-based rates are posted.

Further problems plague some of the disclosure requirements for posting day ahead decremental and incremental production costs. By requiring SMA pivotal utilities to post their incremental and decremental costs, it appears to give undue advantage to other short-term marketers in knowing the price to beat in conducting transactions. Moreover, as described in the Order, the split-cost model appears to lock both buyer and seller into projected cost quotes

that are not adjusted for real time dispatch costs. This entire section needs to be carefully re-examined to ensure that in an effort to develop a more effective market power screen the short-term energy market design created by this action does not disadvantage any participant.

These observations are not exhaustive of the FPSC's concerns but illustrate the need for further deliberation and explanation of the SMA screening model. Given the importance of developing a fair, consistent, and methodologically sound market power test to replace the hub-and-spoke screen, it is incumbent upon the FERC to permit a rehearing of this issue.

The FERC's Section 206 docket (Docket No. EL01-118-000) provides an avenue for a thorough inquiry on this model. The FPSC is not suggesting that such an SMA model is not to be used if it is ultimately found to be the best model after a hearing is held. We recognize that there have been problems with the hub-and-spoke model. However, until the FERC completes the Section 206 proceeding, no implementation should occur.

In addition, before the FERC switches to a new model, the FERC should take into account the impact on the retail customer. It has been represented to us that the model may have a negative impact on retail customers of Gulf Power Company of at least \$4 million per year from lost sales revenues and lost purchase savings. The FPSC has not independently analyzed this impact. No change to the existing policy should be made without a full and fair examination of this issue.

In addition, this reconsideration will enable the FERC to work with state commissions' assistance in developing a new model.

The FERC has an obligation to engage in “reasoned decision making.” This was addressed in *FPL v FERC*, 85 F.3d 684; 1996 (D.C. Cir. 1996), and *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970). In the FPL case, the Court noted: “While we are quite sympathetic to FERC’s implicit claim that we should cut it some slack in this era of wide-ranging reform, allowing it to devote its intellectual resources primarily to the broader picture, we find that the Commission’s explanation here fails to meet the basic reasoned decision making requirement.”

Conclusion

In conclusion, the FERC should retract this ill-conceived order, and delay action until after the general Section 206 inquiry is concluded. A stay is warranted to defer the January 4 compliance date in the Order until after such an inquiry is completed.

Respectfully submitted,

/ s /

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/ s /

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DATED: December 20, 2001

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Notice of Intervention of the Florida Public Service Commission will be sent today by U.S. Mail to all parties on the attached service list.

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