

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

GULF STATES UTILITIES COMPANY

DOCKET NO. 50-458

REQUEST FOR REEVALUATION OF CITIES OF BENTON,
CONWAY, NORTH LITTLE ROCK, OSCEOLA, PRESCOTT,
AND WEST MEMPHIS, ARKANSAS AND THE FARMERS
ELECTRIC COOPERATIVE CORPORATION (Collectively
ACC) ON ANTI-TRUST ISSUES

TO:

William T. Russell, Director, Office of Nuclear Reactor
Regulation, U. S. Nuclear Regulatory Commission (NRC).

On April 10, 1995, your office issued Riverbend Station, Unit 1,
Gulf States Utilities Company and Cajun Electric Power Cooperative,
Inc., Finding of No Significant Antitrust Changes Time for Filing Requests
for Reevaluation at 60 Federal Register 18151 (1995 Finding). The 1995
Finding announced the results of the NRC's new analysis of the Entergy
Corporation(Entergy) and Gulf States Utilities Company(GSU) merger,
the attendant changes in ownership of the River Bend nuclear plant and
license condition requests by intervenors. NRC determined that the
concerns raised by the commenters are covered by and should be
resolved, before the NRC, through existing license conditions rather than
being dealt with as new license conditions applicable to the entire post

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merger Entergy system in this proceeding.

Based on that analysis, your office determined that the Entergy/GSU merger does not constitute a significant change in GSU's activities which would justify a new antitrust review. Finally, the 1995 Finding goes on to request that

any person whose interest may be affected by this finding, may file, with full particulars, a request for reevaluation, not to exceed ten pages in length, including attachments, with the Director of the Office of Nuclear Reactor Regulation....

ACC hereby submits their Request for Reevaluation, formally readopt and reallege herein all of their previous Comments and statements to NRC, advise the NRC of certain recent regulatory actions which are likely to adversely effect the customers of Entergy and GSU and request that NRC undertake an independent evaluation of the effect of the Entergy/GSU merger and regulatory actions upon competition.

Procedural History

On December 16, 1993 the NRC issued its Order finding no significant changes in operation of GSU's River Bend nuclear plant and authorizing amendment of the river Bend operating license to allow acquisition and operation of the plant by Entergy. Various parties appealed or intervened in the appeal of the NRC Order and, on December 29, 1994, the U. S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an Order requesting that the parties file motions to govern further proceedings in the NRC appeal on

or before January 30, 1995. The December 29, 1994 Order was based on DC Circuit's prior decision rejecting Entergy's original open access transmission tariff in Cajun Electric Power Cooperative, Inc. v. Federal Energy Regulatory Commission, 28 Fed 3d 173 (D.C. Cir. 1994). The NRC Merger decision relied completely on FERC's approval of the open access tariff for its finding that Entergy had mitigated any market power over its customers. When the D.C. Circuit rejected the tariff all decisions based on it were rendered null.

On March 14, 1995, the D. C. Circuit vacated NRC's Orders and ordered that the case be remanded to the NRC for further consideration and proceedings in light of the Cajun Electric Power Cooperative, Inc. v. FERC, decision cited above. Petitions for Rehearing were originally due April 29, 1995.

On April 10, 1995, NRC issued the 1995 Finding and gave parties ten days to request reevaluation of the new finding. Reevaluation requests were not to exceed 10 pages in length including attachments and were limited to new information not previously submitted.

Cajun objected to this ten-day time period, demanding a full thirty days under the NRC's rules. In response to the Cajun demand, the NRC filed a motion to allow an extension of time for filing Rehearing Requests at the D. C. Circuit. ACC did not object to the NRC's request based solely on statements of Mr. Daniel Shapiro, NRC counsel, who indicated, prior

to the filing of the NRC motions to extend time, that NRC intended to begin the antitrust analysis over from the beginning. It now appears that, contrary to Mr. Shapiro's assertions used to obtain ACC's consent to its D.C. Circuit Motion, the NRC does not intend to comply with the D.C. Circuit's direction that the NRC hold an evidentiary hearing on the effect of the merger and its accompanying River Bend nuclear plant license amendments upon competition.

Recent Developments

On March 19, 1995 The Federal Energy Regulatory Commission issued a Notice of Proposed Rulemaking in its Docket No. RM95-8-000, RM94-7-000, and RM 95-9-000 (Transmission NOPR). The Transmission NOPR will require utilities to open their transmission systems to third party usage, at least partially, through implementation of generic point to point and network transmission tariffs. Among its other effects, the Transmission NOPR will impose liability for stranded investment costs upon some utilities who take advantage of transmission services and will relieve utilities selling power and energy at wholesale from their current obligation to serve their transmission dependent wholesale customers.

FERC will allow transmitting utilities as that term is defined in the federal power act to collect their costs which are "stranded" by a wholesale customer's exercise of its transmission rights. A utility, like Entergy, may be allowed to recover its generation or other costs through

transmission rates despite the existence of a preexisting contract which did not specifically allow such recovery. The Transmission NOPR states in part:

Third, with respect to stranded costs associated with existing wholesale requirements contracts that are not renewed and that do not contain exit fees or other stranded cost provisions, if the seller can demonstrate that it had a reasonable expectation that the contract would be renewed and can meet other evidentiary criteria, we believe that stranded cost recovery should be allowed. We encourage the parties to such contracts to attempt to negotiate a mutually agreeable stranded cost amendment. We have determined, however, that the three-year negotiation period proposed in the initial Stranded Cost NOPR should be abandoned. We propose instead that: (1) a public utility or its customer under the contract may, at any time prior to the expiration of the contract, file a proposed stranded cost amendment to the contract under section 205 or section 206; or (2) a public utility may, at any time prior to the expiration of the contract, file a proposal to recover stranded costs through transmission rates for a departing customer. We believe it is in the public interest to permit public utilities to seek recovery of stranded costs associated with existing contracts that do not explicitly address stranded costs, and that they be permitted to do so either through transmission rates or through amendment to the existing power sales contracts.... (footnotes omitted) Transmission NOPR at p. 143-4.

This principal will allow Entergy to, if it chooses, attempt to recover Stranded costs from ACC members should they exercise their transmission rights and acquire third party power supplies in the future and will create uncertainty as to the full price an ACC member will be required to pay for power. Additionally, there is a great likelihood that stranded cost will be litigated. As Entergy's transmission dependent wholesale customers are significantly smaller than Entergy with a much

smaller resource base and this type of litigation tends to be extraordinarily expensive, the uncertainty and additional costs which are likely to arise will tend to give Entergy an unfair competitive advantage for sales of power and energy to its transmission dependent wholesale customers.

The Transmission NOPR will also free utilities like Entergy from their traditional obligation to provide wholesale power service to utilities within their boundaries. The Transmission NOPR stated:

Further, to ensure that the rights and obligations of sellers and buyers are symmetrical in the new competitive era, we do not believe that it is appropriate to impose on wholesale requirements suppliers a regulatory obligation to continue to serve their existing requirements customers beyond the end of the contract term. A requirements customer thus will be responsible for planning to meet its power needs beyond the end of the contract term. In this regard, it may sign a new contract with its existing supplier, or it may contract with new suppliers in conjunction with obtaining transmission service under its existing supplier's open access transmission tariff. Transmission NOPR at p.141-2.

This release of the obligation to serve will leave small transmission dependent utilities at the mercy of utilities like Entergy in two ways, the utility will have no obligation to negotiate a new power supply agreement with a wholesale customer but then may seek to recover stranded costs when the customer acquires third party power supplies. This will tend to allow Entergy to recover monopoly profits and will leave Entergy's customers with no effective remedy.

The burden of this stranded investment liability imposition and

loss of security arising from the release of the obligation to serve will undoubtedly fall primarily upon small transmission dependent utilities like ACC and Entergy's other wholesale customers. These facts are likely to create a condition which is inconsistent with applicable antitrust laws and, coupled with Entergy's control of generating assets, make it even more necessary for the NRC to investigate the competitive impact of the Entergy/GSU merger on the wholesale power market.

ACC further advise the NRC that the 1995 Finding fails to satisfy the U.S. Court of Appeals For the District of Columbia Circuit's (D.C. Circuit) Order issued in Cajun Electric Power Cooperative, Inc. v. Nuclear Regulatory Commission, Docket No. 94-1113 on December 29, 1994 (DC Circuit Remand). The NRC's 1995 Finding is clearly faulty in that it does not meet the plain requirements of the DC Circuit Remand.

The DC Circuit Remand Order stated in part:

ORDERED, on the court's own motion, that the orders under review be vacated. NRC's orders are based upon the Federal Energy Regulatory Commission (FERC) decision which this court found to be "seriously flawed" in Cajun Electric Power Cooperative, Inc. v. FERC, 28 F.3d 173, 177 (D.C. Cir. 1994) (per curiam). It is

FURTHER ORDERED that the motion for remand be granted. These consolidated cases are remanded to NRC for further proceedings in light of Cajun Electric...

As this language clearly shows, the D.C. Circuit Remand Order specifically remanded this case to the NRC for further proceedings in light of the Court's decision in Cajun Electric Power Cooperative v.

FERC, 28 F.3d 173 (DC Cir 1994) (Cajun Decision). The Cajun Decision explicitly held that FERC acted in an arbitrary and capricious manner when it approved an Entergy transmission tariff without holding an evidentiary hearing on the effect of that tariff upon competition.

By its terms the DC Circuit Remand Order indicates that the NRC acted in an arbitrary and capricious fashion if it approves the River Bend license changes, which are at issue here, without first holding an evidentiary hearing on the effect, upon competition, of the acquisition of Gulf States Utilities Company and its River Bend nuclear plant by Entergy.

Further, the NRC's apparent intention to seek approval of the 1995 Finding on rehearing is not valid. That process would violate Rule 40 of the Federal Rules of Appellate Procedure which provides that a rehearing request must:

state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present.

Clearly, if the NRC adopts some new justification for approving the merger, it will not show the court that it overlooked or misapprehended some point of law or fact. In the event the NRC rejects this Request For Reevaluation, ACC advise that they will consider opposing any attempt by NRC to substitute upon rehearing the 1995 Finding for the previously rejected Orders on review in DC Circuit Docket No. 94-1113.

Respectfully submitted,

ZACHARY DAVID WILSON, P.A.

BY: Brian C. Donahue

Brian C. Donahue
321 Maple Street
P.O. Box 5578
North Little Rock, AR 72219

Attorney for ACC

CERTIFICATE OF SERVICE

I, Brian C. Donahue, Attorney for ACC, do hereby certify that I have caused a copy of the foregoing Comments to be served upon all parties of record in this docket this 10th day of May, 1995.

Brian C. Donahue
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Respectfully submitted,

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