UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Christian County Generation, L.L.C. **Docket No. EL10-27-000**

MOTION TO INTERVENE AND PROTEST OF RETAIL ENERGY SUPPLY ASSOCIATION

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.214, the Retail Energy Supply Association ("RESA") [1] hereby files this Motion to Intervene and Protest of Christian County Generation, L.L.C.'s ("CCG") Petition for Declaratory Order and Request for Expedited Ruling filed on December 23, 2009 ("Petition"). By its Petition, CCG is seeking a declaratory order confirming the reasonableness of its rate of return on equity ("ROE") and hypothetical capital structure for a 730 MW (gross) hybrid integrated gasification combined cycle ("IGCC") generating station to be located in Christian County, Illinois. The extraordinary relief CCG is seeking – guaranteed upfront approval of a ROE and hypothetical capital structure – is simply not available for this generation project. That relief is available only for determining the eligibility of transmission projects for incentive rates pursuant to Order No. 679.

In addition to being substantively deficient on its face, CCG's Petition is wholly devoid of the facts necessary for the Commission to even make a proper ROE and capital structure finding that would comprise a just and reasonable rate. In fact, such approval

[1] RESA's members include ConEd Solutions; Direct Energy Services, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Gexa Energy; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; Sempra Energy Solutions LLC. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

would yield unjust and unreasonable rates. CCG's petition should be denied. In support of this Motion to Intervene and Protest, RESA submits as follows:

I. CORRESPONDENCE AND COMMUNICATIONS

Communications and communications regarding this matter should be addressed to the following person(s), and the same should also be designated for service on the Commission's official list for this proceeding:

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RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity. RESA and its members are actively involved in retail electricity markets throughout the United States, including retail markets in Illinois, where this project is to be sited. RESA members have been active in related proceedings at the Illinois Public Utilities Commission and before the Illinois legislature. RESA has an interest in this proceeding that cannot be represented by any other party. Its intervention is in the public interest and its motion should be granted.

II. BACKGROUND

On December 23, 2009, CCG filed with the Commission its Petition seeking an up-front ruling from the Commission on its proposed hypothetical capital structure and ROE for its 730 MW (gross) IGCC facility. According to CCG, the project is eligible for DOE loan guarantees of up to $2.579 billion. Pursuant to Illinois legislation enacted in 2008 and signed into law in January 2009, electric utilities and alternative retail electric

suppliers ("ARES") are ***required*** to enter into long-term agreements for the full output of the project. This legislation, included as Attachment 2 to Exhibit CCG-16 to the Petition, contains various provisions that appear tailor-made to supporting the development of this project.

In support of its Petition, CCG claims that up-front rulings on ROE and capital structure are required to complete financing and to advance the project. CCG includes testimony purporting to support its petition. CCG relies for its claims that such up-front treatment is appropriate on cases approving rate treatment for transmission lines approved pursuant to authority granted to the Commission in Federal Power Act Section 219. As will be shown below, this authority and the underlying policy, however, extends only to certain transmission infrastructure investments, not generation development.

Despite CCG's claims to the contrary, it is not appropriate for the Commission to grant up-front approval of the project's ROE and capital structure. First, this is not a project for which Congress or even the Commission has determined is eligible for such treatment. Second, the project is apparently eligible for numerous other benefits provided in legislation both at the federal and state level, rendering the risk of this project no more than any other merchant generating plant in the United States bears when making financing, construction and operating decisions. In fact, there is likely significantly less risk for CCG's IGCC facility given that Illinois legislation has mandated Illinois utilities and ARES to purchase 100% of the output through thirty (30) year power purchase agreements. This is a very different situation than is presented in virtually all other merchant generation developed over the last decade.

Even if CCG were procedurally eligible for the declaratory order it is seeking, its Petition fails to provide the factual evidence necessary for the Commission to make a determination that the proposed ROE and hypothetical capital structure and are just and reasonable and otherwise consistent with the Commission's FPA Section 205 obligations. The Commission must fully evaluate the risks of the IGCC project to properly determine ROE. As noted previously, the entire output of CCG's facility must be purchased through legislatively mandated PPAs. However, the PPAs do not exist yet, and won't until the Illinois General Assembly takes further legislation action. Without the content of the PPA, the Commission cannot adequately assess CCG's risk and establish a just and reasonable ROE. Clearly, substantial issues of material facts exist.

Likewise, CCG has not provided sufficient information from which the Commission can determine its actual capital structure. CCG's proposed capital structure of 55% debt and 45% equity does not comport with its claim that the project will be almost entirely financed through a DOE loan guarantee, or federally guaranteed debt.

Third, customers such as RESA members who currently are and would be potential ARES in Illinois and who would be required to commit to a 30 year term PPA and pay for this generation, have not had the opportunity to seek discovery on the testimony presented by CCG. Even if provided the opportunity to investigate CCG's testimony, it is unlikely that ARES would be able to extract all the information necessary to contemplate the instant request without access to the Facility Cost Report CCG is preparing to comply with the Illinois statute.

Locking in critical components of a cost-based rate without the opportunity to examine the entire package that would comprise a cost-based formula rate (especially the

costs!) makes it impossible to determine whether the ROE and capital structure would be just and reasonable and lead to just and reasonable rates. If the Commission were to grant this Petition, it would do so based on a one-sided presentation and analysis of ROE and capital structure. In short, the Commission must deny the Petition.

III. ARGUMENT

A. CCG is Not Eligible for Pre-Approved ROE and Capital Structure for its Project

CCG is not eligible for pre-approved ROE and capital structure for its project. The Commission must not abandon its market-based approach to generation development and allow one sided support for ROE and hypothetical capital structure to provide support to lock in these components to a formula rate for a generation project which is in the development phase. CCG's Petition must be denied.

1. Transmission-Related Precedent is Wholly Inapplicable to CCG's Requested Relief

CCG touts what it believes to be the benefits of its project and analogizes its situation to instances where the Commission has granted certain incentives to transmission infrastructure proposals. What CCG fails to acknowledge is that the pre-approvals granted to transmission-related projects have been granted by the Commission pursuant to the direction of Congress in Section 1241 of the Energy Policy Act of 2005.[2]

Section 219 of the Federal Power Act, added to the FPA by the Energy Policy Act of 2005, 16 U.S.C. § 824s(a), provides:

> Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for

[2] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

> the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

Section 219(b) requires the Commission to: (1) promote "capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the *transmission* of electric energy in interstate commerce, regardless of the ownership of the facilities;" (2) permit a ROE that attracts new *transmission* investment; (3) encourage the use of new technologies to improve existing *transmission* facilities; (4) allow the recovery of prudently incurred costs to comply with mandatory reliability standards and prudently incurred transmission development costs. 16 U.S.C. § 824s(b) (emphasis added).

The Commission implemented Order No. 679 to comply with these new directives.[3] One of the initiatives was to permit entities seeking to develop new transmission to seek up-front approval of ROE and capital structure, as well as other incentive rate mechanisms. These incentives and pre-approvals are only available to *transmission* infrastructure and not generation. No such incentives or pre-approvals were directed by Congress or by the Commission to apply to generation development.

Congress did not leave generation improvements and development out of its Energy Policy Act initiatives. As noted by CCG, Congress provided tax incentives and the ability to tap into Department of Energy loan guarantees for IGCC projects.[4]

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[3] *Promoting Transmission Investment through Pricing* Reform, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, Order No. 679-B,119 FERC ¶ 61,062 (2007) ("Order No. 679").

[4] *See* Petition at 2, citing Pub. L. No. 109-58, 119 Stat. 594 (2005), Titles XIII (tax credit provisions) and XVII (loan guarantees for IGCC projects).

Congress did not, however, provide for the same incentives to generation as they did for certain transmission infrastructure improvements. There is simply no precedent and no direction by Congress or support from Order No. 679 or subsequent cases that would support pre-approval of ROE and capital structure for a cost-based generation project still in the development phase.

2. Absent FPA Section 219's Directives, Pre-Approval is not Supported on Public Policy Grounds

The Commission has a long history of relying on market forces for the development of generation. Wholesale generation development over the last 20 years has been nearly all market-based. Developers of generation in competitive wholesale markets are expected to assume the risk of development, earning profits only if they maintain their position as an efficient, low-cost generation supplier. For generators that still operate under a cost-based rate alternative, the Federal Power Act and the Commission's regulations contain established statutory and regulatory procedures to ensure that a just and reasonable rate is charged. For example, Section 205(a) requires that a public utility must file rates for Commission approval before they can be charged.[5] Part 35 of the Commission's regulations details the showing that must be made in support of an initial rate.[6] The Commission's regulations contain explicit categories of costs that may be includable in rates and requires explicit showings in support of the components, including rate of return and cost of capital.[7] A just and reasonable cost-based rate is a package of components, all of which must be examined in an orderly fashion.

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5 16 U.S.C. § 825d.

6 18 C.F.R. Part 35.

7 *See* 18 C.F.R. § 35.12.

CCG provides no evidence to show why its project is different than other generation projects that have relied on market forces or upon traditional ratemaking principles in developing rates for its project. As noted above, FPA Section 219-related authorizations do not provide support for up-front approval of ROE and capital structure for generation projects. If this IGCC project provides as many benefits and savings as CCG asserts that it does, it should require no special treatment from the Commission in the form of pre-approvals. In fact, in light of the availability of tax credits, DOE loan guarantees and special legislative preferences, it would appear that this IGCC project poses less risk than most merchant generation developed in the U.S. It has received significant assistance already, and should not receive special, unique and extraordinary treatment from the Commission. Any additional benefits accruing to CCG by Commission pre-approval of ROE and capital structure are off-set by the detriments to customers from such relief.

B. Customers Will Be Harmed By Pre-Approval

Customers of this project will be irreparably harmed by the pre-approval that CCG seeks. Customers such as RESA members who serve as ARESs in Illinois are the ratepayers who will be responsible for paying CCG's rates. RESA members that serve as ARES in Illinois and their small business, non-profit, school, hospital, commercial and industrial customers have the potential to bear a disproportionate share of the out-of-market costs that the CCG project will bring to the state. There are a number of significant issues that affect adversely RESA's members and customers that require denial of the Petition.

First, it is critical in the administrative review process, that the Commission make a determination that the rates are just and reasonable. An important component of that review is the hearing process. Formal discovery allows participants and Commission staff to understand the underlying assumptions made by the rate proponent. CCG would have the Commission bypass this entire process and derive a ROE and capital structure that is unassailable and not subject to even cursory review. What is telling here is that much of the support for the level of ROE that CCG proposes is based on fully litigated ROE determinations.[8]

Second, the impact of the rates, including the ROE and capital structure, is critical to RESA members active in Illinois markets and will impact the very survival of electric competition in Illinois. As currently enacted, the legislation relied upon by CCG for support that would provide a number of benefits to CCG and provide certainty to CCG in its development, is discriminatory as between regulated utilities and ARES. The Illinois legislation as currently drafted requires regulated utilities in Illinois and ARES to purchase the output of the project on a long-term, 30-year basis.[9] Thus, ARES operating in Illinois would be forced to sign "sourcing agreements" with a term of 30 years. The legislation is discriminatory, and perhaps even unconstitutional, in that it contains certain cost caps that would apply to regulated utilities and leaves ARES's cost responsibility limitless. Furthermore, it actually forces the ARES to cover the costs in excess of the cap provided to the utility.[10]

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8 *See* Testimony of William E. Avera, Exhibit No. CCG-5.

9 The legislation is described in the Testimony of Gregory A. VanDyke, attached as Exhibit CCG-16.

10 RESA is not addressing whether or not the legislation is consistent with long-standing precedent that restricts a utility's ability to collect its wholesale rates on the retail level.

RESA and its members are working tirelessly at the state level to address this issue, but what is clear for purposes of CCG's Petition is that the wholesale rates to be charged for generation from this facility will affect retail markets and RESA members as rate paying customers. Their interests in paying a just and reasonable rate must be recognized and they must be given the opportunity to explore the components of the rates in their entirety, including any formula and the cost inputs to the formula to ensure that what they must pay is just and reasonable. That the Illinois public service commission may reduce the ROE upon review in the sourcing agreements, is of little comfort, since, as proposed, CCG has filed this Petition in order to charge cost-based, Commission-jurisdictional wholesale rates. Illinois may turn out to be powerless in reducing any resulting rate that it feels is unjust and unreasonable for Illinois customers.

C. CCG's Petition Is Lacking The Factual Evidence Necessary For A Proper Determination of ROE and Capital Structure

From a substantive perspective, CCG's evidentiary support for its Petition shows that there are substantial issues of material fact present that make it impossible to determine a just and reasonable rate under FPA Section 205. For example, CCG's Discounted Cash Flow ("DCF") methodology uses a specified proxy group to establish a range of ROE. However, as a single purpose entity, the proxy group selection has critical effects on the range of reasonableness of an ROE. No one has had the opportunity to ask questions or perform any analysis as to whether the proxy group or its selection is just and reasonable or otherwise appropriate.

Even a cursory review of the ROE testimony calls into question some of the assertions of the sponsoring witness. Mr. Avera describes a number of regulatory risks

that warrant the relief requested. Summarizing the obvious, that capital markets are tight and the financial markets have retrenched in light of the current economic recession, he notes that there is a "potential that regulators will prevent the recovery of the full costs associated with new investment in utility infrastructure."[11] He cites to disallowances in the 1980s and 1990s to unidentified projects. Yet, that is the risk that CCG is expressly taking on in seeking cost-based rates for its project and that is the risk of any utility seeking to show that the rates are just and reasonable. The risk of disallowance is important to ensure that amounts expended are reasonable and necessary (just and reasonable).

Next, the witness cites to the risk that an investor might be worried that "future regulators might deem long-lived utility assets to be obsolete because of technological change or competition from alternatives."[12] Here, however, the Illinois legislature has apparently ordered utilities and ARES to purchase this power on a long-term basis; has provided that the project shall be eligible to meet renewable portfolio standards ("RPS"); and the project is eligible for preferential treatment under the Energy Policy Act of 2005.

The same is true with respect to the proposed hypothetical capital structure. In Mr. Avera's testimony, he notes that the Illinois legislation requires a capital structure of 45% common equity and from there he supports that level as reasonable. Reliance on a legislatively-declared hypothetical capital structure is highly unusual and should not be condoned. Particularly when CCG has already admitted that most of the project's costs will be funded through federally guaranteed debt. Such a capital structure, if appropriate, must be determined on a standalone basis, not backed into based on a legislative

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11 CCG-5 at 14, ll. 6-8.

12 CCG-5 at 14, ll. 14-16.

requirement. That Mr. Avera has to include a separate exhibit (CCG-15) to further support any perceived departures in particular analysis is further support of the need to explore all of these issues completely before approving a ROE and capital structure for a generation project such as that proposed by CCG.

With respect to the capital structure, while CCG proposes a hypothetical capital structure, neither the Commission nor customers know anything about the financing structure. For example, will CCG be the debt holder or will the project debt be held at an upstream level? These matters are of critical importance to assessing the capital structure-related rate issues.

Clearly, the underlying risk assumptions made by the witness do not support the ROE or capital structure proposed. The Petition must be denied. There are substantial issues of material fact that underlie the case put forth in CCG's Petition that warrant further exploration prior to approval of a ROE and capital structure. To the extent the Commission departs from precedent and entertain generator requests for advanced approval of ROE and hypothetical capital structure and encourage cost-based generation, the justness and reasonableness of those components must be explored in an evidentiary hearing.

IV. CONCLUSION

CCG seeks extraordinary relief in its Petition and such extraordinary relief must not be granted. The project, as a generator, is not the type of project for which Congress or even the Commission has determined is eligible for such treatment. However, the project is apparently eligible for numerous other benefits provided in legislation both at the federal and state level, calling into question the claims of outstanding risk that

underlie the request for extraordinary relief. Finally, granting this petition will cause significant to harm to ARESs many of whom are RESA members. Under the Illinois legislation, ARES would be required to commit to a 30 year term PPA and pay for this generation. ARES have not had the opportunity to seek discovery on the testimony presented by CCG or explore the fundamental issues that support the rate relief requested. Locking in critical components of a cost-based rate without the opportunity to examine the entire package that would comprise a cost-based formula rate makes it impossible to determine whether the ROE and capital structure would produce just and reasonable rates. In short, the Commission must deny the Petition without prejudice to allow CCG to re-file its evidence, as updated, at the time the facility commences service or in accordance with Section 205 of the Federal Power Act. To the extent that the Commission departs from precedent and determines that extraordinary relief is justified under FPA Section 205, the Commission must set the matter for evidentiary hearing.

Respectfully submitted,

/s/Elizabeth W. Whittle

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Dated: January 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **MOTION TO INTERVENE AND PROTEST OF RETAIL ENERGY SUPPLY ASSOCIATION** via electronic mail on all parties listed on the service list compiled by the Secretary in this proceeding.

Dated in Washington, DC this 22nd day of January, 2010.

/s/Elizabeth W. Whittle
Elizabeth W. Whittle