



2. This order grants Movants' request for interlocutory appeal and directs the judge to admit the testimony of Trial Staff's witness for the reasons discussed below. This order benefits the public by accepting relevant testimony that can be weighed by the Commission in reaching a decision on the merits.

### **Background**

3. In *Entergy Services, Inc.*, 103 FERC ¶ 61,256 (2003), the Commission consolidated the subject dockets and set the propriety of certain power purchase agreements (PPAs) for evidentiary hearing. The order listed six issues for consideration: (1) whether in the design and implementation of the request for proposals (RFP) process Entergy Services, Inc. (ESI) and its affiliates unduly preferred Entergy affiliates; (2) whether the analysis of the RFP bids unduly favored Entergy's affiliates, particularly with respect to evaluation of non-price factors; (3) whether ESI selected the affiliates based upon a reasonable combination of price and non-price factors; (4) whether ESI's reliance on bids made in the RFP to support the prices for the non-RFP PPAs adequately demonstrate that ESI did not unduly favor its affiliates when selecting the winning bids; (5) whether, and to what extent, the PPAs impact wholesale competition; and (6) whether the PPAs are just and reasonable and not unduly discriminatory.

4. After conducting a *voir dire* examination of Trial Staff witness Ms. Sabina U. Joe on October 18 and 19, 2004, ESI's counsel moved to strike Ms. Joe's testimony and exhibits on the ground that she did not qualify as an expert witness on affiliate abuse, RFPs or bid analysis. Following argument, the judge granted the motion, striking Ms. Joe's testimony and exhibits. Trial Staff then made a motion under Rule 715 for leave to take an interlocutory appeal of the judge's ruling. The judge denied Trial Staff's motion and based on this denial, Movants filed their interlocutory appeal. On October 22, 2004, ESI filed a notice stating its opposition to Movants' appeal, and that it would file an answer.

### **Discussion**

5. While participants in administrative proceedings before the Commission have the opportunity to challenge the qualifications of witnesses, we believe that the judge erred in determining that this witness was unqualified. Moreover, the Commission is concerned that the judge's ruling effectively eliminates from the evidentiary record relevant testimony, depriving the Commission of a full and complete record on which to rule comprehensively on competitive solicitation procedures in the Entergy market in a timely manner.

6. If the judge's ruling is not immediately corrected, it could give rise to disputes over the admissibility of evidence based on perceived flaws in the qualifications of Trial Staff witnesses in other cases, rather than maintaining a focus on the weight to be accorded to the evidence these witnesses offer and the merits of the issues the Commission has set for hearing.
7. In administrative proceedings before the Commission, the Commission's preference is that evidence be admitted unless the information has no possible relationship to the controversy, is irrelevant, or immaterial, or unduly repetitious. *See* Rule 509 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.509 (2004). Such factors are not present here.
8. The judge relied on other language of Rule 509 that provides that a presiding officer may exclude materials that are "not of a kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs," but did not explain the basis for this conclusion. Instead, he asserted that the Commission's Rule 509 does not exactly fit the situation of striking testimony based on a witness' qualifications. He therefore looked to the Federal Rules of Evidence for guidance and excluded the testimony under those rules, rather than applying the Commission's Rule 509 governing admissibility.
9. As a general matter, the Commission's hiring practices, the development of its training programs, and the experience gained from job performance, are intended to provide the Trial Staff with the requisite knowledge and the analytical skills to be witnesses that are qualified to testify on complex electric, gas and oil issues. While the specific training and experience of a particular Trial Staff witness may affect the weight to be given his or her testimony on any given issue, this does not affect the general competence of the witness to present testimony. The judge's ruling would limit Trial Staff's ability in this and other cases to present an objective view of the facts and develop a complete record.
10. Ms. Joe holds an MBA in corporate finance, and has taken courses in finance and in both micro and macro economics at the graduate level, as well as courses in mathematics, decision sciences and statistics. She has served as an Energy Industry Analyst for over eight years, and is responsible for analyzing and testifying on complex electric, gas and oil issues. She has filed testimony in several proceedings and, of particular relevance, testified in one that involved the reasonableness of affiliate PPAs, and has participated in the analysis of affiliate abuse issues in another Commission case involving affiliate abuse issues. Therefore, we conclude that this witness is qualified to express an opinion and evaluate the affiliate PPAs at issue in this case.

11. The Commission's rules on admissibility are intentionally broad to allow the admission of testimony by a witness with the requisite educational background, analytical experience and skills.<sup>1</sup> The judge's initial reaction was correct when he stated his original inclination to do what is normally done and admit the testimony, and with respect to any shortcomings he perceived, use them to assess the weight to be accorded the evidence, not its admissibility. (Tr. 9692) In not doing so, the judge erred.

### **Conclusion**

12. The Commission finds that Trial Staff's witness holds the requisite training, education, and experience to sponsor the testimony at issue, and that the testimony is admissible under the Commission's Rules of Practice and Procedure. While our ruling here does not compel the judge to give particular weight to the witness' views, the Commission, on exceptions, will now be able to evaluate this evidence in a timely manner and accord it the weight the Commission determines is appropriate.<sup>2</sup>

### **The Commission orders:**

Movants' motion for an interlocutory appeal is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.

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<sup>1</sup> Many Commission technical experts have a subject-matter expertise not easily obtained in the private sector.

<sup>2</sup> *See Williams Natural Gas Company*, 41 FERC ¶ 61,037 at 61,094-95 (1987), *reh'g denied*, 45 FERC ¶ 61,207 at 61,613 (1988), where the Commission allowed Trial Staff testimony that the judge would have excluded.