

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Environmental Resources Trust, Inc.

Docket Nos. ER98-3233-007
EL05-111-002

ORDER DENYING REQUEST FOR REHEARING

(Issued February 28, 2006)

1. In this order, we deny the rehearing request of Environmental Resource Trust, Inc. (ERT) filed in response to the Commission's November 3, 2005 Order revoking ERT's authority to make sales at market-based rates.¹

Background

2. In an order issued on May 31, 2005, the Commission announced its policy with respect to entities that failed to comply with the conditions under which the Commission granted them market-based rate authority, namely, the requirement to submit an updated market power analysis.² The Commission directed the captioned market-based rate sellers, including ERT, to file their updated market analyses within 60 days from the date of issuance of that order or provide satisfactory support for why they should not be required to do so. If an entity failed to file an updated market power analysis or provide satisfactory support for why it should not be required to do so within 60 days, its market-based rate authority would be revoked.

3. In the November 3 Order, the Commission revoked the market-based rate authority of the companies that failed to comply with the May 31 Order and terminated their market-based rate tariffs. Because ERT made no filing in response to the May 31 Order, ERT's market-based rate authority was revoked and its market-based rate tariff was terminated effective November 3, 2005.

¹ *3E Technologies, Inc.*, 113 FERC ¶ 61,124 (2005) (November 3 Order).

² *3E Technologies, Inc.*, 111 FERC ¶ 61,295 (2005) (May 31 Order). The May 31 Order established a refund effective date of 60 days after publication of notice of the investigation in the *Federal Register*. The notice was published in the *Federal Register* on June 10, 2005, with a refund effective date of August 9, 2005.

4. On December 5, 2005, ERT filed a request for rehearing of the November 3 Order revoking ERT's market-based rate authority. ERT requests that the Commission permit ERT to retain its market-based rate authority. ERT acknowledges that it failed to submit an updated market power analysis as required, but requests that the Commission grant rehearing based on the following mitigating factors. ERT states that it has yet to make any sales of power under its market-based rate authority and that its failure to file an updated market power analysis was the result of notice of the Commission's actions being sent to an incorrect address. ERT states that the notice was sent to an old address as the result of outdated contact information, and that it did not become aware of its obligation to file an updated market power analysis until after the Commission's November 3 Order. ERT notes that it has been submitting regular Electric Quarterly Reports as required. ERT states that because of its small size and very limited operations, ERT does not devote significant time or resources to power marketing operations or to monitoring developments in the electric industry, regulatory or otherwise.

Discussion

5. As the Commission stated in the May 31 Order, in the absence of an updated market power analysis, the Commission cannot exercise its statutory duty to ensure that market-based rates are just and reasonable and that market-based rate sellers continue to lack the potential to exercise market power so that market forces are in fact determining the price.

6. We directed ERT to submit an updated market power analysis in the May 31 Order in order to execute this statutory duty. The fact that ERT has never sold power under its market-based rate authority does not relieve ERT of its responsibility to file an updated market power analysis, or comply with Commission orders. Nor does ERT's small size excuse its failure to file a revised market power analysis on a timely basis. Further, ERT states that an incorrect service address has been on file with the Commission for several years without being corrected. An out-of-date service address, however, does not justify a grant of rehearing.³ In any event, the Commission published

³ Rule 2010(k) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010(k) (2005), requires that any entity regulated by the Commission must designate at least one person to receive service of documents. Rule 2010(k)(2) states that "[e]ach regulated entity has a continuing obligation to file with the Commission updated information concerning the corporate official or person designated to receive service." ERT's failure to comply with Rule 2010 is not grounds for rehearing.

notice of the May 31 Order in the *Federal Register*.⁴ The *Federal Register* notice included ERT. Publication of notice in the *Federal Register* is an accepted form of notice.⁵

7. We will therefore deny ERT's request for rehearing. The revocation of ERT's market-based rate authority is without prejudice to ERT making a new filing with the Commission under section 205 of the Federal Power Act to request market-based rate authority.⁶

The Commission orders:

ERT's request for rehearing of the Commission's November 3, 2005 Order revoking ERT's market-based rate authority is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁴ 70 Fed. Reg. 33,888-89 (2005).

⁵ See 18 C.F.R. § 385.2009 (2005). See also 44 U.S.C. § 1507 (2000) (Publication of an order in the *Federal Register* "is sufficient to give notice of the contents of the document to a person subject to or affected by it."); *Yakus v. United States*, 321 U.S. 414, 435 (1944) (citing 44 U.S.C. § 307, now codified as 44 U.S.C. § 1507).

⁶ 16 U.S.C. § 824d (2000).