

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Entergy Services, Inc.

Docket No. ER07-93-000

ORDER ACCEPTING AND SUSPENDING PROPOSED RATE SCHEDULES AND
RELATED OATT AMENDMENTS AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued December 22, 2006)

1. In this order, we accept for filing Entergy Services, Inc.'s (Entergy) proposed Schedules 9 and 10 to its Open Access Transmission Tariff (OATT) and related amendments to the transmission rate formulas for point-to-point and network transmission services included in Entergy's OATT, and suspend them for a nominal period, to become effective December 30, 2006 (after 60 days notice), subject to refund. We also establish hearing and settlement judge procedures.

Background

2. On October 30, 2006, Entergy filed pursuant to section 205 of the Federal Power Act (FPA),¹ and Part 35 of the Commission's Regulations,² a new Schedule 9 and 10 to its OATT as well as related amendments to the transmission rate formulas for point-to-point and network transmission services included in its OATT. Entergy states that the purpose of its filing is to obtain Commission approval of cost-recovery mechanisms that will allow Entergy to recover: (a) the costs it incurred to develop or join a Regional Transmission Organization (RTO) and to develop the Independent Coordinator of Transmission (ICT) (new Schedule 9 to the OATT); and (b) the on-going costs that will be incurred under the ICT Agreement (new Schedule 10 to the OATT).

¹ 16 U.S.C. § 824d (2000).

² 18 C.F.R. Part 35 (2006).

3. Entergy argues that Order No. 2000³ and subsequent precedent such as *Ameren Services Company*⁴ allow Entergy to recover development costs incurred by working with Southwest Power Pool (SPP), by participating in the Commission-ordered Southeastern mediation, by attempting to institute the SeTrans RTO and by developing the instant ICT. Entergy recognizes that, unlike entities in previous cases where recovery has been allowed, Entergy has formed an ICT instead of an Order No. 2000-approved RTO. Nevertheless, Entergy argues that the distinction between an RTO and its ICT should not bar Entergy from recovery because its efforts have led to more independent transmission operations in its region.

4. In explaining its costs, Entergy states that its independent transmission company proposal was filed pursuant to Order No. 888⁵ and was revised when the Commission issued Order No. 2000. Entergy states that it then submitted an application for Commission approval of an independent transmission company that would operate under the oversight of the RTO proposed by the SPP, but the Commission required further development.⁶ Entergy states that it responded by engaging in extensive discussions for a larger RTO with SPP and neighboring transmission-owning entities. According to Entergy, these meetings resulted in an agreement between Entergy and the Tennessee Valley Authority (TVA) to negotiate an agreement to address market, seams and coordination issues between TVA and the proposed partnership RTO between Entergy and SPP. Entergy states that its joint Entergy-SPP RTO proposal was ultimately rejected and that Entergy was directed to engage in mediation to develop a single RTO for the

³ *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

⁴ *Ameren Services Company, et al.*, 103 FERC ¶ 61,178 (2003)(*GridAmerica*).

⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁶ *See* order addressing RTO scope and other issues, *Southwest Power Pool, Inc.*, 94 FERC ¶ 61,359 (2001).

Southeast region.⁷ Entergy states that its efforts to create a single Southeastern RTO proved unsuccessful following a summer of negotiations, and that the docket was terminated by the Commission on December 22, 2004.

5. Next, Entergy states that it, Cleco Power LLC, Southern Company, and certain non-jurisdictional transmission owners in the Southeast region developed the SeTrans RTO proposal as a fully functioning RTO consistent with all the requirements of Order No. 2000. Entergy notes that the proposal required that functional control of the Entergy transmission system be transferred to the SeTrans Independent System Administrator. Entergy states that the proposal was ultimately rejected by participants. Entergy argues that all of these investments were made with the purpose, as well as the full expectation, that Entergy would participate in a viable RTO.

6. Entergy further contends that it also has incurred significant costs establishing the ICT. Entergy states that it included an expanded Weekly Procurement Process (WPP) proposal in a section 205 filing dated March 31, 2004, seeking to create an independent transmission entity. Entergy notes that it proposed to amend its OATT to establish arrangements with an independent entity (ICT) to provide oversight over the operations of the Entergy transmission system. In addition, Entergy proposed to institute a new process for assigning cost responsibility for transmission upgrades, and to implement an expanded WPP. Entergy states that it participated in further technical conferences and meetings, and ultimately submitted its ICT proposal as a new section 205 filing on May 27, 2005 in Docket No. ER05-1065-000. Entergy asserts that on April 24, 2006, the Commission issued the ICT Order, approving Entergy's proposal to establish the ICT for a minimum term of four years.⁸ Entergy made its compliance filing to the ICT Order on May 24, 2006. In that filing, Entergy filed: (a) amended versions of the Entergy OATT attachments related to the ICT proposal; and (b) an executed agreement between SPP and Entergy (the ICT Agreement), pursuant to which SPP will act as the ICT. Entergy also committed to implement the WPP within 14 months of the ICT Order. The Commission conditionally accepted Entergy's compliance filing by order issued on October 19, 2006.⁹

Entergy's Filing

7. Entergy states that the recovery mechanism in Schedule 9 is the same for both the RTO-related and ICT-related development costs incurred by Entergy. In addition, Entergy states that its treatment of its RTO and ICT development costs has been

⁷ *Cleco Power LLC*, 101 FERC ¶ 61,008, at P 5 (2002).

⁸ *Entergy Services, Inc.*, 115 FERC ¶ 61,095 (2006)(ICT Order).

⁹ *Entergy Services, Inc.*, 117 FERC ¶ 61,055 (2006).

consistent with the Commission's decisions addressing similar costs.¹⁰ Moreover, Entergy states that it has included cost support with this filing identifying all of the actual deferred expenses incurred through September 30, 2006, plus estimated costs that will be incurred after September 30, 2006 and prior to actual ICT operations, that will be recovered under Schedule 9.

8. Entergy states that the rate under Schedule 9 is a levelized rate calculated by amortizing the Schedule 9 costs over four years. The Schedule 9 rate was calculated by dividing the annual levelized costs by the total energy transmitted on the Entergy transmission system in calendar year 2005. Entergy states that it will recover that rate until the principal received under Schedule 9 equals Entergy's actual Schedule 9 costs. Entergy indicates that the rate under Schedule 9 initially is \$0.1235/MWh, but that rate will be adjusted for the last month of recovery to align costs and cost recovery. Entergy maintains that at the end of the Schedule 9 recovery period it will file a notice of termination of Schedule 9 and will provide an accounting of the cost recovery and revenues received under the schedule.

9. Entergy states that Schedule 10 will provide for the recovery of on-going costs incurred under the ICT Agreement. Entergy asserts that, prior to June 2008, the rate under Schedule 10 will be equal to the ICT base contract amount for calendar year 2007 plus any projected additional ICT costs for calendar year 2007, divided by the total energy transmitted by the Entergy transmission system in calendar year 2005. According to Entergy, the ICT Agreement provides that, once the ICT is fully operational, the ICT will receive a "Fixed Price Amount" of approximately \$11.5 million per year for the first two years of the agreement. In addition to the Fixed Price Amount under section 3.3 of the ICT Agreement, Entergy states that the ICT will be paid other capital investment and on-going costs. Entergy further states that, for transmission service billings beginning in June 2008, the Schedule 10 rate will be updated on an annual basis. Entergy notes that, beginning in June 2008, the rate will be calculated based on the total ICT operating costs for the previous calendar year plus a true-up amount, divided by the total energy transmitted by the Entergy transmission system in the prior calendar year. Entergy maintains that the true-up amount will be the actual ICT operating costs billed to Entergy in the previous year less the sum of the collections under Schedule 10 during the previous calendar year. Entergy argues that, to minimize over-collections or under-collections of ICT costs, the costs in the previous year may be adjusted as part of the annual update

¹⁰ Citing *American Electric Power Service Corp.*, 104 FERC ¶ 61,013 at P 1, 25, and 27, Entergy states that the Commission has allowed the deferral of start-up costs associated with a failed RTO, recovery of such costs once the entity is integrated in an RTO and the accrual of carrying charges on such costs. Entergy October 30, 2006 filing at 9. Entergy maintains that it has deferred these costs and accrued carrying charges in the form of an Allowance for Funds Used During Construction (AFUDC) pending its participation in an independent entity pursuant to Commission precedent.

process for known or projected cost decreases or increases as indicated by the ICT. Entergy asserts that the billing summary from the ICT will be posted every month on Entergy's Open Access Same Time Information System (OASIS). Entergy indicates that the initial rate under Schedule 10 is \$0.0707/MWh.

10. Entergy further states that it has amended its transmission rate formulas to exclude annual ICT costs from Transmission O&M expense in order to ensure that there is no double recovery of costs.

11. Finally, Entergy requests that the Commission grant waiver of the 60-day prior notice requirement and allow Schedules 9 and 10 and the related OATT amendments to become effective on the date the ICT begins granting or denying transmission service under Entergy's OATT.

Notice of Filing and Responsive Pleadings

12. Notice of Entergy's filing was published in the *Federal Register*, 71 Fed. Reg. 65,483 (2006), with interventions and protests due on or before November 20, 2006. The Mississippi Public Service Commission and the Arkansas Public Service Commission filed notices of intervention. The NRG Companies filed a motion to intervene. Duke Energy Carolinas, LLC filed a motion to intervene and comments. The Joint Intervenors¹¹ filed a protest, motion for rejection and alternative motion for suspension and hearing. A subgroup of Joint Intervenors¹² jointly and severally filed a motion to intervene and supplemental comments. The East Texas Cooperatives,¹³ the

¹¹ The Joint Intervenors include: The Arkansas Electric Cooperative Corporation, Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, Public Service Commission of Yazoo City, South Mississippi Electric Power Association, Lafayette Utilities System, Municipal Energy Agency of Mississippi, and Louisiana Energy and Power Authority. They note they are concurrently filing or have already submitted individual motions to intervene.

¹² The Joint Intervenors include: Arkansas Electric Cooperative Corporation, Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, Public Service Commission of Yazoo City, Lafayette Utilities System, Municipal Energy Agency of Mississippi, and Louisiana Energy and Power Authority.

¹³ The East Texas Cooperatives include: East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-L Electric Cooperative of Texas, Inc.

South Mississippi Electric Power Association (SMEPA) and the Arkansas Cities¹⁴ filed motions to intervene and protests. The Louisiana Public Service Commission (Louisiana Commission) filed a motion for late intervention. On December 5, 2006, Entergy filed an answer to the protests.

13. Joint Intervenors, the East Texas Cooperatives and Arkansas Cities argue that the Commission should convene an evidentiary hearing to examine Entergy's proposed rates because Entergy failed to provide detailed information necessary to make a determination that the costs were prudently incurred and the proposed rates are just and reasonable. In particular, the parties identify return on equity, allowance for funds used during construction and the amortization period for recovery of RTO/ICT start-up costs as items that require further examination.

14. Joint Intervenors protest proposed Schedule 9 arguing that Entergy has not joined an RTO and, therefore, is not entitled to recovery of start-up costs associated with the ICT and failed RTOs. Contrary to Entergy's position, the Joint Intervenors argue that because Entergy has not joined or formed an RTO and the Commission never rejected a tariff filing to implement the SeTrans RTO, it is not entitled to the proposed Schedule 9 cost recovery. They emphasize that this fact cannot be obscured; that Entergy's ICT is not an RTO and, as such, Entergy is not transferring control over its transmission assets to the SPP RTO. Further, the Joint Intervenors state that Entergy did not seek and receive approval to defer start-up costs and to accrue carrying charges. Without approval to defer such costs, Entergy's request is inconsistent with the Commission's accounting regulations under Part 101 and its prohibition against retroactive ratemaking.

15. The Joint Intervenors claim that Entergy has not justified recovery of regulatory filing costs dating back to 2000. They state that these expenses should have been expensed at the time and not deferred, and that Entergy's attempt to recover the costs of past regulatory filings constitutes retroactive ratemaking. In addition, the Joint Intervenors argue that Entergy is not implementing a new market with its ICT. Therefore, they state that under normal ratemaking practice, start-up costs of an investment are not subject to consideration for recovery until such investment has been proven to be used and useful; consequently, these start-up costs should be disallowed.

16. Joint Intervenors argue that the Commission should impose a five-month suspension because Entergy has not provided sufficient data to analyze the filing and it is

¹⁴ The Arkansas Cities include: The Conway Corporation, West Memphis, Arkansas Utilities Commission, the City of Osceola, Arkansas, and the City of Prescott, Arkansas.

not possible to determine whether more than 10 percent of the proposed rate increase is likely to be found excessive. Joint Intervenors also request that the Commission deny Entergy's request for waiver of the Commission's prior notice requirement.

Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant the Louisiana Commission's motion for late intervention given its interest in this proceeding, the early stage of this proceeding and the absence of any undue prejudice or delay.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy's answer and will, therefore, reject it.

Discussion

19. The Commission has emphasized the independence of RTOs from market participants and the ability of RTOs to ensure non-discriminatory transmission service. The Commission has also recognized that entities incur significant costs in participating in the development of RTOs, and has allowed entities to recover prudently incurred development and start up costs once they become a member of an RTO.¹⁵

20. Not all areas of the country, including the Southeast, have been successful in forming RTOs. In the Southeast, Entergy has been involved in several unsuccessful attempts to form an RTO. Despite these failed attempts, Entergy continued its efforts and developed the ICT proposal. The ICT proposal was designed to further the Commission's goals by increasing independence over transmission in an area not served by an RTO. Indeed, in approving the proposal, the Commission noted that the ICT

¹⁵ See, e.g., *GridAmerica*, 103 FERC ¶ 61,178 at P 21 (GridAmerica operates as an independent transmission company within the Midwest ISO); *Alliance Companies*, 99 FERC ¶ 61,105 at 61,442 ("we intend to allow recovery of all costs prudently incurred by any Alliance GridCo participant to establish an RTO once it is a member of an RTO"); *Midwest Independent Transmission System Operator, Inc.*, 103 FERC ¶ 61,219 (2003) (*Consumers*) (The Commission denied the Midwest ISO's request for authorization to reimburse Consumers for costs claimed to have been incurred in seeking to establish the Alliance RTO, finding that Consumers had not joined an RTO and noted that it had already been adequately compensated through the sale of its transmission facilities.)

appears to have sufficient authority to independently and fairly grant or deny transmission service, perform necessary feasibility and system impact studies, administer Entergy's OASIS and ensure that the terms of Entergy's OATT are administered fairly and in a non-discriminatory manner.¹⁶ The Commission further found that it was consistent with or superior to the Order No. 888 tariff and was an improvement over Entergy's existing situation.

21. While Entergy's ICT does not satisfy all of the requirements to be an RTO, we are persuaded that Entergy's ICT is a significant step forward that should provide benefits in Entergy's footprint, and that Entergy should be allowed to recover start up costs. Denying Entergy the ability to recover start up costs would only serve to make Entergy and other similarly situated entities less likely to pursue the development of an RTO or other proposals that move toward greater independence over the provision of transmission service and provide confidence in the operation of markets. Under the circumstances of this proceeding, we conclude that Entergy should be allowed the opportunity to recover its start up costs associated with its formation of the ICT and its participation in prior failed attempts to form an RTO.

Hearing and Settlement Judge Procedures

22. Entergy's proposed Schedules 9 and 10¹⁷ and related OATT amendments raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

23. Our preliminary analysis indicates that Entergy's proposed Schedules 9 and 10 and related OATT amendments have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Entergy's proposed Schedules 9 and 10 and the related OATT amendments for filing, suspend them for a nominal period, make them effective December 30, 2006 (after 60 days notice), subject to refund, and set them for hearing and settlement judge procedures. In establishing an effective date of December 30, 2006, we are denying Entergy's waiver request. Entergy has not demonstrated that good cause exists to justify its waiver request.¹⁸

¹⁶ *Entergy Services, Inc.*, 115 FERC ¶ 61,095 at P 61 (2005).

¹⁷ Entergy states that, for transmission service billings beginning in June 2008, the Schedule 10 rate will be updated on an annual basis. We note that Entergy is required to make these filings under section 205 of the FPA.

¹⁸ *See Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992).

24. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.²⁰ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Entergy's proposed Schedules 9 and 10 and related OATT amendments are hereby accepted for filing and suspended for a nominal period, to become effective December 30, 2006, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning Entergy's proposed Schedules 9 and 10 and related OATT amendments. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603

¹⁹ 18 C.F.R. § 385.603 (2005).

²⁰ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.