UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc. Docket Nos. ER98-4410-000
ER98-4410-001
ER98-4410-002

ORDER GRANTING REHEARING, ACCEPTING AND SUSPENDING PROPOSED REVISION TO TRANSMISSION OWNER TARIFF, DISMISSING COMPLIANCE FILING AS MOOT, AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 25, 2005)

1. On August 31, 1998, Entergy Services, Inc., acting on behalf of the Entergy Operating Companies, (collectively, Entergy) filed a proposed amendment to its Open Access Transmission Tariff (OATT) concerning access to transmission import capacity set aside for native load use and not made available to customers under its open access tariff. In a letter order issued on May 7, 1999,[1] the Commission rejected the proposal on the ground that Entergy had not shown that its proposed reserved capacity was necessary for meeting native load and network customers' load growth, or for the purpose of meeting a reasonable reserve requirement level. Entergy filed a timely request for rehearing of the Letter Order, on the ground that the Commission's decision should not have summarily disposed of factual issues raised by Entergy's proposal. In this order, the Commission grants rehearing, accepts and suspends Entergy's proposed revision to its OATT, and establishes hearing and settlement judge procedures.

2. This order benefits customers by ensuring the proper allocation of a transmission provider's reserved capacity.[2]

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[1] *Entergy Services, Inc.*, 87 FERC ¶ 61,156 (1998) (Letter Order).

[2] The parties refer to such reserved capacity as both Available Transmission Capacity (ATC) and Capacity Benefit Margin (CBM).

Background

Entergy's Filings

3. Entergy's proposed OATT amendment set aside 2,900 MW of transmission capability at the interfaces to import power from interconnected systems to serve native load in case of an emergency on the Entergy system. It required both native load and network customers to designate network resources in order to use the set-aside capacity to deliver a specific resource over a specific transmission path, permitted firm point-to-point customers to "buy through" the set-aside capacity under certain circumstances by paying the associated opportunity costs, and required that, if the import capacity was not being used, that it be made available on a nonfirm basis through the OATT. Entergy requested an effective date for its amendment of October 30, 1998.

4. Notice of Entergy's filing was published in the *Federal Register*, 63 Fed. Reg. 49,106 (1998), with interventions and protests due on or before September 18, 1998. Motions to intervene and protests were filed by Aquila Power Corporation (Aquila), Arkansas Electric Cooperative Corporation (AEEC), Cajun Electric Power Cooperative, Inc., by Ralph R. Mabey, Chapter 11 Trustee (Cajun), Cleco Corporation (Cleco) Commonwealth Edison Company (Commonwealth), Electric Clearinghouse, Inc. (Clearinghouse), jointly by Municipal Energy Agency of Mississippi and Lafayette Utilities System (MEAM/Lafayette), North Star Steel Company (North Star) and Wisconsin Electric Power Company (Wisconsin Electric). On October 5, 1998, Entergy filed an answer.

5. On October 21, 1998, the Commission requested further information with respect to Entergy's calculation. On December 10, 1998, Entergy submitted a letter responding to the Commission's requests.

6. Notice of Entergy's response was published in the *Federal Register*, 63 Fed. Reg. 71,463 (1998), with interventions and protests due on or before December 30, 1998. Motions to intervene and protests were filed by Clarksdale Public Utilities Commission of the City of Clarksdale, Mississippi (Clarksdale), Aquila, AEEC, Clearinghouse and MEAM/Lafayette. On January 14, 1999, Entergy filed a response to these pleadings. Additionally, a motion to intervene out of time was filed on February 5, 1999, by Southern Mississippi Electric Power Association (SMEPA).

7. On February 8, 1999, the Commission requested more information. Entergy responded on March 10, 1999. Notice of Entergy's response was published in the *Federal Register*, 69 Fed.Reg.13,964 (1999), with interventions and protests due on or before March 30, 1999. Motions to intervene and/or protests were filed by El Paso Electric Company (El Paso), OGE Energy Resources, Inc. (OGE), Aquila, Cajun, Clarksdale, Clearinghouse, MEAM/Lafayette, SMEPA. The Arkansas Public Service

Commission (Arkansas Commission) and the Louisiana Public Service Commission (Louisiana Commission) filed notices of intervention. Entergy filed an answer on April 14, 1999.

The Commission's Letter Order

8. In the Letter Order, the Commission concluded that Entergy did not meet its burden of showing that its proposed 2900 MW set aside for native load use was necessary either for meeting native load and network customers' load growth or to meet a reasonable reserve requirement level. Specifically, the order rejected Entergy's proposal on the grounds that the study on which Entergy relied

> (1) treats 282 MW of Entergy's interest in the River Bend generating unit as if it did not exist based on its ratemaking treatment before a state commission; (2) assigns a 100% probability that 2900 MW of off-system resources owned by other utilities will assist during contingencies, but assigns a zero probability that 2565 MW of on-system resources owned by other utilities (including 665 MW owned by Entergy's affiliate which is subject to Entergy's dispatch) will assist during contingencies; (3) double counts 700 MW of operating reserves; and (4) adopts a one-day-in-ten-year standard not only for firm loads, but also for 1500 MW of interruptible loads which have contracted for service which may be interrupted for significant periods during each year.[[3]]

9. Accordingly, Entergy was required to recompute its ATC for its import capacity showing the removal of these items.

Entergy's Compliance Filing

10. On June 1, 1999, Entergy submitted its compliance filing in response to the Letter Order. Notice of Entergy's filing was published in the *Federal Register*, 64 Fed. Reg. 32,223 (1999), with interventions and protests due on or before June 21, 1999. Comments and protests were filed by Aquila, Cajun, Clarksdale, Lafayette/MEAM, the Louisiana Commission and SMEPA. On July 6, 1999, Entergy filed an answer.

11. The protests to Entergy's various filings (i.e., its original proposal, its responses to the requests for further information, and its compliance filing) raised a number of issues, including that: (1) there was no information on how Entergy calculates the CBM; (2) no criteria or formula was included; (3) there was no set way to calculate CBM; (4) there was no information on how to calculate opportunity costs; (5) the assumptions behind the

[3] Letter Order at 1.

CBM calculation were questionable; and (6) Entergy had failed to show that the CBM proposal was based on historical practices.

Entergy's Request for Clarification and Rehearing

12. Entergy also requests clarification and rehearing of the Letter Order. Concerning the Commission's finding that Entergy had double counted 700 MW of operating reserves, Entergy seeks clarification whether the Commission "intended to exclude the portion of operating reserves that Entergy *imports* from other control areas using its transmission ties."[4] Entergy claims that, in actuality, it did not double count.

13. With respect to the Commission's direction that it remove 1500 MW of interruptible loads from its one-day-in-ten-years standard, Entergy requests clarification that "only a *pro rata* share of interruptible load should removed."[5]

14. On rehearing, Entergy first asserts that the Letter Order erred in summarily disposing of disputed issues of material fact. In this regard, Entergy initially protests that the factual issues surrounding the calculation of the Reliability Margin of 2900 MW were not ripe for summary adjudication, as Entergy's proposed OATT amendment did not include a specific methodology for calculating ATC, but only that Entergy would use "Good Utility Practice" for such calculation. In Entergy's view, as its proposed amendment "[o]n its face . . . is consistent with or superior to the Pro Forma Tariff," it should have been accepted for filing.[6]

15. Assuming the issues were ripe for decision, Entergy argues that the Commission erred in summarily disposing of factual issues without explaining the basis for its finding. For example, Entergy maintains, its calculations are factual issues that require a hearing. Indeed, Entergy observes, the Commission has set for hearing disputes over CBM calculations in other cases.[7] Entergy further objects to the Letter Order's finding that it had failed to meet the burden of proof, as the Commission did not evaluate the evidence sufficiently to ascertain whether this was indeed the case. Entergy further asserts that there was insufficient evidence for the Commission to summarily resolve issues

[4] Entergy Request for Clarification and Rehearing at 6 (emphasis in original).

[5] *Id.* at 7.

[6] *Id.* at 8.

[7] *Id.* at 11, citing *El Paso Electric Co.*, 87 FERC ¶ 61,202 (1999) and *Public Service Co. of New Mexico*, 86 FERC ¶ 61,169 (1999).

concerning the treatment of on-system generation, operating reserves, and interruptible retail load.

16. Finally, Entergy asserts that the Commission's order here exceeds its authority by determining the level of reliable service to be provided to native load customers.[8]

17. Aquila and MEAM/Lafayette filed responses to Entergy's rehearing and clarification request. Additionally, on July 30, 1999, Arkansas Cities and Cooperative (Arkansas Cities) filed a motion for leave to file a late intervention and a motion to intervene in this proceeding.

18. On December 9, 2004, the Commission sent a letter to Entergy suggesting that the issues raised by its rehearing and clarification request might be moot and stating that it would terminate these dockets absent an objection by Entergy. However, on January 24, 2005, Entergy submitted to the Commission a letter asserting that the matters raised on rehearing were not moot and objecting to the termination of the dockets.

Discussion

Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene filed by Aquila, AEEC, Cajun, Cleco, Clarksville, Clearinghouse, Commonwealth, El Paso, Lafayette/MEAM, OGE, and Wisconsin Electric serve to make them parties to this proceeding. The Commission grants the Arkansas Cities' and SMEPA's unopposed motions for late intervention given the circumstances of this proceeding, *i.e.*, that the Commission is now ordering a trial-type evidentiary hearing. Additionally, the notices filed by the Arkansas Commission and the Louisiana Commission serve to make them parties.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest or a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept either the responses by Aquila and MEAM/Lafayette to Entergy's rehearing and clarification request, or Entergy's answers to protests filed October 5, 1998, January 14, 1999, April 14, 1999 and July 6, 1999, and will, therefore, reject them.

[8] *Id.* at 23.

Entergy's Request for Clarification and Rehearing

21. Having reviewed Entergy's arguments on rehearing, as well as having reexamined its prior submissions, the Commission finds that Entergy's proposed OATT amendment raises issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing and settlement judge proceeding ordered below. Thus, we will grant Entergy's request for rehearing on this matter.

22. Our preliminary analysis indicates that Entergy's proposed OATT amendment has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Therefore, we will accept Energy's proposed OATT amendment for filing, suspend it for a nominal period, make it effective October 30, 1998, as requested, subject to refund, and set it for hearing and settlement judge procedures.

23. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures commence. To aid the parties in their settlement efforts, the hearing will be held in abeyance and a settlement judge shall be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[9] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise the Chief Judge will select a judge for this purpose.[10] The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order 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.

24. In view of our decision to grant rehearing and set this matter for settlement and hearing procedures, we dismiss as moot Entergy's compliance filing with the Letter Order, as well as the parties' responses thereto.

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[9] 18 C.F.R. § 385.603 (2004).

[10] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge in writing or by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of the Commission's judges and a summary of their backgrounds and experience (www.ferc.gov -- click on Office of Administrative Law Judges).

The Commission orders:

(A) Entergy's compliance filing is hereby dismissed as moot, as discussed in the body of this order.

(B) Entergy's request for clarification and rehearing is hereby granted, as discussed in the body of this order.

(C) 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 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 to address the reasonableness of the proposed OATT amendment, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), 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 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.

(E) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and with the Commission 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 Chief Judge and the Commission of the parties' progress toward settlement.

(F) If settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in this proceeding, to be held within approximately fifteen (15) days of the date on which the presiding judge is designated, in a hearing room of the Commission, 888 First Street, N.E. Washington, D.C. 20426. Such 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)

Linda Mitry,
Deputy Secretary.