

116 FERC ¶ 61,269
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. EL05-52-001

ORDER DENYING REHEARING

(Issued September 22, 2006)

1. Several parties¹ request rehearing of the Commission's March 22, 2005 Order in this proceeding.² That order addressed a petition for declaratory order submitted by Entergy Services, Inc. (Entergy) requesting guidance on issues associated with its proposal in Docket No. ER04-699-000 to establish an Independent Coordinator of Transmission (ICT). The Commission denies rehearing.

¹ Arkansas Electric Cooperative Corporation, Calcasieu Power LLC, Calpine Corporation (Calpine), Clarksdale Public Utilities Commission, Cottonwood Energy Company LP, The Dow Chemical Company, Dynegy Power Marketing, Inc., The Lafayette Utilities System, The Louisiana Energy and Power Authority, Louisiana Energy Users Group, Mississippi Delta Energy Agency, The Municipal Energy Agency of Mississippi, NRG Energy, Inc., Occidental Chemical Corporation (Occidental), Public Service Commission of Yazoo City, Southeast Electricity Consumers Association (SeECA), Suez Energy North America, Inc., and Union Power Partners, LP (collectively Joint Parties); Entergy; Occidental, Calpine and SeECA jointly; and Louisiana Public Service Commission, the Mississippi Public Service Commission and the Council of the City of New Orleans (collectively, Retail Regulators).

² *Entergy Services Inc.*, 110 FERC ¶ 61,295 (*Guidance Order*), order on clarification, 111 FERC ¶ 61,222 (*Clarification Order*) (2005).

I. Background

2. On April 1, 2004, in Docket No. ER04-699-000, Entergy filed revisions to its Open Access Transmission Tariff (OATT) (Original ICT Proposal) proposing: (1) to contract with an independent entity, the ICT, to provide oversight over the operation of the Entergy transmission system; (2) a new process and standards for assigning cost responsibility for transmission upgrades; and (3) a new Weekly Procurement Process. The Commission convened a series of technical conferences to discuss issues raised by Entergy's proposal. As a result of the extensive discussions with Entergy's customers and retail regulators in the technical conferences, Entergy proposed, in Docket No. EL05-52-000, to enhance the functions of the ICT from those in the Original ICT Proposal (Enhanced ICT Proposal).

3. The proposed enhancements would give the ICT authority to grant or deny requests for transmission service, calculate Available Flowgate Capability (AFC), administer Entergy's Open Access Same Time Information System (OASIS), and perform an enhanced planning function (integrating the plans of Entergy and other potential transmission owners to identify regional synergies). Entergy asked for guidance from the Commission as to whether its transmission pricing proposal, as administered by the ICT, would satisfy the Commission's transmission pricing policies.

4. In the *Guidance Order*, the Commission stated that it was prepared to grant Entergy's proposed transmission pricing proposal on a two-year experimental basis, subject to certain enhancements and monitoring and reporting conditions, if Entergy submitted an acceptable filing under section 205 of the Federal Power Act (FPA).³ The Commission stated that the section 205 filing needed to more fully specify in the OATT the responsibilities and duties of the ICT and had to clearly give the ICT authority to grant or deny requests for transmission service. We stated that the ICT must be given authority to independently administer Entergy's OASIS – including calculating and posting available transmission and flowgate capability on the Entergy system. The process for requesting transmission service on the Entergy system and the standards under which the ICT will evaluate such requests must be transparent and understandable to market participants. The Commission stated that it will evaluate the section 205 filing to determine whether, in granting or denying transmission service, the ICT has sufficient authority to ensure that the terms and conditions of Entergy's OATT (including AFC procedures) will be applied in a fair and non-discriminatory manner.

³ 16 U.S.C. § 824d (2000).

5. Under Entergy's transmission pricing proposal, the upgrades to the transmission system are bifurcated into two categories for purposes of pricing. For the first category, the Base Plan, Entergy proposed to continue to roll in the costs of those upgrades, which are needed for reliability and load growth purposes.⁴ Entergy proposed to develop the initial Base Plan subject to oversight by the ICT. The ICT would review whether Entergy's planning standards are consistent with local, regional and North American Electric Reliability Council (NERC) criteria and whether the standards were applied fairly. The Commission modified this proposal, stating that intervenors made a persuasive argument that the ICT, not Entergy, should develop the original Base Plan,⁵ including any inputs and numerical values that go into the Base Plan.

6. With regard to the Supplemental Upgrades, the cost would be directly assigned to the entity requesting the service that makes the upgrades necessary. The *Guidance Order* stated that the rights that Entergy proposed to provide in exchange for the customer's payment for the upgrades were not sufficiently explained. The Commission, therefore, required Entergy to propose and fully support a method for providing firm transmission rights to customers who pay for Supplemental Upgrades. We stated that these transmission rights must protect customers that pay for Supplemental Upgrades from congestion costs that would be faced if not for the upgrades. These firm transmission rights also should protect customers from curtailment except in force majeure situations. We encouraged Entergy to work with the parties to this proceeding to develop a method to fairly compensate customers who pay for Supplemental Upgrades in the form of Financial Transmission Rights or a comparable form of rights.

7. In the *Guidance Order*, the Commission noted that Entergy had only identified one entity that could be selected as the ICT, Southwest Power Pool (SPP).⁶ Therefore, based on Entergy's filing, we assumed that Entergy would select SPP as its candidate to be the ICT. The Commission has already ruled that SPP complies with the independence requirements of Order No. 2000. Since we have already determined that SPP is an independent entity, we stated that we saw no reason to address allegations that the ICT would not be independent. However, we stated that once Entergy contracts with the ICT, that contract will be subject to Commission review and approval.

⁴ This is consistent with Entergy's current pricing methodology and with the Commission's traditional pricing methodology for such upgrades.

⁵ *Guidance Order* at P 68.

⁶ *See, e.g.*, Arkansas PSC at 3-4. In its compliance filing in Docket No. ER05-1065-002, Entergy filed its executed contract with SPP.

8. On May 12, 2005, the Commission issued the *Clarification Order* in this docket addressing only the request for limited clarification filed on April 8, 2005, Entergy's request for clarification, and the requests for clarification in the Retail Regulators' filing on April 21, 2005. That order clarified the scope of the ICT's role in administering the AFC process. Specifically, the order provided that: when a customer is required to pay costs associated with Supplemental Upgrades, Entergy must specifically define the rights that the customer will receive; that the ICT's independence would be looked at more closely in the section 205 filing and when Entergy files the contract with the ICT and clarified the start and end of the experimental period.

9. On May 27, 2005, Entergy made its section 205 filing under the *Guidance Order* and filed a draft contract between it and the ICT (ICT Agreement). On April 24, 2006, the Commission issued an order conditionally approving Entergy's ICT, pricing and Weekly Procurement Process proposals, with certain modifications.⁷ The Commission stated that the proposed tariff changes, with certain revisions discussed in that order, are just and reasonable, and that they have not been shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The Commission therefore accepted the tariff sheets, subject to compliance as described in the *April 24, 2006 ICT Order*.

II. Discussion

10. On March 24, 2005 the Dow Chemical Company (Dow) filed a motion to intervene out-of time in Docket No. EL05-52-000. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.⁸ Dow has not met this higher burden of justifying its late intervention. In light of our decision to deny Dow's late motion to intervene, we will dismiss Dow's request for rehearing. Because Dow is not a party to this proceeding, it lacks standing to seek rehearing of the *Guidance Order* under the FPA and the Commission's regulations.⁹

⁷ *Entergy Services, Inc.*, 115 FERC ¶61,095 (2006) (April 24, 2006 ICT Order).

⁸ *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

⁹ 16 U.S.C. § 8251(a) (2000); 18 C.F.R. § 385.713(b) (2006).

11. Entergy filed an answer to Occidental's, Calpine's and SeECA's request for clarification on May 16, 2005. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we will reject Entergy's answer.

A. ICT Responsibilities and Duties

12. The Joint Parties assert that their concerns about the ICT's independence have not been fully addressed. First, they assert that turning over the AFC program to the ICT will not cure flaws in the AFC calculation. In the April 8, 2005 request for clarification, certain parties asked for clarification that the Commission did not intend for the AFC process simply to change hands without the ICT being given the authority and the duty to investigate and correct problems with the basic inputs and methods for calculating AFCs. The Joint Parties state that if the Commission denies that clarification, they seek rehearing and ask the Commission to direct SPP, in its role as the ICT, to repair the rules by which transmission service is allocated on the Entergy system.

13. Further, they state that the AFC calculations cannot be credible unless the ICT can also correct flaws in the AFC methodology. Unless the ICT is authorized to independently evaluate Entergy's methodology and take action to correct its flaws, the resulting calculations would be no more worthy of trust than they would have been if Entergy itself continued to perform the calculations.

14. The Joint Parties also assert that the ICT must have the authority to develop the methodologies and criteria used in the studies performed in evaluating transmission service requests. They assert that the studies performed by the ICT will only be as valid as the underlying methodologies and study criteria and that if the criteria and methodologies inherited from Entergy are flawed or biased, the study results will be invalid.

15. The Joint Parties also state that the Commission erred by not addressing concerns regarding the ICT Agreement. They assert that the Commission's evaluation of the ICT's independence was based on the assumption that SPP would serve as the ICT and on the Commission's prior determination that SPP, for purposes of qualifying for regional transmission operator (RTO) status, is independent. The *Guidance Order* did not consider the contractual defining of the ICT-Entergy relationship, which is the linchpin of the analysis. They assert that the ICT's independence must be reviewed on its own merits, separate from any prior determination of an entity's independence in other contexts. Therefore, they state that the *Guidance Order* could not have determined ICT independence because the Commission was not able to analyze the ICT Agreement.

16. The Retail Regulators seek rehearing of the Commission's determination to require that the ICT have more authority, particularly with regard to the ICT's role in developing the Base Plan. They argue that Entergy should develop the Base Plan because the transfer of planning functions may substantially increase the costs of the ICT. Those costs will be flowed through to ratepayers in addition to the costs of Entergy's own planning personnel.

17. They also assert that the transfer of the planning function raises serious questions about the balance of jurisdiction between the Commission and Entergy's retail regulators because the states have traditionally exercised jurisdiction over planning and the reliability of electric service. To the extent that the *Guidance Order* deprives the Retail Regulators of their authority to investigate and order remedies for imprudent transmission planning and operational activities of Entergy, the Retail Regulators state that the determination should be reconsidered because ultimate responsibility for judging the prudence of transmission planning, and particularly reliability planning, rests with the states. Alternatively, the Retail Regulators ask that the Commission clarify that the ICT's role in planning does not alter the existing balance of regulation between the Commission and Entergy's retail regulators.

Commission Conclusion

18. We deny the Joint Parties' request for rehearing concerning the AFC process. In the *Clarification Order*, the Commission stated:

In the [*Guidance*] *Order*, the Commission stated that the ICT must be responsible for calculating and posting available transmission and flowgate capability on the Entergy system. We clarify that Entergy is to work with the ICT and Entergy's stakeholders to develop the procedures by which the ICT will calculate AFC. We will then review these procedures. Entergy should endeavor to ensure that the various concerns raised with regard to its AFC process are addressed. To this end, Entergy must consult with the ICT and Entergy's stakeholders before making a filing to modify its AFC procedures to address any such problems. The Commission will review Entergy's section 205 filing implementing the requirements in the [*Guidance Order*] to ensure that the ICT's ability to calculate and post AFC on the Entergy system is a meaningful improvement over the status quo.¹⁰

¹⁰ *Clarification Order* at P 13.

19. SPP has already performed an audit of Entergy's AFC process, and it requested stakeholder input as to the scope of that audit. The Commission further addressed this issue in the *April 24, 2006 ICT Order*. We noted that the ICT will not have filing rights under section 205 of the FPA and therefore cannot itself propose to change the criteria, standards or policies used to calculate AFC. However, the Commission stated that all such criteria must be filed under section 205 of the FPA and accepted by the Commission. Any interested party, including the ICT, may protest these filings or file a complaint under section 206 of the FPA. Thus, we will be able to ensure that the criteria, standards and policies remain just and reasonable. Further, if the ICT recommends modifying the AFC criteria and Entergy disagrees with the recommendation, the ICT will notify the Commission. The Commission is the final judge as to what criteria are necessary for a just, reasonable and not unduly discriminatory AFC process. Should Entergy not follow any of the ICT's proposed recommendations, the ICT or any other party will be able to voice that protest when the revised AFC process is filed.

20. We disagree with the Joint Parties that the ICT must develop the methodologies and criteria that will be applied in the course of performing system studies. Those criteria, standards and policies must also be approved by the Commission. The fact that the ICT uses initially Entergy-created criteria does not mean that they are inadequate or that it is not independently implementing them.

21. Our decisions in the *Guidance Order* and the *April 24, 2006 ICT Order* makes it clear that the Commission does not intend for the AFC process to merely change hands; it must also be enhanced with recommendations from stakeholders and the ICT. Therefore, we deny the request for rehearing on this matter.

22. We also disagree with the Joint Parties that we determined SPP's independence based solely on its RTO status. The Commission made it clear in the *Clarification Order* that the contract between the ICT and Entergy must provide for the performance of ICT functions in an independent manner. We further clarified that the Commission will examine SPP's independence from Entergy when we evaluate Entergy's section 205 filing and when Entergy files its ICT Agreement.¹¹ The *April 24, 2006 ICT Order* contained an exhaustive review of the draft ICT Agreement and reiterated that SPP's status as a Commission-approved RTO does not vitiate the need to analyze the contract at every level – both in Entergy's section 205 filing and when the executed contract is filed. The Commission will fulfill its commitment to fully analyze the executed ICT Agreement in Docket No. ER05-1065-002.

¹¹ *Clarification Order* at P 18.

23. Because we clarified that the Commission will examine the executed ICT Agreement, we deny the Joint Parties' request that the Commission provide Entergy with additional guidance regarding the ICT. However, we note that in the *April 24, 2006 ICT Order*, the Commission addressed many of the provisions of the draft ICT Agreement, including the Joint Parties' concerns about the budget, the regulatory out provision, and the data provisions.

24. We disagree with the Retail Regulators that the Commission should not have imposed additional functions on the ICT. First, their primary concern seems to be that our order created a jurisdictional shift, and we find that it will not do so. Entergy has filed its ICT Agreement and has chosen SPP as the ICT. The Commission already has jurisdiction over SPP as a public utility by virtue of its RTO status. Entergy will not be transferring operational control over its transmission facilities to the ICT. Similarly, service over the Entergy transmission system will continue to be taken under Entergy's OATT, not an OATT filed by the ICT. While Entergy is transferring certain functions to the ICT, Entergy will continue to be the Transmission Provider under its OATT. The presence of SPP as the ICT will therefore not change the existing balance of jurisdiction between this Commission and Entergy's retail regulators. The *Guidance Order* does not deprive Entergy's retail regulators of their authority to investigate and order remedies for imprudent transmission planning or operational activities by Entergy. Further, the cost of the ICT is speculative.

B. Transmission System Planning

25. The Retail Regulators seek clarification of the Commission's reference to a regional transmission plan in the *Guidance Order*. They state that they are unable to discern whether the Commission was referring merely to Entergy's footprint and Entergy's transmission plan or to a broader, but undefined, region in the South and a corresponding plan for that region. If the Commission had a broader plan in mind, the Retail Regulators ask the Commission to clarify that: (1) the ICT's coordination with other electric systems in the broader region must be consistent with its duty to ensure that native load customers continue to receive safe, reliable service at the lowest reasonable cost, (2) such planning must include coordination not only with the SPP, but also with the Southeast Electric Reliability Council and the Tennessee Valley Authority and (3) the ICT must perform its regional planning duties free from any bias that would create a preference for upgrades or new facilities between Entergy and any single neighboring system.

26. The Joint Parties state that the *Guidance Order* should have provided the ICT with more authority over planning. They also assert that the Commission should make clear that there is to be a meaningful role for stakeholders in how the Base Plan is developed so that market participants who have experienced repeated denials of transmission requests

may be allowed to air their concerns during the development process itself, as opposed to commenting after the fact. They further ask that the Commission give the ICT the responsibility for selecting the criteria and standards used to develop the Base Plan. Without this responsibility, the ICT will be forced to use Entergy's planning criteria, objectives and specifications, which would render meaningless the Commission's goal of securing independence for the ICT by authorizing it, rather than Entergy, to develop the Base Plan. In the alternative, the Joint Parties seek rehearing on the basis that, unless the ICT has discretion to select the planning standards and criteria used in developing the Base Plan, its planning authority will be unduly compromised.

27. Entergy asserts that the Commission should clarify the respective roles of Entergy and the ICT in transmission system planning. The requirements that the ICT have the authority to grant or deny transmission service and that the ICT develop the Base Plan are being read by certain intervenors to require Entergy to grant the ICT authority that is greater than the authority exercised by an RTO. This concern arises in two principal areas: (i) developing the inputs or criteria used to create the Base Plan; and (ii) preparing certain studies, particularly facilities studies, regarding system expansion. Entergy states that the ICT should perform these functions in a manner similar to that of an RTO, which typically relies on member transmission owners to develop certain inputs, criteria and studies to assist in the planning process, subject to RTO review and verification. Entergy asserts that the issue in determining that the RTO is independent is not whether it develops an input in the first instance, but whether it will independently review the input. Entergy states that the ICT will have this authority. This issue cannot be resolved in a vacuum, and the Commission should not rule on this issue until after Entergy had made its section 205 filing.

28. Entergy also states that the Commission has no authority to grant the ICT greater authority than an RTO. It claims that an RTO is, by definition, independent, so the ICT does not need more authority than an RTO to ensure that Entergy's pricing proposal is implemented fairly. Nor would the ICT be able to exercise this additional authority in any event. Similar to an RTO, the ICT will not have the expertise, knowledge or staffing to develop, from whole cloth, every input, criteria or study for the Entergy system.

Commission Conclusion

29. The Retail Regulators seek clarification of the Commission's reference to a regional transmission plan. In the *Guidance Order*, we stated that the ICT should produce technical assessments of the regional grid and support the state siting authorities or multi-state entities by performing any necessary studies. We also stated that stakeholders must be included in any process developed by the ICT, Entergy, and the

affected state commissions to vet the regional transmission plan so that it reflects regional needs.¹²

30. The ICT package as approved by the Commission in the *April 24, 2006 ICT Order* includes several provisions (in the Transmission Planning Protocol of Attachment S) specifying that the ICT is to maximize opportunities for regional planning. This provides the clarification sought by Retail Regulators. “Regional” includes adjoining systems and Entergy’s footprint. The duty to ensure that native load customers continue to receive safe, reliable service at the lowest reasonable cost is not diminished by the presence of the ICT. The issue of regional planning is to be dealt with in our rulemaking on OATT reform, discussed below.

31. Section 9.1 of the Transmission Planning Protocol specifies that the ICT will be responsible for identifying opportunities for regional optimization of the Construction Plan with the construction plans of individual SPP transmission owners. Section 9.2 states that the ICT will identify opportunities for regional optimization of Entergy’s Construction Plan with the construction plans of adjoining transmission owners to the extent those adjoining transmission owners have seams agreements or joint planning processes with Entergy. Entergy and the other transmission owners will be able to revise their construction plans if opportunities for regional optimization occur. The ICT may also revise its Base Plan as a result of the regional optimization.

32. In its compliance filing submitted to comply with the *April 24, 2006 ICT Order* Entergy filed a Reliability Coordinator Protocol. Section 2.1 of his Protocol specifies that the ICT shall be the Reliability Coordinator of the ICT Reliability Area. The Reliability Area includes the collection of generation, transmission, and loads within the Entergy Transmission System and any Balancing Authority Areas or systems for which the ICT performs Reliability Coordinator services.

33. We find that these provisions allow sufficient regional coordination and planning. However, we also note that the Commission is addressing the issue of regional planning on a generic level in the OATT reform proceeding and has proposed “to amend the *pro forma* OATT to require coordinated, open, and transparent transmission planning on both a local and regional level. We propose in that rulemaking to require each public utility transmission provider to submit, as part of its compliance filing in this proceeding, a proposal for a coordinated and regional planning process that complies with [certain]...

¹² *Guidance Order* at P 68.

coordinated and regional planning principles.”¹³ The issue of regional planning is best decided on a generic basis in the OATT reform proceeding.

34. The Joint Parties state that the *Guidance Order* did not provide the ICT with the degree of planning authority necessary to ensure independence. We deny rehearing for the reasons stated in the *April 24, 2006 ICT Order*. In that order, we recognized that under Entergy’s proposal, the ICT’s role is limited to implementing criteria, standards and policies developed by Entergy. However, we also stated that although the ICT will not have filing rights under section 205 of the FPA and therefore cannot itself propose to change criteria, standards and policies, any criteria used by Entergy to grant and deny transmission service, including calculating AFC, must be filed under section 205 of the FPA and accepted by the Commission. Any interested party, including the ICT, may protest these filings or file a complaint under section 206 of the FPA. Of course, any party filing a complaint under section 206 has the burden to show that the existing provisions are unjust, unreasonable or unduly discriminatory. Thus, we will be able to ensure that the criteria, standards and policies remain just and reasonable.¹⁴

35. We also deny Joint Parties’ request for rehearing on a larger role for stakeholders in the planning process. In the *April 24, 2006 ICT Order*, as reaffirmed in our order on rehearing, we stated our expectation that Stakeholders would be consulted at various times by the ICT.¹⁵ Section 7 of the Transmission Planning Protocol provides for an annual Transmission Planning Summit in which stakeholders and regulators will be able to review the ICT’s reliability assessment and Entergy’s Construction Plan. We required additional reporting and feedback, including surveys of transmission customers, to reinforce the role of stakeholders and we pledged to meet with retail regulators. To require any additional feedback mechanisms before the ICT begins to operate would, we feel, be premature. However, we are also ready to make any adjustments if the actual operations of the ICT show that they are necessary.

36. Regarding Entergy’s request for clarification, we clarify that the ICT is to have no greater authority than that exercised by an RTO under any circumstances unless agreed to by the parties to the ICT Agreement. The ICT will have sufficient authority to develop

¹³ *Preventing Undue Discrimination and Preference in Transmission Service*, FERC Stats. & Regs., Proposed Regulations ¶ 32,603 (2006) (*OATT Reform NOPR*) at P 214.

¹⁴ *April 24, 2006 ICT Order* at P 62.

¹⁵ *Id.* at P 299 & n.142.

the Base Plan and evaluate the Planning Criteria with the modifications that we required in the *April 24, 2006 ICT Order*.¹⁶

C. Transmission Pricing Proposal

37. The Joint Parties assert that the Commission erred in approving Entergy's pricing proposal, even on an experimental basis. They argue that, under the Commission's transmission pricing policy in Order No. 2003,¹⁷ independent transmission providers may be afforded flexibility as to the specifics of the interconnection pricing policy, but that a non-independent Transmission Provider that retains operational control over portions of the Transmission System, must follow the compliance procedures for a non-independent Transmission Provider. Thus, they argue that the privilege of favorable transmission pricing hinges on whether a transmission provider has transferred operational control of its facilities to an ISO or RTO.

38. Moreover, the Joint Parties maintain that the Commission's finding that the transmission pricing proposal does not conflict with the Commission's earlier precedent on participant funding does not reflect a "rational connection between the facts found and the choice made by the Commission."¹⁸ They argue that approval of the transmission pricing proposal on an experimental basis does not relieve the Commission of its duty to explain the reasoning behind its decision, particularly in the face of the intervenors' detailed critique of the proposal.¹⁹

39. The Joint Parties also argue that because Entergy will retain operational control over its transmission system, it is likely that the ICT will depend on Entergy personnel for information about system conditions. Such information is vital to understanding the

¹⁶ *Id.* at P 146.

¹⁷ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs., ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats & Regs. ¶ 31,171 (2004), *reh'g pending*; *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004) (Clarifying Notice).

¹⁸ Joint Parties at 22, citing *Missouri Public Service Commission v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003) (citations omitted).

¹⁹ *See Maryland People's Counsel v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985).

kinds of upgrades that are necessary for purposes of reliability and, consequently, should be treated as “Base Plan” upgrades. They state that this information falls squarely under the ICT’s planning authority. They assert that, in Order No. 2003, the Commission ruled that a transmission system administrator may not implement participant funding except as part of a transition to RTO status. Consequently, the ICT’s independence is compromised and the ICT cannot be allowed to implement participant funding.

40. The Joint Parties also maintain that Entergy’s pricing proposal will not promote the construction of needed improvements to Entergy’s system. They claim that SPP has provided evidence that the direct assignment of upgrade costs inhibits, rather than promotes, needed investment. Further, they argue that the direct assignment of network upgrade costs is inconsistent with established Commission policy recognizing the inherently interconnected nature of the transmission grid and applying rolled-in pricing for network transmission facilities.

41. The Joint Parties also state that Entergy’s pricing plan should not be implemented until SPP’s functional independence as the ICT has been determined through actual performance. They assert that the Commission may not assume that because SPP is structurally independent from market participants, it will also be able to perform its duties as the ICT in an independent manner. The Commission can only reach this conclusion after a detailed review of the contract provisions under which the ICT will operate. First, they argue that there are reasons to be concerned about SPP’s ability to police Entergy’s conduct and perform the other duties of the ICT because its RTO activities have stretched its resources to the limit. Second, the Joint Parties assert that SPP serving as the ICT has a conflicting set of interests: to serve independently as the ICT and to reestablish relations with Entergy, which was SPP’s largest member until its withdrawal in 1997. Further, the Joint Parties are concerned that SPP will excessively depend on Entergy personnel to collect and evaluate transmission system information. They claim that in Order No. 2003-A, the Commission rejected a request to allow non-RTO transmission system administrators to administer participant funding.²⁰

Commission Conclusion

42. The Commission disagrees that our approval of Entergy’s pricing proposal departs from our pricing policies. As discussed more fully in the order on rehearing of Entergy’s section 205 filing, in Order No. 2003, the Commission stated that under certain circumstances, it would approve participant funding:

²⁰ Joint Parties at 38, citing *Order No. 2003-A* at P 696.

the Commission believes that, under the right circumstances, a well-designed and independently administered participant funding policy for Network Upgrades offers the potential to provide more efficient price signals and a more equitable allocation of costs than the crediting approach.^[21]

43. Throughout Order No. 2003, the Commission emphasized the importance of whether the entity making the cost allocation determinations is independent. We stated that “the determination of who benefits from ... Network Upgrades is often made by a non-independent transmission provider, who is an interested party. In such cases, the Commission has found that it is just and reasonable for the Interconnection Customer to pay for Interconnection Facilities but not for Network Upgrades.”²² Here, the cost-allocation determination is made by an independent third party, the ICT.

44. Although the Commission in Order No. 2003 specifically discussed allowing participant funding for an RTO or ISO or when an independent administrator has been approved by the Commission and the affected states, the Commission did not limit participant funding to these entities. We stated that “[f]or a Transmission Provider that is an independent entity, *such as* an RTO or ISO, we allow flexibility as to the specifics of the interconnection pricing policy.”²³ We did not limit flexibility to RTOs and ISOs, but based our determination on independence. We further did not require that the transmission owner turn over operational control of its facilities. The fact that we allowed a region to use participant funding as soon as an independent administrator has been approved by the Commission and the affected states for a transitional period not to exceed a year does not affect this determination. The ICT is more than an independent administrator of the Entergy tariff. It is the ultimate decision-maker concerning cost allocation for transmission upgrades.

45. The Commission has allowed independent transmission providers to require interconnection customers to pay for network upgrades where the transmission provider is independent of market participants and gives the interconnection customer valuable rights in return. In those cases, the Commission has stated that, unlike a non-independent transmission provider, a transmission provider that is independent would have no incentive to use the cost determination and allocation process to unfairly advantage its own generation. This independence allows the transmission provider to use a more

²¹ *Order No. 2003* at P 695.

²² *Id.* at P 21.

²³ *Id.* at P 28.

creative and flexible approach. For example, we have permitted an independent transmission provider to require interconnection customers to pay for network upgrades when the interconnection customer receives well-defined congestion rights in return. Where the customer receives these rights in exchange for paying for upgrades, and at the same time obtains access to the network in exchange for an embedded cost access fee, the Commission has found that the customer is paying separate charges for separate services; that is, this is not “and” pricing.²⁴

46. Although in these previous instances the Commission has ruled in terms of the transmission provider itself being independent, the emphasis was on the fact that the determinations were made independently. SPP has no incentive to use the cost determination and allocation process to unfairly advantage Entergy, nor does it have “an interest in frustrating rival generators.”²⁵ There is no incentive for SPP to exploit subjectivity to Entergy’s advantage.²⁶ Moreover, here the customer will obtain valuable rights in return, as discussed in the *April 24, 2006 ICT Order*.

47. We also disagree that the ICT will depend on Entergy personnel for information necessary to fulfill its responsibilities. In the *April 24, 2006 ICT Order*, we recognized that in order for the ICT to perform its functions in an independent, transparent and reliable manner, it must have unfettered access to all information necessary to perform the functions it has undertaken under contract.²⁷ Therefore, we required Entergy to provide explicitly that the ICT will have full access to any data it requests in performing its functions in the executed ICT Agreement. We further proposed that users of Entergy’s transmission and data systems form a Users Group to assess how the Entergy transmission and data (IT) systems are performing, especially in terms of data access, quality and retention. This should satisfy the Joint Parties’ concerns.

48. We disagree that Entergy’s pricing proposal will lead to transmission not being built. Order No. 2003 found that participant funding of upgrades may provide the pricing

²⁴ See *Order No. 2003-A* at P 587, citing *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 at 62,259-60 (1997), *order on reh'g and clarification*, 92 FERC ¶ 61,282 at 61,955-56 (2000), *remanded on other grounds sub nom. Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002).

²⁵ *Order No. 2003* at P 696.

²⁶ *Id.*

²⁷ *April 24, 2006 ICT Order* at P 107.

framework needed to overcome the reluctance of incumbent transmission owners to build transmission, with the result that badly needed transmission infrastructure could be put in place quickly.²⁸ We continue to believe that allowing Entergy to require customers to pay for Supplemental Upgrades under the auspices of the ICT will result in Entergy building transmission and reducing the significant internal transmission constraints on the Entergy system.

49. We also disagree that Entergy's pricing plan should not be implemented until SPP's functional independence as the ICT has been determined through actual performance. We have performed a detailed review of the draft contract provisions under which the ICT will operate.²⁹ Further, Entergy has filed its executed ICT Agreement, which we will review in Docket No. ER05-1065-002. We are not concerned about SPP's ability to perform its duties as the ICT. SPP will be contractually bound under the ICT Agreement to serve independently as the ICT. Further, that contract will provide sufficient funding so that SPP's RTO resources will not be over taxed by its being Entergy's ICT.

D. Firm Transmission Rights

50. The Retail Regulators request rehearing of the Commission's requirement that Entergy file a proposal to protect customers that pay for Supplemental Upgrades from congestion costs that would be faced if not for the upgrade and to protect them from unwarranted curtailment to the extent that it is intended to: (1) require the adoption of locational marginal pricing (LMP) or another nodal pricing system to alleviate congestion on the Entergy system or (2) require a form of transmission rights that cannot be provided absent adoption of LMP pricing.

Commission Conclusion

51. In the *Clarification Order*, the Commission stated that we realize that Entergy does not use LMP pricing and therefore does not have Financial Transmission Rights. Further, the firm transmission rights actually proposed by Entergy, and approved by the Commission, in Docket No. ER05-1065-000 did not include LMP pricing. Therefore, the Retail Regulators' request for rehearing is moot.

²⁸ *Order No. 2003* at P 703.

²⁹ *See April 24, 2006 ICT Order* at P 107.

E. Previously Incurred Interconnection Costs

52. Occidental, Calpine and SeECA assert that the Commission erred by permitting Entergy to more fully address its proposal to have the ICT reexamine previously incurred interconnection costs. They maintain that the *Guidance Order's* failure to summarily reject this proposal is arbitrary and capricious, contrary to law, and not reasoned decisionmaking. They contend that Entergy's proposal to "retroactively re-examine and re-allocate previously incurred interconnection costs" is at odds with the Commission's long-standing policy of recognizing the sanctity of contracts.³⁰ Entergy's proposal does not constitute extreme circumstances justifying deviation from Commission policy and precedent. Occidental, Calpine and SeECA state that Order No. 2003 stopped short of authorizing retroactive changes to individual interconnection agreements. Moreover, they assert that the Commission departed from precedent without a reasoned analysis showing that such precedent was not casually ignored.

Commission Conclusion

53. We deny rehearing of our decision to allow Entergy to further pursue its proposal to reevaluate previously incurred interconnection costs. As explained in more detail in our order in Docket No. ER05-1065-001,³¹ we disagree that we have departed from decisions that respect the sanctity of contracts. First, the Commission did not approve Entergy's proposal; we only allowed it to provide the Commission with further information. Further, the Commission did not propose to abrogate the contracts at issue. The ICT would only be allowed to reevaluate those contracts that contain provisions that allow either party to unilaterally request changes to the interconnection agreement under sections 205 or 206 of the FPA. The parties to the interconnection agreement negotiated the right to request that the Commission change the interconnection agreement under the normal just and reasonable standard. We would merely be using that provision to allow the ICT to reevaluate them.

54. We further disagree that the Commission would apply Entergy's pricing proposal retroactively. Our decision would only apply prospectively and offends neither the filed

³⁰ Occidental, Calpine and SeECA at 4, *citing Pub. Utilis. Comm'n of Cal. v. Sellers of Long-Term Contracts to the Cal. Dep't. of Water Res.*, 99 FERC ¶ 61,087 at 61,383 (2002).

³¹ *Entergy Services Inc.*, 116 FERC ¶ 61,275 (2006).

rate doctrine nor the rule against retroactive ratemaking. Our decision would only allow changes to *future* rates assessed by Entergy against customers for transmission service under Entergy's OATT.³²

55. As discussed in detail in the section concerning cost allocation for new investment, Entergy's pricing proposal is not a departure our pricing policies. The Commission has also rejected arguments that the ICT proposal is an exception to the rule against "and" pricing and that it is invalid without express statutory or regulatory authorization.

F. Seams

56. The Joint Parties seek rehearing of the Commission's decision not to address the seams problems that exist between Entergy and adjacent systems. First, they assert that the process described in the *Guidance Order* appears to contemplate that the ICT would be an adjunct to "state siting authorities or multi-state entities." If that is the Commission's intent, the Joint Parties request rehearing. The Joint Parties argue that the ICT must have the authority to conduct regional transmission studies on its own initiative or at the request of other stakeholders. Divergent interests between or among individual states should not be permitted to stymie the ICT's performance of the regional planning function.

57. The Joint Parties maintain that by "encouraging" Entergy and SPP to negotiate the elimination of pancaked rates, the *Guidance Order* does not deal in a meaningful way with the pricing seams between Entergy and neighboring systems. They assert that Entergy will not agree to remove seams unless required to do so by the Commission.

58. The Retail Regulators state that any elimination of rate pancaking should not shift costs in a manner detrimental to Entergy's native load. Therefore they ask the Commission to clarify that any plan to eliminate rate pancaking between Entergy and SPP should be coupled with a plan to mitigate cost shifting.

Commission Conclusion

59. We deny rehearing of our decision to encourage Entergy and SPP to apply to remove rate pancaking for transmission between the Entergy system and SPP.³³ In Order No. 888, the Commission encouraged, but did not require coordination between

³² *Duke Hinds, LLC*, 102 FERC ¶ 61,068 at P 29 (2003), *reh'g pending*.

³³ *Guidance Order* at P 72.

transmission providers in a region. Therefore, the Commission believed it was more appropriate in the *Guidance Order* to encourage rather than require joint planning and the removal of rate pancaking.

60. As discussed earlier, the Commission is addressing the issue of regional planning on a generic level in the OATT reform proceeding³⁴ and has proposed “o amend the *pro forma* OATT to require coordinated, open, and transparent transmission planning on both a local and regional level.”³⁵ The issue of regional planning is best decided on a generic basis in the OATT Reform proceeding. We continue to encourage Entergy and SPP to remove seams between their transmission systems.

61. We disagree that the *Guidance Order* contemplated that the ICT would be an adjunct to “state siting authorities or multi-state entities” in regional planning. In addition to the planning functions proposed by Entergy, the ICT can assist the states and market participants by giving an independent assessment of the transmission facilities needed by the region to reliably and economically serve load located within the region.

G. Reporting Requirements and Evaluating the ICT

62. The Retail Regulators seek clarification or, in the alternative, rehearing, concerning the standards that the Commission will use to evaluate the success of the ICT and the Entergy pricing proposal. They ask the Commission to clarify that the ability of generators to compete in the Entergy footprint or the amount of transmission that is constructed are not the only criteria the Commission will consider in evaluating the ICT and pricing proposals.

63. The Joint Parties assert that the Commission erred by failing to adopt meaningful safeguards in implementing its ICT experiment, as is required for the Commission to fulfill its duty under the FPA to ensure just and reasonable rates. In addition, they argue that the monitoring and reporting conditions adopted in the *Guidance Order* fail to provide the safeguards needed to ensure that the ICT experiment does not result in unjust and unreasonable rates. First, they assert that the *Guidance Order* gave no specific guidance to the ICT in how to prepare its reports. The Joint Parties cite *Pacific Gas & Electric Company*,³⁶ in which the Commission stated that “the information gathered from

³⁴ *Preventing Undue Discrimination and Preference in Transmission Service*, FERC Stats. & Regs., Proposed Regulations ¶ 32,603 (2006) (*OATT Reform NOPR*).

³⁵ *OATT Reform NOPR* at P 214.

³⁶ 38 FERC ¶ 61,242 (1987) (*PG&E*).

the operation of this Experiment is, from the Commission's long-term perspective, the most important element in allowing the Experiment to proceed."³⁷ The Commission in that case required an independent and objective analysis of the data collected and reports that would (1) ask the right questions, (2) use a method of analysis that will be able to answer these questions, and (3) collect data that are reliable and consistent.

64. The Joint Parties also state that the Commission failed to adopt any meaningful protections from the potential ill effects of the ICT experiment. They argue that the right to bring a complaint under section 206 of the FPA does not provide adequate protection, particularly compared with the considerable remedial options the Commission has invoked to protect experiment participants in the past.³⁸ For example, in *PG&E*, the Commission assured parties that any complaint would be subject to expedited review³⁹ and in *Secondary Market Transactions*, the Commission required that the rates charged under the experimental program adopted therein be subject to refund.⁴⁰

Commission Conclusion

65. The Commission does not need to clarify standards that the Commission will use to evaluate the success of the ICT and the Entergy pricing proposal. In the *April 24, 2006 ICT Order*, the Commission laid out metrics by which we will evaluate the ICT experiment.⁴¹ These are not limited to the ability of generators to compete in the Entergy footprint or the amount of transmission that is constructed. The ICT must provide regular reports to the Commission to help us determine whether continuation of the ICT would be just, reasonable and not unduly discriminatory or preferential. We further acknowledged that we must evaluate the ICT's success in enhancing transmission

³⁷ *Id.*

³⁸ Joint Parties at 30, citing *United Gas Pipe Line Co.*, 57 F.E.R.C. ¶ 61,086, 61,309 (1991)(*United Gas*).

³⁹ *PG&E* at 61,804 (emphasis original); see also *Secondary Market Transactions on Interstate Natural Gas Pipelines*, 77FERC ¶ 61,183, 61,702 (1996) (“*Secondary Market Transactions*”) (“the Commission will assign high priority to the resolution of any legitimate complaints filed during the period the program remains in effect”).

⁴⁰ *Secondary Market Transactions* at 61,709.

⁴¹ *April 24, 2006 ICT Order* at P 304-05.

access.⁴² Therefore, the Retail Regulators' and Joint Parties' concerns have been satisfied.

66. We disagree that we failed to adopt any meaningful protections from the potential ill effects of the ICT experiment. First we do not agree that filing a section 206 complaint is ineffective; we take complaints seriously and have set them for hearing when the complainant presents a sufficient basis to do so. Further, the information we required in the *April 24, 2006 ICT Order* should allow any problem with the ICT to be identified and fixed. If a problem occurs, the Commission will take steps to remedy it.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁴² *Id.* at P 303.