

110 FERC ¶ 61,295  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket No. EL05-52-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued March 22, 2005)

1. On January 3, 2005, Entergy Services, Inc. submitted, on behalf of the Entergy Operating Companies<sup>1</sup> (collectively, Entergy) a petition for declaratory order (Petition) requesting guidance on issues associated with its proposal to establish an Independent Coordinator of Transmission (ICT) in Docket No. ER04-699-000. Specifically, Entergy requests the Commission's guidance on whether the functions to be performed by the ICT will cause it to become a public utility under the Federal Power Act (FPA)<sup>2</sup> or the Transmission Provider under Entergy's Open Access Transmission Tariff (OATT) and whether Entergy's transmission pricing proposal satisfies the Commission's transmission pricing policy. In this order we provide guidance on these issues. This order benefits customers because implementation of the ICT proposal on an experimental basis goes beyond the transmission service offered under Entergy's existing pro forma transmission tariff and will permit a transmission decision-making process that is independent of control by any market participant or class of participants, including Entergy.

**Background**

2. On April 1, 2004, in Docket No. ER04-699-000, Entergy filed revisions to its OATT proposing (1) to contract with an independent entity, the ICT, to provide oversight over the operations of the Entergy transmission system; (2) a new process for assigning cost responsibility for transmission upgrades; and (3) to implement a new

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<sup>1</sup> The Entergy Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc.

<sup>2</sup> 16 U.S.C. § 824e (e) (2004).

Weekly Procurement Process (WPP). The Commission convened a series of technical conferences to discuss issues raised by Entergy's proposal in Docket No. ER04-699-000 (ICT Proposal). As a result of the extensive discussions with Entergy's customers and retail regulators in the technical conferences, in the instant Petition Entergy proposes to enhance the functions of the ICT from those originally proposed in Docket No. ER04-699-000.

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 Systems (OASIS), and perform an enhanced planning function (integrating the plans of Entergy and other potential transmission owners to identify regional synergies) (Enhanced ICT Proposal). Entergy seeks a Commission decision on (1) whether the functions performed by the ICT will cause it to become a "public utility" under the FPA or the "Transmission Provider" under Entergy's OATT; and (2) whether Entergy's transmission pricing proposal, as administered by the ICT, satisfies the Commission's transmission pricing policies. Entergy states that if the Commission rules favorably on these two questions, Entergy expects, within 60 days of such ruling, to amend its proposal in Docket No. ER04-699-000 to incorporate the enhanced functions described in its Petition.

### **Notice and Responsive Pleadings**

4. Notice of Entergy's filing was published in the *Federal Register*, 70 Fed. Reg. 3,012 (2005), with comments, protests, and interventions due on or before February 4, 2005. The Arkansas Public Service Commission (Arkansas PSC) and the Louisiana Public Service Commission (Louisiana PSC) filed notices of intervention and comments. Tractebel Energy Marketing, Inc., the American Public Power Association, and Dynegy Power Marketing, Inc. and Calcasieu Power, LLC filed timely motions to intervene. The Council of the City of New Orleans (New Orleans); the East Texas Electric Cooperatives (East Texas Cooperatives),<sup>3</sup> Plum Point Energy Associates, LLC (Plum Point), Occidental Chemical Corporation (Occidental),<sup>4</sup> Duke Energy Corporation

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<sup>3</sup> The East Texas Electric Cooperatives are East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas.

<sup>4</sup> Occidental states that it supports SeECA's protest and comments with regard to Entergy's transmission pricing proposal.

(Duke), NRG Power Marketing, Inc. (NRG), the TDU Intervenors,<sup>5</sup> Nucor-Yamato Steel Company, Inc. and Nucor Steel-Arkansas (collectively, Nucor), Electric Power Supply Association (EPSA), the Louisiana Energy Users Group (LEUG),<sup>6</sup> Calpine Corporation and Cottonwood Energy Company, LP (collectively Calpine), and the Southeast Electricity Consumers Association (SeECA) filed timely motions to intervene and protest. On February 22, 2005, Entergy filed an answer to the protests. On March 11, 2005, the Public Utility Commission of Texas (PUCT) filed a motion to intervene out of time. On March 14, 2005 the TDU Intervenors filed a reply to Entergy's Answer.

### **Discussion**

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will also accept PUCT's late intervention Pursuant to Rule 214, any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

6. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Entergy's answer and the TDU Intervenors' reply to Entergy answer because they have provided information that assisted us in our decision-making process.

#### **A. Motions to reject the filing**

##### **1. Comments**

7. Some parties contend that Entergy's request for declaratory relief should be denied because it is not adequately supported and fails to provide sufficient information for the Commission to enter definitive findings in the two areas addressed by the Petition. The TDU Intervenors argue that Entergy is not requesting the interpretation of narrow facts or contested contract or tariff language. Rather, the findings requested by Entergy are in the

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<sup>5</sup> The TDU Intervenors are Arkansas Electric Cooperative Corporation, Lafayette Utilities System, the Louisiana Energy and Power Authority, Mississippi Delta Energy Agency and its member, Clarksdale Public Utilities Commission and Public Service Commission of Yazoo County, and the Municipal Energy Agency of Mississippi.

<sup>6</sup> LEUG states that it adopts SeECA's protest in full.

nature of ultimate legal conclusions: that the ICT would not be subject to the Commission's jurisdiction, and that the proposed pricing plan meets the standard of "just, reasonable and not unduly discriminatory." The TDU Intervenors claim that in order for the Commission to make findings of this nature, it must have before it the full body of information bearing on these ultimate legal conclusions. In this instance, where the core of the request involves the legal implications of proposed tariff provisions, they argue that it is essential that the Commission be presented with the tariff provisions that would implement the proposal at hand.

8. The TDU Intervenors argue that, although Entergy states that it will file tariff language implementing the enhancements described in the filing once its petition has been ruled on, it is foreseeable that, when the new tariff provisions are filed, disputes will erupt as to whether those provisions comport with the narrative description on which the Commission relied in making its decision. They ask that the Commission reject the Petition or, at a minimum, withhold action on the Petition and direct Entergy to supplement the Petition by filing the full set of tariff provisions, *pro forma* service agreements, business practices and other documentation that would implement the Enhanced ICT Proposal.

9. Calpine states that until Entergy's proposal is completely fleshed out, the jurisdictional issue in this docket is premature. It recommends that the Commission order Entergy to amend its proposal in Docket No. ER04-699-000, and that the Commission consolidate this issue with the substantive issues in Docket No. ER04-699-000, and decide the issue after a full briefing in that docket.

10. SeECA argues that the ICT does not adequately address the transmission access problems, so the Commission should not grant the Petition. To resolve these problems, SeECA contends that Entergy must join a regional transmission organization (RTO). SeECA also asserts that the Commission should add additional elements to the ICT without triggering Commission jurisdiction. For example, it claims that the ICT should be equally accountable to stakeholders as it is to Entergy, that greater transparency should be ensured, and that the ICT should be allowed to investigate and revise data inputs as necessary. SeECA also asks that the Commission make clear that the ultimate determination depends on approval of necessary contract and tariff language.

## **2. Commission Determination**

11. We deny the requests to reject this filing. Although the Petition is somewhat ambiguous regarding the precise functions the ICT would undertake, the Commission believes that Entergy's ICT proposal may improve transparency of transmission information, enhance transmission access, and relieve transmission congestion. The Commission has set forth below several conditions for acceptance of Entergy's proposal. We believe that these conditions further enhance the ICT proposal. In addition, the

Commission will have the opportunity to fully review the specifics of Entergy's proposal when it files the full set of tariff provisions implementing the ICT proposal under section 205 of the FPA.

## **B. Jurisdiction over the ICT**

### **1. Entergy's Petition**

12. Entergy states that there is a concern that, by permitting the ICT to grant or deny requests for transmission service, the Commission could deem the ICT to be either a public utility under the FPA and/or the Transmission Provider under Entergy's OATT. It claims that the jurisdictional status of the ICT could be a concern to its retail regulators. Entergy asks that the Commission remove this uncertainty, and thereby facilitate retail regulatory support for the ICT, by finding that the ICT will not, by assuming responsibility for the functions described herein, become a public utility or the Transmission Provider.

13. The *pro forma* OATT defines Transmission Provider as a "public utility (or its Designated Agent) that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce and provides transmission service under the tariff." Under section 201 (e) of the FPA, a public utility is "any person who owns or operates facilities subject to the jurisdiction of the Commission . . ."<sup>7</sup> Entergy argues that the determination of whether the ICT will become a public utility or the Transmission Provider turns on the scope of the functions it will perform and, in particular, the level of discretion the ICT has in performing those functions.

14. Entergy claims that Commission precedent establishes that an entity will not be deemed to be a public utility or Transmission Provider if it is only implementing Commission-approved rates, terms and conditions of service, as opposed to creating its own criteria for providing service.<sup>8</sup> Entergy argues that the ICT does not have unilateral discretion to determine the rates, terms and conditions of jurisdictional service, but will ensure the rates, terms and conditions under Entergy's Commission-approved OATT and AFC methodology are applied on a non-discriminatory basis. Entergy asserts that this

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<sup>7</sup> 16 U.S.C. § 824(3) (2000).

<sup>8</sup> Entergy Petition at 6, *citing El Paso Elec. Co.*, 108 FERC ¶ 61,071 (2004); *PSI Energy, Inc.*, 63 FERC ¶ 61,107 (1993) (*PSI Energy*); *Mid-Continent Area Power Pool*, 91 FERC ¶ 61,353, *order on reh'g*, 92 FERC ¶ 61,229 (2000) (*MAPP*).

function does not confer control over jurisdictional facilities or services, and, thus, the ICT will not become a public utility or Transmission Provider.

15. Entergy contends that in *Bechtel Power Corporation*,<sup>9</sup> the Commission held that an entity only operates a jurisdictional facility if it has control and decision-making authority concerning the operation of the facility. It cites four cases that it contends illustrate the nature of this test.

16. In *PSI Energy, Inc.*,<sup>10</sup> the Commission found that PSI controlled the facilities at issue because “PSI basically directs and controls the transmission system with only the limitation that it act in accordance with 'prudent utility practice.'”<sup>11</sup> Entergy claims that this test was applied in *Puget Sound Power & Light Co.*,<sup>12</sup> but that the Commission found that control had *not* been transferred because the parties “specifically limited in the agreement, the operation and management services that Puget may perform without prior direction or approval. In contrast, [the parties] could simply have directed that Puget operate and maintain the facilities in accordance with some general standard, such as prudent utility practice.”<sup>13</sup>

17. Entergy states that the Commission applied the same test to jurisdictional services in *El Paso Elec. Co.*,<sup>14</sup> where the Commission held that Enron Power Marketing, Inc. had assumed “control” over certain jurisdictional power sales made by El Paso Electric Co. because “El Paso Electric admitted that it gave Enron discretion on how, when, and to whom it could sell power on El Paso Electric’s behalf while Enron ran the El Paso Electric trading desk.”<sup>15</sup> It claims that a similar result was reached in *R.W. Beck Plant Management, Ltd.*,<sup>16</sup> where it claims that the Commission held that the manager of a

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<sup>9</sup> 60 FERC ¶ 61,156 (1992) (*Bechtel*).

<sup>10</sup> 63 FERC ¶ 61,107 (1993).

<sup>11</sup> Entergy Petition at 27, *citing Id.* at 61,753.

<sup>12</sup> 64 FERC ¶ 61,335 (1993) (*Puget Sound*).

<sup>13</sup> *Id.* at 63,428.

<sup>14</sup> 108 FERC ¶ 61,071 (2004).

<sup>15</sup> *Id.* at P 14.

<sup>16</sup> *R.W. Beck*, 109 FERC ¶ 61,315 (2004).

power plant (and appurtenant jurisdictional facilities) was a public utility because “except for certain powers reserved to the [owner], Beck has complete authority to manage, control and make all decisions affecting the business and affairs of [the plant]” and, furthermore, the owner had “no employees and no company personnel responsible for the management of the [plant].”<sup>17</sup>

18. Entergy argues that under these cases, the ICT will not assume control over jurisdictional facilities or services. It contends that, in contrast with *El Paso Electric*, the ICT will not have unilateral discretion regarding how, when and to whom it can sell transmission service. Nor, asserts Entergy, will the ICT have complete authority to manage, control and make all decisions affecting the transmission system, as in *R.W. Beck*. The ICT will not create its own standards for the granting of transmission service, but will be obligated to apply Commission-approved OATT standards and AFC criteria on a non-discriminatory basis. Moreover, Entergy argues, Entergy will continue to physically operate its transmission facilities, unlike the owner in *R.W. Beck*. Finally, Entergy contends that it will remain responsible for making filings under section 205 of the FPA<sup>18</sup> and remain responsible for defending complaints regarding the provision of transmission or interconnection service on its system.

19. In addition, Entergy claims that the Commission has previously held that in the Mid-Continent Area Power Pool (MAPP), a contractor was not a Transmission Provider even though it calculated Available Transmission Capacity (ATC) that apply under a tariff; operated the OASIS; received and evaluated transmission requests; granted or denied service; and entered into service agreements with customers.<sup>19</sup> In addition, Entergy claims that the Commission stated that MAPP was neither a public utility nor the Transmission Provider under the MAPP tariff in a case involving refunds.

20. Entergy also points to the Commission’s treatment of Southwest Power Pool (SPP) before it became an RTO. For example, American Electric Power-East (AEP-East) entered into an agreement with SPP under which SPP would calculate ATCs for the AEP-East zone, post the applicable ATC values on AEP’s OASIS, and process (*i.e.*, accept or deny) transmission service requests under the AEP transmission tariff for

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<sup>17</sup> *Id.* at P 3, 12.

<sup>18</sup> 16 U.S.C. 824d (2000).

<sup>19</sup> *MAPP*, 91 FERC ¶ 61,353, *order on reh’g*, 92 FERC ¶ 61,229 (2000).

service in the AEP East zone.<sup>20</sup> The AEP transmission tariff, however, continued to define the AEP operating companies as the Transmission Provider for the AEP-East zone, not SPP.

21. In addition, SPP acted as tariff administrator for its members prior to its certification as an RTO. Entergy claims that SPP's responsibilities at that time included calculating Total Transmission Capacity (TTC) and ATC, posting TTC and ATC values on the SPP OASIS, and processing transmission service requests under certain SPP tariff schedules.<sup>21</sup> Entergy contends that, despite assuming these functions, the SPP transmission tariff provided that the SPP members remained the Transmission Providers under that tariff, and that "SPP is not a Transmission Provider but is authorized by the Transmission Providers to carry out its functions under this Tariff by the Agency Agreement, including the execution of service agreement[s]." Entergy states that, in *Southwest Power Pool, Inc.*,<sup>22</sup> the Commission noted the contrast between the functions performed by an RTO and the more limited pre-RTO functions of SPP, acting as tariff administrator.<sup>23</sup> Entergy argues that this distinction is that an RTO would have operational control of its members' facilities, and thus would function as something more than a tariff administrator, loose power pool, or security coordinator. Therefore, the ICT should not be deemed to be a public utility under the FPA or the Transmission Provider under Entergy's OATT.

## **2. Comments**

22. The TDU Intervenors and Occidental claim that Entergy is, in effect, requesting a disclaimer of jurisdiction over the ICT. They claim that Entergy is able to support its position only by arguing inconsistent positions – *i.e.*, by claiming that the ICT is independent enough that it should be allowed to administer Entergy's pricing proposal,

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<sup>20</sup> Entergy Petition at 30, *citing* AEP/SPP Agreement § 1.1 (as filed in Docket Nos. EC98-40-003, *et al.*); and *American Elec. Power Co.*, 91 FERC ¶ 61,208 at 61,747 (2000).

<sup>21</sup> Entergy Petition at 31, *citing* SPP Transmission Tariff, Att. C (as filed on December 1, 1998 in Docket No. ER99-783-000).

<sup>22</sup> 98 FERC ¶ 61,038 (2002).

<sup>23</sup> *Id.* at 61,110 ("What distinguishes MISO's situation from SPP's is that MISO would have operational control of its members' facilities, and thus would function as something more than a tariff administrator, loose power pool, or security coordinator, which are SPP's current functions.").



but that the ICT is not so independent as to be subject to the Commission's jurisdiction. Therefore, they contend that the Commission should reject Entergy's attempt to capture the benefits of independence while simultaneously arguing that the duties and powers which purportedly confer that independence are not so substantial as to bring the ICT within the Commission's jurisdiction.

23. The Louisiana PSC expressed concerns about the impact that Entergy's ICT proposal could have on retail rates and services and on its own jurisdiction. It states that a ruling by the Commission declaring that the ICT will not be a public utility or Transmission Provider will help to protect the jurisdiction of the state regulators of Entergy's Operating Companies.

24. The TDU Intervenors claim that concerns of state regulators that underlie Entergy's request are unsubstantiated and illusory.<sup>24</sup> The TDU Intervenors contend that an exertion of Commission authority over the ICT would entail no greater extension of federal jurisdiction than already exists over Entergy. The TDU Intervenors also argue that, to the extent there are any concerns among Entergy's retail regulators about jurisdictional "shift," those concerns likely derive from a mistaken belief that any exercise of Commission jurisdiction over ICT activities would eradicate state regulatory authority over the transmission component of bundled retail service. As noted above, however, the TDU Intervenors argue that the assertion of Commission authority over the ICT would entail no greater extension of federal jurisdiction than already exists over Entergy.

25. Many parties argue that the ICT would be performing duties that clearly fall within the Commission's jurisdiction because those activities include decision-making in areas that directly affect the rates, terms and conditions of wholesale transmission service. The TDU Intervenors contends that the fact that the ICT will determine whether short-term transmission requests are accepted or denied, would accept or deny requests for long-term transmission service, and will have "full authority to determine whether a particular upgrade should have been, but was not, included in the Base Plan"<sup>25</sup> shows that the ICT will directly affect the rates, terms and conditions of wholesale transmission service.

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<sup>24</sup> *Citing* Commissioner Randy Bynum of the Arkansas Public Service Commission as saying that he is less concerned about the exercise of Commission jurisdiction than he is ensuring that consumers receive service at the lowest cost. Transcript of November 8, 2004 Technical Conference in Docket No. ER04-699-000 at 194, ln. 6-18.

<sup>25</sup> TDU Intervenors at 27, *citing* Entergy Petition at 17, 37.

26. Several intervenors claim that the cases cited by Entergy do not support its position. They argue that in *Bechtel*, the Commission held that the term “operate” referred to “the person who has control and decision-making authority concerning the operation of the [f]acility—not the person, in a case such as this one, who merely performs specific services that are ordered and directed by another party.”<sup>26</sup> They contend that Bechtel was simply acting as the owner’s agent whereas, by contrast, Entergy has argued that the ICT “will have a decision-making process that is independent of control by any market participant or class of participants, including Entergy.”<sup>27</sup> Occidental states that *Bechtel* stands for the proposition that an entity that operates, or has control and decision-making authority, does not “merely perform specific services that are ordered and directed by another party.”

27. However, the New Orleans City Council argues that, under *Bechtel*, the ICT will not have decision-making authority. It claims that the ICT’s role appears to be that of an agent for Entergy, and no regulatory purpose would be served by exercising jurisdiction over the ICT. According to the New Orleans City Council, the Commission has sufficient jurisdiction over Entergy and its jurisdictional transmission facilities to ensure an open and efficient transmission market.

28. The TDU Intervenors state that in *R. W. Beck*, the consultant hired to operate a facility was subject to specific limitations on decision-making authority, but the Commission found the consulting firm to be subject to its jurisdiction as an operator, “notwithstanding that some of Beck’s actions are ultimately subject to the approval of the Trustee . . . .”<sup>28</sup> They argue that in the instant proceeding, even if the ICT’s discretion were found to be limited by a requirement that it adhere to specific criteria, that fact alone would not take the ICT outside the Commission’s FPA jurisdiction.

29. The TDU Intervenors also state that *D.E. Shaw Plasma Power*<sup>29</sup> supports their contention that the ICT should be under the Commission’s jurisdiction. They argue that the Commission ruled that D. E. Shaw & Co., L.P. (DESCO) was a public utility “in

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<sup>26</sup> *Bechtel*, 60 FERC at 61,572.

<sup>27</sup> Entergy Petition at 12, 28.

<sup>28</sup> *Beck* at P 15.

<sup>29</sup> 102 FERC ¶61,265 (2003) (*Shaw*).

particular due to its potential involvement in [jurisdictional transactions].”<sup>30</sup> The TDU Intervenors contend that *Shaw* is relevant because it shows that, even if the ICT is found to lack unilateral authority in areas subject to the Commission’s jurisdiction, the fact that authority in those areas is shared does not preclude a finding that the ICT also is a jurisdictional entity.

30. Occidental states that in *American Electric Power Co.*,<sup>31</sup> the Commission granted an independent entity the right to calculate ATC, grant and deny service requests, and administer OASIS to mitigate the Transmission Provider’s ability to discriminate against third parties. However, Occidental argues that in *AEP*, the independent entity was performing these functions solely as an interim mitigation measure and that the actual mitigation of the ability to discriminate would be transferring operational control of their transmission facilities to a fully functioning RTO.

31. Occidental cites *Pacer Power, LLC*<sup>32</sup> for the proposition that an entity could be exerting control within the meaning of the FPA by implementing jurisdictional transactions.<sup>33</sup> Occidental argues that *Pacer* was not found to be jurisdictional because it was a passive electronic platform that did not choose or match parties to a transaction or manage or schedule transmission service. However, Occidental argues that the ICT will grant and deny requests for transmission service.

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<sup>30</sup> *Id.* at P 33. They state that the Commission determined that DESCO was a public utility notwithstanding that DESCO’s role included providing “advice” and “recommendations” on jurisdictional matters, that DESCO’s performance was subject to review by the “Managing Member” (a jurisdictional entity), that DESCO agreed to “comply with and conform to all reasonable and proper orders, directions , or requests of the Managing Member,” and that, in the event of a conflict between the Managing Member and DESCO, the determination of the Managing Member would prevail. *Id.* at P 7-8.

<sup>31</sup> 90 FERC ¶ 61,242 (2000).

<sup>32</sup> 104 FERC ¶ 61,131 (2003) (*Pacer*).

<sup>33</sup> “The amount of involvement in the formation and implementation of transactions by market facilitators is an important element in determining whether the facilitator is jurisdictional. If the facilitator is materially involved in the transaction itself (‘exerting effective control’) through means such as ... implementing/administering such transactions, Commission jurisdiction over the facilitator may be appropriate.” *Pacer* at P 29.

32. However, certain intervenors claim that the ICT will not be a public utility under the FPA or a transmission provider under Entergy's OATT. For example, the Arkansas PSC and the New Orleans City Council state that the ICT will not own, control, or operate Entergy's transmission system and will not be providing transmission service under its own Tariff. They argue that the ICT may have extensive oversight, but it will not actually control the system and will not make all the decisions regarding to whom it will sell service. The Arkansas PSC claims that most of the functions that would be performed by the ICT have previously been performed by independent entities on behalf of FERC-jurisdictional utilities without being deemed to be a public utility.<sup>34</sup> In addition, the Arkansas PSC states that, unlike an RTO, the ICT cannot order the construction of transmission facilities.

33. The TDU Intervenors also contend that there are important regulatory purposes served by the Commission asserting jurisdiction over the ICT. In both *Bechtel* and *Shaw* the Commission interjected an additional factor into the evaluation of whether to assert jurisdiction, *i.e.*, whether asserting jurisdiction under FPA section 201(e) would serve a regulatory purpose. The TDU Intervenors and Occidental state that if the Commission were to disclaim jurisdiction over the ICT, it would be unable to exert direct authority over the manner in which the ICT discharges those duties and applies those powers and would be forced to work through Entergy to affect the ICT's conduct and performance. In addition, the TDU Intervenors state that *California Independent System Operator Corp. v. FERC*<sup>35</sup> raises the question of whether, in this context, the Commission could exercise its authority under sections 205 and 206 to direct Entergy to take an action (such as contract enforcement) normally considered within the realm of corporate managerial discretion.

34. EPSA argues that the problem with not treating the ICT as a public utility is that only Entergy will be able to exert control over the ICT's oversight activities by virtue of its contract with the ICT. However, it contends that Entergy's interest is a limited one. Rather than being interested in ensuring that the ICT actually exercises its oversight responsibilities, Entergy's true interest is in ensuring that the ICT maintain the appearance of exerting such oversight. By contrast it argues that the Commission, as the agency responsible for safeguarding the public interest, has an institutional interest in ensuring that the ICT actually does its job properly. Moreover, only the Commission can

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<sup>34</sup> For example, it claims that SPP calculated TTC and ATC, posted TTC and ATC, and processed transmission service requests before becoming an RTO and a public utility.

<sup>35</sup> 372 F.3d. 395 (D.C. Cir. 2004).

exert direct control over the ICT by issuing orders and imposing penalties under the FPA. Consequently, EPSA states that the Commission needs the ICT to be a public utility that is thereby FERC jurisdictional.

### **3. Commission Determination**

35. Entergy has only identified one entity that could be selected as the ICT, SPP.<sup>36</sup> We, therefore, assume that SPP will be selected as the ICT and would be willing to approve Entergy's transmission pricing proposal if SPP becomes the ICT. We agree with the Arkansas PSC and Calpine that the ICT must be, both in perception and in reality, entirely independent from Entergy. The Commission has already ruled that SPP complies with the independence requirements of Order No. 2000. Having SPP serve as the ICT will ensure the ICT's independence from Entergy and will give Entergy's market participants, retail regulators, and this Commission confidence in the ICT's impartiality.

36. In addition, it will be a benefit to Entergy's customers that the ICT be implemented in a timely manner so that the Entergy system can begin to realize Entergy's claimed benefits as soon as possible. Given SPP's familiarity with the Entergy system, we believe that SPP is in a unique position to take over the ICT responsibly, quickly and efficiently. SPP has a long-standing relationship with Entergy through Entergy's former membership in the SPP reliability council. Because Entergy was a founding member of SPP, SPP is already familiar with the Entergy system and its planning and operations. SPP's serving as the ICT also eliminates the need for a lengthy search for an entity to become the ICT.

37. As stated above, and as argued by some protestors, Entergy's Petition is somewhat ambiguous regarding the precise functions Entergy proposes for the ICT to undertake. Some intervenors contend that Entergy is attempting, on the one hand, to capture the benefits of independence (Entergy's pricing proposal), while, on the other hand, arguing that the powers that confer that independence are not so substantial as to bring the ICT within the Commission's jurisdiction. However, we need not rule on whether the functions of the ICT, alone, would serve to make the ICT a public utility under the FPA.<sup>37</sup> Since SPP is already a public utility, if it becomes the ICT, we do not

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<sup>36</sup> See, e.g. Arkansas PSC at 3-4. At the October 8, 2004 Technical Conference, SPP's President indicated that the SPP is willing to serve as Entergy's ICT. Tr 120-121.

<sup>37</sup> We note that, regardless of whether or not the ICT would be a public utility under the FPA, the Commission would have jurisdiction over the agreement between Entergy and the ICT.

need to address whether SPP's performance of these functions would provide an independent basis for deeming SPP to be a public utility.

38. We will, however, address the concerns that the ICT proposal would diminish the jurisdiction of Entergy's retail regulators. As stated above, the *pro forma* OATT defines Transmission Provider as a "public utility (or its Designated Agent) that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce and provides transmission service under the tariff." Based on its representations in the Petition, Entergy would 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 not change the existing balance of jurisdiction between this Commission and Entergy's retail regulators.

### **C. Transmission Pricing**

#### **1. Entergy's Petition**

39. Entergy's transmission pricing proposal bifurcates the transmission system into two categories of pricing. Under the first category, the Base Plan, Entergy proposes to continue to roll-in the costs of those upgrades needed for reliability and load growth purposes.<sup>38</sup> Entergy's proposal calls for it 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. Entergy characterizes the oversight as an improvement to the current process.

40. Upgrades that fall outside of those needed for reliability and load growth, which Entergy terms "Supplemental Upgrades," are paid for by the customer that causes the upgrade to be incurred. This is a change from Entergy's current pricing for such upgrades. Entergy states that Supplemental Upgrades include investments necessary to: (1) qualify a generator at the Network Resource Interconnection Service (NRIS) level; (2) designate a new Network Resource at the Network Integration Transmission Service (NITS) level; (3) provide new or expanded Firm Point-to-Point (PTP) service; or (4) eliminate congestion within or across the Entergy Transmission System. Entergy states that the ICT would be responsible for determining whether upgrades needed to satisfy

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<sup>38</sup> This does not represent a change from Entergy's current pricing methodology or from the Commission's traditionally accepted pricing methodology for such upgrades.

these new reservations are properly deemed Supplemental Upgrades. As examples, Entergy asserts that if the ICT determined that a Supplemental Upgrade eliminated the need for a Base Plan upgrade or that it materially reduced the cost of Base Plan upgrades, the ICT would credit the cost of the Supplemental Upgrade by the savings in the Base Plan.

41. Entergy states that in return for paying for the cost of Supplemental Upgrades, network customers would receive certain delivery rights: (1) all newly designated network resources will receive NRIS status and, once attained, the NRIS status would be maintained through Base Plan expenditures making the NRIS status portable; (2) network customers seeking long-term NITS network resource designations will receive the ability to deliver power from that resource to load on a firm basis without any additional charge for congestion costs; and (3) all new NRIS and NITS service paying for Supplemental Upgrades will receive a firm PTP allowance equal to the cost of Supplemental Upgrades that it has funded giving the customer the right to reserve firm PTP transmission service out of the resource at no additional charge.

42. Entergy claims that the portable NRIS status is analogous to Capacity Resource status in PJM Interconnection, LLC (PJM). For those customers that seek NITS status, the congestion hedge is analogous to the FTR hedge provided by PJM. The PTP service will be granted at no additional charge as long as there is sufficient ATC.<sup>39</sup> If PTP service needs to be curtailed to maintain system reliability, the curtailment would be on the same basis as all other firm service.

43. Entergy claims that its pricing proposal will send efficient price signals for new interconnections and will be applied on a comparable basis to all customers. Entergy states that its pricing proposal does not constitute “and” pricing because the proposed pricing does not apply to existing transmission service, it applies to new network resource designations. As a result, Entergy argues that it is not charging an embedded rate and an incremental rate for the same service.

44. Entergy notes that although the Commission has stated in Order No. 2003, that such pricing would be available to those transmission providers that have turned over control of their transmission systems to RTOs or Independent System Operators (ISOs), it is appropriate for Entergy to receive transmission pricing heretofore reserved for RTOs and ISOs for two primary reasons. First, Entergy believes that giving oversight over certain functions to the ICT should satisfy the Commission that Entergy has ceded adequate functionality over its transmission system to an independent entity. Second, Entergy claims that its system is unique in that approximately 17,000 MWs of new

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<sup>39</sup> Entergy Petition at 51.

merchant generation have been interconnected to the Entergy system and the cost of the network upgrades necessary to qualify this generation as network resources and deliver the output would unfairly be borne by native load and other transmission customers under the Commission's current pricing policy. Entergy believes that its proposal appropriately shifts the burden of these costs to the merchant generator or network customer seeking an alternate generating resource for economic purposes and is consistent with Order No. 2003 in that it holds native load harmless for these upgrades.

45. In addition, Entergy's pricing proposal also proposes that the ICT would review any previously incurred interconnection costs (direct interconnection facilities, required upgrades and optional upgrades) and would apply certain criteria to determine whether the facilities and upgrades would have been classified as Base Plan or Supplemental Upgrades at the time. If a generator had paid Entergy for facilities classified as Base Plan upgrades by the ICT, Entergy would refund the amounts to the generator and roll in the refund amount into Entergy's transmission rate including the calculation of its OATT rate. Payments made for what the ICT deems to be Supplemental Upgrades counting toward ERIS-level integration will be considered to be the generator's responsibility and Entergy would cease providing refunds or credits associated with the upgrades. Payments made for what the ICT deems to be Supplemental Upgrades contributing to either NRIS- or NITS-level integration will be considered to be incremental rates paid by the interconnecting customer. Entergy would cease providing refunds, however, the customer would be entitled to an allowance for PTP service for the remaining uncredited portion of its payments.

46. Entergy requests that the Commission find its transmission pricing proposal to be just, reasonable and not unduly discriminatory because it complies with the Commission's Transmission Pricing Policy Statement<sup>40</sup> and with Order No. 2003.<sup>41</sup>

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<sup>40</sup> *Inquiry Concerning the Commission's Pricing Policy for Transmission Service Provided by Public Utilities Under the Federal Power Act, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,005 (1994).*

<sup>41</sup> *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).*



## 2. Comments

47. Numerous parties filed comments and protests opposing Entergy's proposal. Two state commissions with jurisdiction over a portion of the Entergy system and the City of New Orleans filed comments supporting Entergy's transmission pricing proposal.

48. As an initial argument, a number of intervenors assert that Entergy's pricing proposal does not comply with existing Commission policy because Entergy has not transferred control over its transmission system to an RTO or an ISO nor is Entergy in a one-year transition period to transfer control. These commenters request that the Commission deny or reject Entergy's petition with respect to its proposed transmission pricing.<sup>42</sup>

49. A number of intervenors object to Entergy's proposal to apply its pricing proposal retroactively to generation with existing interconnection agreements.<sup>43</sup> SeECA claims that Entergy has identified \$128 million in transmission credits still owed to non-Entergy generators due to their upfront payments for Network Upgrades built during 1998 to 2003 and that those same upgrades resulted in the native load customers on the Entergy system saving \$870 million in 2002 and 2003 through purchases that displaced Entergy generation.<sup>44</sup> TDU Intervenors state that granting the requested relief would approve a pricing approach that allows Entergy to load costs onto its competitors for transmission upgrades that benefit the network as a whole, while permitting Entergy itself to escape such obligations, thereby perpetuating the status quo vis-à-vis Entergy's market power and dominance.

50. TDU Intervenors assert that Entergy, and not the ICT, is the entity that has the right to determine which upgrades will be rolled-in and which will be directly assigned. According to TDU Intervenors, Entergy, not the ICT, would develop the Base Plan and the ICT would be bound by Entergy's standards defining what Base Upgrades and Supplemental Upgrades are.<sup>45</sup> SeECA adds that Entergy has never identified whether

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<sup>42</sup> See, e.g., Independent Generators at 9 and SeECA at 3. As noted above, we denied requests to reject the filing because we believe that Entergy's proposal to establish an ICT appears to be an improvement over the status quo.

<sup>43</sup> See, e.g., SeECA and Plum Point.

<sup>44</sup> SeECA at 36.

<sup>45</sup> See also Independent Generators at 13 (Independent Generators are Calpine Corporation and Cottonwood Energy Company, LP); SeECA at 33-34; EPSA at 9-10.

any existing Network Resources used to serve the native load customers would be designated NRIS rather than NITS Network Resources and this silence suggests that since Entergy's own Network Resources for native load customers are not currently subject to interconnection agreements, they will be designated NITS Network Resources and exempt from directly assigned generation redispatch charges. SeECA claims that non-Entergy generators would not be treated comparably.<sup>46</sup>

51. SeECA and East Texas Cooperatives argue that Entergy's proposed pricing is unfair with respect to "lumpy upgrades" which are upgrades where more than one party will benefit from additional capacity.<sup>47</sup>

52. TDU Intervenors claim that Entergy's pricing proposal remains inconsistent with Order No. 2003-A, and with the Commission's transmission pricing policy,<sup>48</sup> and is not consistent with or superior to the *pro forma* OATT. NRG asserts that Entergy's proposal amounts to "and" pricing.<sup>49</sup> TDU Intervenors state further, that Entergy's proposed pricing proposal ignores the long-standing recognition by the Commission of the fact that Network Upgrades, by definition, confer system benefits.<sup>50</sup> Similarly, Independent Generators point out that at the New Orleans, Louisiana Technical Conference held on July 29-30, 2004, Entergy agreed that for every one percent of Entergy generation

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<sup>46</sup> SeECA at 34.

<sup>47</sup> *Id.* at 35 and East Texas Cooperatives at 10. In its answer to comments, protests and motions to reject, Entergy states that the issue of "lumpy upgrades" merits further consideration and it will analyze how SPP and PJM deal with the issue as well as other possible solutions and propose one in its compliance filing to Docket No. ER04-699-000.

<sup>48</sup> *See also* Independent Generators at 9; EPSA claims Entergy's pricing proposal is inconsistent with Order No. 2003-B; Nucor claims that Entergy is not an independent transmission provider and thus its transmission pricing violates Order Nos. 2003 and 2003-A and, moreover, Order No. 2003-B limited native load protection from upgrades to case-specific showings. Nucor at 6-8.

<sup>49</sup> NRG at 5-8 and 11-12; *see also* Independent Generators at 19-21; SeECA at 28-31; EPSA at 11-12; Nucor at 3; and East Texas Cooperatives at 14-15.

<sup>50</sup> *See also* Independent Generators at 10-11 (where a preliminary study in Louisiana Public Service Commission Docket No. 23356-A, indicated that customers in Louisiana alone would save \$200 million due to certain economic transmission upgrades).

displaced by unaffiliated merchant units, savings would be approximately \$30 million.<sup>51</sup> East Texas Cooperatives argues that the primary beneficiary of the 17,000 MW of merchant generation being qualified as network resources would be the Entergy Operating Companies and their native load.<sup>52</sup>

53. Independent Generators claim that a number of network customers on the Entergy system currently receive generation from Entergy and the contracts under which they receive service are nearing the end of their terms. According to Independent Generators, these network customers are examining contracting with merchant units and designating those merchant units as Network Resources and Entergy's proposal discriminates against unaffiliated generators. Independent Generators also claim that Entergy's stance on system upgrades protects its own generation while ignoring the needs of load and other transmission customers.<sup>53</sup> Independent Generators claim that merchant units are cheaper than Entergy's generation and that load in the Entergy footprint should have the ability to realize lower energy costs through access to more economic sources and Entergy as the transmission provider has a responsibility to maintain its system in order to minimize costs and promote competition.

54. A number of intervenors assert that Entergy's pricing proposal would serve to enhance Entergy's market power in its control area because new generation entrants intending to serve loads within Entergy's control area would find it difficult to surmount the entry barrier presented by Entergy's proposed pricing scheme. These intervenors claim that Entergy's proposed WPP would ensure that Entergy would have little need to designate new Network Resources on behalf of its native load for years to come, thus minimizing Entergy's exposure to pricing rules that assign grid upgrade costs to customers that designate new Network Resources. In support, TDU Intervenors cite testimony filed by Entergy in Louisiana PSC Docket No. U-28155 on January 31, 2005.<sup>54</sup>

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<sup>51</sup> Independent Generators at 22.

<sup>52</sup> East Texas Cooperatives at 8. East Texas Cooperatives goes on to state that Entergy's proposal fails to address the need to have those who benefit from an upgrade pay for that upgrade.

<sup>53</sup> Independent Generators at 24.

<sup>54</sup> Direct Testimony of Michael M. Schnitzer on Behalf of Entergy Louisiana, Inc. and Entergy Gulf States, Inc., filed January 31, 2005 in Louisiana PSC Docket No. U-28155, at 19, ln. 1-4 and 13-15.

TDU Intervenors believe that the PTP “delivery rights” that would be conferred on upgrade-funding customers would have little or no value in the real world.<sup>55</sup>

55. Nucor states that the Commission should not approve any form of participant funding for Entergy before Entergy files the Enhanced ICT Proposal, and the Commission and all stakeholders have the opportunity to examine whether the ICT can and will function as an independent regional transmission planner.<sup>56</sup>

56. Arkansas PSC supports Entergy's Petition and states that Entergy has made the necessary showing that its proposed transmission pricing is consistent with Commission policy. The Arkansas PSC adds that discussions at the Technical Conferences held last year indicate that the ICT will provide truly independent administration over Entergy's system and would be a potentially significant step forward to bringing a vibrant and competitive market to ratepayers in the Entergy region.

57. The Arkansas PSC states that Entergy's proposed transmission pricing will send correct pricing signals to generation on a comparable basis and ensure that facility costs will be assigned to those who benefit: reliability upgrades will be paid for by all transmission customers and Supplemental Upgrades will be assigned to the customer requesting the upgrade. The Arkansas PSC asserts that Entergy's transmission pricing proposal will ensure that transmission customers will consider all costs including locational costs in their planning decisions and the pricing proposal also ensures that native load will not be saddled with costs that they did not cause.

58. The Arkansas PSC notes that prior RTO efforts in the Southeast region have not succeeded in part due to regional regulatory concerns. In addition, the Arkansas PSC believes that the lack of an independent administrator has resulted in substantial litigation at the Commission (citing Docket Nos. ER91-569-023 *et al.*, examining Entergy's market power; ER03-1272-000, Available Flowgate Capability; and EL05-22-000, investigation into Entergy's transmission access). The Arkansas PSC declares that Entergy's ICT proposal holds the potential to enhance competition, mitigate market power, increase

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<sup>55</sup> See, e.g., Independent Generators at 14-16, East Texas Cooperatives at 15, NRG at 11, SeECA at 29, and WPSA at 10.

<sup>56</sup> Nucor at 11. East Texas Cooperatives states that Entergy's enhanced planning function for the ICT cannot be evaluated until Entergy supplies full details including tariff language that spells out the scope and duties of the ICT. East Texas Cooperatives at 12-14.

market confidence and thereby decrease litigation, and alleviate retail regulators' concerns over a loss of jurisdiction.

59. The Arkansas PSC states that the ICT will meet the independence standards set out in Order No. 2000 and Entergy has identified SPP as a potential ICT candidate. As to the functions performed by the ICT, the Arkansas PSC states that the responsibilities fall short of the ICT needing to be deemed a public utility under the FPA.

60. The New Orleans City Council also filed comments supporting Entergy's Petition. New Orleans cites many of the same reasons contained in Arkansas PSC's filing as reasons for its support of Entergy's Petition.

61. The Louisiana PSC filed comments stating that Entergy has made its ICT filing at the Louisiana PSC and that it is under review. The Louisiana PSC staff and intervenors are scheduled to file their first round of testimony on March 14, 2005, and the Louisiana PSC will keep the Commission apprised of any significant developments or decisions. The Louisiana PSC adds that a decision by the Commission declaring that the ICT is not a jurisdictional public utility or transmission provider will help to protect the jurisdiction of state regulators. As to Entergy's proposed transmission pricing, the Louisiana PSC notes that it has previously expressed its preference for a pricing methodology that assigns costs pursuant to cost-causation and protects native load customers.

62. The PUCT believes that Entergy's transmission pricing proposal is not consistent with Commission policy or with the creation of an active wholesale market in the Entergy region. The PUCT believes that Entergy's proposal will not facilitate the construction of transmission facilities to meet the needs in the Entergy region. The PUCT references concerns about the reliability of the existing transmission network and about the need to continue operating high-cost, high-emission power plants because of transmission constraints on the Entergy system.<sup>57</sup> The PUCT believes that the most effective way to address these concerns would be to implement regional transmission planning and pricing under a Commission-approved RTO.

63. The PUCT states that the ICT clearly has less independence and a narrower scope than an RTO. The PUCT believes that Entergy has crafted the ICT proposal so that all policy-making with respect to transmission rates is done by Entergy, whereas in an RTO, the independent organization has the power to file with the Commission changes in transmission pricing. The PUCT also states that RTOs typically operate with collaborative development of tariff changes, and changes in the tariff are approved for

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<sup>57</sup> The PUCT cites the technical conferences held in New Orleans, Louisiana, Jackson, Mississippi, and Little Rock, Arkansas.

submission to the Commission by an independent governing board. The PUCT asserts that in an RTO, the regional planning process would identify transmission improvements that would benefit customers in the region, and the costs of the improvements would be allocated equitably among the transmission customers through a regional transmission tariff.

64. The PUCT emphasizes that Entergy's proposal does not provide incentives for the construction of new transmission facilities because new transmission facilities provide benefits to multiple transmission customers over their useful lives, and a regional pricing mechanism would normally reflect these benefits by spreading the costs of new facilities among transmission customers. The PUCT asserts that transmission costs can be spread to customers through postage-stamp rates or by giving a customer that funds new facilities tradable congestion revenue rights. The PUCT declares that Entergy's proposal provides that there be no sharing of costs for supplemental upgrades needed in the Entergy system. The PUCT maintains that Entergy's pricing of new transmission facilities is more onerous to independent power producers than the requirements under Order No. 2003.

### **3. Commission Determination**

65. The Commission believes the ICT may be just and reasonable with certain modifications. We note that, by virtue of the ICT's oversight, Entergy's proposal is a step beyond the transmission service offered under its *pro forma* OATT and the underlying Order No. 888 principles. We also note that the retail commissions filing comments in this proceeding, with the exception of the PUCT, support Entergy's Petition. The PUCT states that it would like to see an independent regional transmission planning and pricing regime in the Entergy system. We see Entergy's proposal as a positive development towards the more independent regime envisioned by the PUCT.

66. The Commission is prepared to grant Entergy's proposed transmission pricing proposal on a two-year experimental basis, subject to certain enhancements and monitoring and reporting conditions. First, before any approval of Entergy's transmission pricing proposal can be given, Entergy will need to make a section 205 filing in a new docket detailing the enhanced functions that the ICT will perform.

67. The section 205 filing will need to more fully specify in the tariff the responsibilities and duties of the ICT and it must clearly and unambiguously give the ICT authority to grant or deny requests for transmission service. This would, of necessity, include performing any necessary feasibility studies, system impact analyses, or other studies necessary to evaluate a request for transmission service. In addition, 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 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.

68. Moreover, there are certain enhancements and modifications that are needed to support the pricing sought by Entergy. We believe that intervenors make a persuasive argument that it is the ICT that should develop the original Base Plan. Our concern with Entergy's proposal for it to execute the original Base Plan with oversight by the ICT is that the process would still be controlled *ab initio* by a market participant, not an independent entity. We agree with the intervenors that Entergy should not be the entity to develop the inputs that go into developing the Base Plan. For there to be true independence in this component of transmission planning, the ICT must develop the Base Plan including any inputs and numerical values that go into the Base Plan. In addition, the ICT must have authority to verify that resources are properly designated as ERIS, NRIS or NITS resources on the Entergy system. The ICT should also produce technical assessments of the regional grid and support the state siting authorities or multi-state entities by performing any necessary studies. This would 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. Other 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 is reflective of regional needs.

69. With respect to the proposal to have the ICT review any previously incurred interconnection costs (except for those upgrades that are "subject to judicial appeal"), we find that the process by which this review will take place is not adequately explained in the request for declaratory order. In its proposed tariff sheets, it appears that the ICT would simply review the System Impact Study and Facilities Study that would have been previously conducted by Entergy to determine if a particular set of upgrades associated with an interconnection were appropriately assigned as Base Load or Supplemental Upgrades. Our concern here is similar to the concern we expressed above with regard to the ICT's role in the pricing of transmission upgrades required for new service – the ICT must be the entity that determines that the appropriate data inputs were used in performing the necessary studies.

70. It is unclear from the information provided how the ICT would be able to go back and reevaluate the validity of the input data to ascertain that the upgrade was properly assigned. In addition, we have concerns about whether it is appropriate to retroactively re-examine and re-allocate costs that might affect underlying contractual commitments and financial guarantees. Moreover, establishing a process to generically reexamine

these arrangements would be very difficult because the underlying contracts may contain differing provisions regarding the legal standard for reopening or challenging the contract. Finally, it is not clear how the ICT would recreate the pre-existing system conditions and the criteria it would use to determine whether an upgrade is properly assignable as either a base or supplemental upgrade.

71. Because of these concerns, the Commission is unwilling to approve those aspects of the proposed transmission pricing which relate to previously incurred interconnection costs at this time. Therefore, we will require Entergy in its section 205 filing to more fully address these concerns and we will address the justness and reasonableness of any reexamination of such costs by the ICT at that time.

72. We also agree with the intervenors that the rights that Entergy proposes to provide in exchange for paying for the upgrades on an incremental basis are not sufficiently explained nor developed. We will require Entergy to propose, and fully support, under section 205, a method for providing firm transmission rights to customers who pay for Supplemental Upgrades. The transmission rights that would be proposed in the section 205 filing should protect customers that pay for Supplemental Upgrades from congestion costs that would be faced if not for the upgrade. These firm transmission rights also should protect customers from facing curtailment except in a force majeure situation. These guiding principles, defining the nature of the transmission rights that customers would receive, and the ICT's involvement in pricing decisions, as described above, should address the pricing concerns raised by intervenors. We encourage Entergy to work with parties in this proceeding to develop a method to fairly compensate customers who pay for supplemental upgrades in the form of FTRs or a comparable form of rights. We also encourage Entergy and SPP to apply to remove rate pancaking for transmission between the Entergy system and SPP as part of Entergy's section 205 filing. This will enable independent generators in the Entergy system to make off-system sales without paying two separate access charges.

73. Our decision to allow Entergy to charge customers directly for Supplemental Upgrades does not conflict with our earlier precedent to allow participant funding to transmission providers that have transferred control over their transmission systems to an independent system operator or RTO, or who have commitments to do so within a defined period of time. Entergy proposes to transfer certain authorities to an ICT.<sup>58</sup> As

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<sup>58</sup> The proposed enhancements would give the ICT authority to grant or deny requests for transmission service, calculate AFC, administer Entergy's OASIS, and perform an enhanced planning function (integrating the plans of Entergy and other potential transmission owners to identify regional synergies).



discussed above in the section on ICT Jurisdiction, we are satisfied with the oversight authorities that the ICT will have with the modifications we require above, for purposes of a temporary experiment.

74. In terms of the financial and operational independence of the ICT and in order to receive approval of its proposed transmission pricing, as stated above, we are assuming Entergy will select SPP as the ICT. Since we have already determined that SPP is an independent entity by virtue of its being an RTO, we see no reason to address commenters' allegations that the ICT will not be independent. Moreover, once Entergy contracts with the ICT, that contract will be subject to Commission review and approval.

75. In this case however, because Entergy's proposal does not transfer complete control over the operation of its transmission system to the ICT, we are limiting our approval of Entergy's proposed transmission pricing to a period of two years on an experimental basis. The reason for the sunset is because of the Commission's need to monitor the potential for undue discrimination and to determine, based on yearly reports from the ICT and any comments received in Entergy's section 205 request to renew its pricing proposal authorization, that the continuation of the program is just, reasonable and not unduly discriminatory or preferential. This two-year period will begin upon the effective date of our acceptance of Entergy's section 205 filing. We will require the ICT to file a comprehensive report assessing the state of Entergy's transmission system operations as well as whether Entergy's proposed transmission pricing is a successful vehicle to ensure that merchant generation seeking to compete in the Entergy footprint is able to do so.<sup>59</sup> This report will be filed one year after the ICT is operational. The experimental period we propose to grant for Entergy's proposed transmission pricing will terminate on its own at the end of the two years. Sixty days prior to the expiration of the two-year period, Entergy may re-apply under section 205 to seek a continuation of the ICT and the proposed transmission pricing. We view this experimental two-year period and the report that would be forthcoming, as an opportunity for the retail regulators of the Entergy System to see the benefits of a more-open transmission system first hand and consider supporting the ICT assuming operational control over Entergy's transmission system in the future.

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<sup>59</sup> With respect to the PUCT's and other intervenors' concern that Entergy's proposal would inhibit new investment in transmission facilities, among other things, this report would assess the level of new and planned transmission investment on the Entergy system.

76. Finally, in light of the fact that the ICT will be carrying out functions and taking actions that otherwise would be undertaken by Entergy in its role as a public utility under the FPA, we must ensure that persons affected by ICT decisions or actions have the ability to raise issues promptly with the Commission, and that the Commission can adequately redress any situation in which the ICT fails to carry out its functions properly. Affected persons always have the ability to file a complaint under section 206 of the FPA with respect to actions of a jurisdictional public utility, and we believe that a section 206 filing would be the appropriate procedural mechanism for complaints against actions undertaken by the ICT in carrying out some of Entergy's public utility functions. However, to avoid any lack of clarity over these matters, section 205 filings made by Entergy to implement its proposal shall provide: (1) an explicit statement of how affected persons may seek Commission review of ICT decisions; and (2) a commitment by the ICT that, in agreeing to carry out FERC-jurisdictional functions that Entergy would otherwise carry out as a public utility, it agrees to be bound by the Commission's authorities and directives under the FPA with respect to those functions.

### **Procedural Matters**

77. We anticipate that Entergy will file its section 205 filing, in a new docket, within 60 days of the date of this order.

78. We expect that Entergy will file to install an independent entity with the ICT functions within 60 days after a Commission order approving the section 205 filing. We also expect that the ICT will be installed within 60 days of the date of the order approving the section 205 filing unless the ICT requests a delay.<sup>60</sup>

79. Given the experimental basis of our approval of Entergy's ICT proposal, we will require the ICT to give the Commission status reports on the success of the experiment. Thus, for example, if SPP is selected as the ICT, it is directed to give the Commission a status report one year after it commences work as the ICT, and a final report ten months later.

80. As stated above, if the Commission approves the 205 filing, the ICT as well as Entergy's proposed transmission pricing will sunset after two years of Commission approval of the 205 filing. In other words, Entergy must re-apply under section 205 to continue the ICT (including Entergy's proposed transmission pricing) 60 days before the two year period expires.

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<sup>60</sup> The ICT proposal may resolve matters at issue in a hearing instituted by the Commission on Entergy's AFC program. *See* 109 FERC ¶ 61,281 (2005).

The Commission orders:

Entergy's petition for declaratory order is granted, as conditioned and discussed in the body of this order.

By the Commission. Commissioner Brownell concurring with a separate statement attached.

( S E A L )

Linda Mitry,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc.

Docket No. EL05-52-000

(Issued March 22, 2005)

BROWNELL, Commissioner, concurring:

I believe today's order establishes high, yet attainable, standards for a legitimate ICT to be recognized by this Commission and for an ICT to advance towards a more competitive marketplace and deliver the quality service customers have been denied. While today's order sets the bar for an ICT, the true test will be in the section 205 filing. The section 205 filing must clearly and unambiguously grant the ICT with sufficient authority and independence to justify its ability to administer Entergy's pricing proposal. Today's order gives substantial guidance on the additional functions the ICT is expected to perform. Additionally, I would encourage Entergy to ensure its filing contains provisions that mitigate the fundamental tensions in the Entergy-ICT commercial relationship and that resolve long-standing transmission market power and affiliate abuse complaints.

The relationship between Entergy and the ICT is comparable to that of an employer/employee simply due to the contractual nature of the relationship that exists under the Entergy proposal. While divesting assets or converting operational control to a third-party is optimal in eliminating transmission market power, this Commission is willing to test third-party transmission coordination. Accordingly, we direct the ICT 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.

On the pricing proposal, we direct the ICT to establish the Base Plan and we further direct Entergy to explain how the ICT will review costs independently and fairly without using Entergy supplied inputs. I am not yet convinced Entergy will satisfy this requirement when it controls the purse strings. More importantly, I am concerned that the work of the ICT could be compromised if the ICT is not given timely access to accurate

and complete data. Entergy's recent history in the Generator Operating Limit (GOL) and the Available Flowgate Capability (AFC) calculations raises some doubts. The integrity of data will be critical to the ICT's ability to fulfill its responsibilities. I fully expect Entergy's section 205 filing to address and allay these critical concerns.

While I agree with my colleagues that the ICT proposal is a step forward, I remain skeptical primarily given my experiences with Entergy over the last few years. Promises have been made, promises have been broken. In the March 13, 2003 Commission's order accepting the GOL program (102 FERC ¶ 61,281), GOL's appeared to be "superior to the status quo." A year later, when issuing the February 11, 2004 AFC order (106 FERC ¶ 61,115), which replaced the GOL program, the AFC proposal appeared "to be superior to Entergy's current procedures." Here we are another year later and the Entergy ICT proposal "appears to be an improvement over the status quo." Given the number of complaints we have received, it seems to me customers deserve considerably more than the "status quo." I am certain my state colleagues share this concern. My support of this order relies on faith that Entergy will recognize the prerequisites to affirm and realize this simple promise. My review of the section 205 will be made with these concerns and expectations in mind.

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Nora Mead Brownell  
Commissioner