

131 FERC ¶ 61,186
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Entergy Services, Inc.

Docket No. ER10-984-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF AMENDMENTS
AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued May 28, 2010)

1. In this order, we accept for filing Entergy Services, Inc.'s (Entergy) proposed amendments to Attachment H and Schedule 7 of the Entergy Operating Companies'¹ Open Access Transmission Tariff (OATT), and suspend them for a nominal period, to become effective June 1, 2010, as requested, subject to refund. We also establish hearing and settlement judge procedures.

I. Background

2. In Docket No. ER95-112-000, the Entergy Operating Companies, via a settlement agreement, amended their OATT to adopt a formula rate for use in deriving charges for service on Entergy's bulk transmission facilities (OATT Formula). In accordance with the OATT, on or before May 1 of each year, the Entergy Operating Companies submit an informational filing with the Commission to update the charges that will apply for OATT service for the upcoming June 1 through May 31 period, known as the rate year, using actual data from the prior calendar year (Annual Rate Update). Specifically, the Annual Rate Update calculates charges for the upcoming rate year using historical, actual costs, loads and other inputs, such as revenue credits, as recorded during the rate year in accordance with Appendix A to Schedule 7 (Firm Point-to-Point Transmission Service) and Attachment H (Network Service) to the OATT.

¹ The Entergy Operating Companies are Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States Louisiana, LLC (Entergy Gulf States), Entergy Texas, Inc. (Entergy Texas), and Entergy New Orleans, Inc. (Entergy New Orleans).

II. Entergy's Proposed Tariff Amendments (Docket No. ER10-984-000)

3. On March 31, 2010, Entergy proposed two amendments to its OATT to provide for the recovery of storm costs (March 31 Filing). Entergy, explains that, in August and September of 2005, Hurricanes Katrina and Rita caused catastrophic damage to large portions of Entergy Louisiana, Entergy New Orleans, Entergy Gulf States, Entergy Texas and Entergy Mississippi's service territories. Entergy states that the storms and flooding resulted in significant damage to its electric transmission, distribution, and generation and gas infrastructure. Entergy notes that the Entergy Operating Companies have pursued a broad range of initiatives to recover storm restoration costs at the retail commissions, including the issuance of securitization bonds. Entergy states that while each of the storm restoration plans authorized by the retail commissions differ slightly, they generally involve the issuance of bonds by an entity other than the Entergy Operating Company (a state entity in the case of Entergy Mississippi, Entergy Louisiana and Entergy Gulf States' financings, and a special purpose entity owned by Entergy Texas in the case of the Entergy Texas financing). Entergy states that storm restoration bonds are securitized by a corresponding amount of utility plant, including transmission plant. Further, Entergy states that under the state authorized storm recovery plans, the reconstructed plant is accounted for differently than in the past. Entergy explains that under the state authorized restoration plans, the transmission plant is not reported on the Form 1 balance sheets of Entergy Louisiana, Entergy Gulf States and Entergy Texas. Further, Entergy states that the corresponding securitization of bonds for Entergy Gulf States and Entergy Louisiana are not reported on their respective balance sheets. Entergy claims that the structure of the retail storm recovery mechanisms has had the unintended effect of reducing the transmission plant and related accounts in these Entergy Operating Companies' Form 1s.

A. Securitization Amendment

4. Entergy proposes to clarify the OATT Formula to address explicitly the treatment of reconstructed transmission plant in service subject to the retail commission financing determinations. Specifically, Entergy proposes to add the following language in a new General Note 6 of the OATT Formula:

If one or more of the retail regulatory authorities for any of the Entergy Operating Companies utilizes non-traditional regulatory treatment for storm damage costs that affects Electric Plant in Service, then such non-traditional regulatory treatment shall be reversed for purposes of the development of the rates under this rate formula for Electric Plant in Service, Depreciation Expense and Accumulated Provision for Depreciation. Any Accumulated Deferred Income Taxes associated with the Electric Plant in Service adjustment shall be included in the Ratemaking Balance. If such non-traditional

regulatory treatment results in the issuance of bonds to finance the Electric Plant in Service being restored, then an amount of such bonds equal to the Electric Plant in Service adjustment at the end of the test year will be included in the development of the Cost of Capital.

5. Entergy states that it is proposing this clarification to the OATT Formula to avoid potential future litigation. While the formula requires use of Form 1 information, Entergy states that the current OATT Formula also provides that transmission costs not reported in the Form 1s are properly includable as long as the costs are supported by proper documentation. Entergy states that this has been its practice in recent Annual Rate Update submissions.

6. Entergy further states that although it believes that the current OATT Formula provides for the recovery of the reconstructed transmission plant, the proposed amendment clarifies the current OATT Formula to add explicit rate treatment for this securitized plant in service. Entergy contends that, absent the proposed clarification, the OATT Formula rate could be interpreted to relieve the wholesale OATT customers from all cost responsibility for the reconstructed transmission plant in service due to the accounting for the retail storm restoration plans. Entergy further states that the proposed clarification is only for the plant in service reconstructed under the retail securitization plans. Additionally, Entergy clarifies that under the securitization plans, a substantial amount of storm related operation and maintenance costs and amounts to fund storm restoration reserve accounts were also securitized; however, this filing only addresses the securitized plant and does not address those other cost elements.

7. Entergy states that Entergy Louisiana and Entergy Gulf States do not report the bonds on their balance sheets because the bonds are issued by a state entity and are not the obligation of Entergy Louisiana or Entergy Gulf States. Further, Entergy states that to service the bonds an Entergy Operating Company collects a retail commission authorized charge from the retail customers and remits the collections to the bond trustee. Additionally, Entergy states that in recognition of these non-traditional financing arrangements authorized by the retail commissions, it proposes to include in the calculation of the cost of long-term debt an equivalent amount of such bonds as the total plant in service that is being securitized. Entergy asserts that the cost of such debt will be calculated consistent with the existing formula and the second clarification described below.

B. Cost of Capital

8. Entergy proposes a second clarification to the OATT Formula concerning the derivation of the embedded cost of long-term debt used in the calculation of the cost of capital of the Entergy Operating Companies. Entergy asserts that the current OATT

Formula states that the cost of capital is to be determined as of the end of the test year and that the Annual Rate Update submissions have consistently incorporated the embedded cost rate for long-term debt as of the end of the historical test year. Further, Entergy states that its use of end-of-year data is intended to ensure that the cost of capital is representative of the costs that will be incurred during the rate year. Additionally, Entergy contends that the current OATT Formula clearly requires that the cost of capital is to be calculated as of a point in time, and Entergy reiterates that it has used the embedded cost rate for the long-term debt as of the end of the test year. However, to avoid any potential confusion and to eliminate any other possible interpretation of the OATT Formula, Entergy is proposing to clarify the procedure that is currently employed to calculate the cost of long-term debt by including the following language in General Note 3:

The cost of long-term debt will be calculated as follows: the principle amount outstanding in December of the test year for each bond issuance will be multiplied by the coupon rate for that bond (including the cost of any insurance or other issuance costs), and any amortization of debt expense, debt discount or loss on reacquired debt will be annualized by taking the expense for December of the test year times 12.

Entergy notes that it is filing this amendment to General Note 3, out of an abundance of caution, to eliminate any possibility of doubt as to how the cost of capital will be calculated in the Annual Rate Updates going forward. Further, Entergy states that the proposed clarification does not result in a rate increase for OATT customers or a change in methodology.

III. Notice of Filing and Responsive Pleadings

9. Notice of Entergy's filing was published in the *Federal Register*, 75 Fed. Reg. 18,195 (2010), with interventions and protests due on or before April 21, 2010. South Mississippi Electric Power Association (Joint Intervenors) and East Texas Cooperatives (East Texas) filed timely motions to intervene and protests. Cleco Power filed a timely motion to intervene. On May 6, 2010, Entergy filed an answer. On May 21, 2010, Joint Intervenors and East Texas filed answers.

A. Joint Intervenors' Protest

10. Joint Intervenors argue that Entergy is seeking to charge its wholesale customers greatly in excess of its actual storm restoration costs. They contend that consistent with its cost incurrence, Entergy will charge its retail customers the cost of storm restoration of transmission facilities based entirely on the cost of the securitized bonds, without any equity return or gross-up for income taxes, for the approximate 12-year life of the securitized bonds. However, Joint Intervenors argue that Entergy's proposal charges its

OATT customers, over a 30-40 year span, its overall cost of capital for the storm-related capital additions to transmission plant, including its normal equity return grossed up for taxes, as if those additions were funded by Entergy's general capital. Joint Intervenor assert that if this is permitted OATT customers would pay considerably more than both Entergy's cost and the charges which will be borne by Entergy's retail customers.

11. Joint Intervenor state that this issue has been raised in other dockets² and is currently pending before the Commission in Entergy's 2009 update filing. Further, the Joint Intervenor argue that Entergy has known for several years that securitization would be employed as an important part of its Hurricanes Katrina and Rita cost recovery efforts. Further, Joint Intervenor assert that for at least two years Entergy's OATT customers have had serious concerns as to the propriety of Entergy's proposed method to pass such amounts onto OATT customers through the existing formula rate. However, the Joint Intervenor argue that Entergy has chosen to wait until the final date to institute its proposed formula rate change to be effective in the 2010 update. Further, Joint Intervenor assert that this delay is not the result of any action by any of Entergy's OATT customers and that Entergy could have made this filing years ago and provides no explanation for its choice not to do so.

12. Joint Intervenor argue that the OATT Formula does not provide for automatic recovery of storm-related capital costs by making adjustments to the Entergy Operating Companies' underlying books and reported costs. Joint Intervenor contend that nothing in the OATT states that data from entities other than the Entergy Operating Companies may be used. Additionally, Joint Intervenor assert that Entergy attempts to gloss over the fact that the exception to use of Form 1 data³ only applies to data required under the OATT Formula that is not reported in the appropriate Entergy Operating Company's Form 1. Further, Joint Intervenor argue that the existing OATT Formula does not require use of the securitized plant amounts not found on the books of the Entergy Operating Companies and that the exception to use data listed in the FERC Form 1 has a specific and much more limited purpose than implied by Entergy.

² Docket No. EL09-78-000 (a complaint concerning Entergy's 2009 OATT formula rate update), Docket No. ER08-1057-000 (protest to Entergy's 2008 update filing), and Docket No. ER09-1214-000 (protest to Entergy's 2009 update filing).

³ The OATT language includes an exception that states:

[d]ata required under the rate formula that is not reported in the respective operating companies' FERC Form 1 for the applicable calendar year shall be supported with appropriate documentation which shall be included in the workpapers accompanying each annual redetermining filing.

13. Joint Intervenors state that the capital assets associated with these storm restoration facilities are no longer reflected on the affected Entergy Operating Companies' books nor are they part of their reported plant investment. Joint Intervenors assert that Entergy's filing in this proceeding proposes to permit, for ratemaking purposes under the OATT Formula, the reversal of the accounting entries utilized by the affected Entergy Operating Companies to remove the securitized storm restoration costs from their books and transfer them to the special-purpose financing entities' books. Joint Intervenors state that the costs of such assets are not on the books of the Entergy Operating Companies because such costs have been reduced by the non-shareholder contributed capital from the special purpose entities. Joint Intervenors argue that if Entergy's proposal is permitted it would restore the securitized assets to plant in service for the affected Entergy Operating Companies, allow for depreciation of those assets, and provide an associated accumulated depreciation reserve. They further assert that the net plant amounts associated with each of the affected Entergy Operating Companies' capitalized storm restoration costs would be included in the rate base, despite Entergy providing none of the investment in the securitized plant.

14. Joint Intervenors state that it appears from Entergy's filing that for purposes of implementation the amounts of non-traditional bonds to be included in the development of the cost of capital will somehow be tied to the amount of electric plant in service being restored to the books of the affected Entergy Operating Companies. Joint Intervenors argue that Entergy's filing is silent as to the amount of the securitized bonds to be included in the cost of capital calculation under the formula rates, how such bonds will be amortized, and the manner for recognizing the sinking fund nature of such bonds in the cost of capital. Joint Intervenors then argue that, if they correctly interpret Entergy's intent, this proposed treatment of bonds will have the effect of including a portion of these lower-cost bonds in the capital structure under a formula rate.

15. Joint Intervenors assert that Entergy's proposed inclusion of an amount of securitized bonds in the capital structure equivalent to the securitized plant restored to rate base would have the effect of increasing somewhat the debt component of the capital structure under the OATT Formula and reducing the weighted cost of debt. However, Joint Intervenors argue that Entergy proposes to apply the overall weighted cost of capital to the net plant associated with the capitalized storm restoration costs, meaning that a large portion of the cost of capital as applied to that plant would be the much higher cost equity component of the capital structure. Further, Joint Intervenors contend that the formula specifies a net rate of return and the equity component of the weighted cost of capital will require a gross-up for income taxes. Therefore, they assert that the net effect of this proposed treatment is that the transmission customers under the formula rate will pay charges substantially in excess of Entergy's actual costs because of the equity component of return applied to the amount of securitized net plant and the effects of income taxes. Joint Intervenors state that Entergy is seeking disparate treatment of the wholesale transmission customers as to the recovery of capital-related storm restoration

costs that will result in higher charges to those customers than the affected Entergy Operating Companies' retail customers for the same capital-related storm restoration costs.

16. Joint Intervenors also argue that it is reasonable to assume that once the bonds have been fully amortized, under Entergy's proposed formula rate, there would no longer be any securitization bonds reflected in the cost of capital calculations under the formula rate. Yet, according to Joint Intervenors, the securitized plant that would have been fully recovered through the payoff of the securitized bonds would continue to be in the rate base under the formula rate, and Entergy would continue to earn a rate of return on the cost of capital plus recover a component for income taxes associated with the equity portion of such rate of return. Joint Intervenors contend that recovery would continue until the securitized plant that had been restored to rate base under the formula rate has been fully depreciated; therefore, the transmission customers would continue to pay an inflated cost for many years after the securitization bonds are retired. Further, Joint Intervenors state that given that Entergy apparently credits its retail customers with revenues received from the OATT transmission customers, the retail customers will benefit from these higher charges to the OATT transmission customers long after the securitized bonds have been fully amortized. They conclude that this crediting process is an unreasonable subsidization of the retail customers, at the expense of the transmission customers, that is unjust, unreasonable, discriminatory and unduly preferential.

17. Joint Intervenors argue that Entergy's filing contains no information that demonstrates that the securitized plant was somehow limited solely to an allocable retail share of such plant. Joint Intervenors state that Entergy's filing asserts that revenues for transmission services under the OATT are treated as revenue credits in the development of rates at the retail jurisdictional level for the Entergy Operating Companies. Joint Intervenors argue that if the affected Entergy Operating Companies had allocated a portion of the capital-related storm restoration costs to the transmission-only customers, thereby reducing the amount of plant securitized for retail purposes, and then credits the revenues collected from transmission-only customers, including any amounts collected for recovery of capital-related storm restoration costs, the retail customers would receive an unfairly large revenue credit for costs that they had not borne as a result of the alleged allocation of securitized plant to transmission only customers process. Joint Intervenors assert that such revenue crediting process at the retail level, were it to occur under these conditions, would result in under-recovery by Entergy of the capital-related storm restoration costs. Therefore, they argue that it is reasonable to conclude that no such allocation of capital related storm restoration costs to transmission-only customers occurred; therefore, the securitization bonds that were issued actually financed storm restoration costs for facilities that ultimately would be borne, in part, by transmission-only customers. Under these circumstances, Joint Intervenors argue that it is reasonable for the transmission-only customers to receive the benefits of the securitization costs associated with the capital-related restoration costs recovered through the utilization of

securitization bond, and not be required to pay more than their allocable share of the costs of such securitized bonds or to pay in a manner that results in over-recovery relative to the actual costs of the securitized bonds utilized for each of the affected Entergy Operating Companies.

18. With respect to Entergy's proposed cost of capital, Joint Intervenors argue that Entergy's proposal reflects the cost of paying interest expense for the entire 12-month period, regardless of whether 12-months of interest expense was actually incurred during the test year. Therefore, Joint Intervenors state that when Entergy issues debt after January 1 of the test year, Entergy's proposed formula will overstate the amount of interest expense that should be recovered in the proximate rate year. According to Joint Intervenors, General Note 3 of Entergy's OATT provides that all rate base items reflect 13-month average balances for the test year and that cost of capital is to be determined as of the end of the test year. Joint Intervenors believe that this footnote applies to rate base and end-of-year cost of capital balances, as well as preferred stock and common equity. Joint Intervenors argue that Entergy's proposal is a selective and inappropriate annualization of its long-term debt interest expense as a *pro forma* adjustment to determine its embedded cost rate or long-term debt. Further, Joint Intervenors argue that Entergy has not demonstrated that this language was meant to include the forward looking annualization of long-term debt interest expense to determine the embedded cost rate of long-term debt or the forward looking annualization of preferred stock dividend costs to determine the embedded cost rate of preferred stock. Joint Intervenors argue that even though Entergy contends that its preferred stock cost has been calculated in a consistent manner with long-term debt, this does not mean that the preferred stock rate or the long-term debt rate calculation have been made correctly over the previous years.

19. Joint Intervenors urge the Commission to reject Entergy's proposed tariff amendments to prevent Entergy's wholesale transmission customers from being charged for interest that has not yet been incurred and is improper and out of date. Joint Intervenors argue that the impact of Entergy's proposed treatment of long-term debt interest expense can result in significant over-recovery in Entergy's OATT rates. For example, Joint Intervenors state that Entergy's redetermined OATT transmission rates for 2009 reflected \$29,553,332 of interest expense that was not actually incurred by Entergy in 2008. Joint Intervenors explain that the mismatch of interest expense included in the 2009 Update and the Entergy Operating Companies' FERC Form 1s occurred because Entergy utilized an annualized interest rate to calculate what its interest expense would have been had the outstanding end-of-year debt issuances been in place for all of 2008.

20. Joint Intervenors argue that the use of verifiable, annually-reported FERC Form 1 data, to the extent available, to calculate Entergy's transmission rates is of great value for OATT customers that seek to confirm the accuracy of the transmission charges derived under Entergy's OATT Formula. Joint Intervenors state that Entergy's proposal would constitute a significant break from this arrangement and would introduce an additional

layer of complexity to the formula rate. Further, Joint Intervenors argue that while Entergy is attempting to portray its filing as a clarification, it is far from clear that the practice of hypothetically annualizing interest expense, not actually incurred, was ever consistent with the Entergy OATT. Joint Intervenors assert that Entergy's use of hypothetical interest expense based on one month of data in place of the data reported on the FERC Form 1 is squarely at odds with the provisions of the OATT. Therefore, Joint Intervenors conclude that Entergy's request is a rate change and that Entergy bears the burden of demonstrating that the proposed rate is just and reasonable.

21. If a change to the determination of the cost of debt is to be made, Joint Intervenors argue that the appropriate change would be to use a 13-month average capital structure for all capital components including debt and to use the actual long-term debt interest expense for the cost year divided by the 13-month average long-term debt to calculate the weighted cost of debt. Further, Joint Intervenors request that, if Entergy's filing is not rejected, that it be suspended for the full statutory five-month period and set for hearing.

B. East Texas' Protest

22. East Texas states that, as a threshold matter, no reasonable interpretation of Entergy's OATT would support the inclusion of plant and related costs of another entity, so that the Commission should give no credence to Entergy's claim that the current Formula allows for inclusion of these securitized costs in the OATT rate. East Texas asserts that an affirmative change to the formula rate must be made in order to recover these costs from OATT customers, and that East Texas does not oppose a modification to Entergy's formula rate to ensure that transmission customers pay their fair share of the costs to restore the transmission system. East Texas, however, argues that Entergy's proposed language does not provide a clear explanation of how securitized costs will be included in the formula and recovered from wholesale customers. Moreover, East Texas contends that the proposed tariff revisions may be unduly discriminatory to the extent that they will result in OATT customers paying more for the securitized facilities than retail customers. Further, East Texas asserts that any method of recovering these storm restoration costs from transmission customers must ensure that transmission customers do not incur costs in excess of what Entergy incurs through the securitized financing.

23. East Texas further contends that Entergy bears the burden of proof under section 205 of the Federal Power Act to demonstrate that its proposed tariff revisions are just and reasonable. East Texas states that Entergy's proposed clarification in General Note 6 appears to allow Entergy to add back to its formula the original cost, accumulated depreciation, depreciation expense, and accumulated deferred income taxes associated with the storm damage costs that were securitized. However, East Texas contends that the formula does not explain exactly how the cost of capital calculation will be modified, whether this adjustment will continue after the full repayment of the securitized bonds, or whether the debt cost rate could change after full repayment.

24. East Texas states that, if the intent of the footnote is for Entergy to stop including the lower cost of securitized debt in the OATT cost of service as the principle is repaid, then the proposal will result in Entergy recovering more than its actual cost of the facilities from OATT customers by reverting to a full rate of return on the remaining non-depreciated balance of the plant from OATT customers after the securitized debt is repaid. Therefore, East Texas states that Entergy would earn a higher return through its OATT Formula after the securitized debt is exhausted. Further, East Texas argues that because retail customers are credited OATT transmission revenues in their retail rates, transmission customers will end up subsidizing retail customers and this subsidization would constitute undue discrimination.

25. East Texas states that it agrees with Entergy that the OATT customers should receive the full benefit of the favorable financing secured for the reconstructed plant and should pay their share of actual costs. However, East Texas argues that it is by no means clear that Entergy's proposed General Note 6 accomplishes this goal. East Texas contends that a mechanism must be incorporated into the formula rate that limits Entergy's recovery from transmission customers to the cost actually incurred by Entergy for the securitized plant. East Texas states that this can be accomplished by:

- (1) including in the OATT Formula the transmission function's share of the securitized principal and interest payments for each year during the 10-to-12 year payback period;
- (2) including in the OATT Formula the transmission function's share of the securitized operating and maintenance costs, and storm reserve costs, to the extent Entergy intends to recover these costs from OATT customers; and
- (3) not including the cost of securitized plant operating and maintenance, and storm reserve in the Entergy OATT rates, once the securitized debt is repaid, as is the case for retail customers.

C. Entergy's Answer

26. Entergy asserts that it has always included the transmission plant subject to its retail storm restoration plans in the Annual Rate Update submissions. Further, Entergy asserts that the only arguable difference is that for accounting purposes the securitized plant authorized by the retail commissions is not reported in the Operating Companies' respective FERC Form 1s. However, Entergy explains that in the March 31 Filing the current OATT Formula provides that such transmission costs, although not reported in the FERC Form 1, are properly includable as long as the costs are supported by proper documentation. Entergy states that to date the Joint Intervenors have challenged every attempt by Entergy to recover storm restoration costs through the OATT Formula. Entergy argues that its March 31 Filing was intended to remove any doubt as to the exact formula inputs and to avoid any further litigation relating to the reconstructed transmission plan component of the storm restoration costs.

27. Entergy states that it recognizes that the OATT Formula rate will recover a portion of the storm costs in a manner that differs from the plans approved by the retail

jurisdictions. However, Entergy argues that it disagrees with the East Texas and the Joint Intervenors that the disparate rate treatment at wholesale/retail is unjust, unreasonable and discriminatory. Entergy asserts that the Commission is not bound by a state commission's considered judgment with respect to accounting or ratemaking, and that the Commission's "used and useful" precedent is clear regarding inclusion of the reconstructed transmission plant in the OATT Formula rate. Further, Entergy asserts that it is not aware of any Commission requirement that Commission-jurisdictional transmission rates must be identical to transmission rate recovery mechanisms established at retail. Additionally, Entergy states that, to the extent that Joint Intervenors believe they are denied any benefits under the retail restoration plans, it should be noted that OATT customers are not subject to the retail securitization plans, and they do not pay for the accompanying expenses of those plans.

28. Entergy argues that the OATT customers are not shouldering: (1) any accelerated depreciation of the securitized plant; (2) the capitalized operating and maintenance expenses incurred in the restoration process; or (3) any funding for the storm reserve accounts. Therefore, Entergy states that any allegations that the OATT customers are somehow subsidizing the retail customers are unfounded. Entergy asserts that it is unaware of any Commission policy that such an analysis or review of retail rate design is required for evaluating a Commission jurisdictional OATT rate.

29. Entergy states that the Joint Intervenors' protest requested that the securitization bonds should be applied entirely to the securitized transmission plant that is included in the OATT rate base. Entergy asserts that its understanding of the Joint Intervenors' proposal is that it would apply the unadjusted cost of capital to the rate base excluding the securitized plant and then add the securitized plant times the securitization debt cost. Entergy states that it will commit to making the OATT Formula reflect the same financing that was secured in the retail rate proceedings and remove any argument that OATT customers will be charged a different cost of capital. Further, Entergy contends that it is not waiving its right to argue for an alternative treatment in the event that the Commission sets this matter for hearing.

30. In response to Joint Intervenors' arguments that the transmission customers will continue to pay an inflated cost for many years after the securitization bonds are retired, Entergy states that because the amount of reconstructed transmission plant included in rate base is based on actual cost, there is nothing inflated about the OATT rate. However, Entergy states that if all of the active OATT customers agree and are willing to pay accelerated depreciation for the reconstructed transmission plant, Entergy is willing to make a separate section 205 filing to amend the OATT Formula in this regard. Entergy also asserts that it is premature to launch any investigation into allegations of possible post-2020 over-recovery because of the number of intervening events that will occur prior to that time that will likely affect the OATT rate. Entergy also states that if the Commission accepts the March 31 Filing, without modification, it will bear the

burden of proof in the first Annual Rate Update after the expiration of the retail amortization period to show that the continued inclusion of the reconstructed transmission plant in rate base is just and reasonable.

31. Entergy argues that, since acceptance of the OATT, it has consistently calculated the embedded cost of long-term debt as of the end of the test year. According to Entergy, Joint Intervenors and East Texas fail to acknowledge that the Commission permits such treatment for calculating cost of capital, and that the proposed clarification is how the cost of capital has been calculated for more than ten years and has not resulted in an over-recovery by the Entergy Operating Companies. Additionally, to rebut Joint Intervenors examples from Entergy's 2009 Annual Rate Update, Entergy argues that the Commission has a long history of adopting forward-looking cost of capital ratemaking principles and has allowed the use of a utilities' most recent embedded cost of debt, even though it was subsequent to the test year.⁴ Entergy asserts that the Commission has noted that capital costs are an exception to the normal requirement of synchronized revenue, expenses and investment because of their tendency to rise and fall sporadically and unexpectedly without evidence of offsetting cost trends.⁵ Entergy also contends that Joint Intervenors never explain how using end-of-year values results in an over-recovery of the cost of debt.

32. In response to Joint Intervenors contention that the phrase "cost of capital is to be determined as of the end of the test year," was meant to include the forward-looking annualization of debt or preferred stock, Entergy argues that in its initial filing of the OATT Formula,⁶ not only were the balances determined as of December 31 of the test year, but the interest expense was determined by multiplying the coupon rate times the principle amount and amortizations of debt discount and expense. Further, Entergy states that the premium on debt and loss on reacquired debt were explicitly annualized by taking the December expense amount times 12. Entergy also argues that the filing in Docket No. ER95-112-000 demonstrated that the OATT Formula was designed to use annualized interest. And, according to Entergy, to the extent Joint Intervenors were active participants in that docket, they did not protest Entergy's proposed treatment of debt and preferred stock in the development of the cost of capital.

33. Entergy argues that application of the OATT Formula does not create an over-recovery and the proposed clarification to Note 3 of the OATT Formula is consistent with Commission policy and practice. Further, Entergy asserts that Joint Intervenors have not

⁴ Entergy cites to *Sierra Pacific Power Co.*, 54 FPC 201 (1975).

⁵ *Id.* at 204.

⁶ Docket No. ER95-112-000.

supported any of their allegations proving that the proposed clarification is unjust and unreasonable. Therefore, Entergy contends that no evidentiary hearing is needed to resolve the March 31 Filing and the Joint Intervenors' request for a hearing should be denied as they have not identified any disputed material facts that necessitates a hearing.

D. East Texas' Answer

34. East Texas states that Entergy's statements make clear that the issues in this proceeding are by no means cut and dry, and signal that the parties might be able to come to an agreement on the proper treatment of the securitized plant costs in the OATT rate if they have the opportunity to engage in further discussions. For example, East Texas states that having OATT customers pay accelerated depreciation on the reconstructed transmission plan is a concept worth exploring. Also, as explained in East Texas' protest, it believes that the securitized operating and maintenance and storm reserve costs should also be addressed in this proceeding. East Texas states that these are all open issues that the parties may be able to resolve in a settlement setting. Accordingly, East Texas states that the Commission should set Entergy's filing for hearing and settlement judge procedures, and the parties should be given the opportunity to negotiate the appropriate treatment of these costs in the OATT rate.

E. Joint Intervenors' Answer

35. Joint Intervenors state that contrary to Entergy's characterizations, the filing in this proceeding is clearly a change to Entergy's filed formula rate and the change will result in an increase in costs under the formula rate to recover securitized costs by increasing plant balances associated with storm-related capital costs. Joint Intervenors state that if Entergy thought that its treatment of the securitization costs in the 2009 Annual Rate Update were correct, there would be no need for the instant filing to clarify (by changing) the application of the formula rate with regard to such securitization issues. Rather, Joint Intervenors argue that this filing seeks to have the Commission sanction an unauthorized formula rate change after the fact.

IV. Discussion

A. Procedural Matters

36. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept all answers because they have provided information that assisted us in our decision-making process.

B. Hearing and Settlement Judge Procedures

37. Entergy's proposed amendments to Attachment H and Schedule 7 of its OATT raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

38. Our preliminary analysis indicates that Entergy's proposed amendments have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Entergy's proposed amendments for filing, suspend it for a nominal period, make it effective June 1, 2010, subject to refund, and set it for hearing and settlement judge procedures.

39. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁷ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁸ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Entergy's proposed amendments is hereby accepted for filing and suspended for a nominal period, to become effective June 1, 2010, as requested, subject to refund, as discussed in the body of this order.

⁷ 18 C.F.R. § 385.603 (2009).

⁸ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

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

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

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

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.