

141 FERC ¶ 61,269
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Entergy Arkansas, Inc.

Docket No. ER13-288-000

ORDER ACCEPTING TRANSMISSION SERVICE MONITORING PLAN AND
RETENTION AGREEMENT FOR INDEPENDENT TRANSMISSION SERVICE
MONITOR

(Issued December 31, 2012)

1. On November 1, 2012, pursuant to section 205 of the Federal Power Act (FPA),¹ Entergy Services, Inc., on behalf of the Entergy Operating Companies² (collectively Entergy), filed Attachment Y to Entergy's Open Access Transmission Tariff (OATT). Attachment Y consists of a Retention Agreement for Transmission Service Monitoring (Retention Agreement) between Entergy and Potomac Economics, Ltd. (Potomac Economics) and a Transmission Service Monitoring Plan (Monitoring Plan). The Retention Agreement provides the terms and conditions pursuant to which Entergy will retain Potomac Economics to act as an independent Transmission Service Monitor (TSM) for the areas served by Entergy's transmission facilities (Entergy Region) and pursuant to which Potomac Economics will monitor activities that relate to or affect transmission access and transmission service in the Entergy Region. In this order, we accept the Monitoring Plan and Retention Agreement with certain modifications, to be effective December 1, 2012, as discussed further below.

¹ 16 U.S.C. § 824e (2006).

² The Entergy Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, LLC, Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc.

I. Background

2. On April 24, 2006, the Commission conditionally approved Entergy's proposal to establish an Independent Coordinator of Transmission (ICT) for Entergy's transmission system.³ Since the creation of the ICT this arrangement has been extended by the Commission twice, on November 10, 2010⁴ and on October 2, 2012.⁵ In the order accepting the second extension, the Commission also accepted, effective December 1, 2012, the transfer of the ICT function from Southwest Power Pool, Inc. (SPP) to Midwest Independent Transmission System Operator, Inc. (MISO). This included the transfer of oversight of Entergy's Weekly Procurement Process⁶ (WPP) to MISO's independent market monitor, Potomac Economics.

II. Entergy's Filing

3. Entergy states that the purpose of the TSM is to provide additional assurances to the Commission, Entergy's retail regulators, and stakeholders in the Entergy Region that transmission access is not being impeded by anticompetitive conduct in connection with the operation or planning of Entergy's transmission system, or by the actions of any customer or eligible customer under Entergy's OATT.

4. Entergy states that it has discussed the possible adoption of a TSM for the Entergy Region with stakeholders for over a year, including at meetings of the Entergy Regional State Committee (E-RSC)⁷ and the E-RSC Working Group.⁸ Entergy states that it

³ *Entergy Services Inc.*, 115 FERC ¶ 61,095 (ICT Order), *order on reh'g* 116 FERC ¶ 61,275, *order on compliance*, 117 FERC ¶ 61,005 (2006), *order on clarification*, 119 FERC ¶ 61,013 (2007).

⁴ *Entergy Services, Inc.*, 133 FERC ¶ 61,136 (2010).

⁵ *Entergy Arkansas, Inc.*, 141 FERC ¶ 61,011 (2012).

⁶ The Weekly Procurement Process, governed by Attachment V to the Entergy OATT, is a weekly bid-based optimization process designed to provide wholesale suppliers a greater opportunity to be integrated into the procurement processes that Entergy and other network customers use to serve their native load customers. *See Entergy Services, Inc.*, 126 FERC ¶ 61,227, at P 2 (2009).

⁷ The E-RSC is a coalition of state regulators formed to address issues concerning the quality and availability of transmission service on Entergy's system that have been the source of numerous customer complaints. Its members include the Louisiana Public Service Commission, the Arkansas Public Service Commission, the Mississippi Public Service Commission, the Public Utility Commission of Texas, and the Council of the City of New Orleans.

believes there is support from the E-RSC and other stakeholders to adopt the Monitoring Plan for the Entergy Region.

5. Entergy states that it has previously raised the possibility of expanding monitoring services with the Commission. Entergy explains that in an August 2, 2012 filing with the Commission it disclosed that it was in discussions with MISO and Potomac Economics to expand the scope of Potomac Economics's monitoring services beyond oversight of the WPP.⁹

6. Entergy states that the TSM will monitor: (1) the effects of real-time generation dispatch and transmission schedules on constrained transmission facilities; (2) details regarding binding transmission constraints; (3) operating guides and other procedures designed to relieve transmission constraints; (4) the volume of transactions and prices charged by entities in electric markets before and after redispatch or any other congestion management actions are implemented; (5) the use of transmission loading relief procedures or local area procedures; (6) the calculation of available transmission capacity; and (7) the effect on constrained transmission facilities of transmission service requests, generator interconnection requests, transmission service reservations, or other uses of Entergy's transmission system. Entergy states that the TSM will investigate conduct related to systems operations, reliability coordination, transmission planning, and transmission reservations and scheduling. Entergy notes that the TSM will monitor the conduct of both Entergy and its transmission customers within the Entergy Region.

7. Entergy states that in order to perform these functions the TSM will receive data as provided for by the Retention Agreement and Monitoring Plan. Entergy states that the TSM will then use its independent judgment to determine if any action in connection with the operation or planning of Entergy's transmission system may be anticompetitive, or whether parties are taking actions that impede access to transmission.

⁸ Entergy states that it provided a draft Retention Agreement and draft Monitoring Plan to the E-RSC Working Group and the stakeholders for review and comment. These documents were reviewed at the September 25, 2012 E-RSC Working Group and ICT Stakeholder Policy Committee meeting, after which Entergy provided stakeholders the opportunity to provide written formal comments. Entergy states that it then revised the Retention Agreement and Monitoring Plan to reflect changes based on stakeholder comments and distributed revised copies to the E-RSC Working Group for final review. Entergy Transmittal Letter at 2-3.

⁹ Entergy Transmittal Letter at 2 (citing Transmittal Letter, Entergy Servs., Inc., Docket No. ER12-2390-000 at 5 (filed on Aug. 2, 2012)). *See also Entergy Arkansas*, 141 FERC ¶ 61,011 at P 55 (2012).

8. Entergy states that the initial term of the Retention Agreement is for two years. Thereafter, the agreement will automatically renew in one-year increments unless Entergy or Potomac Economics terminates it. Entergy notes that the terms of the arrangement could be affected by its plan to transfer functional control of its transmission system to MISO¹⁰ and its proposal to sell its transmission assets to ITC Holdings Corp.¹¹ Entergy states that because of these future plans the Retention Agreement allows for Entergy to terminate the agreement effective on the date Entergy integrates into a regional transmission organization (RTO). Entergy states that the agreement also allows for Entergy and Potomac Economics to restructure or terminate the agreement if some or all of Entergy's transmission assets are sold to an unaffiliated third party.

9. Entergy requests that the services under Attachment Y be made effective on December 1, 2012 and requests waiver of the prior notice requirements to permit such an effective date. Entergy asserts that good cause for the waiver exists here because it filed the Retention Agreement and the Monitoring Plan immediately after the documents were finalized, and after the E-RSC Working Group and stakeholders were provided with an opportunity for review and comment. Entergy states that a December 1, 2012 effective date would allow for monitoring services to begin as soon as reasonably practicable and on the date that MISO begins performing the ICT function for Entergy.

III. Notice and Responsive Filings

10. Notice of Entergy's filing was published in the *Federal Register*, 77 Fed. Reg. 67,640 (2012) with interventions and protests due on or before November 23, 2012. Motions to intervene and protests were filed by the Arkansas Electric Cooperative Corporation (AECC), the NRG Companies (NRG), and Union Power Partners, L.P. (Union Power). The Louisiana Public Service Commission (Louisiana Commission) filed a motion for late intervention. On December 6, 2012, Entergy filed an answer to the protests, including a revised version of the Monitoring Plan containing proposed amendments to address some of the concerns of the protesters, which Entergy said it would submit for Commission acceptance in a compliance filing.

¹⁰ The Entergy Operating Companies have filed with each of their retail regulators applications to transfer functional control of their respective transmission assets to the MISO RTO, consistent with a plan to fully integrate into the MISO markets in December 2013.

¹¹ Entergy and ITC submitted a joint application for this transaction in Docket No. EC12-145-000. Entergy also notes that upon closing of the ITC transaction, ITC would own the transmission facilities covered by the Monitoring Plan, and that MISO would provide transmission service over those facilities in accordance with Module B-1 of MISO's tariff, the revisions for which were filed in Docket No. ER12-2682-000 and are pending before the Commission.

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

12. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2012), the Commission will grant the Louisiana Commission's late-filed motion to intervene given the Louisiana Commission's interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Entergy's answer because it has provided information that has assisted us in our decision-making process.

B. Substantive Matters

1. General Need for the Monitoring Plan

a. Entergy's Filing

14. Entergy states that the purpose of the TSM is to provide additional assurances to the Commission, Entergy's retail regulators, and stakeholders in the Entergy Region that transmission access is not being impeded by anticompetitive conduct in connection with the operation or planning of the Entergy transmission system, or by action of any customer or eligible customer under Entergy's OATT.¹²

b. Comments

15. Union Power states that it supports the concept of a market monitor and a monitoring program for the Entergy Region.¹³ NRG states that it "welcomes the additional oversight of Entergy's activities"¹⁴ and AECC does not oppose the Monitoring Plan. All three protesters, however, seek revisions or additions to the Monitoring Plan that are discussed further below.

¹² Entergy Transmittal Letter at 3.

¹³ Union Power Protest at 3.

¹⁴ NRG Protest at 5.

c. Determination

16. We find that Entergy's Monitoring Plan, subject to the modifications discussed below, is consistent with or superior to the Order No. 890¹⁵ *pro forma* OATT and is otherwise just and reasonable. Independent monitoring of utilities is an arrangement that the Commission has accepted repeatedly in the past.¹⁶ The Monitoring Plan will help assure competitive access to transmission service within the Entergy Region. Therefore, we accept Entergy's Monitoring Plan, subject to the modifications discussed below, to be effective December 1, 2012 as requested.

17. This Monitoring Plan differs in some respects from those that we have earlier approved in that it expressly includes the conduct of third parties using Entergy's transmission system. However, save for certain concerns regarding information disclosure, which are discussed below, the protesters do not raise this as a concern and we find that scrutiny of third parties may heighten protection for all Entergy transmission customers. As noted, the commenters do not oppose the Monitoring Plan, but seek modifications or additions to it, as discussed below.

2. Access to Information Gathered by the TSM

18. Entergy proposes that the TSM will provide reports addressing its monitoring and findings.¹⁷ Under the Monitoring Plan, the TSM will provide quarterly reports and reports generated from its investigations.¹⁸ The quarterly reports will be submitted to the Commission, the E-RSC, and Entergy. The TSM may also issue additional reports at any time to the Commission, the E-RSC, and Entergy at its discretion if it identifies any potentially anticompetitive behavior.

¹⁵ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126.

¹⁶ *See Duke Power*, 113 FERC ¶ 61,288 (2005); *PNM Resources, Inc.*, 110 FERC ¶ 61,204 (2005); *Unisource Energy Corp.*, 109 FERC ¶ 61,047 (2004); *Oklahoma Gas & Elec. Co.*, 108 FERC ¶ 61,004 (2004).

¹⁷ Entergy Transmittal Letter at 4.

¹⁸ Monitoring Plan §§ 1.1(c), 1.3, 4.1, 4.2.

a. **Limiting Entergy's Access to the Information**

i. **Comments**

19. NRG states that because Entergy competes with its customers, the information the TSM shares with Entergy should be limited.¹⁹ NRG asks the Commission to ensure that the TSM does not discuss reports or findings with Entergy prior to filing with the Commission and the E-RSC, and that Entergy does not receive the TSM's reports. NRG states that the sharing of information, with Entergy, even if redacted, is a threat to competition because of thinly traded markets.

20. Additionally, NRG requests that the Monitoring Plan be amended to require the TSM to discuss any potential anticompetitive conduct with the accused entity before reporting the conduct to the Commission and the E-RSC or sharing information with Entergy.²⁰ NRG asserts that otherwise the Monitoring Plan will chill parties' willingness to talk to the TSM.

21. AECC requests that the TSM notices of potentially anticompetitive behavior should only be sent to the E-RSC and the Commission and not to Entergy.²¹ AECC states that giving notice to Entergy of anticompetitive conduct, including conduct by Entergy affiliates that compete with AECC and other Entergy transmission customers, would give Entergy a competitive advantage, for which Entergy's transmission customers would be paying.

22. Union Power requests that if Entergy is permitted to have preferential access to reports, Entergy and Potomac Economics should be required to amend the Monitoring Plan to specify the Entergy business units that will have access to the information.²² Union Power states that it is important that Entergy's generation and marketing functions not be given access to the reports because Entergy's transmission customers are competitors of these business units.

¹⁹ NRG Protest at 3.

²⁰ *Id.* at 4.

²¹ AECC Protest at 4.

²² Union Power Protest at 5-8.

ii. **Entergy's Answer**

23. Entergy responds to protesters' concerns by agreeing to amend the Monitoring Plan to identify the specific Entergy business unit that will receive reports or other information from the TSM.²³ Entergy proposes to do so by revising the Monitoring Plan's provisions that call upon the TSM to share information and reports with "Entergy" in parallel with the E-RSC and the Commission such that the provisions will require the TSM to provide such information and reports only to the "Entergy transmission unit," not to "Entergy."²⁴ Entergy asserts that the proposed revisions, which it states it will provide in a compliance filing, will prevent any business unit other than its transmission business unit from accessing the information, unless that business unit is the subject of the investigation contained in the report. Entergy also asserts that the revisions put its generation and marketing business in the same position as all Entergy transmission customers with respect to the Monitoring Plan.

24. Entergy states that the protesters' arguments that its transmission business should not be permitted to access the TSM's reports should be rejected.²⁵ Entergy states that as the owner of the transmission system and provider of transmission services it has an important interest in the reports so that it may take any necessary actions related to such behavior, including making potential amendments to its OATT. Entergy agrees, however, to amend the Monitoring Plan to clarify that the other party that is subject to an investigation or that may have engaged in anticompetitive conduct also will receive notice.

25. Entergy clarifies that under the Monitoring Plan the TSM will have the option to discuss its findings with any affected party but will not be obligated to do so. Entergy asserts that this arrangement is consistent with Commission precedent.²⁶ Entergy also states that NRG's argument that the TSM should only be permitted to contact third parties, and not Entergy, prior to filing reports is unwarranted.

²³ Entergy Answer at 3.

²⁴ "Entergy" in both the original and revised versions of the Transmission Plan is defined as the six Entergy Operating Companies, which have both transmission and marketing and generation functions. *See* Monitoring Plan § 1.1(a) n.1.

²⁵ Entergy Answer at 4.

²⁶ *Id.* at 5 (citing *Duke Power*, 113 FERC ¶ 61,288 and Duke Monitoring Plan § 1.3).

iii. Determination

26. We find that the Monitoring Agreement, as Entergy has proposed to amend it, adequately addresses protesters' concerns that commercially sensitive transmission customer information could be improperly shared with Entergy's generation and marketing units and place those units at a competitive advantage. We find that Entergy's replacement of "Entergy" with "Entergy transmission unit" in provisions of the Monitoring Plan discussing the TSM's sharing of information with Entergy is consistent with the Commission's Standards of Conduct,²⁷ which require independent functioning of, and limit information sharing between, the transmission functions and marketing functions of transmission providers.²⁸ Entergy's proposed amendments would place Entergy's generation and marketing units in the same position as other Entergy transmission customers by giving these units access to the reports only if they are the subject of an investigation. We will, however, require Entergy in its compliance filing to replace the term "Entergy transmission unit" with "Entergy transmission function"²⁹ throughout its Monitoring Plan where Entergy proposes to limit access to this function to ensure adherence to our rules and avoid confusion.

27. We disagree with protesters' suggestions that the Entergy transmission function should not be given access to the TSM's reports, or that it should not have greater access to reports than Entergy's transmission customers. We find it appropriate that Entergy's transmission function should be given access to the reports about conduct on its own system so that it can take actions to remedy anticompetitive behavior on its system. In this regard, we note that protesters' concerns generally appeared limited to concerns that the generation and marketing units of Entergy would have access to such reports and information, a concern that is addressed by Entergy's proposed amendments accepted herein. We note that the amended Monitoring Plan also calls for Entergy transmission customers that are subject to an investigation or believed by the TSM to have engaged in anticompetitive conduct to receive similar notice and reports as do the Commission, the E-RSC, and the Entergy transmission function from the TSM.

28. However, we find that some language in the Monitoring Plan does not properly reflect Entergy's proposed approach because it does not require the TSM to share information with transmission customers that are the subjects of investigations or anticompetitive conduct concerns. One instance is a sentence in Article 1.1(c), which should be revised, as we indicate in italics, to read:

²⁷ See 18 C.F.R. part 358 (2012).

²⁸ *Id.* § 358.2(b)-(d).

²⁹ See *id.* § 358.3(h).

In accordance with Section 4.2 of this Plan, the Monitor shall report potentially anticompetitive conduct to FERC, the E-RSC, the Entergy *transmission function, and any party that engaged in the conduct (including the Entergy generation or marketing units)*... (emphasis added).

Another sentence in Article 3 should be revised to read:

The results of investigations shall be submitted to FERC, the E-RSC, the Entergy *transmission function, and the party that engaged in the conduct (including the Entergy generation or marketing units)*... (emphasis added).

29. We also find that certain language in the Retention Agreement must be revised to mirror the amendments that Entergy will make in the Monitoring Plan and that a revised Retention Agreement must also be included in Entergy's compliance filing to the Commission.³⁰

30. We disagree with NRG that the TSM should be required to review its findings with parties whose conduct is under scrutiny prior to the TSM's submissions of findings to the Commission and the E-RSC. The Commission has long held that protestors must provide more than unsubstantiated allegations in support of their positions,³¹ and NRG has failed to provide anything beyond mere assertions that failing to provide such prior review will chill customers' willingness to cooperate with the TSM. We find that the current provision, which gives the TSM discretion to either provide such prior review to parties or not, is reasonable. We note that we have accepted agreements in the past that give the monitor discretion to review its reports with the affected party prior to submission to the Commission and relevant retail regulators and we see no reason to change this policy at this time.³² We find that such discretion will allow the TSM

³⁰ See, e.g., Retention Agreement at 5(B): "Consistent with the terms of the Plan, Potomac Economics will simultaneously notify FERC, the Entergy Regional State Committee, and *Entergy* upon determining that a significant anticompetitive problem has been identified . . ." (emphasis added). These examples are not necessarily exhaustive and Entergy should ensure that its compliance filing includes all necessary changes to the Monitoring Plan and Retention Agreement to ensure consistency with the amendments it proposes in its Answer.

³¹ E.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,173 at P 93 (2010); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,108 at P 14 (2006).

³² See *Duke Power*, 113 FERC ¶ 61,288 (approving an independent monitor agreement containing a substantially similar clause).

flexibility to approach individual cases as they warrant. We also note that the Monitoring Plan provides the TSM with discretion to decline to review its findings with the Entergy transmission unit, as well as other parties, before making submissions to the Commission and the E-RSC.³³

b. Requests that the Reports Be Made Public

i. Comments

31. AECC requests that the Commission expand access to the TSM's reports beyond Entergy, the Commission, and the E-RSC to all Entergy transmission customers, subject to appropriate confidentiality provisions.³⁴ AECC states that expanded access to the reports is consistent with the goals of the Monitoring Plan and that transmission customers should receive the benefits of the reports since they will bear the burden of paying for the monitoring services, will be subjected to monitoring, and will be required to provide information to the TSM to assist its functions.

32. Union Power advocates that the Commission should require Entergy to amend the Monitoring Plan to provide monitoring reports to the public, with any confidential information restricted to non-public versions.³⁵ Union Power states that if the TSM is to truly benefit all transmission customers then the reports should be made available to the public. Union Power states that this is consistent with other market monitoring protocols that have been approved by the Commission.³⁶

ii. Entergy's Answer

33. Entergy states that the reports disclosing potential anticompetitive conduct should not be made public.³⁷ It asserts that the Monitoring Plan's disclosure is consistent with the plan approved in *Duke Power*³⁸ and that the Commission rejected similar arguments

³³ Monitoring Plan § 1.3.

³⁴ AECC Protest at 4.

³⁵ Union Power Protest at 5.

³⁶ *Id.* (stating that the PJM Interconnection, L.L.C. OATT, Attachment M. section IV.E provides that the all reports of the market monitor will be made available to the public).

³⁷ Entergy Answer at 6-7.

³⁸ *Duke Power*, 113 FERC ¶ 61,288.

calling for public disclosures of reports in that order.³⁹ Entergy states that the Commission should retain this structure as it allows for the Commission and the E-RSC to investigate anticompetitive before it is disclosed to the public. Entergy further states that Union Power's cite to the PJM Interconnection, L.L.C. OATT in support of public disclosure of reports is not applicable.⁴⁰

iii. Determination

34. We deny the protesters' requests to make the TSM's reports generally public, particularly with respect to reports concerning investigations. As Entergy notes, we denied a similar request in *Duke Power*. We note there is a compelling interest in not prematurely disclosing the identities of parties accused of anticompetitive behavior, given potential harm to reputation that cannot easily be undone in the event the TSM's scrutiny does not lead to a finding of anticompetitive behavior.⁴¹

35. As Entergy acknowledges, pursuant to the Duke Power independent monitoring plan, the independent monitor provides redacted versions of its quarterly reports to the Commission, and those versions are available to the public on eLibrary.⁴² In order to address protesters' request for some access to the reports, we direct Entergy to modify the Monitoring Plan to provide that similar redacted versions of the TSM's quarterly reports will be filed with the Commission, along with the confidential versions of the reports. The Commission will post the redacted versions on eLibrary.

36. We agree with Entergy that Union Power's citation to section IV.F of Attachment M to the PJM OATT is inapplicable given that it does not apply to matters involving investigations. We note its concerns with respect to access to the TSM's

³⁹ *Id.* P 40.

⁴⁰ Entergy states that Union Power appears to refer to section IV.F of Attachment M of PJM's OATT, not section IV.E.

⁴¹ See *Enforcement of Statutes, Regulations, and Orders*, 134 FERC ¶ 61,054 at P 14 (2011) ("the importance of fairly treating an entity's reputation has played an important part in our repeated affirmation of the general principle that our investigations are confidential in nature," (citing, as an example, *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071, at PP 465-469 (2008)).

⁴² See, e.g., Entergy Answer at 8 (citing the October 30, 2012 quarterly Market Monitoring Report on Duke Energy Carolinas, LLC, Docket No. ER05-1236-000 and noting that both public and non-public versions of the report were filed in that docket). Potomac Economics is Duke Power's independent monitor.

quarterly reports are addressed in the preceding paragraph to the extent we believe warranted.

c. E-RSC Access to Transmission Customer Information

37. The Monitoring Plan provides that the E-RSC will receive reports about potentially anticompetitive conduct of Entergy transmission system customers, which may contain the confidential information of those customers.⁴³ While previous independent monitoring plans provided for similar disclosures of confidential information and reports to state regulators,⁴⁴ the parties monitored were limited to the public utilities filing the monitoring plans, unlike, as noted above, Entergy's Monitoring Plan, which also monitors transmission customers. We note that no protesters commented on this issue.

Determination

38. We find that it is reasonable for the E-RSC to have access to confidential transmission customer information. We will, however, require the TSM to enter into confidentiality agreements with each of the E-RSC's member regulatory commissions that provide for reasonable safeguards for maintaining the confidentiality of confidential information of non-Entergy parties that the TSM provides to the E-RSC commissions pursuant to the Monitoring Plan.⁴⁵

3. Confidential Information

39. The Monitoring Plan provides for the protection of confidential information that is designated as such by Entergy or any supplying party.⁴⁶ It provides that such information will not be disclosed by the TSM to any party, including Entergy, without prior consent of the providing party, unless required by subpoena or compulsory process and with an

⁴³ See Monitoring Plan §§ 2.2, 4.1-4.2.

⁴⁴ See, e.g., *Duke Power*, 113 FERC ¶ 61,288 at P 4.

⁴⁵ See generally *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,448, at PP 77-78, 93 (approving proposed provisions for non-disclosure agreement and noting that states must be able to protect confidential information from third-party requests for its disclosure), *order on reh'g*, 113 FERC ¶ 61,081 (2005); *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,322, at PP 12-14 (2004) (approving an agreement under which the state commissions would not be able to access confidential information without a non-disclosure agreement).

⁴⁶ Monitoring Plan § 2.3.

exception permitting sharing of such information with the E-RSC and the Commission.⁴⁷ Additionally, the Monitoring Plan provides that if the TSM shares the information with the Commission or the E-RSC in a report, it must request that they maintain such information as confidential.

a. Comments

40. Union Power states that the Monitoring Plan should be revised to prevent Entergy from gaining preferential access to non-public reports and non-Entergy, non-public information.⁴⁸ It states that there is potential that the TSM will share with Entergy non-public information about Entergy's competitors that it learns in its role as the TSM. Therefore, Union Power states that the Commission should direct Entergy to revise the Monitoring Plan to prevent Entergy from gaining access to competitors' information.

41. Union Power states that additional measures are needed to protect confidential information. It requests that the Commission direct Entergy to revise the Monitoring Plan to specify that the TSM create public and non-public reports.⁴⁹ Additionally, Union Power states that the Monitoring Plan should be amended so that Entergy is only given access to the public reports.

42. Union Power additionally requests that the Commission require Entergy to revise the Monitoring Plan, including section 1.1(c), such that it automatically designates information, including operational and pricing information identified in section 1.1(b) of the Monitoring Plan, as confidential without the requirement that the supplying party label the information as confidential.⁵⁰

43. Union Power also requests that, to the extent that Entergy releases any confidential information of a non-Entergy party, it be required to designate it as confidential and confirm with that party that the information is confidential.⁵¹ Union Power states that the TSM should also be obligated to verify that any information that is marked as non-confidential but is similar in nature to information the party treats as confidential, is not confidential.

⁴⁷ *Id.* § 2.3(c).

⁴⁸ Union Power Protest at 8.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.* (stating that without public and non-public reports the TSM cannot meet both its requirement to provide information to Entergy and its obligation to protect confidential information).

⁵¹ *Id.* at 9-10.

b. Entergy's Answer

44. Entergy states that it will amend provisions of the Monitoring Plan to provide clarity that confidential information of non-Entergy parties will not be disclosed to the Entergy transmission unit.⁵² The amendments to the Monitoring Plan that it proposes also would require that to the extent Entergy provides to the TSM information, documents, or other materials supplied to Entergy by a third party and designated as confidential by that third-party, Entergy would designate such information as confidential information.⁵³ However, Entergy does not agree that all the confidentiality revisions requested by the protesters are necessary, such as the requested revision of section 1.1(c). Entergy also states that the Commission should reject the requests to identify certain information as confidential because it is reasonable to require that any party supplying information designate it as confidential.

c. Determination

45. We accept the Monitoring Plan's provisions for protecting confidential information, subject to the modifications that Entergy has proposed. The amendments protect confidential information from disclosure to Entergy's generation and marketing units and adequately prevent disclosure of confidential information to the public. We decline Union Power's request to require that Entergy amend the Monitoring Plan so that the TSM must presume that certain classes or types of information are confidential. The parties providing the information are in the best position to determine what information is and is not confidential, and the Monitoring Plan, as modified, properly places the burden on the supplying party to identify its own confidential information.

46. In order to ensure that all Entergy transmission customers are aware of their burden to designate their own information as confidential, we order Entergy to add provisions to its OATT, in Attachment Y and elsewhere in the OATT's provisions concerning communications with transmission customers and confidential information, as appropriate, stating that transmission customers must designate information as confidential to receive treatment by Entergy and the TSM as confidential information pursuant to the Monitoring Plan.

4. Costs

a. Entergy's Filing

47. Entergy states that the monitoring services will be performed at a cost of \$30,000 per month. Set-up costs will be billed on a time and materials basis and are not expected

⁵² Entergy Answer at 8-9. *See also* Amended Monitoring Plan § 4.2.

⁵³ Amended Monitoring Plan § 2.3(e).

to exceed \$120,000.⁵⁴ Entergy notes that if set up costs exceed \$130,000, it may terminate the agreement upon receiving Commission approval. Additionally, Entergy states that investigations will be performed at an hourly rate and are not expected to exceed \$180,000 annually. If that amount is exceeded, Entergy states that the TSM must notify Entergy, which may seek a determination by the Commission that the additional costs are reasonably necessary to meet the objectives of the Monitoring Plan. Entergy notes that it may terminate its agreement with Potomac Economics if recovery of costs through wholesale rates under the Retention Agreement is denied.

b. Comments

48. NRG protests that Entergy should not be permitted to pass the cost of the TSM onto Entergy's customers; rather, Entergy should bear such costs itself.⁵⁵ NRG states that Entergy's customers already pay approximately \$17.8 million in annual costs of the ICT but that agreement has yet to produce the benefits that would justify its costs. NRG asserts that it would be unjust and unreasonable to require NRG's customers to pay for multiple layers of oversight that have yet to improve the availability of Entergy's transmission system. It estimates that the TSM arrangement will cost \$660,000 in annual costs.

c. Entergy's Answer

49. Entergy states that the Commission should reject NRG's cost arguments.⁵⁶ Entergy asserts that it is not seeking to recover the costs of the TSM in this proceeding. Rather, Entergy states that the costs will be addressed in its annual transmission rate update, which would be the proper proceeding to address the issue. Entergy also states that, if the Commission addresses the issue here, the benefits of the arrangement extend to all Entergy transmission customers and the costs are properly recovered through the Entergy OATT.

d. Determination

50. In Docket No. ER12-1428-000, Entergy filed amendments to its formula rate in its OATT to allow recovery of costs associated with regional market operations from its transmission customers, in order to allow for recovery of the costs of the WPP. The

⁵⁴ Entergy Transmittal Letter at 5.

⁵⁵ NRG Protest at 4-5.

⁵⁶ Entergy Answer at 9.

Commission accepted and nominally suspended Entergy's filing and set it for hearing and settlement judge procedures.⁵⁷

51. Some provisions contained within Entergy's amendments to its OATT in that proceeding would also allow for the costs of the TSM program. We find here that it is reasonable for Entergy to recover the costs of the TSM program from its transmission customers, through these formula rate provisions, as those customers will all benefit from the TSM program. Additionally, interested parties may challenge the prudence of the costs that Entergy seeks to flow through its rates in its annual transmission rate update, and our acceptance of the TSM program here is without prejudice to the parties' ability to do so.

5. Effective Date

52. We find good cause to grant waiver of the 60-day prior notice requirement.⁵⁸ Entergy has demonstrated that the Monitoring Plan will provide benefits to Entergy transmission customers through additional oversight, and the sooner the plan will go into effect, the sooner that oversight can begin. Therefore, we accept Attachment Y, with the modifications detailed in this order, to become effective on December 1, 2012.

The Commission orders:

The Commission accepts Entergy's Monitoring Plan and Retention Agreement, as modified, to be effective on December 1, 2012. Entergy is directed to file within 60 days of this order the revisions to Attachment Y and other provisions of its OATT as directed by the Commission, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁷ *Entergy Services, Inc.*, 139 FERC ¶ 61,173, at P 1 (2012).

⁵⁸ *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, at 61,339, *order on reh'g*, 61 FERC ¶ 61,089 (1992).