

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Entergy Services, Inc.

Docket No. ER05-1065-002

ORDER ON COMPLIANCE FILING

(Issued October 18, 2006)

1. On May 24, 2006, Entergy made a compliance filing in accordance with the April 24, 2006 Order in this proceeding.¹ That order addressed Entergy Services Inc.'s (Entergy) proposal to establish an Independent Coordinator of Transmission (ICT) for the Entergy System, a Weekly Procurement Process and a draft contract between Entergy and the ICT (ICT Agreement).

I. Background

2. On April 1, 2004, in Docket No. ER04-699-000,² Entergy filed revisions to its Open Access Transmission Tariff (OATT) (Original ICT Proposal) proposing: (1) to contract with an independent entity, the ICT, to provide oversight over the operations of the Entergy transmission system; (2) a new process and standard for assigning cost responsibility for transmission upgrades; and (3) a new Weekly Procurement Process. The Commission convened a series of technical conferences to discuss issues raised by

¹ *Entergy Services Inc.*, 115 FERC ¶ 61,095, *errata notice* May 4, 2006 (*April 24, 2006 ICT Order*), *order on reh'g*, 116 FERC ¶ 61,275 (2006).

² *Entergy Services, Inc.*, 110 FERC ¶ 61,295 (*Guidance Order*), *order on clarification*, *Entergy Services, Inc.*, 111 FERC ¶ 61,222 (2005) (*Clarification Order*), *order on reh'g*, *Entergy Services, Inc.*, 116 FERC ¶ 61,269 (2006).

this proposal. As a result of extensive discussions with Entergy's customers and retail regulators in the technical conferences, on January 3, 2005, in Docket No. EL05-52-000, Entergy filed a petition for declaratory order to obtain general guidance from the Commission on a proposal to enhance the functions of the ICT from those in the Original ICT Proposal (Enhanced ICT Proposal).

3. Entergy proposed that the ICT have authority to grant or deny requests for transmission service, calculate Available Flowgate Capacity (AFC), administer Entergy's Open Access Same Time Information System (OASIS), and perform an enhanced planning function. The Commission issued two orders on Entergy's Enhanced ICT Proposal.³ In the *Guidance Order*, the Commission stated that it was prepared to accept Entergy's proposal on a two-year experimental basis, subject to certain enhancements and monitoring and reporting conditions, if Entergy submitted an acceptable filing under section 205 of the Federal Power Act (FPA).⁴ We stated that the section 205 filing would need to more fully specify in the tariff the responsibilities and duties of the ICT and that it must unambiguously give the ICT authority to grant or deny requests for transmission service. The Commission said that this must 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.

4. Further, the Commission set out certain other enhancements and modifications that were needed to support the pricing sought by Entergy. The Commission required that the ICT develop the original Base Plan (which is a critical part of Entergy's pricing proposal), including any inputs and numerical values that go into the Base Plan.

5. The Commission found that Entergy had not adequately explained its proposal to have the ICT review previously incurred costs of interconnecting generators. We stated that the ICT must determine that the appropriate data inputs were used in performing the necessary studies. Further, it was unclear how the ICT would be able to go back and reevaluate the validity of the input data to ascertain that the upgrade had been properly classified. In addition, we had 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 contracts involved may contain

³ *Id.*

⁴ 16 U.S.C. § 824d (2000).

differing legal standards for being revised. Finally, it was 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 classified as either a Base or Supplemental Upgrade. We required Entergy to address these concerns and said we would then address the justness and reasonableness of any reexamination of previously incurred costs by the ICT.

6. On May 27, 2005, Entergy made its section 205 filing in Docket No. ER05-1065-000 in accordance with the *Guidance Order* indicating that the Southwest Power Pool (SPP) would be the ICT. The *April 24, 2006 ICT Order* conditionally approved Entergy's ICT, pricing and Weekly Procurement Process proposals, with certain modifications. The Commission stated that our review of the proposed tariff changes indicates that with certain revisions discussed in that order, Entergy's proposals appear to be just and reasonable, and that they have not been shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The Commission therefore accepted the tariff sheets, subject to compliance as described in the *April 24, 2006 ICT Order*. On May 24, 2006, Entergy made its compliance filing in the instant docket. In this order we accept the compliance filing subject to the modifications discussed herein. We direct Entergy to install SPP as the ICT within 30 days of the date of this order. In order to avoid further delay of the ICT implementation, any changes directed in this order can be made in a filing within 60 days after SPP is installed as the ICT.

7. On May 24, 2006, parties filed requests for rehearing of the *April 24, 2006 ICT Order* in Docket No. ER05-1065-001. On September 22, 2006, the Commission issued an order denying rehearing.⁵

II. Procedural Matters

8. Notice of Entergy's filing was published in the *Federal Register*, 71 Fed. Reg. 32,944 (2006), with comments, protests, and interventions due on or before May 24, 2006. The Generator Coalition;⁶ Southeast Electricity Consumers Association (SeECA); Occidental Chemical Corporation (Occidental); East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas

⁵ *Entergy Services, Inc.*, 116 FERC ¶ 61,275 (2006).

⁶ The Generator Coalition is Cottonwood Energy Company LP, KGEN Power Management, Inc., NRG Energy, Inc., Suez Energy North America, Inc., and Union Power Partners, LP.

(collectively East Texas Cooperatives); Cottonwood Energy Company, LP (Cottonwood); the NRG Companies (NRG); and Plum Point Energy Associates, LLC (Plum Point) filed timely motions to intervene and protests. TDU Intervenors⁷ filed a protest one day out of time with an explanation. On June 29, 2006, Entergy filed an answer (June 29 Answer). On July 6, 2006, Boston Pacific Company, Inc. (Boston Pacific) filed a motion to intervene out of time with comments. On July 13, 2006, Cottonwood filed an answer to Entergy's June 29, 2006 answer. On July 21, 2006, Entergy filed an answer to Boston Pacific (July 21 Answer).

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will also accept TDU Intervenors protest since it was filed late due to e-filing errors. We will also accept Boston Pacific's late filed comments given its interest in this proceeding and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept both of Entergy's answers and Cottonwood's answer because they have provided information that assisted us in our decision-making process.

III. Discussion

A. ICT Independence and Authority

1. Modifications to the ICT Agreement/Attachment S to Entergy's OATT

10. In the *April 24, 2006 ICT Order*, the Commission approved the draft ICT Agreement with modifications. The Commission rejected arguments that the draft ICT Agreement was too vague because in the *Guidance Order*, the Commission allowed Entergy to file the executed ICT Agreement within 60 days after a Commission order approving the section 205 filing.⁸ In addition to ensuring that Entergy complied with the

⁷ The TDU Intervenors include: Lafayette Utilities System, Louisiana Energy and Power Authority (LEPA), Municipal Energy Agency of Mississippi (MEAM), the Mississippi Delta Energy Agency (MDEA), the Clarksdale Public Utilities Commission, the Public Service Commission of Yazoo City and Arkansas Electric Cooperative Corporation.

⁸ *Clarification Order* at P 23 (emphasis added). Entergy filed the Executed ICT Agreement on May 24, 2006 in Docket No. ER05-1065-002.

April 24, 2006 ICT Order, the Commission further stated that it would examine the executed ICT Agreement when it was filed. The Commission also acknowledged that SPP's status as a Commission-approved RTO does not vitiate the need to analyze the contract at every level – both in Entergy's section 205 filing and when the executed contract is filed.

a. Term of the ICT Agreement

11. In the *April 24, 2006 ICT Order*, the Commission extended the initial term of the ICT from two years to four years, at which time the ICT Agreement will sunset, unless Entergy makes a section 205 filing to continue the ICT. Our approval of Entergy's ICT proposal was conditioned on Entergy committing not to file to seek a termination date for the ICT Agreement that is within the first four years of ICT operation. The ICT Agreement will automatically terminate at the end of four years unless Entergy files, and the Commission approves, an extension of the ICT beyond that four-year period. At the end of the four-year period, if Entergy requests that the ICT proposal be renewed, the Commission may revisit an appropriate termination provision going forward, including any issues similar to those presented in the "regulatory out" provision proposed in section 4.4 of the draft ICT Agreement. The Commission also noted that, if Entergy terminates the ICT Agreement, the basis for the Commission's approval of Entergy's pricing proposal for any prospective transmission upgrades will no longer exist. Entergy was required to revise its tariff sheets and the ICT Agreement to reflect this modification in its compliance filing. Finally, the ICT Agreement provides that it cannot be amended by Entergy or SPP unless the amendment is agreed to in writing by both parties and approved by the Commission. The ICT Agreement provides that the standard of review for any changes to the ICT Agreement proposed by a non-party or the Commission and not agreed to by Entergy and SPP shall be the public interest standard of review.⁹

i. Compliance Filing

12. Attachment S to Entergy's OATT governs the functions of the ICT. Entergy has revised Attachment S to provide for an initial term of four years, and to address the prohibition on terminating the ICT proposal during the initial term. Entergy also modified the effective date of Attachment S to be the same as the effective date of the ICT Agreement. Thus, Entergy has modified section 1.3(a) of Attachment S to be consistent with section 4 of the ICT Agreement.

⁹ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

13. Entergy has proposed a new section 4.2.1 of the ICT Agreement and section 1.3(c) of Attachment S. Under these sections, Entergy or the ICT may terminate the ICT Agreement, after providing 30 days notice and without Commission approval, if upon rehearing or appeal of the *April 24, 2006 ICT Order* either the Commission or a federal appellate court changes the ICT package in a material way.

14. Entergy has also proposed new section 4.2.2 of the ICT Agreement and section 1.3(d) of Attachment S. In these sections, Entergy may seek termination of the ICT Agreement with Commission approval. The conditions to seek termination include: if the Commission in a subsequent proceeding issues an order that would: (i) reject or materially change the pricing proposal contained in Attachment T to the Entergy OATT; or (ii) issues an order that SPP is a public utility (or a designated agent) or transmission provider that (a) owns, controls, or operates Entergy facilities used for the transmission of electric energy in interstate commerce and (b) provides transmission service under Entergy's OATT.

15. Entergy explains that as part of the initial approval process, if the ICT package is changed in a material way, Entergy or the ICT should be able to terminate the proposal. Entergy claims that this proposed and limited termination right in section 4.2.1 is consistent with the Commission's recognition of the ICT proposal as an integrated package. Entergy further explains that its limited termination right in proposed section 4.2.2 is consistent with the Commission's recognition of retail regulators' concerns regarding shifts in jurisdiction and the link between the ICT pricing structure and the ICT itself.

ii. Comments

16. SeECA, Occidental, the Generator Coalition and TDU Intervenors protest Entergy's retention of a "regulatory out" provision as being contrary to the *April 24, 2006 ICT Order*. While Entergy has removed section 4.4 of the ICT Agreement (referred to as the "regulatory out" provision), the parties argue that Entergy has inserted two new regulatory out provisions: first, section 4.2.1 would allow Entergy to terminate the ICT Agreement without Commission approval if the Commission or an appellate court does not approve the ICT Agreement or "related provisions" of Entergy's OATT in "materially the same form" as included in the compliance filing; and second, section 4.2.2 would allow Entergy to seek Commission approval to terminate the ICT Agreement if the Commission materially changes Entergy's pricing proposal or issues an order finding that SPP is a public utility with respect to Entergy's transmission facilities. Parties argue that the regulatory out provisions are impermissible and should be rejected because of the Commission's ruling on the regulatory out in the *April 24, 2006 ICT Order* and because the Commission stated in the *April 24, 2006 ICT Order* that Entergy may not file to terminate the ICT Agreement within the four-year initial term.

17. The Generator Coalition further argues that section 4.2.1 would effectively prevent the Commission or other parties from using section 206 to require modifications of Attachments S, T, U, and V of the OATT because Entergy could use its termination right if there was a change to the related tariff provisions. The Generator Coalition states that section 4.2.2 should be rejected for similar reasons.

18. The Generator Coalition also states that the Commission should require Entergy to clarify section 4.5 of the ICT Agreement, which allows either party to terminate the agreement “for cause,” including the financial health of the parties. The Generator Coalition states that the term “Party” is ambiguous and questions whether the bankruptcy of a single Entergy Operating Company could trigger the termination provisions under section 4.5. The Generator Coalition argues that Entergy should be directed to clarify whether “Party” in section 4.5 means Entergy Services, Inc. or any of the Entergy Operating Companies.

19. Occidental expresses a concern that customers will be burdened with ICT-related costs if the ICT is terminated early.

iii. Entergy’s Response (June 29 Answer)

20. Entergy states in the June 29 Answer that sections 4.2.1 and 4.2.2 are consistent with the Commission’s intent in the *April 24, 2006 ICT Order*. Entergy explains that if, as part of the *initial* approval process, the ICT package is changed in a material way, Entergy or the ICT should be able to terminate the proposal. Entergy maintains that this is consistent with the Commission’s recognition of the ICT proposal as an integrated package. It states that section 4.2.2 is consistent with similar provisions approved by the Commission in *Duke Power*.¹⁰ The Generator Coalition’s concern that Entergy can exercise its termination right at any time during the initial term and therefore limit the Commission (or other parties) from using section 206 of the FPA to require modifications is not true. Entergy states that section 4.2.1 applies only to the initial approval process of the ICT proposal and ensures that the ICT package is not changed in a material respect as part of the initial approval process.

¹⁰ *Duke Power*, 113 FERC ¶ 61,288 at P 44 (2005) (accepting provision that permits termination of independent entity if a change would materially or adversely diminish, interfere with, or otherwise impinge or intrude upon the state regulatory commissions’ jurisdiction).

21. Entergy recognizes Occidental's concern that in the case of early termination the Commission may require Entergy to demonstrate the prudence of any cost recovery Entergy may want to charge its wholesale customers for the cost of the ICT.

iv. Commission Conclusion

22. In the *April 24, 2006 ICT Order* the Commission stated, "approval of Entergy's ICT proposal is conditioned on Entergy committing not to file to seek a termination date for the ICT Agreement that is within the first four years of ICT operation."¹¹ The Commission did not direct Entergy to propose any new termination rights. We clearly prohibited any ICT Agreement provision that would enable Entergy to terminate the ICT Agreement without Commission approval.¹² Therefore, we will reject sections 4.2.1 and 4.2.2 of the ICT Agreement because they are essentially new termination provisions (regulatory out clauses). In the *April 24, 2006 ICT Order* we stated that "[a]t the end of the four-year period, if Entergy requests that the ICT proposal be renewed, the Commission may at that time revisit an appropriate termination provision going forward."¹³ Compliance filings must be limited to the specific directives ordered by the Commission.¹⁴ Compliance filings are not to include new changes initiated by the filing entity, but only changes expressly directed by the Commission.¹⁵ Sections 4.2.1 and 4.2.2 of the ICT Agreement and sections 1.3(c) and 1.3(d) of Attachment S to Entergy's

¹¹ *April 24, 2006 ICT Order* at P 96 & 98.

¹² *Id.* at P 100.

¹³ *Id.* at P 100.

¹⁴ See *AES Huntington Beach, LLC*, 111 FERC ¶ 61,079, at P 60 & n.25 (citing, *inter alia*, *Midwest Independent Transmission System Operator*, 99 FERC ¶ 61,302, at 62,264 (2002), *Sierra Pacific Power Co.*, 80 FERC ¶ 61,376, at 62,271 (1997), *Delmarva Power & Light Co.*, 63 FERC ¶ 61,321 at 63,160 (1993)). See also *American Elec. Power Serv. Corp.*, 99 FERC ¶ 61,178 at 61,699, *letter order on clarification*, 100 FERC ¶ 61,150 (2002) (compliance filings are limited to specific directives in the Commission's order; the sole issue is whether they comply with those directives).

¹⁵ *Southern Co. Services, Inc.*, 61 FERC at 62,328 (1992), *reh'g denied*, 63 FERC ¶ 61,217 at 62,596 (1993).

OATT are rejected as beyond the scope of a compliance filing. We direct Entergy to delete these provisions.¹⁶

23. The Generator Coalition's request for clarification of the term "Party" in section 4.5 (Termination for Cause) of the ICT Agreement is unnecessary. Any termination for cause is effective only upon the Commission's approval of such termination. The term "Party" as defined has not changed from the draft ICT Agreement to the executed ICT Agreement of the instant compliance filing. We did not direct Entergy to clarify the term "Party" and it is not necessary now. Further, we note that Party is defined in the first paragraph of the ICT Agreement.¹⁷

24. Occidental's concern over the costs of early termination is moot, since we are rejecting sections 4.2.1, 4.2.2 of the ICT Agreement and the similar Attachment S, sections 1.3(c) and 1.3(d) that deal with early termination.

b. Budget

25. In the *April 24, 2006 ICT Order*, the Commission found that section 3.2 of the draft ICT Agreement might allow Entergy to exercise significant control over the ICT's budget and did not sufficiently safeguard against the ICT's compensation being affected by its treatment of Entergy. Therefore, we required Entergy to negotiate with SPP the cost for providing ICT services (*e.g.*, a fixed amount, a formula) and file it in its executed ICT Agreement. We also required Entergy to revise the ICT Agreement to provide that if there are disputes between it and the ICT that cannot be resolved, then within 15 days, Entergy will file with the Commission asking us to resolve the dispute.

¹⁶ On pages 18-19 of Entergy's transmittal letter to its compliance filing, Entergy committed to file, within 60 days of the date SPP is installed as the ICT, tariff sheets that will provide for financial compensation associated with short-term PTP transmission service. It is in this filing that Entergy should also make any changes directed in this order to the ICT Agreement and tariff sheets.

¹⁷ The language in the ICT Agreement reads: "[Entergy Services Inc. ("ESI"), on behalf of the Entergy Operating Companies (Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana LLC, Entergy Mississippi, Inc. and Entergy New Orleans, Inc.)(collectively, "Entergy") and the Southwest Power Pool, Inc. ("SPP"), which are sometime individually referred to herein as a "Party" and collectively as "Parties."]

i. Compliance Filing

26. Entergy has revised sections of the ICT Agreement to include Entergy's payment obligations to SPP during the initial term. In addition to the fixed price amount now specified in the ICT Agreement for the initial term, certain costs that are not included in that amount will be billed by SPP at SPP's actual cost. In addition, Entergy will pay SPP for SPP's capital investment costs. Entergy has also added section 3.7 of the ICT Agreement to provide that if Entergy and SPP cannot resolve a dispute over budgeting or funding, within 15 days of the day the dispute arises, Entergy will ask the Commission to resolve the issue.

ii. Comments

27. SeECA objects to the ICT's recovery of capital investment costs under the ICT Agreement and asserts that inclusion of such costs goes beyond the scope of the compliance filing. SeECA claims that recovery of SPP's capital investment costs was not in Entergy's May 27, 2005 filing, nor is it based on a directive in the *April 24, 2006 ICT Order*, so it should be rejected as beyond the scope of the compliance filing. Alternatively, SeECA asks the Commission to require Entergy to present additional evidence showing that the sums of capital investment costs to be recovered during the initial four-year ICT period are just and reasonable. Further, SeECA asserts that Entergy should provide capital investment cost projections for the four-year ICT period, including the basis for the projections, and the process for developing the capital budget.

28. Occidental notes that the *April 24, 2006 ICT Order* required Entergy to "clarify that in the event of a budgeting or funding dispute, either party may request that the Commission resolve it, but that pending resolution, the ICT's funding will be based on actual costs for the preceding *contract* year."¹⁸ Occidental states that because a contract and calendar year are not the same, the compliance filing is inconsistent with the Commission's directive and should be rejected.

iii. Entergy's Response (June 29 Answer)

29. In response to SeECA, Entergy states that the ICT Agreement previously provided that Entergy and the ICT would agree upon the costs recoverable under the agreement, including capital investment costs. Entergy contends that SPP and Entergy have negotiated the initial cost arrangement for ICT services and included the negotiated resolution in the executed ICT Agreement and that this is precisely what the Commission

¹⁸ *April 24, 2006 ICT Order* at P 135.

ordered.¹⁹ Further, Entergy notes that the ICT Agreement provides (a) that SPP will recover only its actual capital investment costs and (b) that such costs are budgeted for the first year of the initial term to be \$1 million. Also, Entergy states that the ICT Agreement includes procedures for determining capital investment costs in subsequent years.

30. Entergy agrees with Occidental that pending resolution of a dispute over budgeting or funding matters, the language in section 3.7 of the ICT Agreement and section 9 of Attachment S should include the term *contract* year, not *calendar* year. Entergy has agreed to make these changes in a compliance filing.

iv. Commission Conclusion

31. Contrary to SeECA's assertion, Entergy's May 27, 2005 ICT filing included a section for capital investments in the unexecuted ICT Agreement. Therefore, we expected to see the amount negotiated between SPP and Entergy for capital investments. Entergy has complied with our directive to provide the negotiated dollar amount, and we disagree with SeECA's assertions that Entergy has not provided sufficient detail with respect to SPP's capital investment costs. We will accept Entergy's proposal regarding the initial term compensation, the fixed price amount and capital investment costs as explained in sections 3.2, 3.3 and 3.4 of the ICT Agreement. These sections include the level of detail as required by the *April 24, 2006 ICT Order*. The amounts included in these sections pertain to payments made by Entergy to SPP. They do not address recovery of these costs by Entergy.

32. We accept Entergy's agreement to change the term "calendar year" to "contract year" in section 3.7 of the ICT Agreement and section 9 of Attachment S. We direct Entergy to make this change within 60 days of the date SPP is installed as the ICT.

c. Data

33. In the *April 24, 2006 ICT Order*, the Commission stated that it was concerned about Entergy's data access provisions. Although Entergy had provided a non-exclusive list of data and reports that the ICT may request from Entergy in Addendum A to Attachment S, we did not find this to be sufficient. Therefore, we required Entergy to provide explicitly that the ICT will have full access to any data it requests in performing its functions in the executed ICT Agreement. We noted that the interrelationship of these various provisions was not immediately obvious upon reading the draft ICT Agreement.

¹⁹ *Id.* at P 105.

Entergy was therefore required to reference section 6.1²⁰ and Addendum A to Attachment S in section 8.2 of the executed ICT Agreement.

i. Entergy Compliance Filing

34. Entergy has revised section 8.2 of the ICT Agreement to provide that SPP will have full access to all data that SPP deems necessary to perform the functions required to be performed under the agreement. Consistent with the *April 24, 2006 ICT Order*, Entergy has included a reference to sections 6.1 and 6.2 of Attachment S in section 8.2 of the ICT Agreement.²¹

ii. Comments

35. SeECA argues that Entergy's changes to section 8.2 do not provide SPP with the unfettered access required by the *April 24, 2006 ICT Order*. Further, SeECA asserts that Entergy is still in a position to exercise control over SPP's access to data because of the language that requires SPP to secure Entergy's agreement not only with respect to the "format and manner in which [data] shall be provided" but also all other "issues involving access to data."

iii. Entergy's Response (June 29 Answer)

36. Entergy states that section 8.2 of the ICT Agreement provides that Entergy must "supply to SPP, both initially and throughout the Term, full access to all Data that SPP deems necessary to perform the functions required to be performed under this Agreement." Entergy explains that the ICT Agreement does provide that after SPP notifies Entergy of the data SPP requires, Entergy and SPP will attempt to reach agreement upon the format and manner in which it will be provided. Those discussions do not relate to the information itself, but rather to the best way to provide the data. Also, if Entergy and SPP do not agree on issues involving data access, SPP's position will control pending resolution of the dispute.

iv. Commission's Conclusion

37. The Commission agrees with Entergy that revised section 8.2 of the ICT Agreement complies with the Commission's directive in the *April 24, 2006 ICT Order*

²⁰ Section 6.1 of Attachment S gives the Commission authority to resolve any disputes over what data Entergy must provide to the ICT.

²¹ *April 24, 2006 ICT Order* at P 108.

and SPP will have full and unfettered access to data. However, if the ICT at any time believes that Entergy is using data format to obfuscate content, it must inform the Commission.

d. Exclusion of Boston Pacific

38. In the *April 24, 2006 ICT Order*, the Commission found that it was not clear from the draft ICT Agreement that Entergy would not have influence over the ICT's decision regarding key personnel. Therefore, to protect the ICT's independence, we required Entergy to modify its executed ICT Agreement to make clear that it will not have unilateral veto authority over the ICT's decisions on this matter.

39. The Commission further found that Entergy failed to justify the express exclusion of Boston Pacific from performing services under the ICT Agreement. The Commission was unwilling to approve this aspect of section 12.4 of the draft ICT Agreement and required Entergy to more fully support its exclusion of Boston Pacific.

i. Compliance Filing

40. In the executed ICT Agreement, Entergy and SPP have removed section 12.4 so that Entergy will not have unilateral veto authority over the ICT's decisions regarding key personnel. Entergy and SPP also have clarified section 2.1 so that "Entergy shall have no selection or veto power over the ICT's personnel matters, including the ICT's appointment of the initial SPP Contract Manager (as provided in section 7.2), or any subsequent staff changes for any position." Section 2.1 of the ICT Agreement addresses employees of the ICT, whereas section 2.3 addresses agents and subcontractors. Entergy continues to include in section 12.3 (redlined section 12.4) the statement that "For purposes of this [ICT] Agreement, the consulting firm of Boston Pacific shall not be deemed to be independent of Entergy and therefore shall not perform any such services or receive any such information."

41. Entergy clarifies that its concern about Boston Pacific's independence is not a function of Boston Pacific's role as the market monitor for the SPP Regional Transmission Organization. Rather, it is a result of the fact that Boston Pacific is not objective when it comes to the very issues regarding transmission on the Entergy system and claims of undue discrimination that the ICT will oversee. Entergy says that Boston Pacific's consistent and long-term pattern of testimonial antagonism towards Entergy prejudices the very matters that the ICT will oversee. It says that Boston Pacific has a real and direct conflict of interests with Entergy, and should not act as a contractor to the ICT, at least during the initial term of the ICT Agreement.

ii. Comments

42. Cottonwood, the Generator Coalition and SeECA all claim that Entergy has not justified excluding Boston Pacific from performing services under the ICT Agreement. They argue that Entergy's perception that a principal of Boston Pacific has been adverse to Entergy in other proceedings does not justify excluding Boston Pacific. Cottonwood argues that the concern is whether Entergy, having agreed at Commission insistence to forego a veto over ICT personnel, is continuing to try to insist on limiting the independence of the ICT. SeECA states that Commission-approved safeguards preserve Boston Pacific's independence and that Entergy has failed to provide evidence to the contrary.

43. The Generator Coalition states that the issue is not ripe for decision by the Commission in the absence of any indication that SPP wishes to use Boston Pacific's services. The Commission should not limit SPP's ability to engage any specific contractor.

44. Boston Pacific states that the SPP Board of Directors and the Commission have already determined that Boston Pacific is independent of all other market participants. Therefore, Boston Pacific states it could not benefit financially by taking a position adverse to Entergy. Boston Pacific states that it has met the independence standard that the ICT Agreement sets out. Specifically, the ICT Agreement states, "For purposes of this Agreement, 'Independent' has the meaning set forth in FERC Order No. 2000 and 18 C.F.R. § 35.34(j)(i) and (ii)."²² Further, Boston Pacific maintains that the relevant portion of this independence standard is that "the Regional Transmission Organization, its employees, and any non-stakeholder directors must not have financial interests in any market participant."²³ Boston Pacific states that it meets this standard and has committed to it contractually.

²² See The Executed ICT Agreement, section 2.1.

²³ *Regional Transmission Organizations, Order No. 2000*, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,089 at 31,226-27 (1999), *order on reh'g, Order No. 2000-A*, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 & 31,092 (2000), *affirmed sub nom. Public Utility District No. 1 of Snohomish County, Washington, et al. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

iii. Entergy's Response (July 21 Answer)

45. In its answer to Boston Pacific, Entergy contends that the issue is one of bias and that Boston Pacific has a long-standing and consistent bias against Entergy which covers matters that the ICT will be addressing. Entergy suggests that in order to avoid any appearance of bias, the Commission should allow Entergy to prohibit the use of Boston Pacific as a contractor for the ICT.

iv. Commission Conclusion

46. In the *April 24, 2006 ICT Order* the Commission was unwilling to approve the exclusion of Boston Pacific from performing services under the ICT Agreement without Entergy supporting it. Entergy's claims of bias and non-independence by Boston Pacific are not persuasive and we will reject section 12.3. In response to the Generator Coalition's suggestion that the issue is not ripe for decision by the Commission, we note that in the future, if Entergy objects to SPP's selection of an agent or subcontractor, Entergy can file a complaint with the Commission at that time. SPP is the ICT and as an independent administrator it has an obligation to fulfill its obligations without bias to any market participant, including Entergy, and that this obligation extends to the duties under the ICT. It is unnecessary to limit SPP's ability to engage any specific contractor to fulfill its ICT obligations. We direct Entergy to eliminate any reference to Boston Pacific in section 12.3 of the ICT Agreement within 60 days of the date SPP is installed as the ICT.

B. Reliability Coordinator

47. In the *April 24, 2006 ICT Order*, the Commission accepted Entergy's proposal that the ICT be the reliability coordinator for Entergy's transmission system and for the control area, with the following modifications: (1) Entergy must modify the language in the first paragraph under section 5 of the Attachment S, and elsewhere in the document, to reference the new reliability standards that are applicable to reliability coordinators; (2) Entergy must revise the language in sections 5.6(b) and 5.6(c) to require the ICT (serving as the reliability coordinator) to have sufficient staff certified at the Reliability Coordinator level, not just the system operator level; (3) Entergy must clarify section 5.2(b) to state that any requirement identified in the day-ahead analysis (including redispatch) shall be coordinated between the ICT, the transmission operator, and the balancing authority to solve any problems; and (4) Entergy must modify section 5.2(e) to ensure that these protocols are consistent with all requirements applicable to reliability coordinators, transmission operators, and balancing authorities, under North American Electric Reliability Council (NERC) Standards. Also in the *April 24, 2006 ICT Order*, the Commission stated that policies and procedures related to the ICT's assumption of reliability coordinator functions must be filed under section 205 of the FPA.

1. Compliance Filing

48. Entergy has (1) revised Attachment S related to reliability as required in the *April 24, 2006 ICT Order*, (2) filed the Reliability Coordinator Protocol as a new addendum to Attachment S, and (3) included for information purposes the Reliability Plan that will apply to the ICT, which has been approved by the NERC. Entergy states that it understands that the Commission required the Reliability Plan to be filed under section 205 only if that plan otherwise is subject to the Commission's jurisdiction. Entergy states that the materials at issue here ultimately will be subject to the rules and procedures established by the Electric Reliability Organization (ERO),²⁴ and Entergy does not understand the *April 24, 2006 ICT Order* to prejudge the ERO's requirements and procedures in these regards by requiring a filing under section 205 that would not otherwise be required at this time.

2. Comments

49. SeECA, Occidental and the TDU Intervenors all protest Entergy's failure to file the Reliability Plan under section 205 of the FPA as not being in compliance with the *April 24, 2006 ICT Order*. The protestors take issue with the Reliability Plan being filed for informational purposes only.

3. Entergy's Response (June 29 Answer)

50. Entergy states that certain aspects of the Reliability Plan are likely to change over time to reflect the ERO initiative. Other aspects will change to reflect lessons learned during implementation and evolving infrastructure and technology. Entergy notes in its answer that requiring a section 205 filing to modify the Reliability Plan would delay and impede compliance with emerging ERO requirements, limit Entergy's and the ICT's flexibility to address the more routine aspects of ICT implementation and reliability coordination, and be unnecessary and administratively burdensome. Entergy states that the division of reliability-related functions is already contained in the Reliability Coordinator Protocol filed under section 205, and the Reliability Plan itself has been filed on an informational basis and will remain publicly posted on NERC's website.²⁵ Also,

²⁴ NERC was certified as the ERO by the Commission on July 20, 2006. *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (2006).

²⁵ The current versions of the reliability plans for all reliability coordinators (including the ICT's reliability plan) are publicly posted and available on the NERC website at <http://nerc.com/>.

Entergy maintains that both the Reliability Coordinator Protocol and the Reliability Plan address the same division of reliability functions, but the Reliability Plan includes additional details involving matters such as the timing and frequency of reliability analyses, references to current NERC standards, and the use of computer applications, data links, and cell phones.

4. Commission Conclusion

51. We agree with the protestors that the *April 24, 2006 ICT Order* required Entergy to file its Reliability Plan under section 205 of the FPA.²⁶ However, in the compliance filing Entergy has filed the Reliability Coordinator Protocol as part of Attachment S under section 205 of the FPA. We find that the Reliability Coordinator Protocol is sufficiently detailed and thus satisfies the requirements of the *April 24, 2006 ICT Order*. We will not require a section 205 filing of the Reliability Plan at this time. We note that if needed in the future we can request this information either through the ERO or through Entergy under section 215 of the FPA.

52. We will require minor clarification changes to language in section 3 of the Reliability Coordinator Protocol and sections 5.2(b) and 5.2(c) of Attachment S.

53. Entergy must insert the underlined language into the following sentence of section 3 in the Reliability Coordinator Protocol.

The specific division of responsibilities and authorities with respect to Operations Planning, current-Day Operations, and Emergency Operations shall also comply with the applicable NERC Standards and are described in Section 4-6 of this protocol.

54. In section 5.2 of Attachment S, Entergy must insert the underlined language into the following sentence:

During Phase I, the ICT and Transmission Provider will meet with SERC and/or NERC to establish the process for NERC certification of the ICT as Reliability Coordinator, including guaranteeing that the ICT has sufficient staff certified at the Reliability Coordinator level to meet the requirements of NERC Standard PER-004-0 or successor standards thereto.

55. In section 5.3 of Attachment S, Entergy must insert the underlined language into the following sentence:

²⁶ *April 24, 2006 ICT Order* at P 156.

Under Phase II, the ICT will initiate the process for guaranteeing that the ICT has sufficient staff certified at the Reliability Coordinator level to meet the requirements of NERC Standard PER-004-0 or successor standards thereto.

56. Entergy is directed to make these changes within 60 days of the date SPP is installed as the ICT.

C. Transmission Planning

1. Entergy's Business Practices and Local Reliability Criteria

57. In the *April 24, 2006 ICT Order*, we found that the ICT would independently develop the Base Plan. However, we stated that Entergy's business practices and local reliability criteria (inputs, assumptions, and methodologies), if the ICT chooses to include them in the Base Plan, must be subject to the scrutiny of stakeholders whose interests may be affected. Accordingly, we required that the ICT develop a process that makes these matters transparent and takes into account stakeholder objections to any inputs, assumptions and methodologies relied upon in developing the Base Plan. The Planning Protocol provided that the ICT will post the local criteria and business practices on OASIS. Thus, the Commission expected the planning process to be transparent and well understood by market participants. In addition, the Planning Protocol laid out in detail procedures that will be followed for stakeholder and regulator input and for coordinated regional planning. We directed Entergy to modify its agreement accordingly and submit these modifications in the instant compliance filing.

a. Compliance Filing

58. Entergy has added new sections 3.2.3 and 3.2.4 to the Planning Protocol. Section 3.2.3 provides that "the ICT shall conduct a stakeholder meeting to obtain stakeholder input regarding the Planning Criteria and other inputs, assumptions, and methodologies relied upon in developing the Base Plan." In new section 3.2.4, the ICT will determine whether Entergy's local reliability criteria and business practices result in undue discrimination. If the ICT determines that the application of one or more of Entergy's local reliability criteria or business practices results in undue discrimination, and the ICT and Entergy do not reach agreement on a remedy, the ICT shall not incorporate the local reliability criteria or business practices in the development of the Base Plan.

b. Comments

59. Cottonwood, the TDU Intervenors, and SeECA all take issue with Entergy's proposal in section 3.2.3 for a single "stakeholder meeting" rather than the "process" mandated in paragraph 146 of the *April 24, 2006 ICT Order*. These parties and

Occidental also protest the language in section 3.2.4 of the Planning Protocol that requires the ICT to develop the Base Plan consistent with Entergy's business practices and local reliability criteria "except in the case of undue discrimination." The intervenors argue that Entergy's new language violates the Commission's directive that the ICT must exercise sole discretion as to whether to include Entergy's business practices and local reliability criteria.

c. Entergy's Response (June 29 Answer)

60. In response to intervenors' concerns, Entergy confirms that it did not intend for section 3.2.3 to limit the ICT's ability to conduct additional stakeholder meetings to address the inputs, assumptions, and methodologies that will be used to develop the Base Plan. In its answer, Entergy agrees to clarify section 3.2.3 to state, "that the stakeholder process should make transparent any inputs, assumptions, and methodologies relied upon in developing the Base Plan, subject to confidentiality requirements and the protection of commercially sensitive information."²⁷

61. Entergy disagrees with the parties' objections to the language in section 3.2.4 incorporating the unduly discriminatory standard for inclusion of Entergy's local reliability criteria and business. Entergy states that the Commission addressed a specific concern that the design of business practices and local reliability criteria can be used by a transmission owner to unduly favor its own uses of the grid. It says this specific concern does not lead to a conclusion that the ICT can choose not to use a business practice or local reliability criterion for any reason.

d. Commission Conclusion

62. We will accept Entergy's proposal to clarify section 3.2.3 and direct Entergy to make this change within 60 days of the date SPP is installed as the ICT. This will enable a stakeholder process to begin that will make the planning process transparent and take into account stakeholder objections.

63. We disagree with Entergy that the *April 24, 2006 ICT Order* limited the ICT's discretion to include Entergy's local reliability criteria or business practices "except in the case of undue discrimination." It was not the Commission's intent to task the ICT with making legal determinations of undue discrimination. Specifically, the *April 24, 2006 ICT Order* provided that the "ICT will independently develop the Base Plan."²⁸

²⁷ Entergy's June 29 Answer at page 10 n.5.

²⁸ *April 24, 2006 ICT Order* at P 146.

The Commission vested the ICT with sole discretion as to the inclusion or exclusion of Entergy's business practices and local reliability criteria in the Base Plan.²⁹ We reject Entergy's proposed limitation on the discretion of the ICT and require Entergy to change the language in section 3.2.3 of the Transmission Planning Protocol within 60 days of the date SPP is installed as the ICT.

2. Stakeholder Review and Reporting Requirements

64. The April 24, 2006 ICT Order required that the ICT provide several opportunities for stakeholder review and input regarding implementation of the ICT arrangement and specified reports to be posted on the OASIS or submitted to the Commission.³⁰

a. Compliance Filing

65. The ICT Agreement does not include or acknowledge these requirements. It contains no reference at all to the ICT's obligations to meet regularly with the Users Group and survey transmission customers or Entergy's obligations to report data errors or loss to the ICT. The ICT Agreement contains only a general obligation for the ICT to "[f]ile such reports as may be required by this Agreement, Attachment S of Entergy's OATT or as otherwise required by the FERC or Entergy's Retail Regulators."³¹

b. Comments

66. The TDU Intervenors argue that the ICT Agreement should be amended to include certain requirements included in the *April 24, 2006 ICT Order*. Specifically, the TDU Intervenors aver that the April 24, 2006 ICT Order explicitly requires that the ICT

²⁹ *Id.* "Entergy's business practices and local reliability criteria (inputs, assumptions, and methodologies), if the ICT chooses to include this in the Base Plan, should be subject to the scrutiny of stakeholders whose interests may be affected."

³⁰ April 24, 2006 ICT Order at PP 103, 299, including n.142 and PP 302-305 (requires the ICT to submit annual reports with specified content to the Commission); P 109 (quarterly meetings with the Users Group and Entergy IT experts); PP 110 and 304 (Users Group and the ICT annual review of error rates of Entergy's data); P 110 (ICT has to post within 24 hours any complaints associated with Entergy's data and advise the Commission as to the remedy); and P 300 (requires the ICT to survey transmission customers in advance of the annual reports required by PP 299 and 302-305).

³¹ ICT Agreement, Attachment A, *see also* ICT Agreement, § 14.1.

provide several opportunities for stakeholder review and input regarding implementation of the ICT arrangement and specifies reports to be posted on the OASIS or submitted to the Commission by the ICT or Entergy.

67. The Generator Coalition similarly argues that Entergy should be required to develop new stakeholder provisions in its tariff. It states that Entergy's tariff provides no formal role for stakeholders and only requires such stakeholder processes as the ICT finds to be necessary. The Generator Coalition argues that the tariff language is too vague and does not respond to the Commission's directives in the *April 24, 2006 ICT Order*.

c. Entergy's Response (June 29 Answer)

68. In its answer, Entergy does not object to addressing the matters identified by the TDU Intervenors and agrees to include them in Attachment S. Entergy states that including them in Attachment S, rather than the ICT Agreement, will ensure that substantive provisions regarding stakeholder interactions are located in a single place and will avoid the need to formally amend the ICT Agreement itself.

d. Commission Conclusion

69. We will accept Entergy's agreement to specify the stakeholder review and reporting requirements in Attachment S. We direct Entergy to modify Attachment S to include the stakeholder review and reporting requirements list within 60 days of the date SPP is installed as the ICT.

D. Transmission Pricing and Service

1. Criteria to be Used to Grant or Deny Transmission Service

70. The *April 24, 2006 ICT Order* stated that "any criteria used by Entergy to grant and deny transmission service, including calculating AFC, must be filed under section 205 of the FPA and accepted by the Commission. Any interested party, including the ICT, may protest these filings or file a complaint under section 206 of the FPA." The *April 24, 2006 ICT Order* did not specify a deadline for the filing of this criteria.

a. Compliance Filing

71. Entergy did not include the criteria the ICT will use to grant or deny transmission service in this compliance filing.

b. Comments

72. The TDU Intervenors, Cottonwood and Plum Point all point out that Entergy has not filed under section 205 the criteria to be used by the ICT to grant or deny transmission service. The TDU Intervenors argue that the Commission should establish a due date for Entergy to file the criteria. Cottonwood makes a similar argument. Cottonwood argues that the Commission should stay any consideration of the compliance filing until Entergy files the criteria and demonstrates that the criteria were developed using the stakeholder consultation process contemplated by the *April 24, 2006 ICT Order*.

c. Entergy's Response (June 29 Answer)

73. Entergy states that consistent with the *April 24, 2006 ICT Order*, Entergy will file the transmission service criteria before the ICT becomes operational, but after the ICT has concluded the stakeholder process addressing those criteria. Entergy points out that given the ongoing AFC stakeholder process and the need to conduct additional stakeholder meetings to review the transmission service criteria before the section 205 filing, a contemporaneous filing would not have been possible.

d. Commission Conclusion

74. Entergy states that it will file the transmission service criteria before the ICT becomes operational, but after the ICT has concluded the stakeholder process addressing those criteria. We agree that this is in compliance with the *April 24, 2006 ICT Order*.

2. Supplemental Upgrade Issues

75. The *April 24, 2006 ICT Order* stated that it “will accept Entergy’s proposal³² to amend Attachment T, section 4, to provide compensation to a customer if the ICT

³² Entergy’s proposal was outlined in its August 22, 2005 answer. In its answer, Entergy agreed “to amend section 4 of Attachment T to provide that to the extent the ICT determines that surplus capacity, which was created by an investment that was paid for on a direct assignment basis, is being used to support load growth in the next year that would otherwise require a Base Plan investment, the ICT may direct a payment to the funding party. Such payments to compensate for load growth will be considered Base Plan expenditures, and thus would be rolled in to transmission rates as a Base Plan expense.”

determines that the funded capacity is being used to support load growth in the next year.”³³

a. Compliance Filing

76. Entergy amended Attachment T to provide compensation for load growth consistent with its commitment in its August 22, 2005 answer. Entergy states that the same general procedures that are used to provide financial compensation when a Supplemental Upgrade is needed to grant network service are used to provide compensation when load growth requires use of an upgrade. Entergy explains that as the transmission provider, it will be responsible to make the financial payment associated with load growth, with the costs rolled-in to rates as Base Plan expenditures.³⁴

b. Comments

77. The Generator Coalition argues that Entergy should define load growth and clarify that the financial compensation mechanism is not limited to Entergy’s load growth but any network resource customer’s load growth. Specifically, the Generator Coalition cites to language Entergy added in sections 4.3.1 and 4.3.2.2 of Attachment T.

78. The Generator Coalition also wants clarification that section 4.3.1 of Attachment T (which addresses financial compensation for long-term service sold to other customers) should not be limited to when third parties use Supplemental Upgrades.

79. The Generator Coalition also argues that Entergy should clarify that the requirements in section 4.3.2.1 are deemed to be met if true for any hour of a transmission service request.

c. Entergy’s Response (June 29 Answer)

80. In its answer, Entergy agrees that the compensation mechanism applies both to Entergy’s load growth and the load growth of network customers under Entergy’s OATT. Entergy states that the Generator Coalition’s clarification is unnecessary because section 4.3.2.2 of Attachment T specifies that the load growth at issue is the load growth included in the Base Plan, which includes Entergy load and network customer load.

³³ *April 24, 2006 ICT Order* at P 198.

³⁴ *See* Entergy OATT, Attachment T, section 4.3.5.4.

81. In response to the Generator Coalition's request for clarification of section 4.3.1, Entergy states that this is beyond the scope of the compliance filing and that section 4.3.3.2 of Attachment T already addresses this concern.

82. In response to the Generator Coalition's request for clarification of the requirements in that section 4.3.2.1, Entergy states that this argument goes beyond the scope of the compliance filing and should be rejected.

d. Commission Conclusion

83. We agree with Entergy that the language in section 4.3.2.2 already satisfies the load growth and compensation issues raised by the Generator. We will also deny the clarification raised by the Generator Coalition for section 4.3.2.1, as it is beyond the scope of this compliance filing.

3. Financial Compensation for Short-term Uses of Supplemental Upgrades

84. The *April 24, 2006 ICT Order* required Entergy to provide a detailed explanation of the technical changes that will be needed to provide financial compensation when funded capacity paid for by a customer is sold on a short-term basis and the time and cost of establishing such a compensation system.³⁵

a. Compliance Filing

85. Entergy proposes to provide financial compensation when Supplemental Upgrades are used to grant short-term point-to-point transmission service through the AFC process. Entergy states that such service provides incremental revenues to Entergy that can be allocated in whole or in part, as appropriate, to parties that paid for any Supplemental Upgrades that are needed to grant the service. Entergy also states that financial compensation can be provided when short-term point-to-point service that relies on a previously funded Supplemental Upgrade is granted through the Weekly Procurement Process and when that service provides incremental revenues to Entergy. It does not propose a mechanism to provide financial compensation when a new network resource is designated on a short-term basis, either through the AFC process or the Weekly Procurement Process, using a previously-funded Supplemental Upgrade. Entergy explains that because facilities are not constructed to grant short-term transmission service for network resources, there is no basis for allocating transmission upgrade costs

³⁵ *April 24, 2006 ICT Order* at P 194.

to such service. Entergy continues that, due to the lack of incremental revenues, any financial compensation for short-term network service would merely shift existing network service revenues away from native load customers, thereby increasing the portion of the costs they are required to bear.

86. Entergy has committed to file, within 60 days of the date SPP is installed as the ICT, tariff sheets that will provide for financial compensation associated with short-term point-to-point service.³⁶

b. Comments

87. The TDU Intervenors, NRG, the Generator Coalition, Cottonwood and Plum Point all argue that Entergy needs to provide financial compensation for the short-term use by network customers of participant funded transmission upgrades. They argue that to deny financial compensation ignores the fact that third parties are using upgrades funded by others. They assert that the issue is whether the designation of a new network resource on a short-term basis is using transmission capacity funded by others not whether Entergy is receiving incremental revenues from network customers for the transmission service. The protestors assert that it is necessary to compensate the entity that funded the transmission capacity when it is being used by third parties on a short-term basis. The protestors urge the Commission to require Entergy to develop compensation for all short-term uses of the transmission upgrades as a condition for approval of the ICT proposal.

88. The Generator Coalition argues that Entergy should be required to clarify and modify section 4.3 of Attachment T, dealing with customer funding of Supplemental Upgrades. It states that Entergy's transmittal letter claims that Entergy will provide financial compensation for short-term service, but that Entergy has not provided any tariff sheets to that effect. Entergy's proposal to delay filing the new tariff sheets is inappropriate because covering short-term service is a key aspect of the pricing proposal.

c. Entergy's Response (June 29 Answer)

89. Entergy explains that the Commission did not require Entergy to file a specific compensation mechanism at this time. It disagrees with the protestors' arguments that even though Entergy does not receive incremental revenues (from new network resources designated on a short-term basis over Supplemental Upgrades), it should financially compensate those subject to participant funding for those Supplemental Upgrades. Entergy states that the protestors are seeking a greater right to revenues associated with

³⁶ See compliance filing transmittal letter at pp 18-19.

short-term designations of network resources than Entergy (and thus its retail customers) has.

90. Entergy challenges Cottonwood's and the Generator Coalition's argument that SPP provides credits for short-term network uses of a transmission upgrade. It asserts that credits under the SPP OATT apply only to "Long-Term Network Transmission Service," not to short-term designations of network resources.³⁷ Entergy states that imposing additional network upgrade charges for short-term network transmission system uses of the grid would be inefficient.

d. Cottonwood's Answer

91. Cottonwood disagrees with Entergy's claim that the SPP OATT does not provide for service credits for short-term network service and cites the SPP OATT and various Commission orders approving the SPP OATT.

e. Commission Conclusion

92. SPP's OATT provides credits for point-to-point uses of a transmission upgrade and long-term network uses of a transmission upgrade.³⁸ Similar to SPP, Entergy is proposing to provide financial compensation for point-to-point uses of a transmission upgrade [Supplemental Upgrade] and long-term network use of a transmission upgrade [Supplemental Upgrade].³⁹ We agree with Entergy that unlike point-to-point service, the load-based pricing used for network service does not provide for any incremental revenues when a new network resource is designated.

93. We direct Entergy to submit tariff sheets detailing how it will provide financial compensation for Supplemental Upgrades being used for short-term point-to-point service. These tariff sheets must be filed within 60 days of the date SPP is installed as the ICT.

94. We acknowledge that determining financial compensation for short-term use of Supplemental Upgrades is a challenging issue and one that is difficult to resolve. In the future, if SPP develops a financial compensation mechanism for short-term network uses of Supplemental Upgrades to be part of its OATT, we recommend that at that time,

³⁷ SPP OATT, Attachment Z section VII.2.

³⁸ *Id.*

³⁹ Attachment T, section 4.3.

Entergy and SPP develop a common methodology regarding compensation for Supplemental Upgrades being used for short-term network service.

4. Reclassification of Network Upgrades

95. The *April 24, 2006 ICT Order* accepted, with modification, Entergy's proposal to have the ICT review all previously incurred interconnection costs back to January 1, 1997 involving interconnection agreements without *Mobile-Sierra* language. If the ICT finds that any facility should be reclassified, either the transmission customer or Entergy may file with the Commission for consideration of such evidence, as allowed by the individual Interconnection Agreement. However, the ICT may not analyze previously incurred interconnection costs associated with interconnection agreements that are currently pending before the Commission. The Commission also stated that it will not prejudice the outcome of any ICT review of previously incurred interconnection costs. As to the effective date of any reclassification, and the date that Entergy would cease providing credits, we found that the date would be the date granted by the Commission in the applicable section 205 filing.

96. Because of Entergy's data problems and because of the benefits noted in the *April 24, 2006 ICT Order*, we required Entergy to modify its tariff to state that if a party to a non-*Mobile-Sierra* Interconnection Agreement seeks to have a review undertaken of its previously incurred interconnection costs, the ICT will undertake that review, and the ICT will base its analysis on then-current system conditions and the most recent Base Plan.

a. Compliance Filing

97. In its compliance filing, Entergy modified sections 5.2.1.1 and 5.2.2 to provide that the ICT will determine whether facilities are to be classified as Supplemental Upgrades based on the current transmission system configuration. Entergy has modified section 5.3 to specify that the ICT will use the most recent Base Case Model if it needs to perform further analysis to determine whether an upgrade is properly classified as a Base Plan or a Supplemental Upgrade.

b. Comments

98. Cottonwood states that the ICT's ability to honestly assess previously incurred transmission costs is inappropriately constrained by the compliance filing. Cottonwood asserts that in Attachment T, Entergy initially proposed a three-step procedure for reclassifying network upgrades as either Base Plan Upgrades or Supplemental Upgrades. Cottonwood states that the Commission took issue with two of the three steps: section 5.2.1, assessment of direct interconnection facilities; and section 5.2.2, assessment of

required upgrade facilities. Cottonwood asserts that in rejecting this approach, the Commission found that the ICT could not make reliable determinations about previously incurred interconnection costs based on earlier system conditions and criteria.

Cottonwood states that the Commission approved the third step of Entergy's proposal, section 5.3, an assessment of reliability effects based on the Base Case Model developed by the ICT, because the ICT would evaluate the effect of an upgrade based on current system reliability.

99. Cottonwood states that the Commission required classifications of upgrades to be based on then-current system conditions and the most recent Base Plan. Cottonwood states that compliance filing continues to apply sections 5.2.1 and 5.2.2, modified only to add the phrase "current system transmission configuration" to each section. Cottonwood argues that the Commission directed Entergy to employ section 5.3 for all reclassifications. The Commission should reject Entergy's modifications to sections 5.2.1 and 5.2.2 as not in compliance with the *April 24, 2006 ICT Order*. Similarly, Plum Point states that Entergy's proposed compliance filing is a superficial attempt to appease the Commission by parsing language from section 5.3 that includes the phrase "current system" and strategically incorporating it into sections 5.2.1 and 5.2.2. Plum Point states the Commission directed Entergy to use section 5.3 for all reclassifications and for the ICT to base its analysis on the then current Base Plan.

100. The Generator Coalition argues that the Commission should reject proposed changes to section 5.2.1.1 of Attachment T. It states that Entergy removed the requirement that direct interconnection facilities be "new" facilities. The Generator Coalition argues that if an upgrade replaces or improves an existing transmission facility, the upgrade is part of the transmission system, because the original facility was part of the transmission system. Neither Entergy nor the ICT should be permitted to directly assign the upgrade to an interconnection customer if the upgrade provides a benefit to other customers.

c. Entergy's Response (June 29 Answer)

101. Entergy states that the Commission said nothing about eliminating two of the three steps, sections 5.2.1 and 5.2.2. Entergy argues that the Commission only required the use of current system conditions in the analysis of previously incurred costs.

d. Commission Conclusion

102. The Commission agrees with Entergy on this point. The language of the *April 24, 2006 ICT Order* is clear. The Commission required that current system conditions and the most recent Base Plan be used in any analysis of previously incurred interconnection costs. By including the phrase "current transmission system configuration" to sections

5.2.1 and 5.2.2, Entergy has complied with that directive. We did not discuss the various steps of the analysis and did not specify that a particular step should be used. We remind Cottonwood and Plum Point that in the *April 24, 2006 ICT Order* we clarified that if the ICT finds that any facility should be reclassified, either the transmission customer or Entergy may file with the Commission for consideration of such evidence, as allowed by each individual interconnection agreement.⁴⁰

103. We also reject the Generator Coalition's assertion that direct interconnection facilities must be new facilities. When the ICT evaluates the transmission system based on current conditions, it should take into consideration the situation that the Generator Coalition refers to (*i.e.*, an upgrade replacing or improving an existing transmission facility).

5. Preservation of Transmission Rights

104. In the *April 24, 2006 ICT Order*, the Commission stated that where the generator has been charged for Supplemental Upgrades, it will retain all the meaningful transmission rights provided to it by the ICT as long as it is responsible for paying for the upgrade, even if the ICT ceases to exist. We also stated that Entergy must explain on compliance how it will ensure the preservation of those rights if the ICT ceases to function.⁴¹

a. Compliance Filing

105. In the compliance filing transmittal letter, Entergy describes two scenarios that could arise if the ICT is terminated. In the first scenario, both the ICT and the Weekly Procurement Process would be terminated. Entergy states that in this scenario there would be no mechanism to allocate congestion charges and that absent a replacement mechanism, parties that pay for Supplemental Upgrades would not be subject to

⁴⁰ *April 24, 2006 ICT Order* at P 237.

⁴¹ *Id.* at P 167. As examples of the types of concerns we had if the ICT ceased to exist, we asked who would perform the calculations to determine the extent of financial compensation due to generators for Supplemental Upgrades? How would the generator be ensured that the compensation it received was fair and equitable and that it is being treated comparably with other similarly situated Generators? We stated that if the ICT ceases to function and is not replaced by some structure of equal protective value, Entergy will need to satisfy the Commission that these transmission rights will continue to be protected.

congestion charges. Entergy states that a replacement entity would have to be hired to monitor financial compensation to customers funding Supplemental Upgrades. In the second scenario, the Weekly Procurement Process would continue while the ICT terminates. Entergy states that a replacement entity would have to be designated to oversee the Weekly Procurement Process.

b. Comments

106. The Generator Coalition argues that the Commission should require Entergy to provide more assurance that customers' transmission rights will be preserved if the ICT ceases to function; Entergy's response in the transmittal letter that "someone else will have to be hired" is not sufficient. The Generator Coalition states that Entergy must present a proposal that keeps customers funding Supplemental Upgrades whole.

c. Commission Conclusion

107. Entergy has not complied with our directive in the *April 24, 2006 ICT Order*. The language we used in that order was clear: Entergy must "explain and fully support" its plan for preserving the transmission rights of customers funding Supplemental Upgrades if the ICT ceases to function. Entergy has provided some insight into what would need to be done to preserve transmission rights but needs to more fully explain how it would actually do it. The ICT Agreement already contains a provision, section 4.9, that allows for a transition period of up to six months in the event that the ICT expires or terminates. Entergy needs to explain in greater detail how the preservation of transmission rights would also fit into such a transition period. We expect Entergy to file this detail within 60 days of the date SPP is installed as the ICT.

E. Miscellaneous

1. Impermissible Requests for Rehearing

a. Comments

108. TDU Intervenors, SeECA and Occidental argue that Entergy has impermissibly included requests for rehearing in the compliance filing. SeECA and the TDU Intervenors argue that the conditional requests for rehearing do not satisfy the requirements of Rule 713 of the Commission's regulations⁴² or Order No. 663-A.⁴³

⁴² 18 C.F.R. § 385.713 (2006).

Entergy's conditional rehearing requests in the compliance filing should be disregarded and the issues raised in those requests should be considered waived.

b. Entergy's Response (June 29 Answer)

109. Entergy states that there were a limited number of instances where the *April 24, 2006 ICT Order* could be read differently than Entergy's understanding of the order. Entergy requested rehearing of those limited matters in case its understanding of those matters is incorrect. Entergy states that an additional rehearing filing would do nothing but result in administrative inefficiency, as it would repeat the same discussions in the compliance filing.

c. Commission Conclusion

110. A compliance filing is not the right mechanism to challenge a Commission directive. Therefore, we deny Entergy's requests for rehearing and clarification that are embedded in the compliance filing.

2. Weekly Procurement Process

111. Entergy states that it will develop an audit process as the Weekly Procurement Process software is developed and will post the audit procedures on its OASIS before the Weekly Procurement Process begins operations. The Generator Coalition seeks clarification that the ICT will conduct audits at least once per year and file the audits with the Commission. In its answer, Entergy agrees that audits should occur at least annually, but does not agree that the results should be filed with the Commission when other mechanisms for stakeholder review are available.

112. The Commission agrees with Entergy that the Weekly Procurement Process audits do not have to be filed at the Commission. Entergy can post the Weekly Procurement Process audit procedures and its audit reports on its OASIS for stakeholder review. If stakeholders disagree with the calculation of redispatch costs or other issues in the audit report they can file a complaint under section 206 of the FPA.

⁴³ *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, Docket No. RM05-33-001, 114 FERC ¶ 61,284, 71 Fed. Reg. 14,640 (2006).

3. Clarifications to the ICT Proposal

a. Clarification of Section 17 of the ICT Agreement

113. The *April 24, 2006 ICT Order* did not require changes to section 17 of the ICT Agreement. However, the Generator Coalition seeks clarification of section 17 of the ICT Agreement. It questions Entergy's purpose in granting to SPP all of the protections afforded to Entergy as a public utility under Entergy's OATT and applicable state law. The Generator Coalition states that it is not clear why it is appropriate to provide protections to SPP as though it is a public utility.

114. We will deny the Generator Coalition's requested clarification as a collateral attack on our previous order approving the ICT Agreement. The Generator Coalition's opportunity to question this section of the ICT Agreement was in its review of the draft ICT Agreement, and the language has not changed in this compliance filing except to change the word "contractor" to "SPP."

b. Clarification of Section 1.3.3 of Attachment U

115. The East Texas Cooperatives seek a revision of section 1.3.3 of Attachment U to Entergy's OATT to ensure that generators that are qualified as long-term Network Integration Transmission Service (NITS) network resources are not automatically deemed to be qualified as Network Resource Interconnection Service (NRIS) resources and thus improperly subject to congestion charges. Section 1.3.3 provides: "Generators that have qualified as long-term NITS Network Resources will also be deemed to be qualified as an NRIS resource." The East Texas Cooperatives state that this error surfaced last year in Entergy's tariff filing made on May 27, 2005 and that Entergy has previously agreed to delete it. In its answer, Entergy agrees that section 1.3.3 should be deleted. We accept Entergy's agreement to remove section 1.3.3 of Attachment U within 60 days of the date SPP is installed as the ICT.

c. Clarification of Section 5.6 of Attachment T

116. The *April 24, 2006 ICT Order* did not require changes to section 5.6 of Attachment T. Cottonwood argues that section 5.6 of Attachment T, addressing stakeholder participation, is not sufficient. Entergy responds that the Commission did not require any change to section 5.6 of Attachment T regarding stakeholder participation.⁴⁴ We will

⁴⁴ Section 5.6 of Attachment T reads, "Stakeholder Participation" The ICT will develop appropriate procedures for consulting with individual generation owners during this process, to ensure that the ICT has the benefit of the generator's view of its

(continued)

deny Cottonwood's requested clarification as a collateral attack on our previous order approving Attachment T. Cottonwood's opportunity to question this section of Attachment T was in its review of the draft Attachment T, and the language has not changed in this compliance filing.

The Commission orders:

(A) The Commission accepts the compliance filing and directs that SPP be installed as the ICT within 30 days of the date of this order.

(B) The effective date of the executed ICT Agreement, Attachments S, T, U, & V to Entergy's OATT, the Transmission Service Protocol, the Interconnection Service Protocol, the Transmission Planning Protocol, and the Reliability Coordinator Protocol shall be the date SPP is installed as the ICT.

(C) Within 60 days of the date SPP is installed as the ICT, Entergy is directed to make the changes required in this order as part of the same filing that details the financial compensation associated with short-term PTP transmission service.

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

(S E A L) Commissioner Wellinghoff concurring with a separate statement attached.

Magalie R. Salas,
Secretary.

interconnection upgrades and cost assignments, and to ensure that the generator understands the analytical process undertaken by the ICT with respect to that generator's upgrades."

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc.

Docket No. ER05-1065-002

(Issued October 18, 2006)

KELLY, Commissioner, *concurring*:

This order on compliance accepts with modifications Entergy's tariff revisions that, *inter alia*, set forth "a framework whereby . . . assurance is provided to Market Participants and Interested Government Agencies that transmission and interconnection service under the Tariff is administered in a non-discriminatory manner . . . [through] an independent party [the Independent Coordinator of Transmission (ICT)] [that] will implement the provisions of the [tariff] by performing the functions set forth [t]herein."¹ This order also accepts with modifications an Agreement executed by Entergy and SPP (the ICT Agreement), whereby they agree that SPP will perform the ICT services described and defined in the tariff. The executed ICT Agreement specifies, in part, that the standard of review for any changes to the ICT Agreement proposed by a non-party or the Commission acting *sua sponte* shall be the "public interest" standard of review set forth in *Mobile*² and *Sierra*.³ Under the circumstances presented here, I think it is appropriate to accept the ICT Agreement.

Courts have held that "the purpose of the *Mobile-Sierra* doctrine is to preserve the benefits of the parties' bargain as reflected in the contract, assuming that there was no reason to question what transpired at the contract formation stage."⁴ However, the D.C. Circuit Court recently underscored the fact that the Commission need not preserve the parties' bargain in all contracts that are presented to it. In *Maine PUC*, the court upheld the Commission's rejection of a *Mobile-Sierra* "public interest" standard provision proposed by parties in a Transmission Owners Agreement to form RTO-NE, noting that the Agreement was "a complex agreement establishing a new regional structure impacting all

¹ Section 1.1 of Attachment S to Entergy OATT.

² *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

³ *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

⁴ *Maine PUC v. FERC*, 454 F.3d 278, 284 (D.C. Cir. 2006) (*Maine PUC*), citing *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002).

market participants,” which “hardly seems the situation *Mobile-Sierra* was designed to guard against, viz., where one party to a rate contract on file with FERC attempts to effect a unilateral rate change by asking FERC to relive its obligations under a contract whose terms are no longer favorable to that party.”⁵ The *Maine PUC* court also noted that the Transmission Operating Agreement had been submitted to the Commission for the first time and had yet to be approved.⁶

The ICT Agreement at issue in this case differs from the Transmission Owners Agreement at issue in the *Maine PUC* case. For that reason, and because the Commission, Entergy, SPP, and third-parties to the ICT Agreement retain their FPA section 205 and 206 rights to seek changes pursuant to the “just and reasonable” standard to Entergy’s tariff governing independent performance of Entergy’s transmission services, I see no need to strike the ICT Agreement’s “public interest” standard provision. In this case, unlike in the *Maine PUC* case, the establishment of a new regional market structure is being accomplished primarily by revisions to Entergy’s tariff, which is subject to the FPA’s “just and reasonable” review, and not by the ICT Agreement. The ICT Agreement primarily governs the terms and conditions of SPP’s employment as the ICT. In addition, the ICT Agreement cannot be used to alter or constrain the activities required to be performed by the ICT under Entergy’s tariff and that are subject to Commission review under a “just and reasonable” standard. For example, this order rejects two “regulatory-out” provisions in the ICT Agreement. One provision would have allowed Entergy to terminate the ICT Agreement without Commission approval if the Commission or an appellate court does not approve the ICT Agreement or related provisions of Entergy’s OATT “in materially the same form” as included in the compliance filing. Another provision would have allowed Entergy to seek Commission approval to terminate the ICT Agreement if the Commission materially changes Entergy’s pricing proposal or issues an order that SPP is a public utility. These provisions were correctly rejected. They could have impacted the Commission’s and interested parties’ rights to seek modifications under the “just and reasonable” standard of FPA section 206.

Moreover, in this proceeding, the Commission has actively reviewed, modified, and approved the draft ICT Agreement submitted as part of Entergy’s FPA section 205 ICT filing and the ICT Agreement filed here under the “just and reasonable” standard of FPA section 205. In the April 24, 2006 Order, the Commission conditionally approved Entergy’s proposed tariff revisions and approved the draft ICT Agreement with modifications. After considering comments filed by various parties, the April 24, 2006 Order conditioned approval

⁵ *Id.* at 284.

⁶ *Id.*

of the ICT filing on acceptance of numerous changes, including extending the initial term to four years; ordering changes to the dispute resolution provisions; eliminating any unilateral veto authority over the ICT's decision regarding key personnel in order to protect the ICT's independence; and prohibiting any provision that would enable Entergy to terminate the ICT Agreement without Commission approval. In addition, the April 24, 2006 Order made clear that the Commission would examine the executed ICT Agreement when Entergy filed it and allow any party with concerns to file comments.⁷ This order on compliance reviews the executed ICT Agreement, considers comments filed by various parties, and directs Entergy to make additional modifications to the ICT Agreement, such as removal of a provision that would prevent Boston Pacific from performing services under the ICT Agreement.

Indeed, the executed ICT Agreement recognizes that the Entergy tariff provision governing the ICT's services can be modified by the Commission pursuant to the "just and reasonable" standard and that the parties will modify the ICT Agreement to reflect those changes. Specifically, section 19.3 of the ICT Agreement provides that "[t]o the extent that changes to the scope of services provided under this Agreement are required due to changes in Entergy's OATT, the Parties agree to negotiate in good faith in making such changes to this Agreement."

Finally, there has been broad participation in this proceeding by various interested parties, including non-signatories of the ICT Agreement, such as Entergy's customers and retail regulators, whose concerns we have addressed. Further, no participant objects to the "public interest" standard provision in the ICT Agreement.

For the reasons discussed above, I concur with this order's decision to accept Entergy's ICT Agreement.

	_____ Sudeen G. Kelly
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⁷ April 24, 2006 Order at P 92-93.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services Inc.

Docket No. ER05-1065-002

(Issued October 18, 2006)

WELLINGHOFF, Commissioner, concurring:

The parties to the ICT Agreement have asked the Commission to apply the “public interest” standard of review if and when it considers requests from any of those parties to change the Agreement in the future.¹ The parties have also asked the Commission to apply the “public interest” standard when such changes are sought by either a non-party to the Agreement through a complaint or the Commission acting *sua sponte*.

In its original order approving the ICT Agreement,² which issued prior to my becoming a Commissioner, the Commission did not comment on or explain why it was appropriate to apply the “public interest” standard in the circumstances sought by the parties, rather than retaining the “just and reasonable” standard of review for prospective contested changes to the Agreement. I believe that the particular facts of this case warrant the Commission agreeing to apply the “public interest” standard when it considers such changes to the Agreement. In light of the importance of this issue, I want to take this opportunity to explain how I reached that conclusion.

The Federal Power Act and the Natural Gas Act require that rates, terms, and conditions of service must be “just and reasonable” and not unduly discriminatory or preferential.³ There is little dispute that the Commission’s initial review of an agreement

¹ The “public interest” standard of review and the related *Mobile-Sierra* doctrine stem from the U.S. Supreme Court’s rulings in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

² *Entergy Services Inc.*, 115 FERC ¶ 61,095 (April 24, 2006 ICT Order), *errata notice* May 4, 2006, *order on reh’g*, 116 FERC ¶ 61,275 (2006) (ICT Rehearing Order).

³ 16 U.S.C. § 824d; 15 U.S.C. §717c.

is conducted under the “just and reasonable” standard.⁴ Similarly, there is little dispute that the parties to an agreement should be able to expressly prescribe the standard of review for future disputes over the agreement as between or among the parties to that agreement. Thus, the parties to an agreement may request that the Commission use the “public interest” standard, which is generally viewed as higher or stricter than the “just and reasonable” standard,⁵ in reviewing proposed changes to their agreement that are contested between or among the parties at some future time after the agreement is initially approved by the Commission.

Other circumstances, however, present more difficult policy decisions for the Commission. These include what standard of review should apply when the parties to an agreement fail to expressly state the standard of review that should apply when the Commission considers future contested changes to the agreement. Difficult questions of policy also arise when the parties to an agreement ask the Commission to apply the “public interest” standard when it considers changes sought by either a non-party to an agreement or the Commission acting *sua sponte*.

Case law on the applicability of the “public interest” standard is not entirely clear and is, in fact, inconsistent.⁶ Indeed, the courts have noted that “[w]hether and when *Mobile-Sierra* applies in varying contexts is going to remain in confusion” until the Commission establishes a clear policy.⁷ The courts have further suggested that the Commission need not tolerate the “public interest” standard at all and could require prospectively that all contracts be subject to the “just and reasonable” standard.⁸

Given this uncertainty in case law, I believe that the Commission should set a clear policy on these issues. That policy should strive to strike a balance between recognizing contracting parties’ needs for certainty with respect to their agreements and protecting the interests of energy consumers. An agreement, by its terms, may affect not only the rights and interests of the parties thereto, but also the rights and interests of

⁴ See, e.g., *Maine Pub. Utils. Comm’n v. FERC*, 454 F.3d 278, 283-86 (D.C. Cir. 2006).

⁵ See, e.g., *Standard of Review for Modifications to Jurisdictional Agreements*, Notice of Proposed Rulemaking, 113 FERC ¶ 61,317 at P 4 (2005) (citing *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983)).

⁶ See, e.g., *Boston Edison Co. v. FERC*, 233 F.3d 60, 67 (1st Cir. 2000) (stating that even cases within the D.C. Circuit “do not form a completely consistent pattern”).

⁷ *Id.* at 68.

⁸ *Id.*

others, as well as the operation of markets that shape rates, terms and conditions of service within the Commission's jurisdiction. Therefore, the Commission's determination as to whether and when it will agree to apply the "public interest" standard to future changes to an agreement sought by non-parties or the Commission acting *sua sponte* should not be limited to a consideration of the rights and interests of the contracting parties alone.

To strike the proper balance, I would first require parties to include specific language in an agreement if they intend to ask the Commission to apply the "public interest" standard with regard to future changes sought by any or all of a party, non-party, or the Commission acting *sua sponte*. Thus, unless specific language appeared in an agreement, the Commission would apply the "just and reasonable" standard to future changes. This approach reflects my belief that as a general matter, retaining the right to future review under the "just and reasonable" standard enables the Commission to more effectively fulfill its statutory mandate under the FPA and the NGA.

The "just and reasonable" standard is not new; it is well-known and well-defined. The electric and gas industries have operated and thrived under this standard for seven decades, during which it has served the Commission well as a tool to protect the interests of consumers. The Commission should not surrender this important tool absent a compelling factual and policy basis for doing so.

I reject the argument, made by some advocates of broad use of the "public interest" standard, that the "just and reasonable" standard is antithetical to the principle of sanctity of contract and fails to promote certainty and stability in energy markets. Past precedent demonstrates that the Commission recognizes the importance of sanctity of contract and that the Commission uses the "just and reasonable" standard judiciously in considering contract modification. In Order No. 888, for example, the Commission made precisely these points and indicated that an entity "has a heavy burden in demonstrating that the contract ought to be modified" even under the "just and reasonable" standard.⁹

Second, where the parties to an agreement ask the Commission to apply the "public interest" standard to future changes to sought by non-parties or the Commission acting *sua sponte*, I would require the parties to demonstrate by substantial evidence that a factual and policy basis supports their request. In particular, I believe that the Commission should only grant such requests in narrowly proscribed circumstances where substantial evidence affirmatively demonstrates that the contract or agreement has broad-

⁹ Order No. 888 at 31,665.

based benefits to both parties and non-parties. In making this assessment, I would take into consideration, among other issues: (1) whether the contract or agreement was negotiated through a stakeholder process reflecting a wide range of interests, (2) whether state commissions had meaningful opportunity to participate in the stakeholder process, (3) the extent of and justification for opposition to the request for the Commission to apply the “public interest” standard; and (4) whether granting the request is necessary to the resolution of the proceeding. Requiring a showing of broad-based benefits, supported by substantial evidence, is an appropriate condition precedent to the Commission granting such a request because the term “public interest” implies interests beyond and distinct from those of the contracting parties.

Third, it is important to recognize that the *Mobile-Sierra* doctrine assumes that agreements are entered into voluntarily. The courts have stated that “the purpose of the *Mobile-Sierra* doctrine is to preserve the benefits of the parties’ bargain as reflected in the contract, assuming that there was no reason to question what transpired at the contract formation stage.”¹⁰ Therefore, the standard of review that applies to prospective contested changes to an agreement – whether it be the “just and reasonable” standard or the “public interest” standard – does not affect the ability of a party, or the Commission acting *sua sponte*, to seek to make that agreement void (*e.g.*, on the basis of fraud, mistake, misrepresentation, duress, or undue influence).

Applying these standards to the facts of this case, I believe that it is appropriate for the Commission to agree to apply the “public interest” standard when it considers future changes to the ICT Agreement sought by parties, non-parties, and the Commission acting *sua sponte*. Concerns about transmission access on the Entergy system have been extensive and persistent. The ICT proposal, as modified by the Commission, promises to alleviate such concerns and significantly improve access to transmission service.

Since 2002, the Commission, state regulators, and market participants have worked with Entergy to improve access to transmission service on Entergy’s system.¹¹ The first attempt toward that end was the Generator Operating Limits (GOL) proposal.

¹⁰ *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) (citing *Town of Norwood v. FERC*, 587 F.2d 1306, 1312 (D.C. Cir. 1978)). See also *PacifiCorp v. Reliant Energy Services, Inc.*, 105 FERC ¶ 61,184 at P 55 (2003) (“All three cases [cited by PacifiCorp] recognize that *Mobile-Sierra* preserves the parties’ bargain as reflected in the contract, when there is no need to question what transpired at the contract formation stage. Our decision here is consistent with those cases, as there has been no showing of fraud, duress, or the exercise of market power at the contract formation stage.”).

¹¹ See April 24, 2006 ICT Order at P 4-21; ICT Rehearing Order at P 2-7.

However, significant errors in Entergy's use of the GOL methodology did not permit the Commission or market participants to determine whether available transmission capacity was being restricted or withheld from independent power producers and other generators that use transmission service. The next attempt was the Available Flowgate Capability (AFC) proposal. Again, implementation errors led to numerous claims by customers of loss of access to transmission, lack of transparency, and data reliability problems.

The ICT proposal marks the third, and a significantly different, attempt to improve access to transmission service on Entergy's system. The ICT appears 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 in a nondiscriminatory manner. In particular, having an independent entity oversee and evaluate Entergy's AFC process and verify Entergy's data, and requiring Entergy to report any disagreements it has with the ICT over proposed modifications to the AFC process, will provide transparency to Entergy's transmission program. The ICT is also required to develop and chair a stakeholder process that will provide safeguards for continued nondiscriminatory access to transmission service, as well as a forum for further improvements.

In addition, several of Entergy's retail regulators were parties to the Commission's proceeding on the ICT Agreement, and the Commission took their comments, as well as the comments of other parties, into account when making its determinations. Consideration of those comments was entirely appropriate and helped the Commission in reaching its conclusion that Entergy's ICT proposal, as modified, is just and reasonable and consistent with or superior to the Commission's *pro forma* OATT.

Taking all of these factors into account, I believe that it is appropriate for the Commission to grant the request of the parties to the ICT Agreement, and to apply the "public interest" standard when it considers future changes to the ICT Agreement sought by parties, non-parties, and the Commission acting *sua sponte*.

For these reasons, I respectfully concur with the Commission's order.

Jon Wellinghoff
Commissioner