

133 FERC ¶ 61,136
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket Nos. ER10-2748-000
ER10-2748-001

ORDER ACCEPTING AMENDED AND RESTATED AGREEMENT
AND ACCEPTING IN PART AND REJECTING IN PART PROPOSED TARIFF
REVISIONS

(Issued November 16, 2010)

1. On September 17, 2010, as amended on October 13, 2010, pursuant to section 205 of the Federal Power Act (FPA),¹ Entergy Services, Inc., on behalf of the Entergy Operating Companies² (collectively, Entergy), filed an Amended and Restated Independent Coordinator of Transmission (ICT) Agreement (ICT Agreement) between Entergy and the Southwest Power Pool, Inc. (SPP).³ The ICT Agreement reflects the terms and conditions pursuant to which SPP will continue to act as the ICT for the Entergy transmission system for an additional term of two years. The filing also includes changes to Entergy's OATT to reflect the extension of the ICT arrangement. As discussed below, we will accept the amended ICT Agreement, and accept in part and reject in part Entergy's proposed OATT revisions, to be effective, as requested, November 17, 2010.

¹ 16 U.S.C. § 824e (2006).

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

³ The ICT Agreement is filed as Attachment W to Entergy's Open Access Transmission Tariff (OATT).

I. Background

2. On April 24, 2006, the Commission issued an order⁴ conditionally approving Entergy's proposal to implement the ICT, the Weekly Procurement Process⁵ and a new transmission pricing structure based on participant funding for the Entergy transmission system. In the ICT Order, the Commission accepted Entergy's proposal for SPP to serve as the ICT for the Entergy transmission system. Entergy noted that, as the ICT, SPP would function as an administrator of Entergy's OATT and as Entergy's Reliability Coordinator.⁶ The Commission found that Entergy's ICT proposal, with certain modifications, is consistent with or superior to the Order No. 888 *pro forma* tariff.⁷ The Commission accepted the ICT arrangement for an initial term of four years and required that the ICT arrangement sunset, or expire on its own terms, at the end of the four years, unless Entergy makes, and the Commission accepts, a section 205 filing to continue the ICT arrangement.⁸

⁴ *Entergy Services Inc.*, 115 FERC ¶ 61,095 (ICT Order), *order on reh'g*, 116 FERC ¶ 61,275, *order on compliance*, 117 FERC ¶ 61,055 (2006), *order on clarification*, 119 FERC ¶ 61,013 (2007).

⁵ The Weekly Procurement Process is a weekly, bilateral exchange market designed to allow other generators on the system to displace Entergy's more inefficient oil and gas units. In the ICT Order, the Commission noted that the ICT's oversight of the transmission aspects of the Weekly Procurement Process is intended to assure that transmission access would be granted on a fair and discriminatory basis. ICT Order, 115 FERC ¶ 61,095 at P 3.

⁶ Among other things, the ICT was given authority to grant or deny requests for transmission service, calculate available flowgate capability, administer Entergy's Open Access Same Time Information System, and perform an enhanced planning function. *Id.* at P 2, 44-47, 61-66.

⁷ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁸ ICT Order, 115 FERC ¶ 61,095 at P 96.

3. On March 29, 2009, the Commission commenced a process to assess the continuing benefits of the ICT arrangement.⁹ As part of this process, the Commission stated that it would seek input from Entergy's retail regulators.¹⁰ In response, a Joint Commission and State Regulator Conference was held on June 24, 2009 to discuss issues involving the current ICT arrangement, transmission access, and construction on the Entergy transmission system. Entergy states that this conference resulted in two important developments. First, Entergy's retail regulators formed the Entergy Regional State Committee (E-RSC)¹¹ to provide collective retail regulatory agency input on the operation and construction of the Entergy transmission system and the operations and functions of the ICT. Second, the Commission and the E-RSC committed to sponsor cost-benefit analyses to evaluate the costs and benefits of possible alternatives to the current ICT arrangement.¹²

II. Entergy's Filings

4. On September 17, 2010, Entergy filed to extend the ICT arrangement, for an additional period of one year (September 17 Filing). Entergy explains that, under section 1.3 of Attachment S to Entergy's OATT, the initial four-year term is set to expire automatically on November 17, 2010 unless: (1) Entergy makes, and the Commission approves, a filing to continue the ICT arrangement; and (2) Entergy receives any necessary approvals from its retail regulators. Entergy states that the extension will allow the ICT to continue to provide independent oversight of the Entergy transmission system while Entergy and the E-RSC complete the analyses necessary to determine whether Entergy should join an RTO, namely SPP or the Midwest Independent Transmission System Operator (Midwest ISO), or propose long-term changes to the ICT structure.¹³ Accordingly, Entergy requests that the Commission extend the ICT arrangement for an additional one-year period. Entergy also notes that the only retail regulatory approval required is from the Louisiana Public Service Commission (Louisiana Commission).

⁹ *Entergy Services Inc.*, 126 FERC ¶ 61,227 (2009).

¹⁰ *Id.* P 82.

¹¹ The E-RSC is a collection of regulators from Entergy's retail regulatory jurisdictions (Arkansas, Louisiana, Mississippi, New Orleans, and Texas).

¹² This study was completed on September 30, 2010 and involved a study of the costs and benefits of Entergy joining the SPP regional transmission organization (RTO) as a transmission-owning member.

¹³ September 17 Filing, Transmittal Letter at 1, 7.

Entergy states that it intends to file an application by the end of October with the Louisiana Commission seeking to extend the term of the ICT arrangement.¹⁴

5. Additionally, Entergy proposes to make certain changes to the indemnification and liability provisions of the ICT Agreement and to its OATT. Specifically, Entergy proposes to revise the indemnification provision in the ICT Agreement (Attachment W) to: (1) provide that Entergy will indemnify SPP for any regulatory fine or penalty, unless that regulatory fine or penalty is the result of SPP's gross negligence or willful misconduct; and (2) eliminate SPP's obligation to indemnify Entergy for losses arising from a breach by SPP of its obligations under the ICT Agreement. Entergy also proposes changes to its OATT to limit the ICT's and Entergy's liability and to provide for Entergy's recovery from transmission customers of costs associated with Entergy indemnifying the ICT for any regulatory fine or penalty pursuant to Attachment W. According to Entergy, these changes were necessary in order for SPP to agree to an extension of the ICT arrangements.¹⁵

6. On October 13, 2010, Entergy submitted an amendment to its September 17 Filing, proposing to extend the ICT arrangement for two years (October 13 Filing). Entergy explains that, during a stakeholder working group meeting, many of the stakeholders expressed concern that a one-year extension would not provide sufficient time to complete the analyses of the possible alternatives or changes to the ICT structure and they generally expressed support for a longer extension period to allow for sufficient time for the analyses and implementations to occur. Thus, with the support of SPP, Entergy is revising the ICT Agreement and Entergy's OATT to provide that the term of the arrangement extension will be for two years, unless the full two years is not needed to implement new arrangements.¹⁶

¹⁴ We note that in a separate proceeding in Docket No. ER11-1923-000, Entergy stated that the Louisiana Commission voted to approve the proposed changes to the ICT arrangement at its October 13, 2010 open meeting. *See* Entergy's October 27, 2010 filing at 2.

¹⁵ September 17 Filing, Transmittal Letter at 8.

¹⁶ October 13 Filing, Transmittal Letter at 2 (citing Entergy OATT, Attachment W § 4.1 and 4.3). Entergy states that the new arrangements may include circumstances whereby: (1) a party other than SPP acts as the ICT for Entergy or (2) Entergy's transmission facilities are placed under the tariff of an RTO. *Id* at 2.

III. Notice of Filings and Responsive Pleadings

7. Notice of Entergy's September 17 Filing was published in the *Federal Register*, 75 Fed. Reg. 59,254 (2010), with interventions and protests due on or before October 8, 2010. The Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention. Motions to intervene were filed by Occidental Chemical Corporation and GDF SUEZ Energy Marketing NA, Inc. Comments were filed by NRG Power Marketing LLC, Bayou Cove Peaking Power LLC, Big Cajun I Peaking Power LLC, Louisiana Generating LLC, and NRG Sterlington Power LLC (collectively, NRG) and SPP. Protests were filed by the Conway Corporation, the West Memphis Utilities Commission, the City of Osceola, Arkansas, the Hope Water & Light Commission, the City of Benton, Arkansas and the City of Prescott, Arkansas (collectively Arkansas Cities); the Lafayette Utilities System, the Louisiana Energy and Power Authority, the Municipal Energy Agency of Mississippi, and the Mississippi Delta Energy Agency, and its members the Public Service Commission of the City of Yazoo City, Mississippi and the Clarksdale Public Utilities Commission of Clarksdale, Mississippi (collectively, L-M Municipals); and Union Power Partners, L.P. (Union Power). Entergy filed an answer on October 21, 2010, containing an admission that it made an inadvertent error in its filing (which we discuss further below) and answering the protests.

8. Notice of Entergy's October 13 Filing was published in the *Federal Register*, 75 Fed. Reg. 65,315 (2010), with interventions and protests due on or before October 22, 2010. Motions to intervene were filed by Electric Power Supply Association, Arkansas Cities, and the Arkansas Electric Cooperative Corporation. Union Power filed comments. The Council of the City of New Orleans filed a motion to intervene out of time (New Orleans Council). The Public Utility Commission of Texas (Texas Commission), through the Office of the Attorney General of Texas, filed a motion to intervene out-of-time and comments. The Arkansas Commission filed a motion to submit comments out of time. In response, Entergy filed an additional answer on October 28, 2010. The New Orleans Council and the Arkansas Commission filed answers on November 1, 2010 in response to Entergy's answer. The New Orleans Council also filed a motion to lodge an audit report by the Commission's Office of Enforcement, assessing Entergy's compliance with its OATT, in this proceeding to support its November 1, 2010 answer. Entergy filed an answer in response to the New Orleans' motion to lodge. The New Orleans Council filed an answer in response to Entergy's answer.

IV. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

10. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant the Council of the City of New Orleans and the Texas Commission's late-filed motions to intervene given the early stage of this proceeding, their interest in the proceeding and the absence of undue prejudice or delay.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest and an answer to an answer unless otherwise ordered by the decisional authority. We accept Entergy's admission of error, as discussed further below, but we are not persuaded otherwise to accept the answers submitted by Entergy, the New Orleans Council and the Arkansas Commission and will, therefore, reject them as impermissible answers. We also deny New Orleans Council's motion to lodge the Commission's audit report as an impermissible answer to an answer. Likewise, we reject Entergy's and the New Orleans Council's answers.

B. Substantive Matters

12. We will accept Entergy's proposal to extend the ICT arrangement by an additional term of two years. In addition, we will accept Entergy's modifications to the ICT Agreement, and accept in part and reject in part Entergy's proposed revisions to its OATT to implement the two-year extension of the ICT arrangement.

1. Two-Year Extension

a. Entergy's Proposal

13. Entergy requests that the Commission grant Entergy's proposal to extend the ICT arrangement for two years. Entergy asserts that in Order No. 890¹⁷ the Commission stated that it will approve a departure from the *pro forma* OATT when that departure is consistent with or superior to the Order No. 890 *pro forma* OATT.¹⁸ Entergy maintains that the Commission has already concluded that the ICT arrangement is consistent with or superior to the provisions of the *pro forma* OATT.¹⁹ Entergy contends that the same

¹⁷ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

¹⁸ September 17 Filing, Transmittal Letter at 4.

¹⁹ *Id.* (citing ICT Order, 115 FERC ¶ 61,095 at P 3).

conclusion remains true today. Entergy claims that the ICT's direct and substantial oversight over the operations and planning of the Entergy transmission system have "provided a number of benefits, including increased transparency and objective and verifiable assurance that the transmission service is being provided in a non-discriminatory manner."²⁰ Thus, Entergy argues that the ICT structure has been, and continues to be, consistent with the core policy goals underlying the Commission's open access transmission initiatives.

14. Additionally, Entergy maintains that the ICT has extensive authority over the transmission planning process that has provided important benefits to the Entergy transmission system.²¹ Further, Entergy notes that the ICT and Entergy both have worked to identify potential improvements to the ICT and Weekly Procurement Process structures during the initial term of the ICT arrangement.²² Entergy maintains that the Commission's approval of the proposed extension will facilitate the consideration of additional improvements. Of importance, Entergy states that it has proposed to give the E-RSC the authority, upon unanimous vote of the E-RSC members, to direct the Entergy Operating Companies to: (1) add specific projects to Entergy's Construction Plan; and (2) make a section 205 filing to propose changes to the cost allocation methodology for future transmission upgrade costs. Entergy explains that it will be working with the E-RSC working group²³ to finalize the necessary tariff changes and a memorandum of understanding to give the E-RSC the two authorities. Entergy notes that it expects to submit a section 205 filing within the next few months, upon unanimous vote of all E-

²⁰ *Id.*

²¹ Entergy notes that the ICT's role in the planning process includes, but is not limited to: (1) preparing a Base Case Model and reliability assessment; (2) applying applicable reliability criteria; (3) reviewing Entergy's Construction Plan; (4) conducting stakeholder meetings to obtain stakeholder input regarding the Planning Criteria and other inputs, assumptions, and methodologies relied upon in developing the reliability assessment, the Base Plan, and the Construction Plan; and (5) leading an annual Transmission Planning Summit with stakeholders and regulators to review the ICT's independent reliability assessment and Base Plan, and Entergy's Construction Plan. *Id.* at 5.

²² Entergy notes that 24 possible enhancements have been presented to the E-RSC. Twelve of these have been or are in the process of being implemented or are already within the ICT's current authorities to implement. *Id.*

²³ The E-RSC working group consists of regulatory staff and consultants for each of the E-RSC member retail regulators.

RSC members, to expand the E-RSC's authority over cost allocation and the Construction Plan.²⁴ Entergy states that this expansion in the E-RSC authority would be responsive to concerns raised by Entergy's regulators and stakeholders regarding transmission cost allocation and construction, and would constitute additional improvements to the current ICT structure.

15. Thus, Entergy argues that the ICT arrangement has provided important benefits during the initial term and continues to provide for transmission services that are consistent with or superior to the services under the *pro forma* OATT. Accordingly, Entergy contends that it is reasonable to continue the ICT arrangement on an interim basis while long-term arrangements are being analyzed and finalized.

b. Comments

16. SPP states that it supports extending the current ICT arrangement for up to two additional years as this provides stability and clarity in the near term while the E-RSC and the ICT stakeholder processes address a number of challenging and important issues.²⁵ SPP further states that it continues to be supportive of the E-RSC's and the ICT stakeholders' consideration of ways to enhance the current ICT structure. SPP notes that it and Entergy have already implemented, or are in the process of implementing, changes to realize efficiencies that provide additional value to stakeholders on the Entergy system. Lastly, SPP explains that it will continue its effort to work with the E-RSC, the E-RSC working group, Entergy, and stakeholders to identify and implement changes that will provide additional benefits through the extension of the interim ICT arrangement.²⁶

²⁴ On October 27, 2010, Entergy submitted a section 205 filing in Docket No. ER11-1923-000, seeking Commission approval to give the E-RSC the authority, upon unanimous vote of all E-RSC members, to direct the Entergy Operating Companies: (1) to make a filing pursuant to section 205 to change the terms and conditions that apply to cost allocation for transmission projects, including to modify the time horizon of the Base Plan developed by the ICT in accordance with the OATT and used to allocate transmission costs in accordance with the Entergy OATT; and (2) to add specific projects to the Entergy Construction Plan that is developed under Attachment K of the Entergy OATT. The filing also includes the memorandum of understanding between Entergy and the E-RSC. Entergy's October 27, 2010 filing, Transmittal Letter at 1 (Docket No. ER11-1923-000).

²⁵ SPP Comments at 3.

²⁶ *Id.* at 4.

17. NRG states that it supports Entergy's September 17 Filing, but recommends that the Commission direct Entergy and the ICT to enter into a contract extension of two years, as opposed to just one year.

18. Arkansas Cities filed a limited protest to the September 17 Filing, noting that a one-year extension of the ICT is problematic. Arkansas Cities argue that it would be more efficient to consider a two to three year extension of the current ICT arrangement because such an extension would offer more stability to the Entergy transmission system. Arkansas Cities also note that, according to Entergy, Entergy's current filings are incomplete and that additional section 205 filings would be needed.²⁷ Therefore, Arkansas Cities request that Entergy be required to update its long-term plans, such as RTO membership, as promptly as possible.²⁸

19. L-M Municipals state that they agree that an extension of the ICT would facilitate an orderly transition to whatever long-term arrangements will supersede the current ICT arrangement.²⁹ However, L-M Municipals maintain that they would only favor such an extension based on the expectation that the pending enhancements described in Entergy's filing will be implemented. Thus, L-M Municipals add that they reserve the right to withdraw their support for the extension if any or all of the enhancements described in Entergy's filing fail to be implemented. Union Power states that while there have been improvements as a result of the ICT, the ICT's Quarterly Performance Reports filed in Docket No. ER05-1065-000 and Entergy's filing of available flowgate capability-related error reports reflect that certain issues remain in the provision of non-discriminatory transmission service on the Entergy transmission system.³⁰ Notwithstanding these concerns, however, Union Power maintains that extending the ICT arrangement is appropriate on an interim basis to enable all interested stakeholders to evaluate the cost-benefit analyses being completed.³¹

c. Commission Determination

20. We accept Entergy's proposal to extend the ICT arrangement for two years. In the ICT Order, we found that the ICT arrangement is consistent with or superior to the *pro*

²⁷ See *supra* note 24.

²⁸ Arkansas Cities Protest at 2-3.

²⁹ L-M Municipals Protest at 7.

³⁰ Union Power Protest at 3-4.

³¹ *Id.* at 4.

forma OATT.³² Also, in 2009, the Commission stated that “having the ICT in place the last two years has had a positive impact by providing increased transparency on, and non-discriminatory access to, the Entergy system.”³³ We find that the ICT’s direct and substantial oversight over the operations and planning of the Entergy transmission system will provide stability to the region and allow all parties to engage in discussions aimed at improving conditions on the Entergy transmission system. As the parties contemplate, more than a year is needed to fully engage in those discussions and make decisions about the long-term status of the Entergy transmission system. Those discussions will revolve around the merits of RTO membership and enhancing the ICT.

21. We recognize that some parties are concerned that any extension of the ICT arrangement without improvements to the ICT structure will be problematic. However, we note that Entergy has recognized that the ICT structure is not static and is committed to making improvements and enhancements to the ICT structure.³⁴ Entergy states that it is currently working with the E-RSC and stakeholders to enhance the ICT structure and will be submitting filings under section 205 of the FPA to implement such enhancements.³⁵ In this regard, our acceptance of the two-year extension in no way prevents Entergy from making section 205 filings aimed at enhancing the ICT structure or pursuing an alternative arrangement that best suits the needs of Entergy’s transmission system.³⁶ In fact, we encourage and expect that Entergy will propose enhancements to the ICT that can be used either as a bridge to RTO membership or a fully-enhanced ICT.

³² ICT Order, 115 FERC ¶ 61,095 at P 3.

³³ *Entergy Services Inc.*, 126 FERC ¶ 61,227 at P 79.

³⁴ September 17 Filing, Transmittal at 5 (noting that Entergy recognizes that “the ICT arrangement was not intended to be static, [but that] the intent has been to identify potential improvements as experience is gained with the ICT and the [Weekly Procurement Process]”).

³⁵ As noted above, Entergy made one such filing on October 27, 2010. *See supra* note 24.

³⁶ We also note that Entergy must continue to comply in Docket No. ER10-1065-000 with the filing requirements established in the ICT Order. ICT Order, 115 FERC ¶ 61,095 at P 297-305.

2. Changes to the ICT Structure

a. Entergy's Proposal

22. Entergy did not propose any changes to the structure of the ICT in this filing, but notes that it is currently working with the E-RSC to implement enhancements and improvements to the ICT structure, which would be detailed in future filings to the Commission.³⁷

b. Comments

23. Union Power advocates a change to the transmission planning horizon used in the ICT's Base Plan, arguing that the Commission should direct Entergy to extend the Base Plan to a ten-year planning horizon. Union Power asserts that such a change would enable transmission customers to avail themselves of long-term transmission service on the Entergy system and eliminate unduly discriminatory practices that stem from Entergy's current planning process.³⁸ Union Power explains that the three-year Base Plan results in a lack of incremental reliability upgrades beyond the three-year horizon and, as a result, the majority of customers are required to assume financial responsibility for transmission upgrades that would otherwise be rolled into Entergy's transmission service rates.³⁹

24. The Arkansas Commission states that it supports Entergy's proposal to extend the ICT by two additional years, subject to certain recommended changes. First, the Arkansas Commission argues that Entergy's use of participant funding should terminate either immediately or at most, within one year, if a new transmission cost allocation is not adopted for the Entergy region.⁴⁰ Second, the Arkansas Commission contends that Entergy and SPP should be directed to work with stakeholders and retail regulators in the SPP and Entergy region to cost-effectively resolve the seams issue by a certain deadline (not to exceed nine months).⁴¹ Third, the Arkansas Commission maintains that the Weekly Procurement Process should be revised to: (1) provide meaningful information to market participants whose bids are rejected; (2) authorize the ICT to directly

³⁷ See, e.g., *supra* note 24.

³⁸ Union Power October 22 Comments at 3.

³⁹ *Id.* at 7-8.

⁴⁰ Arkansas Commission Comments at 7-9.

⁴¹ *Id.* at 10-11.

implement improvements to the Weekly Procurement Process; and (3) require routine audits to ensure that the Weekly Procurement Process is operating consistently with the OATT requirements.⁴² Fourth, the Arkansas Commission states that the ICT should be given additional authority over the calculation of available flowgate capability and available transfer capability, with routine auditing.⁴³ Finally, the Arkansas Commission requests that the Commission order the use of independent, third-party market oversight of Entergy's operations to guard against the exercise of market power.⁴⁴

c. **Commission Determination**

25. We find that the arguments raised by the protesters regarding the specific structure of the ICT arrangement, or modifications to the current tariff implementing the arrangement, are outside the scope of this proceeding. As discussed above, we are accepting the two-year extension of the existing ICT arrangement, with the understanding that this additional time is needed to facilitate improvements and enhancements to the ICT structure and to evaluate the possibility of Entergy joining an RTO or establishing a permanent long-term ICT arrangement. Thus, the primary objective of this filing is to extend the current arrangement to provide parties additional time to discuss, analyze, and implement improvements to the ICT structure while solutions are being considered. The issues raised by Union Power and the Arkansas Commission, including changing transmission cost allocation, changing the time horizon for the Base Plan, and enhancing the ICT's role are, currently being discussed at E-RSC meetings. In fact, at its October 20th and 21st meetings, the E-RSC unanimously voted in favor of a proposal that could serve to address some of the issues raised by protesters, such as transmission upgrade cost allocation and the Base Plan horizon, by granting certain transmission planning and pricing related authorities to the E-RSC. This proposal is currently before the Commission under a section 205 filing made by Entergy in Docket No. ER11-1923-000.⁴⁵ Accordingly, we reject the arguments raised here with respect to changes to the ICT structure and the WPP, and encourage protesters and other stakeholders to continue pursuing improvements to the ICT in their discussions with Entergy and the E-RSC.⁴⁶

⁴² *Id.* at 12-13.

⁴³ *Id.* at 14-15.

⁴⁴ *Id.* at 15.

⁴⁵ *See supra* note 24.

⁴⁶ We also note that the parties may bring issues regarding the ICT structure before the Commission under section 206 of the FPA.

3. Indemnification Provisions in the ICT Agreement and OATT

a. Entergy's Proposal

26. Entergy's filing also includes changes to the indemnification provisions of the ICT agreement as well as the liability provisions of the OATT. Entergy explains that these changes were required by SPP in order for it to continue operating as the ICT.

27. Under the new proposal, Entergy will indemnify SPP for any fines or penalties assessed on the SPP by the Commission, NERC, the SERC Reliability Corporation, or any regional entity.⁴⁷ Entergy also proposes changes in its OATT to recover the costs from its ratepayers that it may incur from providing indemnification to SPP.⁴⁸ Additionally, Entergy proposes revisions to its OATT to limit SPP's and Entergy's liabilities.⁴⁹ Entergy maintains that the changes to the ICT Agreement and the OATT are consistent with Commission precedent and policy.

⁴⁷ Specifically, Entergy proposes to revise the ICT Agreement as follows:

Section 6.1 - to provide that Entergy will indemnify SPP for any regulatory fine or penalty assessed on SPP by FERC, NERC, SERC, or any regional entity, unless it arises out of SPP's gross negligence or intentional misconduct;

Section 6.1.1 – to provide that, if FERC, NERC, or any regional entity proposes to assess a regulatory fine or penalty against SPP arising out of its performance under the ICT Agreement, the parties will advocate for non-monetary penalties in lieu of such regulatory fines; and

Section 6.2 - to eliminate the requirement that SPP indemnify Entergy for losses based on SPP's breach of its obligations under the ICT Agreement.

⁴⁸ Specifically, Entergy proposes to add a new section 10.4 to provide that, to the extent Entergy incurs costs of regulatory fines under section 6.1 of the ICT Agreement, Entergy may recover these costs from its customers as ICT Operating Costs under Schedule 10 of Entergy's OATT.

⁴⁹ Specifically, section 10.3 of Entergy's OATT excludes: (1) the ICT's liability for money damages or other compensation to any Transmission Customer except in cases of gross negligence or willful misconduct; (2) Entergy's liability for monetary damages or other compensation to any Transmission Customer for actions or omissions by the ICT

(continued...)

28. Further, Entergy contends that the limitation on the ICT's liability to customers under the OATT is consistent with the Commission's previous finding that the ICT is similar to an RTO, is under the Commission's exclusive jurisdiction, and furthers the Commission's goals and, therefore, that a "gross negligence standard" is consistent with Commission policy.⁵⁰ Entergy also asserts that the proposed limitation on liability provisions is similar to the Commission-approved provisions included in SPP's OATT⁵¹ and other RTOs' OATTs.⁵²

b. Comments

29. L-M Municipals protest Entergy's proposed liability revisions because they limit the ICT's and Entergy's own responsibilities for their action or inaction.⁵³ L-M Municipals argue that the first sentence in section 10.3 that excludes the ICT's liability for money damages or other compensation to any transmission customer except in cases of gross negligence or willful misconduct should be rejected. They reject Entergy's claim that SPP, in acting as the ICT for Entergy's transmission system, is sufficiently akin to an RTO to lay the claim to the full set of liability protections made available to RTOs.⁵⁴ L-M Municipals maintain that the "close enough" standard is not a suitable standard by which to judge tariff provisions that limit the legal rights of transmission customers. Also, L-M Municipals assert that given the ICT extension and the failure to deliver all the benefits announced at the outset of the ICT arrangement, the Commission should reconsider its earlier holding that applied the "gross negligence" standard to the ICT.⁵⁵

in performing its obligations under the OATT; and (3) Entergy's and the ICT's liability for any incidental, consequential, punitive, special, exemplary or indirect damages.

⁵⁰ September 17 Filing at 8 (citing *Entergy Servs Inc.*, 123 FERC ¶ 61,043, at P 25, 26 (2008) (ICT Amendment Order)).

⁵¹ *Id.* (citing SPP OATT § 10.2).

⁵² *Id.* (citing e.g., ISO New England, Inc. OATT § 1.5.2; Midwest ISO OATT §§ 10.3(a), 10.3(b); New York Independent System Operator, Inc. OATT § 10.3; PJM Interconnection, LLC OATT § 10.2; SPP OATT § 10.2).

⁵³ L-M Municipals Protest at 9.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 11. In the ICT Amendment Order, the Commission accepted Entergy's revisions to section 10.2 of its OATT to have the transmission customer indemnify the

(continued...)

30. Also, L-M Municipals maintain that there is no justification for the second sentence in section 10.3 that states that Entergy would not be liable for money damages, or other compensation, to any transmission customer for actions or omissions by the ICT in performing its obligations under the OATT or service agreement. As the party that selects the entity retained as the ICT, L-M Municipals argue, Entergy should bear some responsibility for the ICT's actions. Also, L-M Municipals add that if at some future point, Entergy were to retain an unqualified entity to act as ICT and that entity's negligent actions later caused customers to suffer some loss, Entergy should be held accountable for its selection of that entity.⁵⁶ Further, Union Power argues that Entergy fails to explain why the same limitation on liability in the last sentence of section 10.3 that limits ICT's liability for consequential and indirect damages should also apply to Entergy.⁵⁷ Because Entergy is not itself an RTO and has not turned over all control of its transmission system to the ICT, but instead retains certain responsibilities for the provision of transmission service, Union Power argues that Entergy should not be allowed to limit Entergy's liability for such damages for its own actions under the OATT.⁵⁸

31. L-M Municipals and Union Power assert that amended section 6.1 of the ICT Agreement, which requires Entergy to indemnify the SPP for regulatory fines incurred by the ICT, operates in conjunction with section 10.4 of the OATT, which provides that Entergy can recover the costs of any such regulatory fines as ICT operating costs, to create an automatic pass-through of penalties and fines. They argue that the combined

ICT (SPP) under the gross negligence standard. The Commission explained that the ICT arrangement is, like RTOs and ISOs, created and solely regulated by the Commission and, therefore, it is consistent with Commission policy to apply the gross negligence standard to SPP in its role as the ICT. ICT Amendment Order, 123 FERC ¶ 61,043 at P 23-26.

⁵⁶ L-M Municipals Protest at 11.

⁵⁷ Specifically, Union Power is referring to the last sentence in section 10.3 that states “[i]n no event shall the Transmission Provider or the ICT be liable for any incidental, consequential, punitive, special, exemplary or indirect damages, loss of revenues or profits, arising out of, or connected in any way with, the performance or non-performance under this Tariff or any Service Agreement thereunder.” Entergy admits that the reference to itself, i.e., “Transmission Provider” is inadvertent and states that it is willing to eliminate “the Transmission Provider” in section 10.3. Entergy's October 21, 2010 Answer at 5.

⁵⁸ Union Power Protest at 4.

effect of these provisions is the same as an automatic pass-through directly from SPP to transmission customers, which is contrary to the guidance provided in the RTO Penalty Guidance Order.⁵⁹

32. L-M Municipals assert that the Commission, in its RTO Penalty Guidance Order, expressed concern that RTOs and Independent System Operators (ISO) will not have the appropriate incentives to proactively comply with Reliability Standards if they have blanket authority to automatically pass through money penalties to their customers.⁶⁰ Union Power also argues that Entergy failed to address the Commission's guidance with respect to the pass-through. L-M Municipals argue that the same factors identified by the Commission in disallowing an automatic pass-through mechanism for RTOs and ISOs also counsel against approving the mechanism proposed by Entergy and SPP for recovery of penalty-related costs. Union Power notes that the Commission also stated in the RTO Penalty Guidance Order that any contract and/or tariff mechanisms to reassign penalty responsibility must not be unduly discriminatory.⁶¹ Union Power argues that Entergy has not made such a showing in seeking to pass through the regulatory fines and penalties to transmission customers. Therefore, L-M Municipals state that Entergy and SPP should be required to abide by the process described in the RTO Penalty Guidance Order and propose an appropriate mechanism only at such time as it may be needed in connection with a specific penalty levy.

33. Finally, L-M Municipals argue that section 6.1 of the ICT Agreement is a broad indemnity provision that should either be stricken in its entirety or at least be amended so that the indemnification obligation is limited to fines or penalties arising in connection with SPP's performance of ICT-related duties.⁶²

34. The Texas Commission and the Arkansas Commission state that they take no position on the appropriateness of the proposed indemnification and liability provisions, but they argue that, if the Commission were to approve the amendments authorizing

⁵⁹ *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) (RTO Penalty Guidance Order).

⁶⁰ L-M Municipals Protest at 12 (citing RTO Penalty Guidance Order, 122 FERC ¶ 61,247 at P 16).

⁶¹ Union Power Protest at 5 (citing RTO Penalty Guidance Order, 122 FERC ¶ 61,247 at n.40).

⁶² L-M Municipals Protest at 14.

Entergy to indemnify SPP for regulatory fines and penalties, Entergy should not be permitted to recover any costs of that indemnification from Entergy's customers. The Texas Commission further argues that Entergy, not its customers, is solely responsible for its compliance with regulatory requirements and, as such, any penalties or fines assessed against Entergy for its failure to meet such requirements should be borne by Entergy alone, not its customers.⁶³ Similarly, the Arkansas Commission states that Entergy, not its customers, is the only entity that is responsible for compliance with regulatory rules and standards and failure to meet those standards should result in Entergy, and Entergy alone, bearing the consequences of such failures.⁶⁴

c. Commission Determination

35. We accept Entergy's proposed revisions to the indemnification provisions in sections 6.1, 6.1.1, and 6.2 of the ICT Agreement, which, with one exception discussed below, are unopposed, to reflect the agreement between SPP and Entergy whereby SPP has agreed to continue to function as the ICT for an additional two years. We also accept in part and reject in part Entergy's proposal to revise its OATT to add two new sections that concern limited liability provisions and the recovery of indemnification costs, respectively. Specifically, we accept the limited liability provision in section 10.3, with certain modifications agreed to by Entergy, and reject Entergy's proposed indemnification cost recovery mechanism in section 10.4.

36. We reject L-M Municipals' argument that the indemnity provision in section 6.1 should be amended so that the indemnification obligation is limited to fines or penalties arising in connection with SPP's performance of ICT-related duties. Such an amendment is unnecessary because section 6.1 of the ICT Agreement applies to regulatory fines incurred by SPP only with respect to its ICT-related duties.

37. We accept, as modified below, Entergy's proposed revisions in section 10.3 of its OATT that limit Entergy's and the ICT's liabilities. With the exception described below, Entergy's proposed revisions are similar to the limitation of liability provisions in Commission-approved RTO and ISO OATTs.⁶⁵ We reject L-M Municipals' argument that the "gross negligence standard" applied to RTOs should not apply to the ICT, as stated in section 10.3. The Commission has held that the ICT is similar to RTOs and

⁶³ Texas PUC Comments at 3.

⁶⁴ Arkansas Commission Comments at 14.

⁶⁵ *See, e.g.*, ISO New England OATT, section 1.5.2; Midwest ISO OATT, section 10.3; SPP OATT, section 10.2, and PJM OATT, section 10.2.

ISOs because it is created and solely regulated by the Commission and found that it was reasonable to extend the gross negligence standard to the ICT for the purpose of applying the OATT indemnification provisions because of its importance as an independent entity overseeing Entergy's system.⁶⁶ L-M Municipals have provided no rationale for overturning that finding here. We also find unavailing L-M Municipals' argument that Entergy should be liable for money damages arising from acts or omissions of the ICT under the OATT because there is a potential for an unqualified entity to act as the ICT. L-M Municipals' argument is premature and speculative. Currently, SPP is approved to act as the ICT for the Entergy transmission system, and if and when Entergy selects a different entity to act as the ICT, L-M Municipals can raise their concern at that time.

38. In response to Union Power's argument regarding the last sentence in section 10.3,⁶⁷ Entergy admits in its answer that the reference to the limitation of Entergy's liability for consequential, incidental, and indirect damages for its own actions was inadvertent. Entergy states that it will delete the phrase "the Transmission Provider" so that the revised sentence in section 10.3 only applies to the ICT. Accordingly, we direct Entergy to revise that sentence in a compliance filing to be submitted within 30 days of the date this order.

39. We also find that Entergy's proposed automatic recovery of the costs of regulatory fines and penalties through Schedule 10 of the Entergy OATT under proposed section 10.4 is contrary to Commission precedent and the reasoning in the RTO Penalty Guidance Order and therefore, reject it. In the RTO Penalty Guidance Order, the Commission stated that penalties are designed to encourage compliance with Reliability Standards. The Commission further stated that if an RTO or ISO knows it can simply pass through the costs of those penalties, the incentive to comply with the Reliability Standards would be reduced. Entergy's proposal to create an automatic pass-through of indemnification costs to its customers would reduce Entergy's incentive to comply with the Reliability Standards. The Commission stated, however, that it would entertain section 205 filings on a case-by-case basis that propose to recover penalty costs from members and/or customers, but that the Commission would consider such matters as whether the RTO or ISO had a sound compliance program in place to prevent the

⁶⁶ ICT Amendment Order, 123 FERC ¶ 61,043 at P 26 (stating that the Commission does not intend to extend such protection to all transmission providers).

⁶⁷ The last sentence of section 10.3 states "In no event shall *the Transmission Provider* or the ICT be liable for any incidental, consequential, punitive, special, exemplary or indirect damages, loss of revenues or profits, arising out of, or connected in any way with, the performance or non-performance under this Tariff or any Service Agreement thereunder." (Emphasis added).

violations or whether the violations were intentional or grossly negligent. In this case, Entergy has proposed an automatic pass-through of indemnification costs without any recognition of these matters.

40. Moreover, we find that Entergy ignores the premise of the RTO Penalty Guidance Order that RTOs may be unable to pay reliability penalties, given that they may be non-profit entities.⁶⁸ In contrast, Entergy is a shareholder-owned, for-profit entity.

41. Accordingly, we reject Entergy's proposed section 10.4. Entergy, however, may seek Commission approval on case-by-case basis under section 205 of the FPA to recover indemnification costs related to regulatory fines or penalties from its transmission customers. In such a filing, Entergy may seek to directly assign the costs of the penalty to the responsible entity or, if appropriate, it may seek to spread those costs broadly to all customers.⁶⁹

The Commission orders:

(A) Entergy's proposal to extend the ICT arrangement for two years is hereby accepted, to be effective November 17, 2010, as discussed in the body of this order.

(B) Entergy's proposed indemnification provisions in sections 6.1, 6.1.1, and 6.2 of the ICT Agreement are hereby accepted, to be effective November 17, 2010, as discussed in the body of this order.

(C) Entergy's proposed section 10.3 of the Entergy OATT, as modified, is hereby accepted, to be effective November 17, 2010, subject to the compliance filing directed in Ordering Paragraph (D) below.

⁶⁸ RTO Penalty Guidance Order, 122 FERC ¶ 61,247 at P 12.

⁶⁹ In the RTO Penalty Guidance Order, the Commission also stated that it would "not allow the direct assignment of penalty costs to another entity under section 205 unless that entity had previously been put on notice of its potential liability for penalty costs in the event that it contributed to the RTO or ISO's violation of a Reliability Standard and incurrence of the penalty." *Id.* P 24. Further, the Commission noted that "it is important for RTOs and ISOs to include provisions regarding the appropriate responsibility for reliability-related monetary penalties in their contracts with their members and customers and/or in their tariffs. . . ." *Id.*

(D) Entergy is hereby directed, in a compliance filing to be submitted within 30 days of the date of this order, to revise section 10.3 of the Entergy OATT, as discussed in the body of this order.

(E) Entergy's proposed section 10.4 of the Entergy OATT is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.