

108 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket Nos. ER04-830-000

ORDER ACCEPTING IN PART AND REJECTING IN PART PROPOSED
MODIFICATIONS TO PRO FORMA LARGE GENERATOR INTERCONNECTION
PROCEDURES AND LARGE GENERATOR INTERCONNECTION AGREEMENT

(Issued July 8, 2004)

1. On May 11, 2004, Entergy Services, Inc. (Entergy) submitted, on behalf of the Entergy Operating Companies¹ in compliance with Order No. 2003-A,² proposed variations from the *pro forma* Large Generator Interconnection Procedures (LGIP) and Large Generator Interconnection Agreement (LGIA). It says that these variations are “consistent with or superior to” the provisions of Order No. 2003-A. In this order, the Commission accepts in part and rejects in part the proposed variations. In addition, certain variations are made subject to the outcome of Entergy’s related proceeding in Docket No. ER04-699. This order benefits customers because it provides just and reasonable terms and conditions of transmission service while ensuring that reliability is protected.

¹ The Entergy Operating Companies include: Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi Inc., and Entergy New Orleans Inc. (collectively Entergy).

² Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles ¶ 31,146 (2003) (Order No. 2003), *order on reh’g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004) (Order No. 2003-A), *reh’g pending*; *see also* Notice Clarifying compliance Procedures, 106 FERC ¶ 61,009 (2004).

I. Background

2. In Order No. 2003, pursuant to its responsibility under sections 205 and 206 of the Federal Power Act (FPA)³ to remedy undue discrimination, the Commission required all non-independent public utility Transmission Providers that own, control or operate facilities for transmitting electric energy in interstate commerce to append to their open access transmission tariffs (OATT) a *pro forma* LGIP and a *pro forma* LGIA.⁴ In order to achieve greater standardization of interconnection terms and conditions, Order No. 2003 required such public utilities to file revised OATTs containing the *pro forma* LGIP and LGIA by January 20, 2004.⁵

3. Non-independent Transmission Providers are also permitted to seek variations from the *pro forma* LGIP and LGIA not made in response to recognized regional reliability requirements. Such requests for variation must be made pursuant to FPA section 205 filings (that is, they will not be considered to be compliance filings) and will be approved only if the applicant demonstrates that the proposed variations are “consistent with or superior to” the terms of the *pro forma* LGIA and LGIP.⁶

4. On May 11, 2004, Entergy filed a revised LGIA and LGIP pursuant to Order No. 2003-A. It proposes variations from the *pro forma* LGIP and LGIA that were adopted in Order No. 2003-A. It requests an effective date of May 12, 2004.⁷ In addition, Entergy has submitted for approval proposed Appendix 2 to Attachment N-1, Queue Priority and Cost Allocation, which Entergy requests be made effective consistent with the effective date of Attachment T, Recovery of New Facilities Cost, which is pending Commission

³ 16 U.S.C. §§ 824d, 824e (2000).

⁴ Order No. 2003 at P 2.

⁵ See Notice Clarifying Compliance Procedures, dated January 14, 2004, *supra* note 1 (clarifying that the Commission will deem OATTs of non-independent public utilities to be revised as of January 20, 2004 to include the *pro forma* LGIA and LGIP). Also see Order No. 2003-A, at P 41 directing non-independent Transmission Providers to also make ministerial filings reflecting the revisions to Order No. 2003-A upon their next filings with the Commission.

⁶ Order No. 2003 at P 825.

⁷ We find good cause to grant waiver of the Commission’s 60-day prior notice requirement to permit the effective date requested by Entergy. See *Central Hudson Gas & Elec. Corp., et al.*, 60 FERC ¶ 61,106 at 61,338, *reh’g denied*, 61 FERC ¶ 61,089 (1992).

action in Entergy's application to establish an Independent Coordinator of Transmission (ICT) in Docket No. ER04-699-000. We note that Entergy named this filing "Ministerial Compliance Filing." This title is misleading. In addition to the ministerial filing, the filing includes requests for variations from the Commission's *pro forma* LGIA and LGIP.

II. Proposed Modifications to the LGIA and LGIP

5. Entergy proposes to revise the *pro forma* LGIP to add a two-part "deliverability" test for customers seeking to qualify generators as Network Resource Interconnection Service (NRIS) resources under the NRIS testing process generally outlined in section 3.2.2.2 of the *pro forma* LGIP.⁸ Entergy's proposed tests (contained in Attachment N-1 to the LGIP) include: (1) a test of deliverability from generation to the aggregate load connected to Entergy's transmission system ("from generation" test); and (2) a test of deliverability to load associated with sub-zones ("to load" test). The tests are conducted for peak conditions in summer and winter for each year of the five-year planning horizon beginning in the first year in which the new unit is scheduled to begin operations.⁹ Section 1.3 of proposed Attachment N-1 to the LGIP states "NRIS will become available [when] Appendix 2 to Attachment N-1 goes into effect."

6. Entergy states that in order to pass the "from generation" test, a generator must be able to run at its maximum rated output without impairing the capability of the aggregate previously qualified generation resources at the NRIS or the Network Integration Transmission Service (NITS) level in the local area. Pursuant to this test, the resources assumed to be displaced in order to test the generator will be located outside of the local area. In order to pass the "to load" test, Entergy states that a generator must be able to run at its maximum rated output without introducing flows onto the transmission system that would harm the transmission system. In both the "from generation" and "to load" tests, existing long-term firm point-to-point transmission service commitments are assumed to be maintained.

7. Appendix 2 to Attachment N-1 explains a generator's queue priority and cost responsibility for NRIS. Under this proposal, Entergy would review NRIS requests as a group during an initial 30 day window after the effective date of Attachment N-1. Subsequent windows will be 180 days. Network Upgrades identified in a NRIS study would have to be constructed before a generator can receive NRIS status. The Network Upgrade costs would be allocated to individual generators on a *pro rata* share based on their contribution to congestion on constrained element(s).

⁸ These standards were also filed for informational purposes in Docket No. ER04-699-000.

⁹ Appendix 1 of Attachment N-1 contains the details of the test procedures.

8. In addition, as permitted by Order No. 2003-A, Entergy submitted terms related to the following miscellaneous provisions dealing with the Interconnection Feasibility Study (Feasibility Study) in each of the appendix letter agreements (Study Agreement) to the LGIP: indemnities, representations, disclaimers, warranties, governing law, amendment, execution, waiver, enforceability and assignment. Certain of these terms are discussed in more detail below.

9. Entergy has included two disclaimers in its interconnection procedures. First, it includes a Study Release disclaimer, which states that the interconnection study is provided “as is” and that Entergy “makes no warranty or representation regarding the accuracy, completeness or usefulness of the information” contained in the study.¹⁰ This provision also disclaims all warranties regarding the study and states that Entergy will not be liable for any damages of any kind arising out of any use of the information contained in this study.

10. Second, Entergy provides an Equipment Release disclaimer. This disclaimer states that Entergy’s Feasibility Study “shall not be construed as confirming or endorsing the design, or as any warranty of safety, durability, reliability, or suitability of Interconnection Customer’s equipment or installation thereof for any use, including the use intended by Interconnection Customer, and Interconnection Customer agrees to hold [Entergy] harmless for any claims or demands arising out of or relating to Interconnection Customer’s use of the Interconnection Feasibility Study.”¹¹

11. Entergy’s proposed indemnity provision included in each of the appendix letter agreements to the LGIP,¹² provides:

Interconnection Customer agrees to fully indemnify and hold Transmission Provider ... harmless from and against any and all claims, demands, liability, losses, damages, costs or expenses (including attorneys’ fees and other costs of defense), of any nature or kind whatsoever arising out of or otherwise resulting from the Interconnection Customer’s reliance on, or use of, the results of Transmission Provider’s Interconnection Facilities Study. Neither Interconnection Customer nor Transmission Provider shall be liable in contract, in tort (including negligence), or otherwise to the other Party ... for any incidental or consequential loss or damage whatsoever, including, but not limited to, loss of profits or revenue

¹⁰ See, e.g., First Revised Sheet No. 338.

¹¹ See, e.g., First Revised Sheet No. 339.

¹² See, e.g., First Revised Sheet No. 339.

on work not performed, for loss of use of or under-utilization of the other Party's facilities, or loss of use of revenues or loss of anticipated profits.

12. Entergy's proposed Governing Law provision states that the Study Agreements shall be governed by the laws of the state where the Point of Interconnection is located. In addition, this provision provides for exclusive jurisdiction of the state or federal courts in Louisiana and the state of the Point of Interconnection.¹³ Entergy proposes to include a provision stating that a party who does not insist on strict performance or fails to exercise or delays exercising any rights or remedy provided for by the Feasibility Study or by law does not release the other party from its responsibilities and obligations imposed by law or the Feasibility Study.

13. Under proposed provisions on amendment, assignment, execution, and captions: (1) the Study Agreement may not be amended except in writing and approved by a duly authorized representative of the Interconnection Customer and the President or a Vice President of the Transmission provider,¹⁴ (2) the Study Agreement may not be assigned without the prior written consent of the Transmission Provider,¹⁵ (3) the Study Agreement may be executed in two or more counterparts, each of which is deemed an original and all of which are considered the same instrument,¹⁶ and (4) all indexes, titles, subject headings, section titles and similar items are provided for the purpose of reference and are not intended to be inclusive, definitive, or to affect the meaning of the contents or scope of the Study Agreement.¹⁷

14. Entergy includes the term "Good Engineering Practice," which states that Entergy will "rely on current Transmission Provider standards and good engineering practice."¹⁸ This provision also states that the results of Entergy's Feasibility Study "in no way guarantee[s] that the Interconnection Customer will be able to deliver the capacity and energy" from its generator to the transmission system.

¹³ See, e.g., First Revised Sheet No. 339-40.

¹⁴ See, e.g., First Revised Sheet No. 340.

¹⁵ See, e.g., First Revised Sheet No. 340.

¹⁶ See, e.g., First Revised Sheet No. 340.

¹⁷ See, e.g., First Revised Sheet No. 340.

¹⁸ See, e.g., First Revised Sheet No. 338.

III. Notice and Responsive Pleadings

15. Notice of Entergy's filing was published in the *Federal Register*, 69 Fed. Reg. 29,292 (2004), with comments, protests, and interventions due on or before June 1, 2004. Tenaska, Inc. filed a timely motion to intervene. The American Forest and Paper Association (AFPA) filed a timely motion to intervene and protest. Mississippi Delta Energy Agency, The Clarksdale Public Utilities Commission, The Public Service Commission of Yazoo City, Arkansas Electric Cooperative Corporation, and South Mississippi Electric Power Association (collectively Joint Intervenors) filed a timely joint motion to intervene and protest. Entergy filed an answer on June 16, 2004.

16. Both AFPA and the Joint Intervenors protest the deliverability standards. AFPA states that it questions whether the deliverability test criteria are comparable to the criteria that Entergy uses in studying the interconnection of its own generating resources to its system. It also questions why, under the deliverability test, resources outside the local area must be assumed to be displaced instead of those in the local area. AFPA states that a new, efficient generator should be assumed to displace older, less-efficient generators. However, it states that Entergy's proposal assumes that the operation of less-efficient generators at their maximum output would be continued. AFPA claims that by requiring unaffiliated generators to satisfy a "stringent" test, Entergy will impose additional upgrades on the generators, then directly assign the cost of those upgrades to the generator under its participant funding approach. AFPA argues that this is contrary to the Commission's current pricing policy for non-independent transmission providers because costs would be directly assigned even if they are for network upgrades that should be treated as system costs.

17. The Joint Intervenors state that the deliverability test is part of Entergy's broader proposal in Docket No. ER04-699-000 (ICT Proposal) and should be made subject to the outcome of that docket. They state that when combined with the pricing policy in Attachment T to Entergy's ICT Proposal, the deliverability test would "substantially limit[] the flexibility of Network Customers to designate additional network resources and will create significant disincentives for development of network resources."¹⁹ In addition, the Joint Intervenors argue that Entergy has failed to or show that its proposed revisions are "consistent with or superior to" the *pro forma* LGIP and LGIA.

18. AFPA also protests the proposed changes to the Study Agreements. It states that while Entergy's assignment provision prohibits assignment without consent, Entergy does not state that this consent will not be unreasonably withheld, conditioned or delayed. In addition, AFPA argues that the provision on Good Engineering Practice is ill-defined and opens the door for abuse. It contends that the LGIP already includes a provision

¹⁹ Joint Intervenors Protest at 8.

requiring Good Utility Practice and that this includes achieving results “consistent with good business practices, reliability, safety and expedition.”²⁰ AFPA claims that the term Good Engineering Practice adds nothing to the *pro forma* LGIP and that Entergy can adopt the definition of Good Utility Practice.

19. Entergy’s Study Agreement states that the results of the Feasibility study “in no way guarantee that the Interconnection Customer will be able to deliver the capacity and energy from, the [Facility] to the Transmission Provider’s system.” AFPA maintains that interconnection studies are designed to identify the facilities and upgrades required for a customer to be able to deliver its output to the transmission system and that this language “essentially says [Entergy’s] studies are meaningless.”²¹

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy's answer and will, therefore, reject it.

B. Substantive Matters

1. Appendix 2 to Attachment N-1

21. Appendix 2 to Attachment N-1 explains a generator’s queue priority and cost responsibility for NRIS. Entergy stated that it is not seeking a specific effective date for Appendix 2 to Attachment N-1 and that the cost allocation mechanisms could not be implemented until the Commission acted upon Entergy’s ICT proposal in Docket No. ER04-699-000. We believe that this portion of Entergy’s proposal is more appropriately addressed in Docket No. ER04-699-000. Therefore, we reject Appendix 2 to Attachment N-1 without prejudice to Entergy’s filing it for consideration in Docket No. ER04-699-000.

²⁰ LGIP § 1.

²¹ AFPA Protest at 7.

2. Deliverability Test

22. Section 3.2.2.2 of the Commission's *pro forma* LGIP provides that a customer's Interconnection Study request for NRIS shall be studied at the Transmission Provider's peak load under a variety of severely stressed conditions to determine if the aggregate of existing generation in the local area can be delivered to aggregate load on the Transmission Provider's transmission system when the proposed generating facility is at full output.²² This "deliverability" test is intended to ensure that all load on a transmission system with firm service can continue to be served reliably. Similarly, the test is also designed to determine the effect of the new generation resource on previously granted transmission delivery service.

23. Entergy's two-part "deliverability" test is designed to flesh out the Commission's standards set forth in section 3.2.2.2 in order to identify the upgrades required, if any, to make a resource "deliverable" along with existing qualified resources at the NRIS or NITS level so that there is no impairment on those resources in the local area to support load and so that the Customer's generator can run at maximum output without adversely affecting the transmission system.

24. Joint Intervenors and AFPA object to Entergy's deliverability test on the grounds that Entergy filed it as part of its ICT proposal in Docket No. ER04-699-000 and that when it is combined with the pricing proposal contained in Appendix 2 to Attachment N-1, the result would be directly assigning the network upgrade costs to the interconnection customer. This order rejects Appendix 2 to Attachment N-1, so this protest to Entergy's proposed deliverability test is moot. This rejection is without prejudice to the Joint Intervenors raising these concerns in Docket No. ER04-699-000.

25. Entergy has also proposed a modification, section 1.3 of Attachment N-1, indicating that NRIS will not be available until the pricing provisions included in Attachment T of Entergy's filing in Docket No. ER04-699-000 are accepted. We reject the provisions of section 1.3 that tie the availability of NRIS to the acceptance of Attachment T in Docket No. ER04-699-000. Order Nos. 2003 and 2003-A required transmission providers to provide NRIS as of January 20, 2004. As a result, we deem Entergy is already required to provide NRIS under the Commission's current interconnection pricing policy.

26. AFPA argues that Entergy's deliverability test should account for the possible displacement of an existing less efficient generating resource when assessing the impact of a new generating facility. AFPA is mistaken as to the purpose of the deliverability test. The deliverability test's purpose is to ensure that the proposed generating facility,

²² See also § 4.1.2.2 of the *pro forma* LGIA.

operating at full output, can be interconnected without adversely affecting any previously granted transmission delivery service or interconnection service. This means that the test must be conducted without regard to the efficiency or economic viability of any generating resources that may be using these previously granted services. We find that Entergy's two-part deliverability test, which assumes the displacement of resources that are outside of the proposed generating facility's local area without regard to operating efficiency, accomplishes this purpose.

27. AFPA asserts that Entergy's deliverability test may not be applied comparably to interconnection of an Entergy or an Entergy affiliated resource. We disagree. We find that there is nothing inherent in Entergy's deliverability test that would require or permit Entergy to treat affiliated and unaffiliated resources differently. Furthermore, section 2.2 of the *pro forma* LGIP and the definition of Interconnection Customer provide adequate assurance that an Entergy or Entergy-affiliated generating resource will face the same tests as will other generators. Therefore, we accept Entergy's deliverability test, with the exception of the portion of section 1.3 stated above, to be effective May 12, 2004.

3. Miscellaneous Provisions

28. Entergy has proposed a number of miscellaneous provisions to the various interconnection study agreements. We conclude that the provisions related to Waiver, Amendment, Execution and Captions are acceptable, since they are consistent with similar provisions in Entergy's Open Access Transmission Tariff. In its transmittal letter, Entergy states that the LGIP cannot be implemented until these provisions are accepted. However, Entergy recognized that the LGIA and LGIP were deemed effective on January 20, 2004. The accepted provisions are effective May 12, 2004 as requested by Entergy. And, contrary to Entergy's contention, the effectiveness of the *pro forma* LGIA and LGIP is not affected by our acceptance or rejection of Entergy's miscellaneous provisions.

29. However, the Commission will reject Entergy's provision entitled "Good Engineering Practice" in the section on miscellaneous terms and conditions. Entergy did not provide any explanation as to why this term is needed and has not shown that it is consistent with or superior to the *pro forma* LGIA. We agree with AFPA that the Good Utility Practices standard is adequate and there is no need to add the "Good Engineering Practice" term.

30. We will also reject Entergy's Study Release disclaimer provisions. Entergy has not shown that these provisions are consistent with or superior to the *pro forma* LGIA. Entergy's proposed Disclaimer provisions appear to eliminate Entergy's obligation to provide reasonably accurate studies that an interconnection customer can rely upon. For example, Entergy's Study Release provision states that the particular study is provided "as is" and that Entergy makes no warranty or representation regarding the accuracy,

completeness or usefulness of the study. The purpose of the various interconnection studies is to provide the Transmission Provider and the Customer a basis on which to identify the interconnection facilities, network upgrades (if required) and other costs that may be necessary to establish the interconnection. Entergy's proposed disclaimers are not compatible with this purpose.

31. In Order No. 2003, the Commission stated that it would be appropriate to have an indemnification standard for interconnection that was broader than that contained in the OATT because interconnection service poses a greater risk of liability than exists for the provision of transmission service.²³ However, the Commission also noted that this expansion of indemnity did not extend to acts of gross negligence or intentional wrongdoing. Entergy's proposed indemnification provision does not include this restriction, and it has not shown that its provision is consistent with or superior to the *pro forma*. In addition, the Commission concluded that the tightened standards as provided in the *pro forma* are an acceptable limit on liability. Entergy has not shown that its proposed indemnity provision is consistent with or superior to this standard. Therefore, we direct Entergy to modify its indemnification provision to track the language in the *pro forma* LGIA.

32. We require that Entergy modify its provision entitled Governing Law. This provision appears to limit the Commission's authority and jurisdiction pertaining to disputes arising out of the various interconnection study agreements and thus is not consistent with or superior to the *pro forma*. We direct Entergy to revise this provision to specify that Commission jurisdiction over these matters is not impeded.

33. AFPA requests that the Commission require Entergy to modify its Assignment provision so that assignment will not be unreasonably withheld, conditioned or delayed. We agree with AFPA and note that Article 19.1 of the LGIA, as well as numerous bilateral agreements, contain language similar to that which AFPA requests. Accordingly, we direct Entergy to file a modified Assignment provision reflecting that consent will not be unreasonably withheld, conditioned or delayed.

4. Other Matters

34. We reject First Revised Sheet No. 354. This sheet states that "[w]hen Attachment S of the Tariff becomes effective, the Independent Coordinator of Transmission (ICT) will be responsible for oversight..." This language assumes that the Commission will approve the ICT proposal currently pending in Docket No. ER04-699-000. Therefore, we reject First Revised Sheet No. 354 as premature without prejudice. For the same reason, we reject all references to the transmission expansion pricing policy of

²³ See Order No. 2003 at P 636.

Attachment T, contained in Docket No. ER04-699, such as those in Appendix 1 or any other references to the proposals pending in that proceeding. Entergy is directed to file revised tariff sheets within 30 days of the date of this order, to remove any such references.

The Commission orders:

(A) Entergy's proposed variations concerning its LGIP and LGIA are hereby accepted in part and rejected in part, as discussed in the body of this order. The accepted provisions are effective May 12, 2004.

(B) Entergy is hereby directed to submit revised tariff sheets with the modifications required herein, within 30 days of the date of this order.

(C) Appendix 2 to Attachment N-1 is hereby rejected without prejudice to Entergy's filing it for consideration in Docket No. ER04-699-000.

(D) Section 1.3 of Attachment N-1 is hereby rejected in part, as discussed herein, without prejudice to Entergy's filing it for consideration in Docket No. ER04-699-000.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.