

123 FERC ¶ 61,043
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. ER08-572-000

ORDER ACCEPTING AMENDMENTS TO
INDEPENDENT COORDINATOR OF TRANSMISSION AGREEMENT
AND ENTERGY'S TARIFF

(Issued April 15, 2008)

1. In this order, the Commission accepts amendments proposed by Entergy Services, Inc. (Entergy) to both the Independent Coordinator of Transmission (ICT) Agreement (ICT Agreement) and Entergy's Open Access Transmission Tariff (OATT), under section 205 of the Federal Power Act.¹ Specifically, Entergy proposes provisions in the ICT Agreement to increase staff, and to clarify terms on standards of performance and indemnification. Entergy seeks to refile the ICT Agreement as a new Attachment W to its OATT. In addition, it proposes amendments to its OATT to indemnify the ICT for ordinary negligence. For the reasons stated below, we accept Entergy's filing.

I. Background

2. The Commission approved the ICT for Entergy's system in order to make transmission information more transparent, to enhance access to transmission, and to relieve transmission congestion.² Southwest Power Pool (SPP) serves as Entergy's ICT and in that capacity, it grants or denies requests for transmission service, calculates available flowgate capability (AFC), administers Entergy's Open Access Same Time Information System (OASIS), and will oversee the Weekly Procurement Process. The

¹ 16 U.S.C. § 824d (2000).

² *Entergy Services Inc.*, 115 FERC ¶ 61,095, *errata notice*, May 4, 2006, *order on reh'g*, 116 FERC ¶ 61,275 (2006) (Order Conditionally Approving ICT). The Commission later accepted the current version of the ICT Agreement. *See Entergy Services, Inc.*, 119 FERC ¶ 61,187 (2007).

proposal seeks to amend the ICT Agreement and Entergy's OATT to increase staffing, clarify indemnification provisions to apply the gross negligence standard to the ICT,³ and clarify standards of performance.

3. Entergy is refiling the ICT Agreement (along with proposed changes) as a new Attachment W to its OATT in accordance with Order No. 614.⁴ Entergy also requests waiver of any requirements under Part 35 of the Commission's regulations to permit the amended ICT Agreement and the revisions to OATT section 10.2 to become effective on April 15, 2008, which is 60 days from the date that Entergy made its filing.

II. Notice of Filing and Responsive Pleadings

4. Notice of Entergy's filing was published in the *Federal Register*, 73 Fed. Reg. 10,754 (2008), with comments, interventions, and protests due on or before March 7, 2008. The Arkansas Public Service Commission, SPP, and the NRG Companies filed timely motions to intervene. L-M Municipals,⁵ Union Power Partners, L.P. (Union Power), and Arkansas Electric Cooperative Corporation (Arkansas Coop) filed protests. Arkansas Coop opposes hiring new employees, while L-M Municipals and Union Power argue for expanding the kinds of work that these employees may do. With regard to indemnification and liability, protesters are generally opposed to granting the gross negligence standard to SPP in its capacity as the ICT.

5. Entergy filed an answer to the protests.

III. Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and 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 Procedures, 18 C.F.R.

³ The gross negligence standard means that the ICT's liability is limited except in cases of gross negligence or intentional wrongdoing.

⁴ *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

⁵ L-M Municipals are the Lafayette Utilities System, the Louisiana Energy and Power Authority, the Mississippi Delta Energy Agency and its members (Clarksdale Public Utilities Commission and the Public Service Commission of Yazoo City), and the Municipal Energy Agency of Mississippi.

§ 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Entergy's answer because it has provided information that assisted us in our decision-making process.

B. Additional Employees

7. Entergy states that SPP needs to hire additional employees in light of the extra functions that the ICT will perform under the Commission's Order No. 890⁶ and the Reliability Standards Rule.⁷ Entergy approved the immediate hiring of six additional ICT staff members in August 2007, but states that the ICT may require up to seven more. Entergy proposes a new section 3.8 in the ICT Agreement to permit SPP to hire up to 13 new full-time employees (the six already hired plus the seven probable additions), so that it can comply with Order No. 890 and the Reliability Standards Rule.⁸ Entergy states that SPP agrees that it needs additional employees.

1. Comments

8. Arkansas Coop argues that Entergy's filing does not provide enough information to show that additional funding for the ICT is warranted. It states that the filing provides no assurance that the additional staff will not duplicate or overlap work being done by Entergy's employees. The lack of significant improvement in Entergy's transmission service during the ICT's term results from a "lack of scope for independent action" by the ICT, regardless of how it is staffed. Arkansas Coop states that if Entergy wants to increase the ICT's responsibilities and budget, the Commission should hold a technical conference and address in a holistic fashion the lack of progress in improving Entergy's transmission service.

9. L-M Municipals and Union Power oppose any restrictions on the ICT's use of the new staff members. They state that certain of their members have expressed concern that the ICT's performance of its duties has been impeded by a lack of resources. While they are pleased that the ICT may hire additional staff, they state that proposed section 3.8 of

⁶ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007).

⁷ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 (2007), *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007) (Reliability Standards Rule).

⁸ The annual fee to be paid by Entergy to SPP for each full-time employee hired by SPP under section 3.8 is to be \$270,750 for the first and second years of the initial ICT term, \$283,575 for the third year, and \$297,293 for the fourth year.

the ICT Agreement may prevent the ICT from using the new staff for anything not directly related to compliance with Order No. 890 and the Reliability Standards Rule. Entergy should clarify whether section 3.8 is intended to limit the ICT's use of its new personnel.

2. Entergy's Answer

10. Entergy clarifies that section 3.8 does not restrict the way that the ICT may use the new employees. Rather, the language addressed by L-M Municipals and Union Power is intended only to describe the reasons why the ICT and Entergy determined additional personnel are required.

3. Commission Determination

11. As Entergy explained in its answer, proposed section 3.8 was not intended to restrict the way the new full-time employees may be put to use by the ICT. We accept Entergy's explanation. But we direct Entergy to modify section 3.8 to reflect its statement that these employees are not restricted to tasks relating to Order No. 890 and the Reliability Standards Rule. Removal of the restrictive language will avoid any confusion in the actual tariff language over the responsibilities of the new staff.

12. We disagree with Arkansas Coop's argument that Entergy's filing should give some assurance that the tasks the new employees are to perform do not duplicate or overlap work already done by Entergy. We also disagree that Entergy's filing has failed to explain the need for more staff. We are not persuaded to substitute our judgment for the ICT's in determining the level of resources that the ICT needs to carry out its responsibilities. In fact, many of the comments that were filed in response to the ICT's First Annual Report expressed concern that the ICT was understaffed to meet its responsibilities under the ICT Agreement. This filing should alleviate some of these concerns.

13. Arkansas Coop's statements about the lack of independent action by the ICT, as well as its call for the Commission to hold a technical conference now on the ICT's performance, are beyond the limited scope of this proceeding. Entergy has not proposed to increase the ICT's responsibilities under the ICT Agreement; its proposal is to increase the number of employees so that the ICT can meet its responsibilities under Order No. 890 and the Reliability Standards Rule.

C. Standards of Performance, Indemnification and Gross Negligence

14. Entergy and SPP agreed to modify provisions in the ICT Agreement related to the standard of performance and indemnification, in light of the ICT's increased

responsibilities under Order No. 890 and the Reliability Standards Rule. With respect to the Standards of Performance, Entergy proposes to modify section 5.2 of the ICT Agreement to state that Entergy, equally with SPP, must:

. . . conform to all applicable reliability criteria, policies, standards, rules, regulations and other requirements of [NERC], and any applicable regional council or their successors, Entergy's specific reliability requirements, and operating guidelines (to the extent these are not inconsistent with other requirements specified in [section 5.2]) and all applicable requirements of federal and state regulatory authorities.⁹

The current ICT Agreement, while applying these requirements to SPP, only obligates Entergy to observe "good utility practice."

15. Regarding indemnification, Entergy states that, while section 6 of the current ICT Agreement sets forth the terms and conditions under which Entergy and SPP indemnify each other if there are claims or liabilities, they have now agreed to clarify the indemnification provisions. Thus, Entergy proposes a new section 6.3 specifying that Entergy or SPP would hold the other party harmless if there are regulatory fines or penalties resulting from Entergy or SPP's failure to conform to the standards of performance.

16. Entergy also proposes revisions to section 10.2 of its OATT to add the ICT to the indemnification provisions of the OATT, consistent with section 17 of the ICT Agreement as approved by the Commission.¹⁰ Entergy's proposed revision to section 10.2 would have the transmission customer indemnify the ICT under the gross negligence standard, arguing that this would provide the ICT with the same protections given to other independent operators of transmission.¹¹ Specifically, the provision reads:

The Transmission Customer shall at all times indemnify, defend, and save the ICT, as defined in Attachment S, harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third

⁹ ICT Agreement, § 5.2.

¹⁰ Under section 17 of the ICT Agreement, Entergy, to the fullest extent allowed under law, grants to SPP, in connection with the performance of SPP's ICT duties, all of the protections afforded to Entergy as a public utility under the OATT and state law.

¹¹ Entergy, as the transmission provider, would still be subject to the negligence standard that the Commission has applied to non-independent entities.

parties, arising out of or resulting from the ICT's performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of gross negligence or intentional wrongdoing by the ICT.

17. Entergy states that the Commission has already extended the protection of the gross negligence standard to SPP in its role as a Regional Transmission Organization (RTO) in SPP's own transmission region. It argues that the gross negligence standard is appropriate here because SPP must provide service to all eligible customers. In addition, the ICT cannot deny service to particular customers based on the risk of damages if service to those customers is interrupted, and it cannot quantify the risk in order to price service based upon such risks. Entergy asserts that the Commission has already extended to the ICT other policies that were reserved for RTOs and Independent System Operators (ISOs), such as start-up-cost recovery and transmission pricing based on the ICT's independence. In addition, Entergy notes that, as the transmission provider, it will still be subject to the simple negligence standard that the Commission has applied to non-independent entities.

1. Comments

18. L-M Municipals argue that the Commission should reject Entergy's proposed change to the OATT indemnification provisions because this is a fundamental change to the ICT arrangement. They state that when the Commission and state utility commissions evaluated the ICT proposal, they had no reason to factor in the effect on transmission customers of holding the ICT harmless from a broad range of potential liabilities. Extending to the ICT the protection of the gross negligence standard would impose on transmission customers a much broader indemnification than was approved by the Commission and state regulators.

19. L-M Municipals further reject Entergy's assertion that because the ICT has received start-up costs and transmission pricing that are generally reserved for RTOs and ISOs, it should also have the benefit of the greater protections of the gross negligence standard. The fact that SPP has this standard in its capacity as an RTO should have no bearing on whether SPP should receive it as the ICT. They state that in Order No. 890, the Commission reaffirmed its policy of approving the gross negligence standard only for RTOs and ISOs, in part because parties had not demonstrated the unavailability or insufficiency of state law liability protection for non-RTOs/ISOs. L-M Municipals state that Entergy has not argued that the ICT lacks protection from liability under state law or that such protection is inadequate.

20. L-M Municipals further argue that given the lack of control Entergy's transmission customers have over the ICT's actions, they should not be the risk-bearers of first resort for liability arising from the ICT's performance. They contend that the ICT was developed by Entergy to achieve its own commercial objectives, so Entergy and its stockholders should absorb any third-party liability for the ICT's missteps. Entergy

should have to demonstrate the unavailability of other liability protections.¹² Union Power raises similar arguments, and notes the additional concern that the gross negligence standard could further reduce the ICT's accountability to those responsible for its indemnification.

2. Entergy's Answer

21. Entergy answers that the Commission has found the gross negligence standard to be appropriate when an RTO or ISO must provide service to all eligible customers without the ability to: (1) deny service to customers based on the risk of damages from service interruption, or (2) easily quantify that risk and thus price such service accordingly. Entergy asserts that both of those conditions apply in the case of the ICT.

22. Entergy argues that, because the ICT is independent, the Commission has extended to it certain policies that generally are applicable only to RTOs/ISOs. The Commission has even recognized that the ICT's authority goes beyond that of RTOs/ISOs, and therefore, the Commission should reject arguments opposing adoption of the gross negligence standard here.

3. Commission Determination

23. We will accept Entergy's proposal to modify section 10.2 of its OATT. Entergy does not ask for the gross negligence standard to protect the ICT from lawsuits for damages; instead, it asks for the gross negligence standard to indemnify the ICT against such damages. As a general rule, the Commission has not extended the gross negligence

¹² L-M Municipals note that proposed section 6.3 of Entergy's filing contains an error. The second sentence states that:

Likewise, ... SPP shall indemnify, defend, reimburse and hold harmless the Entergy Parties from and against any and all regulatory fines and penalties levied against *SPP* by any regulatory agency or body resulting from SPP's failure to conform with Section 5.1, except to the extent any such regulatory fine or penalty is attributable to the act or omission of any of the Entergy Parties. (Emphasis added.)

L-M Municipals state that Entergy should correct the sentence to state that SPP would indemnify Entergy from all fines and penalties levied against *Entergy* resulting from SPP's failure to conform with section 5.1. In its answer, Entergy has agreed to the proposed change, and we will condition our acceptance in this order on Entergy making this change in a compliance filing.

standard to entities that are not RTOs/ISOs. Primarily, the Commission has explained that non-RTO/ISOs can rely on any state laws that protect them from claims founded in ordinary negligence if the state has so chosen.¹³

24. Nevertheless, the Commission has accepted the gross negligence standard for RTOs/ISOs, reasoning that they were created and solely regulated by the Commission, and otherwise would be without limitations on liability.¹⁴ Exposure to the higher level of risk that exists under the simple negligence standard could mean higher insurance premiums (if adequate liability coverage is even available) and a higher cost of capital, which, in turn, would be borne by customers.¹⁵

25. Unlike transmission owners that are not independent, the ICT is similar to RTOs/ISOs because it is created and solely regulated by the Commission.

26. We are further persuaded to grant the gross negligence standard to the ICT because of its importance as an independent entity overseeing Entergy's system. As we have previously recognized, the ICT was established only after several failed attempts to create an RTO in the Southeast.¹⁶ It was designed to further the Commission's goals by increasing independence in the control over transmission in an area not served by an RTO. Accordingly, we find that the gross negligence standard is consistent with Commission policy.

27. We note, however, that just as our acceptance of the gross negligence standard was limited to SPP in its role as an RTO in *SPP*,¹⁷ our acceptance of the standard in this case is limited to SPP in its role as an ICT. Again, we do not intend to extend such protection to all transmission providers.

¹³ See *Southern Co. Services, Inc.*, 113 FERC ¶ 61,239, at P 7 (2005) (*Southern*); Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1677.

¹⁴ *Southern*, 113 FERC ¶ 61,239 at P 7 (2005).

¹⁵ See e.g., *New York Independent System Operator, Inc.*, 120 FERC ¶ 61,026 (2007) (allowing the gross negligence standard for both liability provisions and indemnification provisions); see also *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164, P 29 (2005); *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100, at P 36 (2005) (*SPP*).

¹⁶ *Entergy Services, Inc.*, 117 FERC ¶ 61,320, at P 20 (2006).

¹⁷ *SPP*, 112 FERC ¶ 61,100, at P 39 (2005).

The Commission orders:

(A) Entergy's amendments to the ICT Agreement are hereby accepted, effective April 15, 2008, as discussed in the body of this order.

(B) Entergy is hereby ordered to submit a compliance filing, within 30 days of the date of this order, revising certain provisions of the ICT Agreement, as discussed in the body of this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement to be issued at a later date.

(S E A L)

Kimberly D. Bose,
Secretary.