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ARKANSAS PUBLIC SERVICE COMMISSION

FILED

IN THE MATTER OF A SHOW CAUSE ORDER)
 DIRECTED TO ENTERGY ARKANSAS, INC.)
 REGARDING ITS CONTINUED MEMBERSHIP IN)
 THE CURRENT ENTERGY SYSTEM AGREEMENT,)
 OR ANY SUCCESSOR AGREEMENT THERETO, AND)
 REGARDING THE FUTURE OPERATION AND)
 CONTROL OF ITS TRANSMISSION ASSETS)

DOCKET NO. 10-011-U
 ORDER NO. 68

ORDER

On November 28, 2011, pursuant to Ark. Code Ann. § 23-3-102, Entergy Arkansas, Inc. (EAI) filed in the above-styled docket its *Application to Transfer Functional Control of its Electric Transmission Facilities to the Midwest Independent Transmission System Operator Regional Transmission Organization* (EAI's Application). By this Order the Arkansas Public Service Commission (Commission) concludes, at this time, that it is unable to reach a finding that EAI's Application is in the public interest. However, assuming compliance by EAI and the Midwest Independent Transmission System Operator (MISO) of the conditions enumerated herein, and upon proper motion and proof of compliance in the form of sworn testimony by EAI and MISO officials who are expressly authorized to commit their respective organizations, the Commission will make a determination whether EAI and MISO have, in fact, complied with the conditions. Upon a finding by the Commission that EAI and MISO have, in fact, complied with the conditions, the Commission will grant conditional approval of EAI's Application, as being in the public interest, and will authorize EAI to sign the MISO Transmission Owners Agreement (TOA) and move forward with the MISO integration process. However, subsequent to the issuance of any conditional



approval order, if the Commission, after notice and hearing, finds that any condition enumerated herein has been materially modified or not fulfilled, the Commission will withdraw its conditional approval and require EAI to exit MISO. Therefore, the Commission hereby defers further action on EAI's Application at this time.

Commission Authority

EAI is a wholly owned subsidiary of Entergy Corporation¹ and a retail electric public utility operating within the State of Arkansas pursuant to a Certificate of Convenience and Necessity issued by this Commission. Therefore, EAI is subject to the supervisory and regulatory jurisdiction and authority of this Commission. The Commission has lawful jurisdiction and regulatory authority in this docket pursuant to, but not limited to, the provisions of Ark. Code Ann. §§ 23-1-101(9), 23-2-301, 23-2-302, 23-2-304, 23-2-402, 23-2-310, 23-3-101, 23-3-102, 23-3-113, 23-3-118, 23-4-101, 23-18-103 and 23-18-106.

Introduction

The Commission initiated this Show Cause Docket on February 11, 2010, for the purpose of undertaking a:

detailed investigation as to whether EAI—*independent of its parent company*—is investigating all options when the current [Entergy System Agreement (ESA)] terminates in December 2013, and whether EAI is taking all necessary corrective actions to ensure and protect its Arkansas ratepayers against such continued detrimental effects associated with EAI's participation in the ESA and the operation and control of the [Entergy Transmission System (ETS)], including transmission assets

¹ Entergy Corporation is a multi-state holding company engaged primarily in the electric generation, transmission and distribution business at retail and wholesale through six wholly-owned electric public utility subsidiaries (called Entergy Operating Companies or OpCos) including EAI, Entergy Louisiana, LLC (ELL), Entergy Gulf States Louisiana (EGSL), Entergy Mississippi, Inc. (EMI), Entergy New Orleans (ENO) and Entergy Texas, Inc. (ETI). The OpCos are regulated at retail as follows: EAI—Arkansas Public Service Commission (Commission); ELL and EGS—Louisiana Public Service Commission (LPSC); EMI—Mississippi Public Service Commission (MPSC); ENO—City Council of the City of New Orleans (CNO); and ETI—Public Utility Commission of Texas (PUCT).

owned by EAI and paid for by its ratepayers. If the Commission finds that all necessary corrective actions have not been taken by EAI the Commission can and, if supported by substantial evidence, may deny cost recovery to EAI for any costs not reasonably and prudently incurred on behalf of Arkansas's ratepayers as a result of EAI's generation and transmission planning processes or infrastructure improvement decisions.

Order No. 1 at 5-6.

The Commission's purpose in opening this Docket was to continue and expand upon the investigation initiated by the Commission in Docket No. 04-023-U, which was styled *In The Matter Of An Investigation Regarding Entergy Arkansas, Inc.'s Continued Participation in the Entergy System Agreement, And the Future Protection of Its Ratepayers*.² On December 19, 2005, at the urging of the Commission, EAI gave official written notice of its intent to exit the ESA effective December 18, 2013.³ In pursuit of its statutory responsibility, the Commission has sought in this proceeding critical information necessary to determine whether EAI is properly planning for all of its Arkansas retail utility operations, including both generation and transmission, after it exits the ESA.

The long history of this show cause proceeding, dating back to the mid-1980s, is detailed at length in Order No. 1 issued in this docket on February 11, 2010; Order No. 1 issued in Docket No. 04-023-U on February 10, 2004; and Order No. 1 issued in Docket No. 08-136-U⁴ on September 25, 2008.⁵

² The Commission took administrative notice in this Docket of all matters of Record in Docket No. 04-023-U. See Order No. 1 at 2, fn. 2.

³ The ESA requires ninety-six (96) months advance notice before an OpCo can exit the ESA. See ESA 1.01.

⁴ The Commission took administrative notice in this Docket of all matters of Record in Docket No. 08-136-U. See Order No. 1 at 3, fn. 3.

⁵ The referenced Orders are incorporated herein by reference.

On October 28, 2011, the Commission issued Order No. 54⁶ in which the Commission provided guidance⁷ to EAI “regarding the finalization of its post-ESA reorganization plans ... [and] guidance to EAI regarding the circumstances under which EAI’s post-ESA reorganization will serve the public interest, convenience and necessity as required by Arkansas law.” Order No. 54 at 3.

Pursuant to Order No. 57, issued in this docket on December 16, 2011, the Commission established a procedural schedule for consideration of all matters pending in this proceeding including an opportunity for the filing of multiple rounds of written testimony by all Parties and set an evidentiary hearing to begin on May 30, 2012. As scheduled by Order No. 57 the Commission conducted an evidentiary hearing in this matter on May 30-31, 2012, in which all pre-filed written testimony was introduced into the hearing record, the witnesses were cross-examined by legal counsel for the Parties, questions of the witnesses were asked by the Commission, and an opportunity for public comments was provided. Post-hearing briefs were filed by the Parties on June 11, 2012.

Order No. 54

By Order No. 54 the Commission provided clear and unequivocal guidance to EAI regarding the finalization of its post-ESA reorganization plans and the circumstances under which such reorganization would “serve the public interest, convenience and necessity as required by Arkansas law.” Order No. 54 at 3. At the conclusion of Order No. 54, the Commission stated its appreciation of the fact that “EAI has, at this point in time, some difficult and serious decisions to make in order to balance the interests of its

⁶ Order No. 54 is incorporated herein by reference as though set forth fully, word for word.

⁷ See Order No. 56 issued on December 6, 2011, in which the Commission provided the following clarification regarding Order No. 54: “Order No. 54 was intended to provide EAI guidance as it prepares to operate post-ESA on or before December 18, 2013. Order No. 54 is not a final decision by the Commission regarding the matters presented in this Docket.”

ratepayers and shareholders while satisfying the dictates of this Commission as embodied in ... Order [No. 54] and developed throughout the entirety of this docket.” *Id.* at 112. To date, EAI’s decisions have failed to reach such a balance or to satisfy the conditions set forth in Order No. 54.

There are several major issues, discussed below, that must be satisfactorily resolved by EAI and MISO before the Commission can conclude that EAI’s Application is in the public interest.

Discussion

I. EAI Independence Post-ESA:

EAI’s complete post-ESA independence from the other Entergy Operating Companies (OpCos) is the primary foundational underpinning of this proceeding. Because resolution of this foundational issue is so critical for the protection of EAI’s ratepayers, the Commission takes the liberty to quote extensively from Order No. 54. Therein, the Commission provided the following guidance to EAI on the subject of its post-ESA separation and independence from the other Entergy OpCos:

At its core, the Commission’s goal is to ensure that EAI is completely and effectively operated independently from the other OpCos in order to eliminate the ESA-inflicted litigation that has plagued EAI and its ratepayers for decades, as well as the resultant negative cost consequences of such litigation. As has been expressed time and again in its orders and during the evidentiary hearings in this Docket, the Commission does not anticipate nor will it condone any scenario other than EAI operating independently from the other OpCos when it exits the ESA. “Operating independently” means there will be no shared responsibility within ESI or otherwise to jointly plan, operate, commit, dispatch or transmit power, using generation assets, purchased power contracts, or transmission assets, between EAI and the other OpCos as has been done historically or could be done in the future.

In fact, it is the Commission’s desire to have EAI’s relationship with the other OpCos and ESI to be as limited as practical, with EAI’s CEO and

President having maximum decision-making authority and control over EAI's operations until such time as the Commission is satisfied that the costly OpCo entanglements EAI has experienced have ceased. As stated previously:

[T]he Commission wants to ensure that the thrust of this Docket—and by extension, EAI's actions—remain focused on the Commission's primary objective in this proceeding, which is ensuring that EAI's ratepayers are not subject to continued unfair and unnecessary production cost shifts resulting from EAI's affiliation with the other EOCs after December 18, 2013. The Commission's statutory mandate to ensure EAI provides safe and reliable service at a reasonable cost extends to all post-ESA affiliations EAI may have with other companies, whether with the other EOCs, an RTO, or any other third parties. To be clear, the Commission is considering all aspects of EAI's post-ESA options, including those options affecting the operation and control of both EAI's generation and transmission assets.

Order No. 36 at 3 (June 2, 2011).

The Commission recognizes that all post-ESA reorganization options have differing levels of risk that must be mitigated. At a minimum, it is this Commission's goal to facilitate the independence of EAI from the other OpCos post-ESA. Regardless of whether EAI joins an RTO or becomes a stand-alone entity with third party arrangements with non-Entergy entities, the Commission expects EAI to independently conduct its own utility operations including, but not limited to, generation planning.

As Mr. McDonald has testified, no matter what steps EAI and this Commission take, any decision "will be made with a degree of uncertainty, and ... the result[s] cannot be dictated at the bottom line of a spreadsheet." McDonald Rebuttal at 8-9 (March 18, 2011). Regardless of the risk inherent in basing decisions made today on assumptions about the future, there is no circumstance under which the *status quo* as embodied in the ESA shall be maintained.

The Commission has a statutory mandate to ensure the availability of safe, reliable, affordable electric service for EAI's ratepayers free from the billions of dollars of unnecessary costs that EAI's affiliation with the OpCos has forced onto the backs of EAI's ratepayers. Therefore, the Commission is committed to ensuring that EAI takes all necessary corrective actions to disentangle itself and its ratepayers from its detrimental affiliations with the other OpCos. This Order, like any

preceding or future orders in this Docket, has that commitment as its foundational underpinning.

Because of the significant costs incurred by EAI ratepayers since 1985, associated with EAI's ESA membership and the resultant RPCE payments, it is imperative that the underlying predicates associated with RPCE cease to exist after December 2013, regardless of how EAI reorganizes. In particular, EAI can no longer engage in any generation planning, operation, or dispatch with the other OpCos or engage in any coordinated efforts with the other OpCos that could approximate, or reasonably be argued to approximate, joint planning. Additionally, given the necessity for transmission investment in the Entergy region in the future, it is imperative that EAI be insulated against any attempts to inappropriately shift transmission costs from the other OpCos to EAI because EAI can no longer participate in transmission equalization with the other OpCos, either.

Similarly, EAI should not be involved in any allocation processes associated with services received from ESI. Currently, ESI provides a variety of legal, engineering, and regulatory services to the OpCos with a variety of allocation methodologies associated with bills that the OpCos receive from ESI. Given the ESA-associated complaints filed even since the initiation of this Docket, it seems continued litigation of those allocations will extend into the future. Thus, EAI should negotiate individual, cost-based contracts, separately from the other OpCos, with ESI or any other Entergy service companies that are subject to prior review by this Commission. This approach should serve to disconnect EAI from the other OpCos and minimize the opportunity for litigation whereby the costs of ESI or any other Entergy affiliate are inappropriately allocated to EAI.

Order No. 54 at 84-86 (emphasis added).

A. EAI Generation Planning and Operations Post-ESA:

EAI claims that it will institute changes after its exit from the ESA that will meet, or at least mitigate, the Commission's concerns regarding EAI's complete separation from the other OpCos in generation planning and operations.

EAI witness Kurtis Castleberry states that EAI will not participate in the Entergy Operating Committee (EOC) and will not conduct joint coordinated resource planning, procurement, or generation commitment and dispatch with the other OpCos after EAI

exists the ESA. Castleberry Supplemental Direct at 17 (November 28, 2011). Instead, Mr. Castleberry states that EAI has instituted an EAI Resource Planning and Operations Committee (RPOC), which will oversee and direct EAI's resource planning and operation. *Id.* The RPOC will be headed by the EAI President and CEO, who, according to Mr. Castleberry, has responsibility for making EAI's resource planning and operations decisions. *Id.* at 27. The RPOC will be comprised of the following eight members: (1) EAI Director of Resource Planning and Operations; (2) EAI Legal Counsel; (3) EAI Vice President of Regulatory Affairs; (4) EAI Jurisdictional Finance Director; (5) ESI Vice President SPO; (6) ESI Vice President for Energy Delivery; (7) ESI Director Fossil Operations NW Region; and (8) ESI Nuclear Operations Vice President Site ANO. Castleberry Supplemental Direct at 13 (January 11, 2012). Even though half of the RPOC members will be Entergy Services, Inc. (ESI) employees, Mr. Castleberry asserts that the RPOC's role is advisory only and that EAI's President will be making the individual decisions.⁸ Castleberry Rebuttal Testimony at 20 (April 13, 2012). EAI President McDonald described the role of the RPOC as follows:

The RPOC is the group of experts who will provide analysis, support, and advice to the EAI President and CEO for EAI's resource planning and supply operations processes. The RPOC will provide input and make recommendations on issues related to the planning, construction, and operation of EAI's generation and transmission facilities so that I, as President and CEO of EAI, can make informed decisions about the Company's resource plans within Entergy Corporation's governance policies.

McDonald Supplemental Direct at 5 (January 11, 2012).

⁸ However, the Commission notes that, although the EAI President will make the decisions for EAI, the EAI President must still secure the approval of the Entergy Corporation Board of Directors for any capital expenditure over \$10 million. The Commission assumes the same is true for all of the other OpCos. McDonald Supplemental Direct at 6 (January 11, 2012).

In Order No. 54 the Commission stated that EAI, post-ESA, should “make all of its resource planning decisions” separate and apart from the other Entergy OpCos. Order No. 54 at 107. In spite of this, EAI proposes that the eight-member RPOC will include four ESI employees which could easily lead to a substantive, or appearance of, overlap of generation planning functions with the other OpCos, since ESI will be performing the same work for the other OpCos. This type of arrangement *could* arguably be used in the future as evidence of the same type of joint planning arguments that ultimately led to the FERC decision requiring EAI’s ratepayers to subsidize the ratepayers of the other OpCos through annual production cost bandwidth payments – now totaling \$1 billion and counting.⁹ EAI’s various entanglements with the other OpCos are unacceptable and contrary to the public interest.

If ESI employees should continue to serve on the RPOC, all such ESI employees dedicated to working for EAI should either become direct employees of EAI, rather than of ESI, or enter into an ironclad agency agreement and confidentiality agreement reflecting that ESI employees, while providing services on behalf of EAI, do so only as agents of EAI with the attendant fiduciary responsibilities to EAI and that all such services be performed under strict confidentiality.

B. EAI Independence from ESI:

In Order No. 54, the Commission stressed the critical importance of EAI operating as independently as possible from the other OpCos. This concern extended not just to the ESA production cost allocations, but also to the allocations among the OpCos of costs from ESI or any other Entergy service company. Order No. 54 at 84.

⁹ In expressing its concern, the Commission does not concede that any such arguments would be legitimate or correct.

Therefore, the Commission directed EAI to negotiate individual cost-based contracts, separate from the other OpCos, for all services provided by ESI or any other Entergy service company. *Id.* at 86.

The Commission repeatedly stressed its intention that EAI's inter-OpCo litigation risk and the resulting potential negative cost allocations to EAI and its ratepayers be mitigated as much as possible. Although that risk, in the past, has focused on the production costs of the OpCos, the allocation of service company costs also presents litigation risk. The Energy Policy Act of 2005, among other things, transferred authority over utility service company costs and the allocation of such costs from the Securities and Exchange Commission (SEC) to the FERC. Specifically, Section 1275(b) of that Act provides that the FERC has the jurisdictional authority and responsibility, on the request of a State commission having jurisdiction over a retail public utility, to review the costs of and the allocation of costs associated with the provision of non-power goods or administrative or management services by an affiliated service company to its affiliated public utilities.

This provision makes clear that any Entergy OpCo retail regulator may contest the allocation of the costs of ESI and other Entergy service companies, and, furthermore, that the FERC *must* review the contested allocations. The Commission has repeatedly noted the plethora of FERC litigation over the allocation of production costs. The Commission simply cannot now ignore the likelihood of litigation over the allocation of costs of non-power goods and services provided by ESI or any other Entergy service company to EAI. Entergy's 2011 FERC Form 60, of which the Commission takes administrative notice, reflects that ESI billed the OpCos

approximately \$696 million in 2011. Of that total amount EAI was billed approximately \$169 million.

Similar to the Commission's concerns regarding ESI employees serving on EAI's RPOC, the Commission also is concerned regarding EAI's plans to continue its heavy reliance on ESI for non-power goods and services. The continued use of ESI for such services also *could* arguably be used in the future as evidence of the same type of joint planning arguments that led to the FERC's decision requiring EAI's ratepayers to subsidize the ratepayers of the other OpCos.¹⁰

In light of the above, the Commission reiterates that EAI should negotiate cost-based contracts with ESI and any other Entergy service company, separate and apart from the other OpCos and with no cost allocations with the other OpCos. Moreover, all ESI personnel dedicated to working for EAI should either become direct employees of EAI, rather than of ESI, or enter into an ironclad agency agreement and confidentiality agreement reflecting that ESI employees, while providing services on behalf of EAI, do so only as agents of EAI with the attendant fiduciary responsibilities to EAI and that all such services be performed under strict confidentiality.

C. EAI's Separation from OpCos Within MISO:

EAI CEO and President High McDonald testified that EAI's membership in MISO will be structured so as to separate EAI from the other OpCos to the maximum extent possible and thus minimize the risk of litigation over the allocation of costs among them. For example, Mr. McDonald states that EAI will sign a separate MISO Transmission Owners Agreement (TOA) signature page; will join MISO as a separate

¹⁰ In expressing its concern, the Commission does not concede that any such arguments would be legitimate or correct.

Transmission Pricing Zone (TPZ), separate Load Zone, and a separate Auction Revenue Rights (ARR) Zone; and that EAI will be a separate Market Participant and Asset Owner. McDonald Supplemental Direct at 9-10.

Also, Mr. McDonald states that EAI is exploring with MISO the *possibility* of placing EAI in a Local Resource Zone (LRZ) separate from the other OpCos. *Id.* Another possibility is that EAI could be in a larger LRZ with MISO members who are not OpCos. If EAI were in such a larger LRZ, EAI witness Michael Schnitzer states that EAI would not engage in joint generation planning, nor would there be a need for an agreement between EAI and the other OpCos for allocation of costs. Schnitzer Supplemental Direct at 17-18. However, Mr. Schnitzer also points out that if EAI was in a LRZ with the other OpCos, EAI would have more flexibility in meeting future capacity needs than if EAI were in a separate LRZ. *Id.* at 17.

EAI witness Castleberry states that EAI's transmission operations and planning will be governed by the MISO Open Access Transmission Tariff (OATT) rather than the Entergy OATT and Independent Coordinator of Transmission (ICT), including such responsibilities as granting transmission service and managing congestion on the EAI transmission system. Castleberry Supplemental Direct at 17-19. Moreover, Mr. Castleberry states that EAI will operate as part of the MISO consolidated Balancing Authority rather than the Entergy Balancing Authority and will separately offer its generation in the MISO Day 2 Market. EAI's generation fleet, according to Mr. Castleberry, will no longer be committed and dispatched by an Entergy System Dispatcher considering all of the OpCos' loads and resources. *Id.*

Staff witness Peaco agrees that many of EAI'S MISO conditions will provide EAI with adequate separation. Peaco Direct at 8-11. However, Mr. Peaco points out that EAI's proposal for a separate TPZ is subject to FERC approval, and that FERC has favored larger TPZs and avoidance of seams. Should FERC deny EAI's request, EAI may be left in a TPZ with one or more of the other OpCos, subjecting EAI to the potential for transmission investment cost equalization among the other OpCos. *Id.* at 11-12.

Mr. Peaco also asserts that parts of EAI's proposal will not mitigate the Commission's concerns regarding EAI's separation from the other OpCos until such time as they are approved by MISO and/or the Federal Energy Regulatory Commission (FERC). For example, with regard to EAI's proposal for a separate ARR Zone, should MISO not approve that proposal, EAI could end up in an ARR Zone with the other OpCos which could result in the allocation of ARRs among the OpCos which could negatively impact EAI's ability to hedge congestion costs. *Id.* at 14.

While acknowledging EAI's agreement to elect options in joining MISO, including, but not limited to, signing a separate TOA, being a separate load serving entity, and electing a separate ARR zone, Mr. Peaco testified that EAI's proposals, in the aggregate, "do not guarantee that further litigation will be prevented or that cost equalization among the OpCos will cease." The greatest risk of further litigation, according to Mr. Peaco, appears to be related to EAI's separate TPZ, in which the FERC is directly involved in approving the decision. Also, should EAI not be in separate Load or ARR Zones, Mr. Peaco testified that there is continued risk of production cost equalization, and a risk of transmission investment and congestion cost equalization among the OpCos. *Id.* at 15.

As stated earlier, the primary reason for this Docket is to ensure that EAI will be prepared to plan for its generation and transmission needs and to operate its public utility facilities completely separate from the other OpCos after EAI exits the ESA. In particular, the Commission has stated that EAI can no longer engage in any generation planning, operation, or dispatch with the other OpCos or engage in any coordinated efforts with the other OpCos that could approximate or reasonably be argued to approximate, joint planning. Additionally, given the necessity for transmission investment in the Entergy region in the future, it is imperative that EAI be insulated against any attempts to inappropriately shift transmission costs from the other OpCos to EAI because EAI can no longer participate in transmission equalization with the other OpCos either. Order No. 54 at 86. In furtherance of these objectives, if EAI were to join MISO, it would be necessary for EAI to: (1) sign a separate TOA signature page; (2) be a separate Market Participant within MISO; (3) be a separate Asset Owner within MISO; (4) be in a separate Transmission Pricing Zone, Auction Revenue Rights Zone, Load Zone and Local Resource Zone within MISO; and (5) vote separately, apart from the other OpCos, within MISO.

While EAI has made efforts to accomplish the separation required by the Commission, there remain certain areas of separation that are still dependent upon FERC approval. If such approval is not obtained, the desired separation of EAI from the other OpCos will not be achieved. In such event this Commission would be compelled to reopen and reconsider its final ruling in this proceeding. Further, with regard to the LRZ, the Commission has serious reservations about EAI being in an LRZ with the other OpCos because capacity requirements will be established for each zone. Schnitzer

Direct at 16. Given the \$4.5 billion in payments EAI's ratepayers have been required by FERC to make to the other OpCos over the past twenty seven years to roughly equalize production (generation) costs, this Commission cannot accept any arrangement by which production costs could be pooled with the other OpCos. While at this time it may appear to be without risk for EAI to be in an LRZ with the other OpCos, our experience over the past twenty seven years suggests that the future may play out differently with corresponding litigation risk. Consequently, EAI should not be in an LRZ that includes any other OpCos.

II. Prudence of EAI Becoming a Member of an RTO:

In Order No. 54 the Commission determined that, as a general matter, RTO membership is prudent. Order No. 54 at 94. However, the Commission made no finding regarding whether EAI should become a member of MISO or a member of the SPP RTO. The evidence reflects that either RTO option will provide net benefits to EAI's ratepayers and to the State of Arkansas. Although the evidence reflects that the MISO option will provide slightly greater net benefits than would the SPP RTO option, the projected difference in benefits between the two RTOs is relatively small. Therefore, if EAI is unable to become a member of MISO, for any reason, EAI should promptly evaluate its other post-ESA options, including, but not limited to, seeking membership in the SPP RTO. As the Commission has repeatedly directed, EAI should also, on a parallel track, be taking all necessary actions to maintain the timely viability of the SPP option.

III. RTO Governance

In Order No. 54, the Commission clearly and unequivocally addressed the critical importance of the proper governance structure within any RTO which EAI may join. The Commission stated that when decisions related to transmission construction and cost allocation are made at a regional level,

those decisions can affect Arkansas's interests and, thus, to satisfy its statutory responsibility, the Commission must participate in the decision-making on those matters at the regional and national level. As a result, the role of the Commission in an RTO is a critical issue, and the governance structure is a key factor to the Commission's opinion regarding EAI's future RTO membership.

Order No. 54 at 99 (emphasis added).

The Commission also stated that "influence or input [by retail regulators in MISO] is no substitute for actual, FERC-authorized, legal authority. Specifically, the Commission is concerned about the lack of ... [retail regulatory] decision making authority over cost allocation issues" within MISO. Because the Commission considers the regulatory work it does at a regional level to be "a necessary component of meeting its delegated legislative duty to protect Arkansas's interests" the Commission stated its expectation that the retail regulator group of MISO (the OMS) have "legally-recognized responsibility for" the following regulatory activities. *Id.* at 102.

- Determining regional proposals and the transition process regarding cost allocation, including whether and to what extent participant funding will be used for transmission enhancements;
- Choosing the approach to be used for assessing resource adequacy, if any, across the entire RTO region;
- Determining whether transmission upgrades for remote resources will be included in the regional transmission planning process and the role of transmission owners in proposing

transmission upgrades in the regional planning process. In addition:

- Action by the retail regulators will be taken by a simple majority vote of the retail regulator representatives; and
- As the retail regulators reach decisions on the methodology that will be used to address any of these issues, the RTO will file that methodology pursuant to Section 205 of the Federal Power Act.

Id.

Finally, in Order No. 54, the Commission stated that:

[retail] regulatory participation in the transmission cost allocation process is critical, particularly in light of the uncertainties surrounding the cost allocation methodologies and transmission planning processes in any RTO. This issue will be a critical consideration for the Commission in its review of EAI's anticipated application to transfer operational control of its transmission assets to an RTO. Regardless of which RTO EAI seeks to join, the Commission expects the RTO's governing structure will grant retail regulators FERC-approved decisional authority over, at a minimum, transmission cost allocation.

Id. at 102-103 (emphasis added).

With leave of the Commission,¹¹ MISO filed on May 24, 2012, the Sur-Surrebuttal Testimonies of MISO witnesses R. Wayne Schug and Clair J. Moeller to address the Commission's concerns regarding governance within MISO. MISO advances a post-transition proposal to "include alternative [FERC] tariff sheets and justification proposed by the ... [Organization of MISO States (OMS)] in any cost allocation filing in which MISO seeks to amend or otherwise modify the regional transmission cost allocation methodologies or formulae, where OMS has an alternative proposal to a major element or elements of the MISO proposal." MISO Post-Hearing Br. at 17-18; see EAI Post-Hearing Br. at 6. MISO witness Moeller characterized this alternative as a "shared" Federal Power Act (FPA) Section 205, 16 U.S.C. § 824d, rights approach that is

¹¹ See Order No. 63 issued on May 18, 2012.

intended to address the circumstance of “a jurisdictional dilemma where what we believe FERC will accept and what some commissions would prefer that we file don’t match. So in an event like that, it may be appropriate for those two competing proposals to be presented to FERC simultaneously so that, instead of OMS needing to argue that our proposal is unjust and unreasonable, they can instead argue that their modification is more just and more reasonable.” *Id.* at 18.

However well-intended it may be, it is highly doubtful that MISO’s shared FPA § 205¹² rights approach is lawful, and thus would offer any benefit to this Commission or to the other OMS States.¹³ Under § 205(d), only a “public utility” has the right to file rates and terms for services rendered with its assets. Sections 205 and 206¹⁴ of the Act are simply parts of a single statutory scheme under which all rates are established initially by the public utility, by contract or otherwise, and all rates are subject to modification by the FERC upon a finding that they are unlawful. As OMS is not a “public utility” under FPA § 201(e), submitting alternative tariff sheets and justifications advancing OMS’s position along with the rate filing actually supported by MISO and its Transmission Owning Public Utility members (TOs) would not endow the OMS with FPA § 205 rights, as Mr. Moeller suggests.

If such a filing were made, the OMS alternative, in this Commission’s view, would be treated by FERC as a FPA § 206¹⁵ filing. The FPA does not provide a mechanism for FERC to decide which of two competing proposals (one by a public utility and one by a non-public utility) is “is more just and more reasonable,” as MISO suggests. MISO Post-

¹² 16 U.S.C.A. § 824(d)

¹³ It is also worth noting this alternative would not go into effect until after the five-year transition period, which further diminishes its value.

¹⁴ 16 U.S.C. § 824(e).

¹⁵ *Id.*

Hearing Brief at 18. Rather, in such circumstances, FERC would be required to find the MISO proposed and existing filed rates to be unlawful and to determine the OMS alternative was just and reasonable before FERC could adopt the OMS alternative as the future governing rate for MISO. *See, e.g., Pub. Serv. Comm'n v. FERC*, 866 F.2d 487, 488-89 (D.C. Cir. 1989), and *Western Res., Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993). The power to initiate rate changes rests entirely with a public utility, and an alternative rate sponsored by a non-public utility, such as OMS, cannot be approved by FERC in the absence of the necessary FPA § 206 findings described above. *Id.* In short, unless MISO or its TOs were to adopt and support the OMS alternative as their own FPA § 205 rate filing, simply including an OMS alternative as a part of a MISO rate filing would not change OMS's obligations to meet the FPA § 206 burden before its alternative could be adopted.

Accordingly, absent a stronger showing by MISO of the legal validity of its proposal,¹⁶ this Commission remains concerned that it would not have the necessary legally-recognized responsibility over transmission cost protocols and allocations to properly protect EAI's ratepayers.

Further, under MISO's proposed governance structure, the OMS could not direct MISO to make a § 205 filing on behalf of the OMS until such time as MISO initiates with the FERC a new proposal seeking to amend the existing FERC-approved regional transmission cost allocation methodologies. MISO's proposal further restricts the OMS's

¹⁶ In this regard, MISO indicated it would submit tariff revisions to FERC to effectuate its proposal that OMS be allowed to have FPA § 205 alternative rate filing rights within 90 days after EAI executes the Transmission Owners Agreement. *See* Moeller Sur-Surrebuttal Testimony at 4 (May 24, 2012). While this Commission cannot require MISO to file sooner or to seek an earlier ruling from FERC as to whether such a proposal would be accepted, such a ruling would assuage our concerns that MISO's tariff revisions would be summarily rejected by FERC, subject to affirmation of an appellate court.

§ 205 rights to a situation “where OMS has an alternative proposal to a major element or elements of the MISO proposal.” Moeller Sur-Surrebuttal at 3 (emphasis added). This Commission can easily envision a situation in which the definition of a “major” element could become an obstacle to the exercise of OMS’s § 205 rights.

Mr. Moeller described the proposed § 205 process as follows:

Inclusion of the alternative tariff sheets and justification proposed by the OMS will be contingent upon the alternative proposal meeting the qualifying circumstances set forth below:

MISO is filing a new proposal seeking to amend the existing cost allocation methodology accepted by FERC for any of its regional transmission cost allocation methodologies.

At the conclusion of MISO’s stakeholder process developing a proposal seeking to amend the existing cost allocation methodology:

- a. OMS disagrees with one or more components of the proposed MISO filing;
- b. OMS provides an alternative approach to such component memorialized in the form of alternative Tariff provisions; and
- c. The required supermajority or special majority of OMS members request MISO to include the OMS’s alternate Tariff sheets in MISO’s filing seeking FERC acceptance of MISO’s proposal referenced above.

If the qualifying circumstances are met, MISO will include the OMS’s alternative proposal in MISO’s section 205 filing to modify the cost allocation methodology. The OMS’s alternative proposal will be included along with MISO’s proposal in the MISO filing in the following manner:

- a. The OMS’s alternative proposal will be included in the filing in addition to, not in lieu of, the MISO proposal and will be identified as being requested by the OMS;
- b. OMS is responsible for supporting the justness and reasonableness of their alternative proposal; and

- c. MISO will include such justification as well as any testimony or other supporting documentation provided by OMS in MISO's filing as so requested by OMS, contingent upon OMS providing any supporting language in a time frame that is consistent with MISO's schedule for the filing.

Id.

SPP witness Carl Monroe testified that MISO's governance proposals do not satisfy the Commission's expectations as stated in Order No. 54. Mr. Monroe notes that neither proposal gives the OMS "the *legally recognized responsibility*" for any of the areas of responsibility required by the Commission. Monroe Supplemental Responsive Testimony at 4. Mr. Monroe also testified that MISO's proposal "completely ignores the Commission's expectation that it be given the authority for choosing the approach to be used for assessing resource adequacy, if any, across the entire RTO region." Moreover, according to Mr. Monroe, the MISO proposal "does not delegate to the OMS the authority to determine whether transmission upgrades for remote resources will be included in the regional transmission planning process and the role of transmission owners in proposing transmission upgrades in the regional planning process." *Id.*

Mr. Monroe further testified that the MISO proposals fail to meet the final two expectations of the Commission as stated in Order No. 54, i.e., that OMS should be authorized to take action upon a simple majority vote; and that MISO provide OMS with the "legally recognized authority" to exercise Section 205 filing rights. *Id.* at 4-5. Contrary to those expectations, Mr. Monroe noted that MISO proposes: (1) that the OMS should act upon a "super or special majority" rather than upon a "simple" majority; and (2) MISO proposes a Section 205 filing authority that "does not provide OMS with any legally recognized authority" as expected by the Commission. *Id.* at 5.

During the hearing, in his Opening Statement on behalf of MISO, Mr. Bob Russell stated that later in the hearing there would be an opportunity for “continuing dialogue” between MISO and the Commission regarding the issue of governance. Tr. at 27. Responding to questions from the Commission regarding why planning authority was not included in MISO’s governance proposal. Mr. Moeller answered that MISO has “enjoyed [a] deep and long relationship dealing with planning issues with ... [OMS].” Tr. at 263. As an example of that relationship Mr. Moeller testified that the “most important effort that we collaborated on” was led by a former state commissioner and was entitled “Cost Allocation and Regional Planning.” Throughout that collaboration, Mr. Moeller testified that MISO “looked both at the cost allocation and the regional plan so that we could ensure that the planning and the cost allocation work together. Mr. Moeller stated that MISO anticipates that those types of collaborative efforts “will continue into the future” including “conversations around [FERC] Order 1000....” *Id.* The process, as envisioned by Mr. Moeller, would “elevate the OMS to the point where they have an obligation to provide ... [MISO] feedback rather than merely an opportunity to provide ... feedback.” *Id.* at 263-264.

Apparently responding to the Commission’s condition that OMS decisions be made by a simple majority vote, Mr. Moeller testified regarding MISO’s “super or special majority” proposal as followed:

[It is] our experience that cost allocation is a very volatile issue, that it’s important that there is nearly a regional consensus around that so that the litigation isn’t infinite. We agree that unanimous consent is inappropriate. But generally speaking, if there is broad support, those sorts of things can sustain themselves. If there is not broad support ... we’ll have commissions ordering their utilities to exit ... [MISO]. That does not advance the value to consumers at the end of the day. So, holding to a consensus where the majority of load served agree that the benefits and

the cost match is clearly in our interest as it is in this commission's interest and every commission's interest, frankly, to ensure that we stay in balance.

Tr. at 265-266.

Mr. Moeller further testified that it:

would be difficult for me to proceed thinking that ... [MISO] had a consensus of the region if that was the kind of situation that we found ourselves in. So as we engage in this conversation, I'll be asking OMS to contemplate how big [a majority] is big enough to assure that we've got a general consensus so that we don't find ourselves in a peculiar circumstance that was unintended.

id. at 267.

As recounted above, in Order No. 54 the Commission clearly stated the various governance elements that would be necessary for the Commission to satisfy its "delegated legislative duty to protect the ... interests" of EAI's ratepayers and the State of Arkansas if EAI is allowed to become a member of MISO. Order No. 54 at 102. One element identified by the Commission as being necessary within the MISO OMS governance structure was that action by the retail regulators should "be taken by a simple majority vote of the retail regulator representatives." *Id.* To clarify, it is this Commission's expectation that the OMS, if EAI is to become a member, will be authorized to take official action on transmission planning and associated cost allocation issues on a simple majority vote of the OMS retail regulator representatives. A requirement, as suggested by Mr. Moeller, that OMS decisions be based upon an undefined "super" or "special" majority could lead to a situation whereby smaller retail regulatory jurisdictions essentially could be disenfranchised. Likewise, no retail regulator should have absolute veto power as a result of a unanimous voting requirement. A simple majority voting requirement equally empowers all retail regulators and should be the standard within OMS.

Conclusion

Until conditions a), b) and c) immediately below have been complied with, EAI shall: (1) continue to pursue all activity necessary to operate as a true stand-alone electric utility on December 19, 2013, and (2) pursue all activity necessary to maintain the timely viability of the SPP RTO option in the event EAI is not able to become a MISO member for any reason:

- a) No material change has occurred in the status of the FERC order approving MISO's five-year transition plan for transmission cost allocation, and subsequent eight-year phase-in plan, for the Entergy Region. A material change is defined as a change that has a material adverse effect on the benefits to EAI's customers;
- b) The Commission has determined that the "join MISO" plan has a high probability of successful implementation by December 19, 2013, as indicated in Attachment A of EAI Hearing Exhibit 1; and
- c) The Commission has issued a final order granting EAI's request to transfer functional control of its transmission facilities to MISO.

As demonstrated above, EAI has not fulfilled certain qualitative conditions required by the Commission in Order No. 54. Given the separate and collective failure of EAI and MISO to effectively address and satisfy the Commission's concerns, we are unable, at this time, to reach a finding that EAI's Application is in the public interest. However, compliance with the conditions enumerated below by EAI and MISO provides EAI and MISO a clear path forward toward the full integration of EAI as a member of MISO.

Conditions

1. EAI must comply with the following conditions to ensure that EAI is reorganized and operated independently of the other OpCos:

a) EAI shall negotiate individual, cost-based contracts with ESI or any other Entergy service company, separately from the other OpCos and with no cost allocations with other OpCos. EAI shall file in this docket a renegotiated agreement(s) with ESI, along with supporting testimony, explaining how such agreement(s) satisfy the Commission's concerns; and

b) All members of the RPOC shall be direct employees of EAI. However, if ESI employees on the RPOC are necessary solely for their technical expertise and assistance, such ESI employees shall execute a legally binding agency agreement with EAI and shall participate in RPOC activities strictly as agents of EAI with the attendant fiduciary responsibilities to EAI only and that all such services be performed under strict confidentiality.

Upon agreement to this condition by EAI, and upon the filing of a renegotiated agreement(s) with ESI in compliance with this condition, EAI will have sufficiently complied with these specific conditions for purposes of conditional approval of EAI's Application.

2. Should EAI become a member of MISO, the following additional conditions must be complied with to ensure that EAI is operated independently of the other OpCos within MISO:

- a) EAI shall join MISO as a separate Transmission Owner, Load-Serving Entity, Asset Owner, and Market Participant and receive settlement statements separately and apart from the other OpCos;
- b) EAI shall sign the MISO TOA separately and apart from the other OpCos and vote separately from the other OpCos; and
- c) EAI shall be assigned, separately and apart from the other OpCos, to a Transmission Pricing Zone; Load Zone; Auction Revenue Rights Zone; and Local Resource Zone. EAI shall agree that the Commission, *sua sponte* or upon motion of any party to this proceeding, may reconsider any conditional approval of the transfer of control if FERC does not approve all of these separate EAI arrangements/zones.

Upon agreement to this condition by EAI and MISO, and upon a showing by MISO that EAI has been assigned to such Zones separate and apart from the other OpCos, EAI and MISO will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

3. Should EAI become a member of MISO, during the Entergy/MISO transition period, to the extent that costs are incurred for transmission projects that terminate exclusively in the Second Planning Region, EAI will not be allocated costs that exceed the benefits that EAI receives from such transmission projects.

Upon agreement to this condition by EAI and MISO, EAI and MISO will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

4. Should EAI become a member of MISO, EAI shall agree that it will not exit MISO without first filing an application with the Commission seeking its approval for a change of control of its transmission assets. EAI will otherwise retain all of its rights, state and federal, to appeal or seek review of or relief from the decision of the Commission.

Upon agreement to this condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

5. Should EAI become a member of MISO, EAI shall agree that the Commission, *sua sponte* or upon the motion of any party, after notice and hearing, may direct EAI to exit MISO under the terms of the Memorandum of Understanding or the TOA. EAI will otherwise retain all of its rights, state and federal, to appeal or seek review of or relief from the decision of the Commission.

Upon agreement to this condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

6. Should EAI become a member of MISO, EAI shall remain under the Commission's jurisdiction, to the extent not otherwise preempted by FERC, with respect to retail electric rates and all related electric facility operations, facility siting, financing, and reliability.

Upon agreement to this specific condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

7. Should EAI become a member of MISO, EAI shall agree that the Commission, *sua sponte* or upon the motion of any party to this proceeding, may, after notice and hearing, reconsider and, if necessary, reverse any approval of the transfer of control if:

- a) The terms of FERC's approval of the modifications to the MISO Tariff to transition EAI into MISO are materially changed such that the revised terms will have a material adverse impact on EAI's retail ratepayers; or
- b) Any of the foregoing conditions are not fully adopted, incorporated or realized.

Upon agreement to this condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

8. Should EAI become a member of MISO, EAI shall not unbundle transmission or seek to make basic changes to transmission service for retail ratemaking without prior APSC approval. EAI shall negotiate a transmission service agreement with MISO that ensures that the APSC continues to determine the transmission component of the rates to serve EAI's bundled retail load.

Upon agreement to this condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

9. Should EAI become a member of MISO, EAI shall be allocated no more than its load responsibility ratio for common transition costs, even if one or more of the other CpCos do not join MISO.

Upon agreement to this condition by EAI and MISO, EAI and MISO will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

10. Should EAI become a member of MISO, EAI and MISO shall ensure that it will be allocated Auction Revenue Rights at a proportional level no less than current participants in MISO and adequate to hedge congestion costs.

Upon agreement to this condition by EAI and MISO, EAI and MISO will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

11. Should EAI become a member of MISO, the Commission shall retain full audit rights for costs associated with EAI's membership in MISO.

Upon agreement to this condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

12. Should EAI become a member of MISO, MISO shall provide Entergy retail regulators, during the Entergy/MISO transition period, with the same governance authority as now possessed by the ERSC, including, but not limited to, the ability to take action on transmission planning and associated cost allocation issues by simple majority vote.

Upon agreement to this condition by EAI and MISO, and the express agreement of MISO to seek approval for such governance with FERC, EAI and MISO will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

13. Should EAI become a member of MISO, MISO shall agree to provide to the MISO OMS, effective on the first day of the Entergy post-transition period, full legally-recognized Section 205 Federal Power Act (FPA) filing rights with regard to the following regulatory activities:

- a) Determining regional proposals regarding transmission planning and cost allocation, including whether and to what extent participant funding will be used for transmission enhancements;
- b) Directing MISO to construct transmission upgrades; and
- c) Choosing the approach to be used for assessing resource adequacy, if any, across the entire RTO region.
- d) In addition:
 - i. Action by OMS will be taken by a simple majority vote of the retail regulator representatives; and
 - ii. As OMS reaches decisions on the methodology that will be used to address any of these issues, MISO shall file that methodology pursuant to Section 205 of the FPA.

Upon agreement to this condition by MISO, and after MISO has provided proof in this docket that it has achieved final agreement with its stakeholders specifically authorizing and directing MISO to petition FERC for approval of legally-recognizable FPA Section 205 filing rights for OMS with such rights to be exercised upon a simple majority vote by OMS, MISO will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.

14. Should EAI become a member of MISO, no later than three years after joining MISO and every two years thereafter, assuming EAI continues as a MISO member, EAI shall file with the Commission a detailed report providing the following information:

- a. The quantified historical net benefits of MISO membership for EAI, as compared to the stand-alone option, as of the date of each of the reports described above;
- b. The projected net benefits of MISO membership for EAI, as compared to the stand-alone option, for the post-transition period on a bi-annual basis beginning one year after the end of the transition period;
- c. Any significant changes in FERC RTO policies, rules or regulations, MISO requirements, Day 2 market conditions, or other regulatory or market structure components; and
- d. An estimate of the costs to exit MISO after the end of the five-year transition period or a specified time thereafter and to transition to a new operating environment such as a different RTO.

15. EAI's President shall continue to provide monthly reports to the Commission demonstrating EAI's progress on the following issues:

- a) Generation planning activities;
- b) Development of a revised ESI service agreement;
- c) FERC Order No. 1000 compliance plans and activities;
- d) Development of a true stand-alone option with further detail on costs, coordination agreements, transmission planning, and critical path implementation activities;
- e) Implementation costs and deferrals;

f) EAI's or Entergy's filings to FERC seeking approval of the terms under which EAI will, consistent with this Order, join MISO and the outcome of FERC's rulings on the filings, including any appellate review; and

g) Development of a new Independent Coordinator of Transmission contract.

16. EAI shall agree that upon the issuance of any final and non-appealable order by the FERC or any Entergy retail regulatory body addressing the transfer of control of Entergy transmission assets to MISO, through stipulation or otherwise, which provides benefits to Entergy ratepayers in any jurisdiction or imposes conditions on the OpCos that would benefit the ratepayers of any jurisdiction, such net benefits and conditions will be extended to EAI ratepayers and/or this Commission to the extent necessary to achieve equivalent net benefits and conditions to EAI ratepayers and/or this Commission.

Upon agreement to this condition by EAI, EAI will have sufficiently complied with these specific conditions for purposes of conditional approval of EAI's Application.

17. The Commission will address EAI's request for deferral of its transition costs by subsequent order.

18. The prudence of all MISO integration costs will be considered in a later proceeding when such costs will be incorporated into rates; and

19. If Entergy and EAI intend to pursue the sale of its transmission assets to ITC Holding, Inc. (ITC), then EAI forthwith shall file an application seeking Commission approval to divest its transmission assets to ITC.

Findings and Ruling of the Commission

For the reasons discussed above, the Commission is unable, at this time, to reach a finding that EAI's Application is in the public interest. However, assuming compliance by EAI and the Midwest Independent Transmission System Operator (MISO) of the conditions enumerated herein, and upon proper motion and proof of compliance in the form of sworn testimony by EAI and MISO officials who are expressly authorized to commit their respective organizations, the Commission will make a determination whether EAI and MISO have, in fact, complied with the conditions. Upon a finding by the Commission that EAI and MISO have, in fact, complied with the conditions, the Commission will grant conditional approval of EAI's Application, as being in the public interest, and will authorize EAI to sign the MISO Transmission Owners Agreement (TOA) and move forward with the MISO integration process. However, subsequent to the issuance of such conditional approval order, if the Commission, after notice and hearing, finds that any condition enumerated herein has been materially modified or not fulfilled, the Commission will withdraw its conditional approval and require EAI to exit MISO. Therefore, the Commission hereby defers further action on EAI's Application at this time.

BY ORDER OF THE COMMISSION,

This 3rd day of August, 2012.

I hereby certify that the following order issued by the Arkansas Public Service Commission has been served on all parties of record this date by electronic mail, using the email address of each party as indicated in the official docket file.

KS

Secretary of the Commission
Date 08-03-2012

Karen Shook (Acting)
Secretary of the Commission

Colette D. Honorable, Chairman

Olan W. Reeves, Commissioner

Elana C. Wills, Commissioner