

115 FERC ¶ 61,260
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Entergy Services, Inc.

Docket Nos. ER91-569-027
ER91-569-028
ER91-569-029
ER91-569-030
ER91-569-031
ER01-666-004
ER01-666-005
ER01-666-006
ER01-1675-002
ER01-1675-003
ER01-1675-004
ER01-1804-003
ER01-1804-004
ER01-1804-005
ER02-862-004
ER02-862-005
ER02-862-006
EL04-123-000
EL04-123-003
EL04-123-004
EL04-123-005
EL05-105-002
EL05-105-003

ORDER ACCEPTING COMPLIANCE FILINGS, AS MODIFIED, ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES, AND ACCEPTING
NOTICES OF CHANGE IN STATUS

(Issued May 26, 2006)

1. On November 1, 2005, Entergy Services, Inc. (Entergy) submitted on behalf of the Entergy Operating Companies¹ a filing in compliance with the Commission's December Order² on Entergy's market-based rate authority. In the December Order, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)³ to examine whether Entergy may continue to charge market-based rates in the Entergy control area and established a refund effective date. Entergy's compliance filing contains: (1) proposed amendments to the market-based rate tariff of the Entergy Operating Companies to prohibit sales of power with delivery points in the Entergy control area; and (2) a cost-based rate tariff (Entergy Operating Companies' CBR Tariff or CBR Tariff) for sales by the Entergy Operating Companies of energy and capacity within and outside of Entergy's control area with a term of less than one year.⁴

2. Also on November 1, 2005, Entergy submitted on behalf of EWO Marketing LP (EWO Marketing), Entergy Power Ventures, LP (EPV), Entergy Solutions Supply Ltd. (Entergy Solutions), Warren Power, LLC (Warren Power), and Entergy Power, Inc. (EPI) (collectively, the Entergy Affiliates) a filing in compliance with the December Order. This compliance filing contains: (1) proposed amendments to the market-based rate tariffs of the Entergy Affiliates to prohibit sales of power with delivery points in Entergy's control area; (2) a cost-based rate tariff for sales by EWO Marketing from the Nelson 6 Generating Unit (Nelson 6) and the RS Cogen cogeneration facility (RS Cogen) with a term of less than one year (CBR Tariff 1); (3) a cost-based rate tariff for sales by EWO Marketing from the Warren Power generation facility (Warren Power) with a term of less than one year (CBR Tariff 2).⁵

¹ The Entergy Operating Companies are: Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, LLC, Entergy Mississippi, Inc., and Entergy New Orleans, Inc. Entergy filed the tariffs on behalf of its Operating Companies in Docket Nos. ER91-569-031, EL04-123-005, and EL05-105-003.

² *Entergy Services Inc.*, 109 FERC ¶ 61,282 (2004) (December Order), *order on reh'g*, 111 FERC ¶ 61,145 (2005) (Rehearing Order).

³ 16 U.S.C. § 824e (2000).

⁴ Entergy Transmittal Letter on behalf of its Operating Companies in Docket Nos. ER91-569-031, EL04-123-005, and EL05-105-003 (Operating Company Transmittal Letter) at 1. Entergy states that for sales with points of delivery in Entergy's control area that are one year or longer, Entergy will file separately under section 205 for Commission approval prior to service.

⁵ Entergy states that "EPV, Entergy Solutions, Warren Power, and EPI do not intend to make any additional sales with points of delivery in the Entergy area in the
(continued...)

3. In this order, the Commission accepts for filing, as modified herein, the revised market-based rate tariffs that Entergy has filed on behalf of the Entergy Operating Companies and the Entergy Affiliates. We also accept for filing, as modified herein, the Entergy Operating Companies' CBR Tariff. We accept for filing, as modified herein, and set for hearing and settlement judge procedures CBR Tariffs 1 and 2 that Entergy has filed on behalf of EWO Marketing. As discussed below, we accept each of the filings to be effective on July 22, 2005, as requested, and direct Entergy to make a further compliance filing to address the period between the refund effective date in this proceeding and the effective date of the filings we accept herein.

4. In this order, the Commission also accepts several notices of change in status filed by Entergy.

Background

5. The Entergy Operating Companies are wholly-owned subsidiaries of Entergy Corporation. Each Entergy Operating Company transmits electric energy and sells electric energy and capacity at both wholesale and retail. Entergy provides general executive and administrative services to the Entergy Operating Companies.

6. On August 9, 2004, as supplemented on November 19, 2004, Entergy submitted for filing generation market power screens to comply with *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order). Entergy's filing also included a Delivered Price Test (DPT) analysis. In the December Order, the Commission instituted a proceeding under section 206 of the FPA⁶ to examine whether Entergy may continue to charge market-based rates in Entergy's control area. In an order issued on June 30, 2005, the Commission established a trial-type evidentiary hearing to examine Entergy's DPT, in order to determine whether Entergy should be allowed market-based rate authority for transactions in the Entergy control area.⁷

future. To the extent such parties do seek to make such sales in the future, they will seek separate authorization for doing so. Further, those parties have not made any recent sales in the Entergy region that would be subject to refund. Those parties therefore do not need CBR Tariffs." Affiliate Company filing at 2 n. 3.

⁶ 16 U.S.C. § 824e (2000).

⁷ *Entergy Services, Inc.*, 111 FERC ¶ 61,507 (2005) (June 30 Order).

7. On July 1, 2005, and July 29, 2005, Entergy filed notices of changes in status, relating to the initiation of several long-term purchase power contracts. Entergy asserts that these changes in status have a *de minimis* effect on the pivotal supplier and wholesale market share screens and do not affect the results of the Commission's four-prong market power analysis.⁸

8. On July 22, 2005, Entergy filed, on behalf of the Entergy affiliates conducting power sales in the Entergy control area, a notice stating that it was withdrawing the pending request for renewal of market-based rate authority for transactions in the Entergy control area. Entergy committed to submit, within 60 days, cost-based rates for new transactions in the Entergy control area. Entergy requests that the Commission terminate the hearing that it directed in the June 30 Order. Entergy stated that its election to withdraw its request for market-based rate authority renders the hearing moot, noting that the hearing was established "to examine Entergy's DPT in order to determine whether Entergy should be allowed market-based rate authority for transactions in the Entergy control area."⁹

9. On November 1, 2005, Entergy submitted the compliance filings at issue here.

A. Amendments to Market-Based Rate Tariffs

10. Entergy's amendments to the market-based rate tariffs of the Entergy Operating Companies and the Entergy Affiliates provide that the market-based rate tariffs will not apply to sales of power with points of delivery in Entergy's control area but will only apply to a sale if the point of delivery of the sale is at or beyond a point of interconnection between the Entergy transmission system and the system of Southern Company, Tennessee Valley Authority, Associated Electric Cooperative, Inc., Empire Electric District Company, Oklahoma Gas & Electric Company, Southwestern Power Administration, Southwestern Electric Power Company, Central Louisiana Electric Company, South Mississippi Electric Power Association, or Ameren.¹⁰

⁸ Entergy filed its changes of status in Docket Nos. ER91-569-027, ER91-569-028, ER91-569-029, ER01-666-004, ER01-666-005, ER01-666-006, ER02-862-004, ER02-862-005, ER02-862-006, ER01-1675-002, ER01-1675-003, ER01-1675-004, ER01-1804-003, ER01-1804-004, ER01-1804-005.

⁹ Entergy July 22 filing at 2, *quoting* June 30 Order at 1.

¹⁰ Operating Company filing at 4; Affiliate Company filing at 6.

11. Entergy's market-based rate filings include the Commission's market behavior rules and change in status language.¹¹ Entergy has also revised the language of its market-based rate tariffs to comply with Commission Order No. 652.¹²

B. The CBR Tariffs

1. Entergy Operating Companies' CBR Tariff

12. Under its proposed CBR Tariff, Entergy proposes to allow the parties to negotiate rates for short-term transactions (sales of energy and capacity of less than one year) up to a cost-based ceiling rate equal to incremental costs plus 10 percent. Entergy states that for sales of one year or longer with points of delivery in the Entergy area, it will file these agreements under section 205 for Commission approval.

13. Entergy proposes to calculate its system incremental costs on the same basis as Entergy System Incremental Cost (ESIC) under Schedule 4 of Entergy's open access transmission tariff (OATT).¹³ Entergy states that ESIC is defined as:

Entergy System Incremental Cost in an hour shall be the most expensive source of energy generated or purchased by the Entergy Operating Companies, excluding energy purchases with a duration of longer than a calendar month, any purchase with a duration of a calendar month that was purchased more than one calendar

¹¹ On February 16, 2006, the Commission issued an order rescinding Market Behavior Rules 2 and 6, effective February 27, 2006. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization Holders*, 114 FERC ¶ 61,165 (2006). The Commission also adopted a final rule codifying Market Behavior Rules 1, 3, 4 and 5 in the Commission's regulations, effective February 27, 2006. *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 71 Fed. Reg. 9,695 (Feb. 27, 2006), FERC Stats. & Regs. ¶ 31,208. *See Exelon Generation Co., LLC*, 115 FERC ¶ 61,004 at P3 n.5 (2006). As a result, the Market Behavior Rules no longer will be part of sellers' market-based rate tariffs. Therefore, the tariff revisions that Entergy submitted on behalf of the Entergy Operating Companies and Entergy Affiliates to incorporate the market behavior rules in their market-based tariffs are rejected as moot.

¹² *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005) (Order No. 652).

¹³ *See Entergy Services, Inc.*, 105 FERC ¶ 61,319 (2003), *order on reh'g*, 109 FERC ¶ 61,095 (2004).

month prior to the beginning of the purchase, any multi-year energy purchases, and any Entergy Operating Company generation that would not be operating in that hour but for transmission reliability purposes.

14. Entergy notes that the 10 percent adder is not intended to recover difficult to quantify costs, but instead represents a conservative proxy for a reasonable margin available in a competitive market. Entergy states that even if incremental costs included difficult-to-quantify costs, which it does not, permitting recovery of those costs plus a fair return is consistent with Commission precedent in the July 8 Order.¹⁴

15. To ensure that a specified rate in an agreement for the short-term sale of energy and capacity does not exceed the CBR Tariff ceiling rate, Entergy will compare the contract rate to the actual incremental costs, plus 10 percent adder, over the term of the service. Entergy explains that if the incremental costs, plus the 10 percent adder exceed the agreed-upon rate over the term of service, Entergy will not adjust the rate. On the other hand, if the incremental costs are lower than the agreed-upon rate, Entergy will lower the rate to the ceiling rate.

16. Entergy states that calculating incremental costs based on the most expensive energy purchased or unit running is consistent with Commission policy. Entergy states that the Commission made clear that mitigation rates may be established consistent with Commission precedent on the determination of such rates. Entergy explains that in *Illinois Power*¹⁵ the Commission explained that “its decisions do not mandate a cost-based ceiling based on the composite costs of any particular units.” Entergy further explains that in *Illinois Power* the Commission held that a public utility may base a ceiling rate on the costs associated with a specific unit, average system costs, or the cost of the incremental unit on the system (the generating resource with the highest running cost at the time of the sale.)¹⁶ Entergy argues that its proposed CBR Tariff is consistent with Commission policy set out in *Illinois Power*.

17. Entergy states that it based the non-rate terms and conditions of the CBR Tariff on the Western System Power Pool Agreement (WSPP Agreement),¹⁷ which, according to

¹⁴ Operating Company Transmittal Letter at 7, *citing July 8 Order*, 108 FERC ¶ 61,026 at P 155.

¹⁵ *See Illinois Power Co.*, 57 FERC ¶ 61,213 (1991) (*Illinois Power*).

¹⁶ Operating Company Transmittal Letter at 6, *citing Illinois Power*.

¹⁷ *Id.* at 3, 5, *citing Western Systems Power Pool*, 55 FERC ¶ 61,099 (1991).

Entergy, is well known and used in the Entergy control area.¹⁸ Entergy states the WSPP Agreement provides for power sales at cost-based rates between the WSPP members. Entergy explains that the WSPP Agreement is a standardized agreement that is on file with the Commission. Entergy argues that the use of the non-rate terms and conditions of the WSPP Agreement provides terms and conditions known to market participants in the Entergy area, and therefore will facilitate transactions under its proposed CBR Tariff.

2. EWO Marketing's CBR Tariffs 1 and 2

18. Entergy has submitted for filing on behalf of EWO Marketing¹⁹ a compliance filing that:

(1) provides for a Cost-Based Rate Tariff (CBR Tariff 1) for EWO Marketing's sales from Nelson 6 and RS Cogen with a term of less than one year. This tariff contains two sets of rates – one rate for services of one week or less and one rate for services of greater than one week but less than one year;²⁰ and

(2) provides for a Cost-Based Rate Tariff (CBR Tariff 2) for EWO Marketing's sales from Warren Power with a term of less than one year. This tariff contains two sets of rates – one rate for services of one week or less and one rate for services of greater than one week but less than one year.²¹

19. CBR Tariffs 1 and 2 provide for short-term sales at cost-based rates with points of delivery in the Entergy control area. Entergy states that the sale of capacity and energy

¹⁸ *Id.* at 5.

¹⁹ Entergy states that it is filing CBR Tariffs only for EWO Marketing's two units because Entergy's other affiliates, EPV, Entergy Solutions, Warren Power and EPI do not intend to make any additional sales with points of delivery in the Entergy control area, and if they should seek to make such sales in the future, they will seek separate authorization to do so. Entergy Transmittal Letter on behalf of its Affiliates in Docket Nos. ER91-569-030, EL04-123-004 and EL05-105-002 at 2, n. 3 (Affiliate Transmittal Letter).

²⁰ EWO Marketing purchases from the City of Jonesboro 10.9 percent (60 MW) of the output of Nelson 6, and purchases 50 percent (200 MW of net dependable capacity) of the output of RS Cogen from its affiliate, RS Cogen LLC.

²¹ EWO Marketing owns, through an affiliate (Warren Power, LLC), a 75 percent (225 MW) undivided interest in Warren Power, a gas-fired combustion turbine peaking facility.

will be either from Nelson 6 and/or RS Cogen (CBR Tariff 1) or Warren Power (CBR Tariff 2). EWO Marketing will sell all of its available energy (*i.e.*, energy that it does not sell under previous long-term contracts) to Merrill Lynch Commodities (Merrill Lynch), so Merrill Lynch will be the only customer under CBR Tariffs 1 and 2.

20. Entergy explains that the Nelson 6 and RS Cogen units are base-load units that operate during most of the year, while the Warren Power unit is a peaking facility that EWO Marketing uses to provide service only at peak demand or during the outage of other units. Accordingly, Entergy states that EWO Marketing developed CBR Tariffs 1 and 2 to tailor the rates from the two types of units to the needs of its customer.

21. Entergy states that EWO Marketing developed the rates included in CBR Tariffs 1 and 2 consistent with the default rates adopted by the Commission. Entergy explains that rates for sales of one week or less will be capped at incremental costs plus 10 percent. For sales greater than one week and less than one year CBR Tariffs 1 and 2 include rate ceilings for both capacity and energy charges. Entergy also explains that a 10 percent adder will not be included for sales greater than one week and less than one year under CBR Tariffs 1 and 2.

22. Entergy states that CBR Tariffs 1 and 2 provide that the parties may enter into agreements for purchases at specified prices. At the time the parties negotiate an agreement, they will know the capacity ceiling rate that applies to the transaction; but they will not know the incremental costs, because, when they negotiate their agreement, they will not know the actual fuel costs for the hour during which the sale occurs. The actual fuel costs will not be known until the hour during which the sale is made.

23. To ensure that a rate included in an agreement does not exceed the ceiling rate, EWO Marketing will compare the contract rate to the incremental costs (plus the 10 percent adder, as applicable) calculated using the actual fuel prices over the term of the service. If the incremental costs plus the 10 percent adder exceed the contract rate over the term of service, EWO Marketing will not adjust the rate. On the other hand if the incremental costs are lower than the contract rate, EWO Marketing will lower the rate.

24. Entergy states that EWO Marketing will use CBR Tariffs 1 and 2 for sales of one week or less and for sales of greater than one week but less than a year. For sales of one week or less EWO Marketing proposes to base the rates under CBR Tariff 1 on the incremental costs of the RS Cogen base load unit (heat rate, actual fuel costs, variable operation and maintenance costs and other non-fuel variable costs) and a 10 percent adder. EWO Marketing will base the rates under CBR Tariff 2 for sales of one week or less on the incremental costs of the Warren Power Unit plus start up costs plus a 10 percent adder.

25. For sales greater than a week but less than a year, EWO Marketing proposes to charge both an energy and a capacity charge. Entergy states that EWO Marketing will base the demand charge on the annual fixed costs associated with RS Cogen (CBR Tariff 1), and Warren Power (CBR Tariff 2). Entergy states that, consistent with Commission policy in the April 14 Order, the demand charge will be based on the same resource that will be used to price energy sales under the tariff. Entergy explains that the rates in CBR Tariffs 1 and 2 are ceiling rates and the parties may negotiate a rate below that level.

26. For CBR Tariff 1, EWO Marketing proposes a monthly demand charge of \$6.32/kW. Although EWO Marketing sells all of its available energy (*i.e.*, energy that it does not sell under previous long-term contracts) from both the Nelson 6 and the RS Cogen units to Merrill Lynch, EWO Marketing proposes to base its demand charge only on the costs of the RS Cogen unit.²² EWO Marketing also proposes to charge \$5.05/MWh to recover non-fuel variable costs. Entergy states this charge is based on costs for the RS Cogen unit. EWO Marketing proposes to calculate the energy charge in the same manner that it calculates the charge for sales of one week or less (*i.e.*, recovery of incremental costs), but without the ten percent adder.

27. Under CBR Tariff 2, EWO Marketing proposes to base the monthly demand charge on the fixed costs of the Warren Power unit (\$9,970,916) divided by available capacity (225 MW) and then by four. EWO Marketing proposes to use a divisor of four months instead of 12 because it expects to use the Warren unit during peak periods. EWO Marketing contends that the infrequent use of the facility justifies calculating a monthly charge based on the four peak months. Entergy states that this will translate into a proposed monthly demand charge of \$11.08/kW. EWO Marketing also proposes to charge \$0.50/MWh to recover non-fuel variable operating and maintenance costs. As with CBR Tariff 1, EWO Marketing proposes to calculate the energy charge in the same manner that it calculates the charge for sales of one week or less (*i.e.*, recovery of incremental costs), but without the 10 percent adder.

28. EWO Marketing proposes to base the non-rate terms and conditions of CBR Tariffs 1 and 2 on the Edison Electric Institute Master Agreement (EEI Agreement). Entergy states that the EEI Agreement is a standardized agreement that the industry uses extensively and that will enable EWO Marketing and Merrill Lynch to continue their existing arrangements.

²² EWO Marketing proposes to derive the monthly demand charge by dividing the fixed costs of the RS Cogen unit (\$15,162,780) by available capacity (200 MW) and then by 12.

Notice and Responsive Pleadings

29. Notice of Entergy's July 1, 2005, change of status filing was published in the *Federal Register*, 70 Fed. Reg. 41, 217 (2005) with comments, interventions, and protests due on or before July 22, 2005. None was filed. Notice of the July 29, 2005, change of status filing was published in the *Federal Register*, 70 Fed. Reg. 47,189 (2005) with comments, interventions, and protests due on or before August 19, 2005. None was filed.

30. Notice of the November 1, 2005, compliance filings was published in the *Federal Register*, 70 Fed. Reg. 69, 332 (2005) with comments, interventions, and protests due on or before November 22, 2005.

31. On November 22, 2005, Arkansas Electric Energy Consumers, Inc. (Arkansas Electric) and the Southeast Electricity Consumers Association (Southeast Consumers) filed motions to intervene and the Occidental Chemical Corporation (Occidental) filed a motion to intervene and a protest.²³

32. In its protest Occidental argues that the adoption of cost-based rates for wholesale transactions in the Entergy control area is not a solution to the unresolved issues concerning the lack of competitive access to Entergy's transmission system and does not address the issue of whether Entergy is entitled to market-based rate authority outside of its control area. Occidental states that Entergy's rate filings do not eliminate the need for the Commission to investigate the transmission constraints on the Entergy system or issues of transmission market power. Occidental contends that if the Commission accepts Entergy's cost-based rates, the Commission should order refunds from the refund effective date, February 27, 2005, established in the December Order.

Discussion

A. Procedural Matters

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

²³ Arkansas Electric, Southeast Consumers, and Occidental filed their motions to intervene and Occidental filed its protest in Docket Nos. ER91-569-030, ER91-569-031, EL04-123-004, EL04-123-005, EL05-105-002, EL05-105-003, ER01-666-006, ER02-862-006, ER01-1675-004 and ER01-1804-005.

B. Market-Based Rate Tariffs

34. Entergy Operating Companies and Entergy Affiliates propose to modify their market-based rates tariffs to provide that they do not apply to sales of power with delivery points in the Entergy control area. We accept the Entergy Operating Companies' and Entergy Affiliates' proposal to revise the market-based rate tariffs to provide that they do not apply to sales of electric energy and capacity within Entergy's control area. However, we reject the specific tariff language that Entergy Operating Companies and Entergy Affiliates propose to use to implement the sales prohibition in the Entergy control area.

35. Specifically, Entergy proposes the following revisions to Article A of its market-based rate tariffs: “. . . provided, however, that sales made under the rates, terms and conditions of this Rate Schedule SP are physical sales of power and/or energy with a point of delivery at or beyond a point of interconnection between the Entergy transmission system and the systems of Southern Company, Tennessee Valley Authority, Associated Electric Cooperative, Inc., Empire Electric District Company, Oklahoma Gas & Electric Company, Southwestern Power Administration, Southwestern Electric Power Company, Central Louisiana Electric Company, South Mississippi Electric Power Association, or Ameren.”

36. This proposed tariff language is unclear and may provide for sales within Entergy's control area if Entergy were to sell at points of interconnection not already listed. Accordingly, we direct Entergy to delete the above-referenced tariff language and to replace it with the phrase “provided, however, that this tariff only applies to sales outside of Entergy's control area.” We note that Entergy Affiliates propose a similar, yet slightly different, provision. Accordingly, we direct Entergy Operating Companies and the Entergy Affiliates to submit, within 30 days of the date of issuance of this order, compliance filings to revise their market-based rate tariffs to limit sales of capacity and energy at market-based rates to areas outside of the Entergy control area.

37. In addition, Entergy Operating Companies and the Entergy Affiliates have revised their market-based rate tariffs to include the change in status reporting requirement. The proposed language does not comport with the Commission's regulations, which direct that the tariff state that the market-based rate seller must timely report to the Commission any change in status that would reflect a departure from the characteristics that the Commission relied upon in granting market-based rate authority.²⁴ We will, therefore, direct Entergy Operating Companies and the Entergy Affiliates to submit, within 30 days of the date of this order, a compliance filing to revise the tariffs accordingly.

²⁴ See *Reporting Requirement*, FERC Stats. & Regs. ¶ 31,175 at P 128.

38. The Entergy Operating Companies' and the Entergy Affiliates' market-based rate tariffs fail to state that they will not make sales to affiliates "without first receiving" Commission authorization of the transaction under section 205 of the FPA. We direct Entergy Operating Companies and the Entergy Affiliates to make a compliance filing within 30 days of the date of issuance of this order to revise their market-based rate tariffs to include such language.²⁵

39. We will accept Entergy's notices of change in status filings. These change in status filings informed the Commission that Entergy signed several long-term purchase power contracts subsequent to its last market power analysis. Entergy states that these changes in status do not affect the results of the Commission's four-prong market power analysis.

40. We note that Entergy Solutions has on file a code of conduct that differs from the Commission's standard code of conduct with regard to the simultaneous disclosure of market information. The standard code of conduct requires simultaneous "disclosure" to the public of market information shared by the public utility with the affiliate power marketer, whereas Entergy Solutions' provision requires that such information be "made available" simultaneously. Therefore, we direct Entergy Solutions to revise its code of conduct to provide that all market information shared between the Entergy Operating Companies and Entergy Solutions will be disclosed simultaneously to the public.

41. We will accept the Entergy Operating Companies' and the Entergy Affiliates' market-based rate tariffs for filing, as modified herein, to be effective July 22, 2005, as requested.

42. As noted above, in its protest Occidental argues that the mere adoption of cost-based rates in the Entergy control area does not resolve issues concerning the lack of competitive access to Entergy's transmission system and does not address whether Entergy is entitled to market-based rate authority outside of its control area.

43. In response to Occidental's arguments in this regard, in its order on rehearing of the December Order, the Commission noted that Occidental and others had raised concerns regarding transmission market power. The Commission instituted a proceeding in Docket No. EL05-105-000 under section 206 of the FPA to investigate whether Entergy satisfies the Commission's transmission market power standard for the grant of market-based rate authority and established a refund effective date under the provisions of section 206. The Commission noted that similar transmission market power concerns had been raised in other proceedings, including the proceeding in Docket No.

²⁵ See *Aquila Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

EL05-52-000 relating to Entergy's Independent Coordinator of Transmission (ICT) proposal, and that that proceeding may resolve most of petitioners' concerns. Accordingly, the Commission stated that it would hold the investigation of Entergy's transmission market power in abeyance in the Docket No. EL05-105-000 proceeding until 60 days after the issuance of a Commission order approving Entergy's section 205 filing to implement the ICT proposal.²⁶

44. Thus, Occidental's concerns about potential exercise of transmission market power by Entergy are still pending before the Commission in Docket No. EL05-105-000, which has been held in abeyance pending the outcome of the ICT proceeding. We note that the Commission has conditionally accepted Entergy's ICT proposal subject to a further compliance filing.²⁷ Depending on the outcome of the ICT proceeding, Occidental's transmission market power concerns in Docket No. EL05-105 may be fully addressed. In any event, however, the Commission will address Occidental's concerns in a separate order in Docket No. EL05-105.

45. Occidental maintains that if the Commission accepts Entergy Operating Companies' and the Entergy Affiliates' cost-based rates, the Commission should order refunds from the refund effective date established in the December Order. As discussed below, Entergy Operating Companies and EWO Marketing will be required to refund any amounts they charged from the refund effective date that exceed the rates that are approved in this proceeding (following the hearing procedures directed below and Commission action on the compliance filing directed below to address the period between the refund effective date and the effective date of the cost-based rate tariffs accepted herein).

C. Cost-Based Rates

46. In the April 14 Order, the Commission adopted default rates tailored to three distinct products. Sales of power of one week or less must be priced at the applicant's incremental cost plus a 10 percent adder. Sales of power of more than one week but less than one year will be priced at an embedded cost "up to" rate reflecting the costs of the unit(s) expected to provide the service. All long-term sales (one year or more) into any market where the applicant has market power must be priced on an embedded cost of service basis and each such contract will be filed with the Commission for review and

²⁶ Rehearing Order, 111 FERC ¶ 61,145 at P 12 (2005).

²⁷ *Entergy Services, Inc.*, 115 FERC ¶ 61,095 (2006).

approval prior to the commencement of service. The Commission stated that it will set the just and reasonable rate at the default rate unless it approves different cost-based rates for that applicant based on case-specific circumstances.²⁸

1. Entergy Operating Companies' CBR Tariff

a. Non-Rate Terms and Conditions

47. Entergy proposes to use the WSPP Agreement terms and conditions verbatim for its CBR Tariff. The WSPP Agreement however contains provisions for types of services and rates for those services that Entergy is not proposing to offer. For example, the WSPP Agreement provides for Economy Energy, Unit Service and Firm Capacity/Energy Sale (Service Schedules A through C). In its filing here, Entergy is not proposing to offer those products. In addition, the WSPP Agreement contains many provisions that are irrelevant to the services that Entergy is proposing to offer and also does not specifically describe the services that Entergy is proposing to offer.²⁹ Further, the WSPP Agreement contains a definition of incremental cost that Entergy is not proposing to adopt in this filing. We will direct Entergy to submit a compliance filing within 30 days of the date of this order that revises the Entergy Operating Companies' CBR Tariff to describe only the services, rates, terms and conditions that Entergy is proposing to offer under the Entergy CBR Tariff.³⁰

b. Rates

48. Entergy states that its CBR Tariff allows parties to negotiate rates for short-term transactions up to the ceiling rate included in the tariff, which is equal to incremental costs plus 10 percent. Entergy will calculate incremental costs on the same basis as ESIC under Schedule 4 of the Entergy OATT. Entergy's proposed charges also will include the cost of any transmission or ancillary services that Entergy purchases and sells to the customer. Entergy's Schedule 4 defines ESIC as the most expensive source of energy that Entergy purchases or generates.

²⁸ April 14 Order, 107 FERC ¶ 61,018 at P 148.

²⁹ For example, the WSPP Agreement states that "[t]he WSPP shall perform the administrative tasks necessary and appropriate to implement this Agreement." There are a number of similar types of provisions.

³⁰ See *Consumers Energy Co.*, 80 FERC ¶ 61,283 (1997) (*Consumers Energy*) for an example of a cost-based power sales tariff that the Commission found acceptable. See also *MidAmerican Energy Co.*, 114 FERC ¶ 61,280 (2006).

49. The Commission requires the filing party to include in its cost-based rate tariff the formula and methodology according to which it intends to calculate incremental costs. Entergy's CBR Tariff includes that formula, which contains the same definition of ESIC that is included in Schedule 4 of the Entergy OATT, and which the Commission has approved. We will accept the cost-based rates based on ESIC plus the 10 percent adder. Because Entergy's development of its cost-based rates is consistent with Commission policy, we will accept for filing Entergy's cost-based rates for sales by the Entergy Operating Companies with a term of less than one year.³¹

50. Accordingly, the Commission will accept the Entergy Operating Companies' CBR Tariff for filing, as modified herein, to be effective July 22, 2005, as requested. To the extent that the Entergy Operating Companies made any sales under their market-based rate tariffs in the Entergy control area since July 22, 2005 (the effective date of the CBR Tariff) that were above the rate accepted herein, they are directed, within 30 days of the date of issuance of this order, to make refunds, with interest. In addition, to the extent that such sales were made, we direct Entergy to file a refund report within 15 days after making refunds.

2. EWO Marketing's CBR Tariffs

a. Non-Rate Terms and Conditions

51. EWO Marketing proposes to base the non-rate terms and conditions of CBR Tariffs 1 and 2 on the EEI Agreement. EWO Marketing proposes to use the EEI Agreement terms and conditions because it is a standardized agreement that the industry extensively relies upon and will enable EWO Marketing and Merrill Lynch to continue

³¹ See *Aquila, Inc.*, 112 FERC ¶ 61,307 (2005) (*Aquila*). In *Aquila*, the Commission accepted Aquila's proposal to adopt cost-based rates for all sales of less than one year that included a 10 percent adder, not just for sales of one week or less. To ensure that a specified rate in an agreement for the short-term sale of energy and capacity does not exceed the CBR Tariff ceiling rate, Entergy states that it will compare the contract rate to the actual incremental costs, plus 10 percent adder, over the term of the service. Entergy explains that if the incremental costs, plus the 10 percent adder exceed the agreed-upon rate over the term of service, Entergy will not adjust the rate. On the other hand, if the incremental costs are lower than the agreed-upon rate, Entergy will lower the rate to the ceiling rate. We note that the Commission will address issues regarding the use of discounting and "up to" cost-based rates as adequate mitigation for market power in pending Docket No. RM04-7-000. See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 115 FERC ¶ 61,210 at P 139-144 (2006)

their existing arrangements. We will require EWO Marketing to submit within 30 days of the date of this order a compliance filing that revises CBR Tariffs 1 and 2 to describe only the services, rates, terms, and conditions that EWO Marketing is proposing to offer. The EEI terms and conditions, similar to the WSPP terms and conditions, appear to include many provisions that are not relevant to the service EWO Marketing proposes to offer.³²

b. Rates

52. EWO Marketing justifies the rates in the CBR Tariffs 1 and 2 based on the charges that EWO Marketing has received from the specified generating units.³³ However, EWO Marketing includes no cost data or contracts supporting the charges that it is receiving from the units nor any other evidence that would support a finding that those charges are just and reasonable. EWO Marketing's reference to *Consumers Energy*³⁴ is inapposite. In that case, Consumers Energy had a Form No. 1 on file with the Commission; EWO Marketing does not. Based on the foregoing, our preliminary analysis indicates that the proposed cost-based rates in CBR Tariffs 1 and 2 have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, the Commission will set the proposed rates in CBR Tariffs 1 and 2 for hearing.

53. EWO Marketing has 260 MW of capacity from the two units, 200 MW from RS Cogen and 60 MW from the Nelson unit. EWO Marketing states that its proposal to base the demand and energy charges under CBR Tariff 1 on the costs of the RS Cogen unit is consistent with Commission policy.³⁵ We find that EWO Marketing's approach is not consistent with *Detroit Edison*, where two separate charges were established for power sales under Detroit Edison's tariff. In this case, EWO Marketing is not proposing a separate charge for sales in excess of 200 MW. Further, EWO Marketing has failed to support its proposal to base its cost-based rates for sales from two distinct units on only the costs of the more expensive of the two units. Accordingly, we will set the issue for hearing.

³² See *Consumers Energy*.

³³ See Affiliate Transmittal Letter at 11, Exhibits H and I.

³⁴ See *Consumers Energy*.

³⁵ *Detroit Edison Co.*, 78 FERC ¶ 61,149 (1997) (*Detroit Edison*).

54. In addition, EWO Marketing is deriving its proposed rate for CBR Tariff 2 based on a four-month divisor. EWO Marketing states that the Warren Power unit most likely will be used only during peak periods and calculating a monthly charge based on the four peak months is reasonable.³⁶ However, EWO Marketing has not provided any data that supports the use of a four-month divisor. Accordingly, the hearing should also examine the appropriate billing divisor for calculating the rate for EWO Marketing's CBR Tariff 2.

55. Accordingly, the Commission will accept CBR Tariffs 1 and 2 for filing, as modified herein, to be effective July 22, 2005, and set the rates under those tariffs for hearing. EWO Marketing will be required to refund any amounts it charged that exceed the rates that are approved in this proceeding (following the hearing procedures directed herein).

D. Hearing Procedures

56. Our preliminary analysis indicates that the proposed cost-based rates in EWO Marketing's CBR Tariffs 1 and 2 have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Therefore, we will accept EWO Marketing's proposed cost-based rates in CBR Tariffs 1 and 2 for filing, make them effective July 22, 2005, subject to refund, and set them for hearing and settlement judge procedures. As discussed above, the refund effective date for the cost-based rates will be the refund date established in the December 17 Order, which is February 27, 2005.

57. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁷ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁸ The settlement judge

³⁶ See *DTE East China, LLC*, 99 FERC ¶ 61,315 at P 13 (2002).

³⁷ 18 C.F.R. § 385.603 (2005).

³⁸ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

E. Other

58. The refund effective date established in this proceeding is February 27, 2005.³⁹ However, Entergy has failed to address the period between the refund effective date and the effective date of the cost-based rate tariffs accepted herein (July 22, 2005). Consistent with the April 14 Order, the Commission directs Entergy to make a filing, within 30 days of the date of issuance of this order, proposing case-specific mitigation (such as that contained in the cost-based rate tariffs accepted herein) or agreeing to the default cost-based rates for the period between the refund effective date and the effective date of the Entergy Operating Companies' CBR Tariff and EWO Marketing's CBR Tariffs 1 and 2.

59. The Commission announced in the April 14 Order that, where an applicant is found to have market power (or where the applicant accepts a presumption of market power), the applicant will be required to adopt some form of cost-based rates or other mitigation the applicant proposes and the Commission accepts. Under these circumstances, the Commission found that it is essential that appropriate accounting records be maintained consistent with the Commission's regulations. Accordingly, the Commission indicated it will no longer waive the otherwise applicable accounting regulations (*e.g.* Parts 41, 101, and 141 of the Commission's regulations).⁴⁰ Further, the Commission stated that it will not grant blanket approval for issuances of securities or assumptions of liability pursuant to Part 34 of the Commission's regulations for the mitigated seller and its affiliates.

60. In the instant case, Entergy has agreed to withdraw its request for renewal of market-based rate authority for any Entergy affiliates conducting power sales in the Entergy control area. Thus, any waivers previously granted in connection with those sellers' market-based rate authority are no longer applicable. We will revoke any accounting waivers granted to the Entergy Operating Companies, EWO Marketing, and any of their affiliates with market-based rate authority in the mitigated control area. Any blanket authorizations previously granted for issuances of securities or assumptions of

³⁹ See *Entergy Services, Inc.* 109 FERC ¶ 61,282 at P 38 (2004) (December Order); *order on reh'g*, 111 FERC ¶ 61,145 (2005).

⁴⁰ April 14 Order, 107 FERC ¶ 61,018 at P 150.

liabilities in connection with Entergy Operating Companies, EWO Marketing and any of their affiliates in connection with their market-based rate authorization are no longer applicable.⁴¹

61. To provide these companies with time to make the necessary filings with the Commission and allow for an orderly transition from selling under market-based rates to cost-based rates, we will make the effective date of such rescission of waivers and authorizations 60 days from the date this order is issued.

The Commission orders:

(A) EWO Marketing's proposed cost-based rate tariffs, CBR Tariffs 1 and 2, are hereby accepted for filing, as modified herein, to be effective July 22, 2005, subject to refund, and set for hearing and settlement judge procedures, as discussed in the body of this order.

(B) The Entergy Operating Companies' CBR Tariff is hereby accepted for filing, as modified herein, to be effective July 22, 2005, as discussed in the body of this order.

(C) Within 30 days of the date of this order, the Entergy Operating Companies and EWO Marketing are directed to make a compliance filing to revise the non-rate terms and conditions of the cost-based rate tariffs, as discussed in the body of this order.

(D) Entergy Operating Companies and EWO Marketing are directed, within 30 days of the date of issuance of this order, for the period between February 27, 2005 and July 22, 2005 to: (1) file a mitigation proposal tailored to their particular circumstances; or (2) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

(E) The Commission hereby accepts the Entergy Operating Companies' and the Entergy Affiliates' market-based rate tariffs, as modified herein, to be effective July 22, 2005, as discussed in the body of this order.

(F) Within 30 days of the date of this order, the Entergy Operating Companies and the Entergy Affiliates are directed to make a compliance filing revising their market-based rate tariffs, as discussed in the body of this order.

⁴¹ *Id.*

(G) Any waivers and authorizations previously granted in connection with Entergy Operating Companies' and EWO Marketing's market-based rate authorizations are no longer applicable effective 60 days from the date of the issuance of this order.

(H) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning EWO Marketing's proposed cost-based rates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (I) and (J) below.

(I) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(J) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(K) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's decision, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

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(L) Entergy's notices of changes in status are hereby accepted for filing, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.