

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket No. ER03-811-000

ORDER ON INITIAL DECISION

(Issued December 22, 2004)

1. On June 22, 2003, the Presiding Administrative Law Judge (ALJ) issued an initial decision that permitted Occidental Chemical Corporation (Occidental) to execute Entergy Louisiana, Inc.'s (Entergy Louisiana) most recent *pro forma* interconnection and operating agreement (IA) in place of, and with the same effective date as, a previously filed and accepted IA.
2. The Commission finds that the Initial Decision is fully supported by the evidence and is consistent with Commission policies and precedent. Therefore, the Commission adopts the Initial Decision as its own without modification. This order benefits the public by requiring Entergy Louisiana to comply with the terms of its interconnection agreements.

**I. Background**

3. In order to fully understand this case, the background of several proceedings must be considered. These proceedings relate to several interconnection and operating agreements involving Entergy Louisiana that followed interrelated paths.

4. On March 1, 2000, Entergy Louisiana filed its proposed *Pro Forma* IA. On May 18, 2000, the Commission accepted the proposed *Pro Forma* IA for filing, subject to modification.<sup>1</sup> On May 26, 2000, shortly after Entergy Louisiana originally filed its proposed *Pro Forma* IA in Docket No. ER00-1743, Entergy filed an unexecuted Taft IA. That agreement concerned the interconnection of Occidental's 778 MW cogeneration facility (the Taft facility) to Entergy Louisiana's transmission system.

5. The Taft IA contains the language that is the subject of this proceeding in section 23. 8; we will refer to this language as "the reopener provision":

**FERC-Approved Form Agreement.** Notwithstanding anything in this Agreement to the contrary, in the event Company [Entergy] files a *Pro Forma* Interconnection and Operating Agreement which is accepted for filing by FERC, Customer [Occidental] shall have the option, but not the obligation (unless otherwise provided under the terms of any applicable law or regulation) to execute such FERC-approved form in lieu of this Agreement with the express understanding that the effective date thereof shall remain unchanged from that specified in this Agreement.

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<sup>1</sup> *Entergy Services, Inc.*, 91 FERC ¶ 61,149 (2000). On June 19, 2000, Entergy filed to comply with the May 18, 2000 Order, and Occidental filed to request rehearing of the May 18 Order. On July 10, 2000, Occidental and other parties filed protests to Entergy's June 19, 2000 compliance filing. On March 14, 2001, the Commission issued its order on rehearing of the May 18, 2000 Order and directed further modifications. *Entergy Services, Inc.*, 94 FERC ¶ 61,257 (2001). On June 27, 2001, the Commission directed Entergy to modify its *Pro Forma* IA to provide credits to interconnecting customers for costs required to upgrade the system. *Entergy Services, Inc.*, 95 FERC ¶ 61,437 (2001), *reh'g denied*, 96 FERC ¶ 61,311 (2001). On April 29, 2002 the Commission required the *Pro Forma* IA to be further revised to require interest on optional system upgrade costs. *Entergy Services, Inc.*, 99 FERC ¶ 61,127 (2002). On October 10, 2002, the Commission accepted the revised *Pro Forma* IA compliance filing providing for such interest. *Entergy Services, Inc.*, 101 FERC ¶ 61,016 (2002).

6. Occidental protested the Taft IA, arguing that Entergy Louisiana had not justified the costs for upgrades and had not assured Occidental that it would provide credits. The Commission accepted the Taft IA for filing, prescribed certain modifications (such as requiring Entergy to state which upgrades would receive credits), suspended it and set the matter for hearing and settlement judge procedures.<sup>2</sup>

7. Several months later, Entergy Louisiana filed the Convent IA, which concerned the interconnection of another Occidental generation facility, the Convent Facility.<sup>3</sup> The Convent IA was based upon Entergy Louisiana's original proposed *Pro Forma* IA, which had been accepted for filing by the Commission. This IA does not contain the reopener provision. Occidental protested the Convent IA; the Commission accepted it for filing, established a hearing, and consolidated the proceedings involving the Taft IA and the Convent IA.<sup>4</sup>

8. On March 7, 2001, Entergy Louisiana and Occidental filed a Settlement Agreement that included both the Settlement Convent IA (which does not contain the reopener provision) and the Settlement Taft IA (which does contain such language). The Settlement Agreement included the "Principles for Waterford Breaker Upgrade Cost Allocation" (the Breaker Principles), which cover Required System Upgrades about which Occidental and Entergy Louisiana agreed that Occidental would pay for the replacement of twenty-four 63 kilo-Ampere breakers at Entergy Louisiana's 230 kV Waterford Switchyard needed to compensate for the additional fault current resulting from the interconnection of the Taft facility. The Breaker Principles identify the system upgrades necessary to accommodate interconnection with both the Taft and Convent facilities, provide for the initial allocation of those costs to Occidental, and contain a process for cost-sharing with third parties that would benefit from the use of those upgrades. The Commission approved the Settlement Agreement.<sup>5</sup>

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<sup>2</sup> *Entergy Louisiana, Inc.*, 92 FERC ¶ 61,052 (2000).

<sup>3</sup> Occidental later disposed of its interest in the Convent facilities, and the Convent IA was terminated by unpublished Commission letter order on July 31, 2002.

<sup>4</sup> *Entergy Services, Inc.*, 93 FERC ¶ 61,127 (2001).

<sup>5</sup> *Entergy Services, Inc.*, 95 FERC ¶ 61,213 (2001).

9. On May 2, 2003, Entergy Louisiana filed an Amended Taft IA. The Amended Taft IA modifies the initial point of interconnection for the Taft facility. Entergy Louisiana and Occidental agreed upon this modification. The Amended Taft IA is under the Taft Settlement Agreement. It was unexecuted because the parties disagreed over the inclusion of the reopener provision. Entergy Louisiana included the reopener provision, but it objected to doing so.

10. The Commission accepted the Amended Taft IA for filing, suspended it and made it effective May 3, 2003, subject to refund, and established hearing procedures.<sup>6</sup> The order indicated that the dispute over the inclusion of the reopener provision was an issue of contract interpretation, stating:

The dispute between Entergy Louisiana and Occidental involves whether [the reopener provision] is moot, or whether Occidental can now execute Entergy's *pro forma* interconnection agreement in place of the Settlement Agreement. If Occidental still has the option to execute Entergy's *pro forma* interconnection agreement, it would be eligible to receive transmission credits for the Required System Upgrades that it has paid for under the Breaker Principles. Also, in addition to the credits that the Settlement Agreement specified, Occidental would receive transmission credits for the Optional System Upgrades. 103 FERC at P 11 (footnote omitted).

The Commission set the case for hearing because the dispute could not be resolved on the then current record.

## **II. The ALJ's Decision**

11. In the Initial Decision, the ALJ stated that the issue set for hearing, as stipulated by the parties, was:

Whether section 23.8, as contained in the original Taft IA and the Settlement Taft IA, allows Occidental to execute Entergy's most recent FERC-accepted *Pro Forma* interconnection and operating agreement

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<sup>6</sup> *Entergy Services, Inc.*, 103 FERC ¶ 61,375 (2003), *order on reh'g*, 105 FERC ¶ 61,016 (2003).

(“*Pro Forma IA*”) in place of, and with the same effective date as, the previously-filed and accepted interconnection and operating agreement that was part of the Settlement Agreement. Initial Decision at P 10.

12. The ALJ first discussed whether the reopener provision was intended to be effective or whether its presence was due to inadvertence, as Entergy Louisiana argues. He found that this provision was requested by Occidental in its original discussions with Entergy Louisiana to enable Occidental to switch over to Entergy Louisiana’s Commission-approved *Pro Forma IA*<sup>7</sup> and that the parties discussed this language before its inclusion in that agreement.<sup>8</sup> Accordingly, the ALJ found that Entergy Louisiana clearly was aware of the reopener provision and did not object to its inclusion in the Original Taft IA. The ALJ also found that Entergy Louisiana did not deny knowledge of the reopener provision in the Taft Settlement Agreement.<sup>9</sup>

13. The ALJ found Occidental’s testimony that it intended to include this section in the Settlement Taft IA to be persuasive. The record did not support a finding that the inclusion of the language was inadvertent. The ALJ stated that if Entergy Louisiana did not intend for the reopener provision to be included, it made a mistake in signing a settlement agreement that clearly includes it.<sup>10</sup>

14. The ALJ next examined the meaning and effect of the reopener provision. Occidental claimed to have intended the reopener provision to “provide it with the option, exercisable without time limitation, to opt over to Entergy Louisiana’s *Pro Forma IA*, instead of the Settlement Taft IA and attendant obligations, in a form that was on file

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<sup>7</sup> Initial Decision at P 31, *citing* Exh. OXY-1 at p. 7-8.

<sup>8</sup> *Id.*, *citing* Exhs. ETR- 1 at p. 15; OXY- 18 at p. 6.

<sup>9</sup> The ALJ also noted that Staff had presented evidence that a provision akin to the reopener provision was in 28 other interconnection agreements negotiated and filed with the Commission by Entergy in the same general time frame as in this case. He said that Entergy’s witness had no explanation as to how this provision could have been inadvertently included in the Occidental agreement and 28 other similar agreements. Initial Decision at fn. 6, *citing* Tr. at p. 144.

<sup>10</sup> Initial Decision at P 33.

with and accepted by the Commission, with no change in effective date.”<sup>11</sup> The ALJ stated that “Occidental interprets this provision as enabling it to effectively replace the terms and conditions under which it interconnects its Taft facility with the Entergy Louisiana System, notwithstanding the commitment it made under the terms of the Taft Settlement Agreement.”<sup>12</sup>

15. On the other hand, the ALJ pointed out that Entergy Louisiana “claims to have intended [the reopener provision] to provide Occidental only with a one-time option to execute the *Pro Forma* IA that was accepted for filing, as modified, on May 18, 2000.”<sup>13</sup> He states that “when Occidental executed the Settlement Taft IA that was filed on March 6, 2001, and did not instead elect to execute Entergy Louisiana’s *Pro Forma* IA that had been accepted for filing ten months earlier, Entergy Louisiana claims all rights that Occidental had under [the reopener provision] and the provision became moot.”<sup>14</sup>

16. The ALJ began his interpretation of the reopener provision with an examination of the text of that section. He observed that there is no time limitation included in the reopener provision. He found persuasive Staff’s testimony that the use of the article “a” preceding the words “*Pro Forma* Agreement” suggests that the language was not intended to refer to a particular *Pro Forma* Agreement. The ALJ also pointed to the difficulty Entergy Louisiana had in identifying exactly which *Pro Forma* IA this section allowed Occidental to execute under Entergy Louisiana’s theory of intent. The ALJ determined that Occidental had the more reasonable interpretation of the meaning of the reopener provision. Therefore, the ALJ found that the language does not refer to a particular *Pro Forma* IA.<sup>15</sup>

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<sup>11</sup> *Id.* at P 34, *citing* Exhs. OXY- 1 at pp. 4, 6, 7, 12-13; OXY- 8 at pp. 2-3, 7-9.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, *citing* Exh. ETR- 1 at p. 18

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at P 36-37.

17. Entergy Louisiana argued that the absence of a reopener-type provision in the Convent IA was due to the fact that the Convent IA already provided for the limited outcome available to Occidental under the reopener provision; hence, it was not needed in the Convent case, so the reopener provision in the Taft IA must have been intended to refer only to the recently accepted *Pro Forma* IA. Entergy Louisiana argued that the Original Convent IA was the only contemporaneous, memorialized evidence of intent with respect to the applicability of the reopener provision to various forms of Entergy Louisiana's *Pro Forma* IAs. The ALJ found that this evidence of intent applied to the Convent IA, not the Taft IA. To draw a conclusion from the absence of the reopener provision from the Convent IA would require inferring a certain meaning from the words in the Taft IA. The ALJ found that it would be a "considerable stretch to derive from these Convent IA facts a specific meaning for words in the reopener provision of the Taft agreement."<sup>16</sup>

18. The ALJ found additional evidence that the reopener provision was not moot in the Commission's acceptance of Entergy Louisiana's *Pro Forma* IA eight days before the Original Taft IA was filed. The ALJ reasoned that if Entergy Louisiana's position was correct, it would have been pointless to include the option to accept the Commission-accepted *Pro Forma* IA in the Taft Settlement, since Occidental already had that option wholly apart from the Taft IA.<sup>17</sup> From this the ALJ inferred that the reopener provision was intended to confer upon Occidental broader options than just to elect the specific Entergy Louisiana *Pro Forma* IA that was otherwise available to it. The ALJ stated that:

if this broader option is not what Entergy intended, it had, at bottom, the responsibility to clarify its understanding of the wording of the Settlement before putting its signature on the document. As it is, there is in the Settlement Agreement, no limitation on the time available for Occidental to opt for a *Pro Forma* IA, nor any limitation as to the choice of a particular IA. Entergy's attempts to read into this language limitations that simply are not there must fail in the absence of more convincing evidence of intent and meaning.

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<sup>16</sup> *Id.* at P 39.

<sup>17</sup> *Id.* at P 40, *citing* Exh. OXY-18 at p. 8.

19. The ALJ next focused upon whether Entergy Louisiana and Occidental intended that the Settlement Taft IA and the Breaker Principles would permanently resolve cost allocation issues for the Waterford Breaker Upgrades and remain effective notwithstanding other provisions of the Taft settlement agreement. Entergy Louisiana argued that the Breaker Principles for Waterford Breaker Upgrade Cost Allocation were the final agreement between the parties as to cost allocation in the Taft Settlement Agreement, that the Breaker Principles “shall control in the event of any conflict with respect to the implementation of the cost allocation procedures described in the Settlement Agreement,” and that, therefore, the Breaker Principles would survive into the future, notwithstanding any later standardized form of IA applicable to Entergy Louisiana.<sup>18</sup>

20. Entergy Louisiana also noted that section D of the Settlement Agreement expressly provides:

[t]he terms and conditions set forth in the Breaker Principles shall control in the event of any conflict with respect to the implementation of the cost allocation procedures described in the Settlement Agreement.<sup>19</sup>

Entergy Louisiana argued that this section was designed to prevent abrogation of the Settlement and to ensure that the Breaker Principles would control. It said that the clear intent of the parties that the Breaker Principles survive should override an ambiguous and apparently inconsistent provision inadvertently carried over into the Settlement Taft IA from negotiations conducted over a year before the Settlement Agreement was

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<sup>18</sup> *Id.* at P 41, *citing* Exh. ETR-2 at p. 5; Tr. at p. 137-138.

<sup>19</sup> *Id.* at P 47, *citing* Exh. ETR-2 at p. 5 (Section D).



executed.<sup>20</sup> Entergy Louisiana argued that where there is ambiguity as to intent, the more clearly expressed intentions control<sup>21</sup> and that the weight of any questionable contract provision depends on whether “any reasonable meaning, consistent with the other parts, can be given to it.”<sup>22</sup> Entergy Louisiana argued that the Settlement Taft IA and the Breaker Principles must be read together to give the documents lasting effect, and that if this is done, it becomes clear that the reopener provision must be disregarded because it directly conflicts with the fundamental agreements of the parties expressed in the Settlement Agreement and Breaker Principles.

21. The ALJ noted that Occidental saw no conflict between the Settlement and the Breaker Principles on the one hand and the reopener provision on the other, because Entergy Louisiana incorrectly assumed that the Breaker Principles survive an election under the reopener provision. Occidental argued that Entergy Louisiana was attempting

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<sup>20</sup> Entergy Louisiana further argued that Occidental agreed that the Breaker Principles would be continuously effective. ID at P45, *citing*, Exh. ETR-2 (Section 7). section 7 states:

The application of these cost allocation principles shall be continuously effective through any *Pro Forma* Interconnection and Operating Agreement and Interconnection Procedures that Entergy proposes for a Regional Transmission Organization or a Transco in which Entergy is a member.

Entergy Louisiana maintained that the Breaker Principles, accordingly, are intended to survive any alternate procedures developed by a Regional Transmission Organization or Transco. It concludes that later versions of the *Pro Forma* IA do not negate this express bilateral commitment. Initial Decision at P 45, *citing* Entergy Louisiana Initial Brief at P. 28. However the ALJ found Occidental’s argument that this section provides that the Breaker Principles survive through any IA procedures developed in the context of a Regional Transmission Organization or Transco more persuasive. Initial Decision at P 63.

<sup>21</sup> *Id.* at P 42, *citing Antonio Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 66 (1995).

<sup>22</sup> *Id.* at P 42, *citing Pacific Gas Transmission Co.*, 73 FERC ¶ 61,276 at 61,760 (1995).

to abrogate the Settlement Taft IA by arguing that the reopener provision should be given no meaning, and that Entergy was attempting to use the Breaker Principles as a pretext to avert its obligations under that section. Trial Staff similarly argued that since the Breaker Principles would be replaced under an election of the reopener provision, there would be no conflict in the Settlement terms.

22. The ALJ found that the reopener provision was effective and that it gave Occidental the right to turn away from the Settlement Agreement, the Settlement Taft IA, and the Breaker Principles, in favor of an Entergy *Pro Forma* IA. The ALJ rejected Entergy's argument that the Breaker Principles are the final agreement between the parties regarding cost allocation in the settlement, notwithstanding any later standardized form of IA. Occidental's exercise of its rights under the reopener provision makes the Breaker Principles moot. The ALJ found that this is the only way to interpret the interplay between these documents and give recognition to each of the relevant provisions in the agreements. The ALJ found that the reopener provision was made part of the settlement intentionally and that giving it effect does not disregard any other provision of the Settlement.

23. The ALJ found that Entergy Louisiana's argument that the sanctity of settlements would be breached by a failure to uphold the Principles as the final word on cost allocation fails because the reopener provision is also in the Settlement Agreement and the record demonstrates that it was intended to offer an alternative to the IA that was adopted in that settlement. Therefore, by exercising its option under the reopener provision to choose an alternative arrangement for interconnection, Occidental cannot be said to have failed to respect the sanctity of a Settlement Agreement containing this option.<sup>23</sup>

24. In conclusion, the ALJ found that:

[The reopener provision], as contained in the Original Taft IA and the Settlement Taft IA, allows Occidental to execute Entergy's most recent FERC-accepted *pro forma* interconnection and operating

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<sup>23</sup> *Id.* at P 56-61.

agreement in place of, and with the same effective date as, the previously-filed and accepted interconnection and operating agreement that was part of the Taft Settlement Agreement.<sup>24</sup>

### **III. Discussion**

25. Entergy Louisiana's Brief on Exceptions argues that the ALJ erred in: (1) failing to recognize the express terms and conditions of the Settlement Agreement and the Breaker Principles in finding that the reopener provision was intended to be effective following the execution of the Settlement Agreement and the Settlement Taft IA; (2) finding that the words of the reopener provision determined that section's meaning; (3) finding that the three different ways in which Entergy Louisiana described the initially-accepted Pro Forma IA are different versions of the agreement; (4) ignoring the evidence of intent provided by the Settlement Convent IA between Occidental and Entergy; (5) finding that a strong inference of intent could be drawn from the submittal to the Commission of the Original Taft IA eight days before the Commission's issuance of an order accepting the Pro Forma IA for filing; (6) finding that [the reopener provision] trumps the Breaker Principles even though Entergy Louisiana and Occidental agreed that the Breaker Principles would control in all instances, and; (7) finding that the reopener provision, as interpreted by Occidental, is consistent with the Settlement and Breaker Principles, given that the ALJ's interpretation of the section eliminates the Breaker Principles and renders that agreement void.

26. Occidental and Trial Staff filed Briefs Opposing Exceptions, in which they reiterate their opposition to Entergy Louisiana's position and express their support for the Initial Decision as written.

27. The Commission finds that the Initial Decision is supported by the evidence and is consistent with the Commission's policies and applicable precedent. The ALJ adequately addressed the issues, and nothing raised in the Briefs on Exceptions would compel the Commission to reconsider the findings in the Initial Decision. Accordingly, the Commission adopts the Initial Decision as its own without modification.

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<sup>24</sup> *Id.* at P 64.

The Commission orders:

The Commission approves the Initial Decision in this proceeding without modification.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.