

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Joint Application of Entergy Arkansas, Inc.,)
Mid South TransCo LLC, Transmission Company Arkansas,) Case No. EO-2013-0396
LLC and ITC Midsouth LLC for Approval of Transfer of Assets)
and Certificate of Convenience and Necessity, and Merger and,)
in connection therewith, Certain Other Related Transactions.)

In the Matter of Entergy Arkansas, Inc.’s Notification of)
Intent to Change Functional Control of Its Missouri Electric)
Transmission Facilities to the Midwest Independent) Case No. EO-2013-0431
Transmission System Operator, Inc. Regional Transmission)
System Organization or Alternative Request to Change)
Functional Control and Motions for Waiver and Expedited)
Treatment.)

**JOINT REQUEST FOR ADMINISTRATIVE NOTICE AND MOTION TO DELAY
COMMISSION DECISION**

COME NOW, Kansas City Power & Light Company (“KCP&L”), KCP&L Greater Missouri Operations Company (“GMO”) (collectively, the “Companies”), and The Empire District Electric Company (“Empire”) (together, “Joint Movants”), and pursuant to Mo. Rev. Stat. § 536.070 (6) request that the Commission take administrative notice of the documents attached hereto as Exhibits A, B, and C, evidencing the status of Joint Applicants’¹ pending asset transfer proceedings in other jurisdictions and delay its decision on the pending application to transfer ownership of EAI’s Missouri assets to a subsidiary of ITC. In support of its request, the Joint Movants state as follows:

1. In its initial brief in this matter, the Companies provided a brief summary of the status of other jurisdictions’ review of Joint Applicants’ pending applications to transfer

¹ Entergy Arkansas, Inc. (“EAI”), Mid South TransCo LLC (“Mid South”), Transmission Company Arkansas, LLC (“TC Arkansas”) and ITC Midsouth LLC (“ITC”) are referred to collectively herein as “Joint Applicants.”

ownership of EAI's transmission assets to a subsidiary of ITC.² The Companies noted that Texas administrative law judges had recently recommended that the state commission reject the proposed transmission merger between Entergy and ITC, alleging that the transaction is not in the public interest. In its July 8, 2013 Proposal for Decision, Texas administrative law judges noted that it is not clear whether Texas customers will gain any benefits from the proposed transaction.

2. The Companies further noted in its initial brief that June 20, 2013 testimony from the Mississippi Public Utilities Staff recommended that the Mississippi Public Service Commission reject the proposed transaction, raising significant concerns over potential impacts to ratepayers and stating that the proposal is not in the public interest.³ Finally, the Companies noted that the Arkansas Public Service Commission also submitted recent testimony stating its continued belief that the transfer of EAI's Arkansas transmission facilities to a subsidiary of ITC is not in the public interest and should be denied.⁴

3. The status of ITC and the Entergy Operating Companies'⁵ requests to transfer ownership of the Entergy Operating Companies assets to a subsidiary of ITC continue to face opposition in other jurisdictions, and the Companies hereby request that the Commission take administrative notice of the following actions in other states.

4. First, on August 14, 2013, Arkansas Electric Energy Consumers ("AEEC") filed a Motion⁶ to Suspend the Procedural Schedule in Docket No. 12-069-U, the Arkansas Public

² See Post-Hearing Brief of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company at ¶¶ 46-49.

³ See June 20, 2013, *Direct Testimony of Scott Hempling*, Mississippi PSC Docket No. 2012-UA-358.

⁴ See June 7, 2013 Surrebuttal Testimony of Daniel E. Peaco on Behalf of the General Staff of the Arkansas Public Service Commission, Docket No. 12-069-U.

⁵ The Entergy Operating Companies include Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, LLC; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.

⁶ A copy of this Motion and its attachment is attached hereto as **Exhibit A**.

Service Commission docket considering the proposed asset transfer to ITC.⁷ In that Motion, AEEC discussed the Texas Public Utilities Commission July 8, 2013 Proposal for Decision, recommending that ITC and Entergy Texas, Inc.’s (“ETI”) pending asset transfer application⁸ be denied. AEEC further noted that at an open meeting on August 9, 2013, ITC and ETI withdrew their Texas application after a Memorandum circulated by the Texas Commissioners indicated that the application would be denied. The Texas Memorandum is attached to AEEC’s Motion as Exhibit A. ITC and ETI indicated that they would file a renewed application, and were instructed by the Texas Public Utility Commissioners to file a complete package that included evidence of the rate impact of the transaction and that also included the conditions previously set forth in a Texas Commissioner’s August 9, 2013 Memorandum.

5. AEEC stated in its Motion that ITC and EAI have stated from the outset of these proceedings that approval in all jurisdictions is required, and that based upon the withdrawal of the Texas application, it does not appear that such an outcome will occur. AEEC noted that ITC and EAI proposed a “most favored nations” clause to equalize the rate mitigation across the Entergy system and under which the same treatment afforded to ratepayers in other jurisdictions with Entergy transmission assets purportedly will be afforded to Arkansas ratepayers. Thus, AEEC states, under the most favored nations clause, any proposals made by ITC and ETI in their renewed application to be filed in Texas, if eventually approved, must likewise be made in Arkansas. Accordingly, AEEC requested that the Commission suspend the procedural schedule until such time as the new Texas application is determined and ITC and EAI demonstrate that the new Texas provisions are equivalent to ITC and EAI’s proposals for Arkansas.

⁷ See Arkansas Electric Energy Consumers’ Motion to Suspend Procedural Schedule, Docket No. 12-069-U, August 14, 2013.

⁸ See Texas Public Utility Commission Docket No. 41223.

6. Second, on August 15, 2013, the General Staff of the Arkansas Public Service Commission filed a response to AEEC's Motion to Suspend, concurring with AEEC that the Commission should suspend the procedural schedule in the Arkansas proceeding.⁹

7. Third, also on August 15, 2013, the Public Utility Commission of Texas issued an Order of Dismissal Without Prejudice, granting Entergy Texas, Inc.'s verbal motion to withdraw its application for approval to transfer its transmission facilities to a subsidiary of ITC.¹⁰

8. As noted in the Joint Movants' post-hearing briefs filed in these proceedings, ITC and EAI have proposed a rate mitigation plan if EAI's transmission assets are transferred to ITC Arkansas, which is intended to mitigate the rate impact on customers from certain effects of the transaction. The rate mitigation plan, as initially structured, for the first five years following closing of the transaction, ITC and EAI have proposed \$85 million in bill credits for wholesale customers in the Arkansas pricing zone. (Bready Surrebuttal, ITC Ex. 17 at 11.)¹¹ This zone includes Missouri transmission facilities owned by EAI but not Missouri transmission customers of EAI who would be shifted to the MISO drive-out and drive-through rate. Since the hearing in this matter, Joint Applicants have introduced enhanced rate mitigation commitments in the Arkansas PSC proceedings such that if the transaction is approved and closes there will be rate mitigation funds for the first five years in the Arkansas pricing zone (which includes Missouri customers) of \$127.5 million to offset the changes to ITC's weighted average cost of capital. Rate mitigation will continue beyond the first five years until an independent evaluator confirms

⁹ A copy of the Arkansas' Staff's Response to Arkansas Electric Energy Consumers' Motion to Suspend Procedural Schedule is attached hereto as **Exhibit B**.

¹⁰ A copy of the Texas Public Utilities Commission August 15, 2013 Order of Dismissal Without Prejudice is attached hereto as **Exhibit C**.

¹¹ Post-Hearing Brief of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company at ¶ 43, Empire's Initial Brief at pp. 7-8.

that the tangible and quantifiable benefits of the transaction outweigh the cost of capital impacts.¹²

9. Based upon ITC's withdrawal of its Texas application and the Motion to Suspend the Procedural Schedule in Arkansas, which may have significant impacts upon the proposed rate mitigation plan, Joint Movants hereby respectfully request that the Commission:

- (i) Take administrative notice of the Exhibits attached to this pleading as Exhibit A, Exhibit B and Exhibit C; and
- (ii) Delay its decision regarding the pending transfer of EAI's Missouri transmission assets until such time as the Texas and Arkansas proceedings are resolved.

WHEREFORE, Joint Movants request that the Commission take administrative notice of the August 14, 2013 Motion filed by Arkansas Electric Energy Consumers, the attachment thereto regarding the Memorandum issued by the Texas Commission, the Response of the Arkansas Commission Staff concurring with Arkansas Electric Energy Consumers' Motion to Suspend the Procedural Schedule, and the Texas Commission's Order of Dismissal Without Prejudice, in order to assist the Commission in its deliberations in these proceedings, and further request that the Commission delay its decision regarding the transfer of assets until such time as the Texas and Arkansas proceedings are resolved.

¹² Joint Applicants' Reply Brief at pp. 16-17.

Respectfully submitted,

/s/ Roger W. Steiner

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed or mailed, postage prepaid, to all counsel of record in this case this 20th day of August, 2013.

/s/ Roger W. Steiner

Roger W. Steiner

**BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION**

**IN THE MATTER OF AN APPLICATION OF)
ENTERGY ARKANSAS, INC., MID SOUTH)
TRANSCO LLC, ITC MIDSOUTH LLC,)
TRANSMISSION COMPANY ARKANSAS, LLC,)
AND ITC HOLDINGS CORP. TO ENTER)
TRANSACTIONS RESULTING IN A) DOCKET NO. 12-069-U
CERTIFICATE OF PUBLIC CONVENIENCE)
AND NECESSITY FOR A NEW ARKANSAS)
UTILITY TO OWN EAI'S ELECTRIC)
TRANSMISSION FACILITIES)**

**ARKANSAS ELECTRIC ENERGY CONSUMERS'
MOTION TO SUSPEND PROCEDURAL SCHEDULE**

Arkansas Electric Energy Consumers (AEEC) moves to suspend the procedural schedule set forth in Order No. 15. In support of this Motion, AEEC states:

1. On December 4, 2011, Entergy Corporation (Entergy) and ITC Holdings Corp. (ITC) entered into an agreement to transfer ownership and control of the transmission assets of the Entergy Operating Companies to a subsidiary of ITC. *See* Application filed on September 28, 2012, Document No. 11, Docket No. 12-069-U at 1-2.¹ In this proceeding, Entergy Arkansas, Inc. (EAI) and ITC seek the Commission's approval of a series of transactions which would result in the transfer of EAI's electric transmission facilities from EAI to ITC and the certification of ITC as an Arkansas public utility for the purposes of owning and operating such transmission facilities.

2. ITC and Entergy operating companies have sought approval of the ITC Transaction in other jurisdictions.²

¹ The Entergy Operating Companies include Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, LLC; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.

² *See Application of Entergy Texas, Inc., ITC Holdings Corp., et al. for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery*

3. By Order No. 5 issued on December 10, 2012, the Commission established a procedural schedule, which provided for dates upon which written testimony was to be filed and set an evidentiary hearing for July 9, 2013.

4. EAI and ITC filed their Rebuttal Testimony on May 17, 2013, in which they proposed, for the first time, a purported rate-mitigation plan. After various parties, including AEEC, filed Surrebuttal testimony, EAI and ITC filed, on June 21, 2013, Sur-Surrebuttal Testimony which included testimony of three witnesses that addressed a revised, purported Mitigation Plan that contained different provisions from those proposed in the testimony filed on May 17, 2013.

5. On June 25, 2013, Arkansas Electric Cooperative Corporation filed a Motion to Reschedule the July 9, 2013 Evidentiary Hearing Pending Receipt of Supplemental Testimony, on the grounds that the revised Mitigation Plan set forth in the Sur-Surrebuttal Testimony left many key details unexplained, necessitating discovery and the filing of further testimony. In its Response to Arkansas Electric Cooperative Corporation's Motion, AEEC argued that the Sur-Surrebuttal Testimony and other evidence relating to the revised Mitigation Plan be excluded at the hearing scheduled for July 9, 2013 or that the hearing be suspended and a new procedural schedule entered.

6. By Order No. 14 issued on July 7, 2013, the Commission granted Arkansas Electric Cooperative Corporation's Motion. By its Order No. 15 filed on July 26, 2013, the

Approvals, and Related Relief, Texas Public Utility Docket No. 41223; *In re: Joint Application for Entergy Louisiana, LLC, Entergy Gulf States Louisiana, LLC, MidSouth TransCo LLC, Transmission Company Louisiana I, LLC, Transmission Company II, LLC, ITC Holdings Corp. and ITC MidSouth LLC for Approval of Change of Ownership of Electric Transmission Businesses, for Certain Cost-Recovery Adjustments and for Related Relief*, Louisiana Public Service Commission Docket No. U-32538; *In re: Joint Application for the Transfer of Ownership and Control of Entergy Mississippi Inc.'s Transmission Facilities and Assets Together with Related Certificates, Franchises and Other Property Rights to Transmission Company Mississippi, LLC and Approval of Subsequent Transfers of Ownership and Control*, Mississippi Public Service Corporation Docket No. 2012-UA-358.

Commission entered a new procedural schedule and set this cause for hearing to commence on September 4, 2013.

7. ITC and Entergy Texas Inc. (“ETI”) filed an application before the Texas Public Utilities Commission, seeking approval in Texas of the same transaction with respect to ETI’s transmission assets in Texas as is sought in Arkansas with respect to AEI’s Arkansas transmission assets. *See Application of Entergy Texas, Inc., ITC Holdings Corp., et al. for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery Approvals, and Related Relief*, Texas Public Utility Docket No. 41223. On July 8, 2013, the Administrative Law Judges issued their 66-page Proposal for Decision in Docket No. 41223, recommending that the Application be denied because, *inter alia*, ITC and Entergy had failed to meet their burden of proving that the transaction was in the public interest.

8. At an open meeting held on August 9, 2013, ITC and ETI withdrew their Application in Docket No. 41223 after the Texas Public Utility Commissioners indicated that they would deny the application. ITC and ETI indicated that they would file a renewed application, and were instructed by the Texas Public Utility Commissioners to file a complete package that included evidence of the rate impact of the transaction and that also included the conditions that had been agreed to by ITC and ETI that were set forth in Commissioner Anderson’s Memorandum of August 9, 2013. A video of the open meeting and Commissioner Anderson’s written Memorandum in Docket No. 41223 are publicly available on the Texas Public Utility Commission’s website, <http://www.puc.texas.gov/>. A copy of the memorandum is attached hereto as Exhibit “A”.

9. ITC and EAI have stated from the outset of these proceedings that approval in all jurisdictions is required. Based upon the Administrative Law Judges' findings in Texas and the withdrawal of the application in Texas, it does not appear that such an outcome will occur. Moreover, public utility regulatory commission staffs in Mississippi and Louisiana have likewise made unfavorable recommendations regarding the transaction. *See* Direct Testimony of Scott Hempling on behalf of Mississippi Public Utilities Commission Staff filed on June 20, 2013, Mississippi Public Service Commission Docket No. 2012-UA-358; Staff's Pre-Hearing Memorandum filed on July 11, 2013, Louisiana Public Service Commission Docket No. U-32538.

10. Due to the dismissal of their Texas application, ITC and EAI may not be able to meet the closing deadline required under the merger agreement.

11. Moreover, ITC and EAI proposed a "most favored nations" clause to equalize the rate mitigation across the Entergy system and under which the same treatment afforded to ratepayers in other jurisdictions with Entergy transmission assets purportedly will be afforded to Arkansas ratepayers. *See* Paragraph II.D.3 at page 5 of ITC Exhibit CMB-12 attached to Cameron Bready's Supplemental Testimony filed on July 9, 2013. Further, ITC and EAI propose that this Commission will have the right to reconsider any approval and public interest determination in this proceeding if another state public utility commission issues an order denying EAI and ITC the right to complete the ITC Transaction. *Id.* at paragraph II.D.1. Thus, under the "most favored nations" clause, any proposals made by ITC and ETI in their renewed application to be filed in Texas, if eventually approved, must be likewise made in Arkansas. However, such proposals and any approvals thereof are not known at this time. ITC and EAI rejected important conditions set forth in Commissioner Anderson in the memorandum attached

hereto as Exhibit “A”, but they also accepted many of the conditions. At this stage of the proceedings, the Commission has no way to judge if the new ITC deal in Texas is equivalent to what has been offered in Arkansas.

12. ITC and EAI have not complied with their own supplemental proposal submitted in July, 2013 that they notify the Commission “as soon as they receive them” of any decisions of other Entergy retail regulators that approve, deny or otherwise impact the ITC Transaction. ITC and EAI failed to notify the Commission that the Texas Public Utility Commission, on August 9, 2013, orally granted ITC and ETI’s oral motion to withdraw their Application filed in Texas.

13. The conditions and parameters of the relief sought by Applicants have been a moving target in this cause and continue to be a moving target as demonstrated by the events that have occurred in the corresponding Texas Public Utility Commission proceeding. It would be a waste of judicial resources and the parties’ resources to proceed with this cause when it is unknown what actions will be undertaken and conditions proposed by ITC in Texas. If the hearing is held by this Commission on September 4, another hearing will be necessitated at a later date if ITC and ETI re-file their application in Texas and Texas adopts conditions that differ from those which have been proposed here, an event which appears very likely in light of ITC’s acceptance at the August 9, 2013 meeting of many of the conditions set forth in the Memorandum attached hereto as Exhibit “A”.

14. The hearing in this case is currently scheduled to commence on September 4, 2013. To avoid what may be the unnecessary expenditure of time and resources associated with preparing for and attending that hearing, AEEC respectfully requests an expedited consideration of this Motion.

WHEREFORE, AEEC requests that the Commission suspend the procedural schedule until such time as the new Texas application is determined and ITC and EAI demonstrate that the new Texas provisions are equivalent to ITC and EAI's proposals for Arkansas.

Respectfully submitted,

s/Thomas P. Schroedter

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**ATTORNEYS FOR ARKANSAS
ELECTRIC ENERGY CONSUMERS**

CERTIFICATE OF SERVICE

I, Thomas P. Schroedter, do hereby certify a copy of the foregoing was served on all parties of record by forwarding the same by electronic mail and/or first class mail, postage prepaid, on this 14th day of August, 2013.

s/Thomas P. Schroedter

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EXHIBIT “A”

OPEN MEETING COVER SHEET

2013 AUG -9 AM 8:27
CLERK

MEETING DATE: August 9, 2013

DATE DELIVERED: August 9, 2013

AGENDA ITEM NO.: 11

CAPTION: Docket No. 41223; SOAH Docket No. 473-13-2879
- Application of Entergy Texas, Inc., ITC Holdings Corp., Midsouth Transco LLC, Transmission Company Texas, LLC, and ITC Midsouth LLC for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery Approvals, and Related Relief.

ACTION REQUESTED: Memo from Commissioner Anderson

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Public Utility Commission of Texas

Memorandum

TO: Chairman Donna L. Nelson

FROM: Commissioner Kenneth W. Anderson, Jr. *KWA*

DATE: August 9, 2013

RE: **Open Meeting of August 9, 2013, Agenda Item No. 11, Docket No. 41233**
Application of Entergy Texas, Inc., ITC Holdings Corp., Mid South Transco LLC, Transmission Company Texas, LLC, and ITC Midsouth LLC for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery Approvals and Related Relief

This case presents significant legal and factual questions for the Commission. Applicants Entergy Texas, Inc. (ETI), ITC Holdings Corp. (ITC), and their respective affiliates (collectively, Applicants) seek approval of a transaction that transfers ownership and control of ETI's transmission assets to affiliates of ITC (the Transaction). Depending on whether and how the Commission approves the Transaction, it may have significant and long term effects on the ratepayers in southeast Texas and other jurisdictions. In their Proposal for Decision (PFD), the Administrative Law Judges (ALJs) recommend that the Commission deny Applicants' proposed Transaction.¹ The ALJs reach this recommendation, first, because the Transaction is inconsistent with policy objectives of the Public Utility Regulatory Act (PURA)² on the basis that it contemplates the divestment of a vertically-integrated utility's transmission assets in an area of the state where customer choice has not been introduced.³ Second, the ALJs conclude that the record evidence does not support a finding that the Transaction is in the public interest because its costs do not justify its benefits, which the ALJs find speculative and difficult to quantify.⁴

Because of the importance and consequences of our decision, I wish to state my position with respect to the PFD. I also wish to emphasize the importance of the parties' due process rights in a matter where a firm decisional deadline limits the time in which those parties may submit evidence in support of their legal positions. This discussion includes my view regarding the ALJs' ruling to strike rebuttal testimony of Christopher Kapfer offered in support of the Transaction. Finally, I want to address the public interest considerations at the heart of the PFD, listing the necessary conditions I would require to reach a determination that the Transaction is in the public interest. I address these issues in turn.

¹ *Application for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery Approvals, and Related Relief*, Docket No. 41223, Proposal for Decision at 2 (July 9, 2013) (PFD).

² Public Utility Regulatory Act, TEX. UTIL. CODE ANN. (Vernon 2007 & Supp. 2012).

³ PFD at 14.

⁴ *Id.* at 54.

I. THRESHOLD LEGAL ISSUES AND DUE PROCESS.

Commission Authority to Approve TSP-only Utilities and Transfer of Transmission Assets: I have reviewed the parties' exceptions to the PFD as well as the replies to those exceptions. Some who oppose the transaction continue to argue that PURA does not permit the certification of a transmission-only utility outside of the Electric Reliability Council of Texas (ERCOT) region. In addition, certain challengers argue that a vertically-integrated utility may not transfer its transmission assets in an area where customer choice has not been introduced.

Having considered these arguments, I remain convinced that the conclusions of my July 18, 2013 memorandum⁵ regarding the Commission's legal authority in this case remain correct. Accordingly, and without restating my previous legal analysis, I would adopt the PFD with respect to its determination that the Commission may certify a transmission-only utility outside of ERCOT. However, I would reverse the PFD's conclusion that Subchapter J of PURA Chapter 39⁶ prohibits a vertically-integrated utility from transferring its transmission assets in an area where customer choice has not been introduced.

Due Process Considerations Regarding Applicants' July 2 and 13 Filings: The evidentiary record in this matter closed on June 13, 2013.⁷ On July 2 and 12, 2013, Applicants filed additional evidence regarding their commitments made in other retail jurisdictions in connection with the Transaction.⁸ These two filings purport to offer material enhancements to commitments Applicants previously made in connection with the Transaction. Importantly, Applicants assert that this new evidence provides enhanced additional rate mitigation benefits that would partially offset the increased costs that would flow from the change in the weighted average cost of capital (WACC) associated with ITC's ownership of the transmission system.

However, as the Third Court of Appeals recently and pointedly reminded the Commission in *Oncor Electric Delivery Company LLC v. Public Utility Commission of Texas*, due process requires that "parties must be able to present evidence on the issues to be decided."⁹ Further, "[a]n agency's decision is arbitrary when its final order denies parties due process of law."¹⁰ Commission rules allow parties to introduce evidence that supplements prefiled testimony, but such evidence must be introduced before or during the hearing.¹¹ Further, our rules weigh against introduction of supplemental testimony when opponents do not have an opportunity to respond.¹²

⁵ Memorandum of Commissioner Kenneth W. Anderson, Jr., Docket No. 41223 (Jul. 18, 2013).

⁶ PURA §§ 39.451 – 39.463.

⁷ PFD at 5.

⁸ Informational Filing Regarding Applicants' Relevant Commitments, ITC Exs. A and B (Jul. 2, 2013) and Informational Filing Regarding Applicants' Amended Proposed Commitments, ITC Exs. A and B (Jul. 12, 2013).

⁹ *Oncor Electric Delivery Company LLC v. Public Utility Commission of Texas*, No. 03–11–00233–CV, 2013 WL 3013899, at *12 (Tex. App.—Austin Jun. 14, 2013, no pet.).

¹⁰ *Id.* at *9 (citing *Lewis v. Metropolitan Savings & Loan Association*, 550 S.W.2d 11 (Tex. 1977)).

¹¹ P.U.C. PROC. R. 22.225(c).

¹² P.U.C. PROC. R. 22.225(c).

In this case, the Commission's consideration of Applicants' July 2 and 12, 2013 supplemental filings would necessarily occur after the hearing and close of evidence. Therefore, such consideration would deprive the challengers of an opportunity to respond to the information in the late filings with their own evidence in contravention of the Commission's procedural rules. *Oncor* stands for the principle that the Commission's departure from established rules and practices is a violation of due process when that departure deprives a party of the benefit of reliance on those rules and practices.¹³ Our consideration of the evidence in the late filings without providing the challengers an opportunity to respond to it would violate the due process rights of the challengers. For these reasons, I believe the Commission may not consider the additional evidence presented in Applicants' July 2 and 12, 2013 filings when determining the public interest as it relates to the Transaction.

If this were a typical case, we could delay the procedural schedule and refer the late filings back to the State Office of Administrative Hearings (SOAH) to provide all of the parties with an opportunity to consider and test fully the additional evidence.¹⁴ However, we are not at liberty to do so here because this case is subject to a strict jurisdictional deadline of August 18, 2013.¹⁵ Simply put, we do not have time to allow the parties to appraise and rebut the assertions provided in these or any late filings. Even if Texas ratepayers may benefit from the Applicants' enhanced last-minute commitments, such action by the Commission would leave its final order on the Transaction very likely subject to reversal upon subsequent judicial review for the reasons set forth. Consequently, I believe that the Commission may not consider the late filings in its decision in this matter.

Rebuttal Testimony of Christopher Kapfer: In its rebuttal case, ITC presented testimony of Christopher Kapfer regarding expected savings from economies of scale resulting from expanded transmission business if the Transaction were to occur.¹⁶ The ALJs excluded this testimony after determining that it should have been part of ITC's direct case. In its exceptions to the PFD, ITC requests that the Commission overturn the ALJs' ruling with respect to Mr. Kapfer's testimony.¹⁷ In my view, Mr. Kapfer's testimony constitutes evidence that was required to have been presented in ITC's direct case because it related directly to issues the Commission directed the parties to address in its preliminary order.¹⁸ Specifically, information about savings resulting from economies of scale was germane to the preliminary order's directive that the parties provide evidence of cost savings and benefits, both quantitative and qualitative, associated with the Transaction.¹⁹ Accordingly, I would uphold the ALJs' ruling to exclude the testimony.

¹³ *Oncor*, at *12.

¹⁴ See P.U.C. PROC. R. 22.262.

¹⁵ PURA §§ 39.262(m) and 39.915(b) require that the Commission make a determination regarding the Transaction not later than 180 days after the filing date of the application.

¹⁶ PFD at 41, n. 60.

¹⁷ ITC Holdings Corp. and ITC Mitsouth LLC's Exceptions to the Proposal for Decision at 24 (Jul. 22, 2013).

¹⁸ *Application for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery Approvals, and Related Relief*, Docket No. 41223, Preliminary Order (Mar. 29, 2013).

¹⁹ *Id.* at 5.

Lastly, I wish to comment on the relatively tight deadline in this case as it applies to evidentiary matters. At the outset, the Commission identified the importance of this matter and sought to clarify precisely the issues and evidence the parties were expected to address.²⁰ The parties were on notice that the 180-day deadline would likely impose constraints requiring that evidence be gathered, organized, and ready for administrative proceedings.²¹ In the wake of *Oncor*, I again wish to emphasize the necessity of preparing complete and responsive direct evidentiary materials in a timely fashion to allow all parties to respond to evidence submitted in SOAH proceedings in accordance with our rules.

Should the Commission uphold the ALJ's recommendation with respect to the "public interest finding", I would note that nothing prevents the Applicants from submitting another Transaction application with a complete presentation of evidence, including the excluded testimony of Mr. Kapfer in Applicants' direct case, as well as information provided in Applicants' filings of July 2 and 12, 2013. The inclusion of those materials in evidence would go a long way in providing firmer support for a finding that the Transaction is in the public interest.

II. PUBLIC INTEREST CONSIDERATIONS.

The PFD recommends denial of the Transaction application because the ALJs find that the Applicants have not met their burden of proof that the Transaction is in the public interest. With the record evidence as admitted by the ALJs, I am inclined to agree with the ALJs recommendation. However, if my colleague disagrees with the ALJs' recommendation on this issue, I am willing to consider a different finding if we impose all of the conditions set forth below. However, I would require that any order approving the Transaction with these conditions must include a mechanism whereby all of the Applicants, and their respective successors and assigns, explicitly agree to be bound by all conditions notwithstanding their rights under applicable federal law within 30 days of entry of the order approving the Transaction. These conditions are as follows:

Rate Proceeding and Cost Recovery Conditions

- All transmission-related cost increases by ITC that would ultimately flow through to Texas wholesale and retail customers through ETI as a result of the Transaction, including without limitation any increased costs attributable to the WACC of ITC, shall first be approved by the Commission upon a showing that the quantifiable Transaction benefits equal or exceed such costs.
- Applicants shall not seek to recover compensation paid to any party to settle any part of this case or any part of Docket No. 40346²² from Texas ratepayers.

²⁰ Open Meeting Tr. at 17:22-25 (Mar. 28, 2013).

²¹ See *id.* at 27:20-24.

²² *Application of Entergy Texas, Inc. for Approval to Transfer Operation Control of its Transmission Assets to the MISO RTO*, Docket No. 40346.

- Applicants shall agree to delete section 5.13 of their Merger Agreement, which prohibits ETI from opposing, contesting, or challenging any proposed ITC rate increase in a Federal Energy Regulatory Commission (FERC) proceeding for a period of five years.
- Applicants shall provide a rate mitigation plan that is no less favorable than has been or will be provided to any of the ratepayers of any of Entergy's operating companies other retail jurisdictions on account of the Transaction.
- If any Entergy, ITC or any of their respective operating companies commits to provide rate discounts or concessions to customers in any other jurisdiction in which Entergy operates, ETI and ITC shall offer substantially the same concession to customers in Texas.
- Applicants shall not seek to recover any costs incurred to effectuate the Transaction from their customers.
- ITC shall not recover costs from Texas ratepayers for the upgrade or replacement of the facilities being purchased from ETI without the prior approval of the Commission. If ITC plans to recover such costs, then ITC shall evaluate the condition of the facilities and provide a detailed cost and description of the facilities' conditions and associated explanations of the upgrade replacements and costs to the Commission before it can seek recovery of the costs.
- ITC and its affiliates shall agree not to seek any incentives for new transmission projects allocable to Texas, regardless of the location of the facilities, and to seek prior Commission approval for any new transmission costs allocable to Texas regardless of the location of the facilities, for a period of ten years.
- ITC shall not request from FERC a return on equity (ROE) or capital structure for the transmission assets it acquires from ETI different from ETI's current Commission-approved ROE and capital structure for a period of five years.

Regulatory and Oversight Conditions

- ITC shall submit to the Commission a report on the analysis of the transmission system formerly owned by ETI and any related plan to improve the transmission system in Texas before such improvements are undertaken. ITC shall work in conjunction with the Commission to consider and pursue transmission projects recommended by the Commission and consistent with ITC's planning criteria.

- The Commission shall maintain input on transmission planning activities of ITC, and Applicants shall support an oversight group similar to the existing Entergy Regional State Committee (ERSC).
- ETI shall keep the Commission apprised of ITC Transaction activities in other jurisdictions in which Entergy operating companies operate, and Applicants must provide all Transaction-related orders, updates, studies, reviews, reports, and analyses as required under the orders of the other jurisdictions.
- ITC shall provide to the Commission any periodic filings required by other regulatory jurisdictions related to transmission system safety and reliability.
- ITC shall conform with the State of Texas Operation Center guidelines and provide full support to the transmission facilities pursuant to such guidelines at all times.
- ITC shall designate an employee whose main work location and residence is in Texas to be a liaison to the Commission on behalf of ITC.
- ITC shall propose and support in the Midcontinent Independent System Operator (MISO) planning process those transmission projects identified in any MISO study that are expected to reduce congestion in a cost-effective manner.
- ITC shall make a presentation to Commission staff of the MISO transmission planning process as it relates to the Texas market annually and provide the projects, solutions, and mitigation plans. ITC shall also include annual presentations of operations and maintenance procedures and provide Commission staff with a report of the challenges faced and solutions performed during the year.
- ITC shall make a detailed presentation to Commission staff regarding any proposed rate increase before it files a rate case with the FERC.
- Applicants shall provide to the Commission an emergency response plan that reflects coordination and communication between Applicants, the Commission, local governmental authorities, and applicable emergency responders. Applicants must submit to an independent audit of their storm response by an auditor chosen by the Commission and paid for by ITC and ETI in equal shares. If the auditor finds that storm response could have been undertaken more quickly or efficiently then Applicants must agree to compensate their customers for the delays in an amount the Commission determines to be reasonable.
- ITC shall agree that the certificate of convenience and necessity (CCN) it obtains through the Transaction applies only to the existing transmission it acquires from ETI and does not authorize ITC to own, construct, operate or maintain additional transmission, including transmission outside the ETI service area without first obtaining a

Commission-approved amendment to the CCN allowing such ownership, construction, operation, or maintenance.

Transmission System Maintenance Conditions

- ITC shall provide the Commission a transmission-related vegetation management plan to ensure continued maintenance of the Texas transmission system. The vegetation management plan must show allocations of expenses and responsibility among ETI and ITC.
- ITC shall provide the Commission staff a detailed root cause analysis with solutions when any damage to the system results in loss of power to customers.
- ITC shall file with the Commission its proposal for hardening of the transmission system to mitigate the damage caused by storm or other factors.
- ITC shall provide to the Commission the procedures and associated resources that it will make available in the event of a hurricane or other disaster. Applicants shall provide to the Commission the names and contact information of ITC personnel so that Commission staff has complete, 24 hour communication with applicable personnel regarding the repair of facilities because of a hurricane or other natural disaster. ETI and ITC shall conduct joint storm drills at least one time per year.

Miscellaneous Conditions

- The Transaction shall not be consummated before ETI and the various Entergy operating companies are successfully integrated into the MISO transmission system.
- ITC shall assume all liabilities for unfunded retirement or other obligations such as historical transmission storm damage.

I look forward to discussing these issues with you at the open meeting.

BEFORE THE ARKANSAS PUBLIC SERVICE COMMISSION

**IN THE MATTER OF AN APPLICATION OF
ENTERGY ARKANSAS, INC., MID SOUTH
TRANSCO LLC, ITC MIDSOUTH LLC,
TRANSMISSION COMPANY ARKANSAS, LLC,
AND ITC HOLDINGS CORP. TO ENTER
TRANSACTIONS RESULTING IN A
CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY FOR A NEW ARKANSAS
UTILITY TO OWN EAI'S ELECTRIC
TRANSMISSION FACILITIES**

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DOCKET NO. 12-069-U

**RESPONSE TO ARKANSAS ELECTRIC ENERGY CONSUMERS'
MOTION TO SUSPEND PROCEDURAL SCHEDULE**

Comes now the General Staff of the Arkansas Public Service Commission (Staff) and for its response to Arkansas Electric Energy Consumers' (AEEC) Motion to Suspend Procedural Schedule filed August 14, 2013, states:

1. Staff agrees with AEEC that the Commission should suspend the procedural schedule in this proceeding.
2. Consistent with the Entergy Arkansas, Inc.'s (EAI) and ITC Holdings Corp.'s (ITC) (collectively referred to as the Applicants) own Application, the provisions of the Merger Agreement, and the testimony in this and other related proceedings in other jurisdictions, it does not appear that the Transaction can proceed forward and receive the required regulatory approvals within the required time frame as described by the Applicants because of the withdrawal of the application before the Texas Public Utilities Commission (TPUC). The Applicants have stated that an "order before October 1, 2013 is necessary because of all the activities that must occur in order to effectuate the Transaction's close in December 2013."¹

¹ Applicants' Response to AECC's Motion to Reschedule the July 9 Evidentiary Hearing, at p. 4, citing to Section 7.01 of the Merger Agreement, attached as Exhibit CMB-1 to the Direct Testimony of ITC witness Cameron M. Bready, which provides that the Merger Agreement expires by its own terms on December 31, 2013.

Consequently, it is unclear whether the Applicants can obtain the required approvals within the time frame they describe.

3. In response to the list of conditions specified by Commissioner Anderson of the TPUC, attached to AEEC's Motion as Exhibit A, the yet-to-be-filed application before the TPUC may contain different terms and conditions than the prior application in that jurisdiction and the Application in this docket.² Assuming under the most favored nations provisions that those terms and conditions would be offered to the Arkansas jurisdiction, additional analyses, testimony, and proceedings before this Commission would be required in order to determine whether the proposed transaction is in the public interest.

4. Due to the uncertainty whether the transaction can proceed forward to receive the required regulatory approvals within the required time frame as described by the Applicants in this proceeding due to the withdrawal of the application before the TPUC, it may be unnecessary and administratively inefficient to proceed with the remainder of the procedural schedule in this Docket at this time. The cost to the Parties in time and money to prepare for the hearing and have their witnesses present at the hearing is substantial. Further, the terms of the transaction may change in response to issues raised in the proceeding before the TPUC. Accordingly, Staff recommends that the Commission suspend the procedural schedule in this proceeding. Because the hearing is currently scheduled to begin September 4, 2013, time is of the essence. Staff requests that the Commission order all Parties who desire to respond to AEEC's Motion to do so no later than noon on August 16, 2013. Staff further requests that the Commission enter an order on AEEC's Motion as expeditiously as possible.

WHEREFORE, Staff respectfully requests that this Commission order all Parties who desire to respond to AEEC's Motion to do so no later than noon on August 16, 2013, and expeditiously enter an Order suspending the remainder of the procedural schedule.

² As of this date, the application has not been re-filed in Texas.

Respectfully submitted,

GENERAL STAFF OF THE ARKANSAS
PUBLIC SERVICE COMMISSION

By: /s/ Valerie F. Boyce

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CERTIFICATE OF SERVICE

I, Valerie F. Boyce, hereby certify that a copy of the foregoing Reply has been served on all parties of record by forwarding the same by electronic mail and/or first class mail, postage prepaid, this 15th day of August, 2013.

/s/ Valerie F. Boyce
Valerie F. Boyce

PUC DOCKET NO. 41223
SOAH DOCKET NO. 473-13-2879

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FILED

APPLICATION OF ENTERGY TEXAS,
INC., ITC HOLDINGS CORP., MID
SOUTH TRANSCO LLC, TRANSMISSION
COMPANY TEXAS, LLC, AND ITC
MIDSOUTH LLC FOR APPROVAL OF
CHANGE OF OWNERSHIP AND
CONTROL OF TRANSMISSION
BUSINESS, TRANSFER OF
CERTIFICATION RIGHTS, CERTAIN
COST RECOVERY APPROVALS, AND
RELATED RELIEF

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PUBLIC UTILITY COMMISSION
OF TEXAS

ORDER OF DISMISSAL WITHOUT PREJUDICE

This order addresses the applicants' application for approval of a transaction to change ownership and control of Entergy Texas, Inc.'s transmission facilities to an ITC subsidiary, transfer certificate of convenience and necessity (CCN) for rights associated with the facilities, and for related relief.

On August 9, 2013 at the Commission's open meeting, the applicants jointly moved to withdraw the application without prejudice to refile, pursuant to P.U.C. PROC. R. 22.181(b). Based on the discussion in open meeting, the Commission found good cause for withdrawal and granted the applicants' motion. Accordingly, this order of dismissal without prejudice is issued pursuant to P.U.C. PROC. R. 22.181(b).

SIGNED AT AUSTIN, TEXAS the 15th day of August 2013.

PUBLIC UTILITY COMMISSION OF TEXAS


DONNA L. NELSON, CHAIRMAN


KENNETH W. ANDERSON, JR., COMMISSIONER