

DEC 28 12 28 PM '09

ARKANSAS PUBLIC SERVICE COMMISSION **FILED**

IN THE MATTER OF THE APPLICATION)
 OF ENTERGY ARKANSAS, INC. FOR)
 APPROVAL OF SYNTHETIC RAILCAR LEASE)

DOCKET NO. 09-120-U

ORDER NO. 3

ORDER

On November 19, 2009, Entergy Arkansas, Inc.¹ ("EAI" or the "Company") filed an *Application* requesting Arkansas Public Service Commission ("APSC" or "Commission") approval² of an anticipated replacement for its currently effective synthetic lease³ ("Existing Synthetic Lease")⁴ and additionally requesting expedited consideration of that request⁵. In addition to its Application, EAI filed Direct Testimony and Exhibits of its witnesses Steven C. McNeal and Ryan S. Trushenski in support of approval of the anticipated synthetic lease ("New Synthetic Lease").

On December 7, 2009, the General Staff of the Commission ("Staff") filed the Direct Testimony and Exhibits of its witness Donna Gray, Director of the Commission's Financial Analysis Section, in which she recommended the Commission approve the New Synthetic Lease but only after EAI had filed, and the Commission had considered, a draft of that lease with explanation of any differences between the New Synthetic Lease and the

¹ EAI is a corporation organized under the laws of the State of Arkansas and is a public utility as defined by Ark. Code Ann. § 23-1-101, et seq.

² The Application is filed pursuant to Ark. Code Ann. § 23-3-103, et seq. and Rules 4 and 5 of the Rules of Practice and Procedure of the APSC.

³ The structure of each lease is referred to as a "synthetic lease" and "is so named because of its accounting treatment ... [in that] ... [f]or book accounting purposes, it is an operating lease. However, for tax purposes, the lessee (EAI) is treated as the owner of the equipment." (McNeal Direct at 5-6).

⁴ The New Synthetic Lease will replace that currently in place which covers more than two thousand aluminum railcars designed to deliver coal supplies to the Independence Steam Electric Station and the White Bluff Steam Electric Station ("White Bluff").

⁵ EAI requested that the Commission "expedite action on this Application and enter a final order thereon on or before December 3, 2009." (Application at ¶ 10).

Existing Synthetic Lease. Ms. Gray testified that EAI had not, as of the date of her filed Testimony, provided a draft of the New Synthetic Lease, and her recommendation for approval of that lease was premised on EAI's assertions that the New Synthetic Lease was not expected to be significantly different from that currently in effect. (Gray Direct at 4). Ms. Gray further recommended that the Commission order EAI to file the final, executed copy of the lease as soon as practicable, that the Commission order EAI to seek approval for any future changes made to the lease, that rate treatment be limited by subsequent Commission findings in Docket No. 09-024-U, and that the Commission "encourage EAI to make every effort to timely file such requests in the future affording at least 30 days for Staff review." (*Id.* at 7-8).

On December 8, 2009, the Arkansas Electric Energy Consumers, Inc. ("AEEC") filed a *Petition to Intervene* ("Petition"), expressing concerns regarding the cost impact to its members of the New Synthetic Lease should White Bluff cease operation in September 2013⁶, and stated that it wished to "be heard on each matter at issue herein, as each such matter will affect the costs, terms or conditions of its members' electric service." (Petition at 2).

On December 11, 2009, the Commission issued its Order No. 2 in this Docket granting AEEC intervention as a party and withholding its ruling on EAI's Application until such time that all parties were provided the opportunity to review a draft of the proposed New Synthetic Lease and that they "have had adequate time to evaluate the terms and conditions of the New Synthetic Lease and the potential impacts on ratepayers." (Order No. 2 at 4). In this regard, the Commission directed EAI to file a

⁶ In APSC Docket 09-024-U, for which no final Commission determination has been made, EAI requested approval for "the construction of a flue gas desulfurization ("FSD") system at White Bluff and has indicated that it will not be able to continue to operate White Bluff, after September 2013, if it does not build the FSD." (Petition at 3).

draft of the proposed lease, an updated economic analysis of that lease, and Supplemental Direct Testimony detailing both the differences between the existing and proposed leases and “the ratepayer impact such differences would have assuming the prior lease had been renewed under the same terms and conditions.” (Order No. 2 at 5) The Commission also directed EAI to provide, as well as address in the Supplemental Direct Testimony, “an updated analysis of the ratepayer impact of the New Synthetic Lease under the various likely outcomes which may result in Docket No. 09-024-U and provide full analysis and testimony which supports EAI’s contention that the provisions of the New Synthetic Lease are beneficial to ratepayers and will protect ratepayers from any adverse effects associated with a premature closure of the White Bluff plant.” (Order No. 2 at 5). In Order No. 2, the Commission also directed Staff and AEEC to file any responses to EAI within five business days of EAI’s compliance with its Order.

Also on December 11, 2009, EAI filed a copy of its draft Master Net Railcar Lease⁷ (the New Synthetic Lease) with RBS Asset Finance, Inc., the company with whom it proposes to enter into the lease arrangement, together with a comparison of the terms of that draft with those of its Existing Synthetic Lease.

On December 15, 2009, in compliance with Commission Order No. 2, EAI filed the Supplemental Direct Testimony and Exhibits of its witnesses McNeal and Trushenski. In his Supplemental Direct Testimony, Mr. McNeal explained that the New Synthetic Lease, with pertinent comparison, reflected “the economic parameters submitted by the proposed lessor that have been accepted by EAI” as of that date, and that “(t)he remaining terms under negotiation address non-economic factors, such as administrative

⁷ EAI revised its filing on December 15, 2009, as Mr. O’Neal’s Supplemental Direct Exhibit SCM-3. The revision was made to reflect the interest rate applicable to the New Synthetic Lease but, otherwise, Exhibit SCM-3 was identical to the December 11, 2009, filing. (McNeal Supplemental Direct at 4).

and procedural matters.” (McNeal Supplemental Direct at 4). He states that, once the New Synthetic Lease is signed, which will occur once EAI has received its regulatory approvals, it will file the final executed copy. (*Id.* at 5). Witness McNeal further explains that, while the two leases are similar, they are not “directly comparable because the terms of the existing lease are no longer available upon its expiration...(and that)...(t)he two leases were negotiated at two different times under different financial market conditions.” (*Id.*). Mr. McNeal notes further that “(n)evertheless, and coincidentally, the economic terms of the New Synthetic Lease are similar to the terms of the Existing Synthetic Lease” with the effective annual interest rate for the Existing Synthetic Lease and New Synthetic Lease 5.28 percent and 5.26 percent, respectively. (*Id.* at 5-6).

Mr. Trushenski testifies for EAI that he conducted the economic analysis pursuant to the Commission’s Order No. 2 and, because “(t)he key terms and conditions affecting the relative economics of the alternatives have not changed...(his)...economic evaluation has not changed.” (Trushenski Supplemental Direct at 3). Mr. Trushenski testifies that he has also done an economic analysis of ratepayer impacts under the various likely outcomes of White Bluff’s continued operation. He asserts that “(t)here are three likely outcomes with respect to the New Synthetic Lease.” (*Id.* at 4). Mr. Trushenki testifies that these are: (f)irst, the result of the environmental permitting process could result in an effective date for the new emission limits that is later than October 2013 and that is also beyond the five-year term of the proposed lease. Second, the effective date could remain at October 2013 and EAI could install the required environmental controls equipment to allow White Bluffs continued operation. A final outcome could be that the effective date could remain at October 2013 and the environmental controls equipment would not be installed resulting in White Bluffs shut-down at that time.” (*Id.*). Witness

Trushenski states that the results of his analysis of these three possible outcomes reflect that, for the first two possible outcomes, because the New Synthetic Lease would run until its end date, it remained the most economic alternative⁸. (*Id.*). For the remaining outcome, Mr. Trushenski concluded, based on his analysis comparing the New Synthetic Lease to the only economic alternate lease offered, that the New Synthetic Lease would still provide a savings of \$2 million over that alternate. (*Id.* at 5-6).

In addition to fulfilling the Commission's directives in Order No. 2, EAI witness McNeal also addresses the Commission's concerns regarding EAI's timing in seeking requests for proposals for the re-financing of the railcars and in filing its Application in this Docket. Mr. McNeal explains that, with the volatility of the market during the early part of the year, EAI determined that, based on its informal inquiries, financing resources "appeared (un)willing to enter into a new synthetic lease." (McNeal Supplemental Direct at 6). Mr. McNeal testifies that, because of this, "EAI's only option at that time was to make preparations to exercise the purchase option available under the Existing Synthetic Lease." (*Id.*). He testifies further that the markets began to improve through the year and "by mid to late summer, potential lessors began to informally indicate a willingness to consider and possibly bid on a new synthetic lease transaction." (*Id.*) Mr. McNeal explains that EAI, therefore, issued its requests for proposals on September 23, 2009, before which EAI may not have necessarily received a "useful response" from potential lessors. (*Id.* at 7). He also explains that EAI did not received all submissions until October 27, 2009, at which time EAI chose the winning proposal, with EAI signing the proposal letter on November 4, 2009. (*Id.* at 7). He notes that EAI filed its Application

⁸ This "financing option...would result in approximately \$16 million in savings to customers over the remaining life of the railcars, as explained by Mr. Trushenski in his direct testimony." (McNeal Supplemental Direct at 8) (Trushenski Direct at 6).

in this Docket on November 21, 2009, in which EAI asked Commission approval of “the lease proposal that provided the most favorable economic benefit and lowest cost to its customers....” (*Id.*).

Finally, addressing EAI’s prior requests for expedited approval⁹, Mr. McNeal also explains that the Tennessee Regulatory Authority¹⁰ has approved the New Synthetic Lease but that it has conditioned that approval on subsequent approval by the APSC. Mr. McNeal states that EAI “could still close on the New Synthetic Lease and secure the benefits of that transaction if the APSC issues an order approving the Company’s Application by December 28, 2009.” (*Id.* at 8).

On December 18, 2009, Staff filed the Responsive Testimony of its witness Donna Gray. In that Testimony, Ms. Gray states that she has reviewed the draft of the New Synthetic Lease, as well as, the Supplemental Direct Testimonies and Exhibits of both EAI witnesses. She also states that she has reviewed AEEC’s Petition and considered the issues raised by AEEC in that Petition. Based on her review, Ms. Gray states that she has subsequently identified no new issues nor has her review caused her to change her original recommendation which was to approve the Application with certain conditions. Ms. Gray testifies that those conditions are that EAI file a copy of the executed lease, that EAI be required to seek approval for any future changes to that lease, that ratemaking authorization be limited by subsequent Commission findings in Docket No. 09-024-U, and that EAI be encouraged to file any future requests for financing approval in a more timely manner, providing Staff at least 30 days in which to consider any such requests.

⁹ EAI originally requested that “the Commission...expedite action on this Application and enter a final order thereon on or before December 3, 2009....” (Application at ¶ 10).

¹⁰ The Tennessee Regulatory Authority (“TRA”) also regulates the issuances of securities by EAI. Therefore, EAI also must comply with applicable rules and regulations promulgated by the TRA and must secure certain TRA approvals in connection with the proposed transaction which is the subject of this Application. (*Id.* at ¶ 1).

On December 21, 2009, AEEC filed its *Response to Order No. 2* (AEEC Response), in which it states that EAI's Supplemental Direct Testimony and Exhibits had relieved many of AEEC's initial concerns and that the remainder of those concerns "would be resolved by (the adoption of) the APSC General Staff witness Donna Grey's (sic) recommendation that the Commission approve the EAI synthetic lease proposal at the present time but specifically limit any ratemaking authorization granted in this docket." (AEEC Response at 1). AEEC asserts that the adoption of Staff's recommendation would both "preserve the Commission's ability to protect ratepayers " and, at the same time, "preserve the benefits of the synthetic lease mechanism for both the company and its customers" and states that "it has no objection to the approval of EAI's application in this proceeding as long as that approval is conditioned as requested by Staff Witness Donna Gray in her December 18 supplemental testimony." (*Id.* at 2)

The Commission has reviewed the draft of the proposed New Synthetic Lease and EAI's Testimony and Exhibits in support of its approval, as well as Staff's recommendations to grant approval, subject to certain conditions. The Commission also notes that AEEC does not oppose the Commission approval of the New Synthetic Lease if subject to Staff's recommendation that would limit the ratemaking authorization granted in this docket. Subsequently, the Commission finds that, as stated in EAI's testimony and as reflected in the exhibits provided and giving consideration for the changes in current circumstances, the terms of the proposed New Synthetic Lease appear to be essentially the same as those contained in its Existing Synthetic Lease. EAI witnesses have testified that the New Synthetic Lease should provide ratepayer benefits of approximately \$16 million dollars when compared to the purchase of the railcars. The Commission also finds that the analysis provided by EAI appears to indicate that,

irrespective of the likely outcomes which may result from a final determination in Docket No. 09-024-U, the proposed New Synthetic Lease should provide the most economic result for the benefit of ratepayers. The Commission will, thus, approve the Application, but, as recommended by Staff and supported by AEEC, it reserves any definitive finding for rate purposes until the final outcome in Docket No. 09-024-U has been determined.

The Commission also encourages EAI to file its future requests in a more timely manner, giving consideration to the time needed by Staff and, more importantly, by the Commission, to adequately consider any such financing proposals and the impact to ratepayers those proposals may have. Should, in the future, the Commission find that EAI failed to make a good-faith effort to make a timely filing, the Commission can and will impute appropriate rate treatment based upon an outcome which assumes EAI prudently filed its request on that timely basis.

Therefore, based upon the testimonies and exhibits submitted in this proceeding, the Commission hereby directs and orders as follows:

1. EAI is hereby authorized to go forward with finalization and execution of the New Synthetic Lease;
2. EAI shall file in this Docket, within 90 days of execution of the New Synthetic Lease, a copy of the final, signed lease;
3. Interim recovery of the New Synthetic Lease payments through EAI's Fuel Adjustment clause is approved, with that recovery subject to refund as will be determined in EAI's first general rate change proceeding which follows the final determination in Docket No. 09-024-U; and,
4. EAI shall file, for the approval of the Commission, any amendments or changes to its executed New Synthetic Lease.

BY ORDER OF THE COMMISSION,

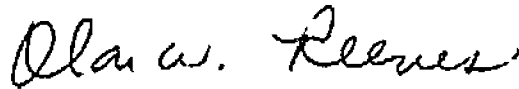
This 28th day of December, 2009.



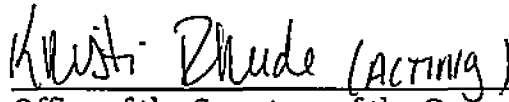
Paul Suskie, Chairman



Colette D. Honorable, Commissioner



Olan W. Reeves, Commissioner



Office of the Secretary of the Commission

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

Secretary of the Commission

Date 12/28/09