

124 FERC ¶ 61,111
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Union Electric Company

Docket No. EL08-60-000

v.

Entergy Arkansas, Inc. and
Entergy Services, Inc.

ORDER HOLDING COMPLAINT IN ABEYANCE

(Issued July 29, 2008)

1. On April 30, 2008, Union Electric Company (Union Electric) filed a complaint against Entergy Arkansas, Inc. (EAI) and Entergy Services, Inc. (Entergy Services) (collectively, Entergy) pursuant to section 206 of the Federal Power Act (FPA),¹ alleging that Entergy is unlawfully recovering rough production cost equalization payments from Union Electric that are not provided for by its service agreement (Service Agreement) with EAI. For the reasons discussed below, we will hold the complaint in abeyance until the resolution of a related proceeding in Docket No. ER07-956-000.

I. Background

2. Union Electric is a transmission-owning member of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) that purchases capacity and energy from EAI, a subsidiary of Entergy Corporation, under the Service Agreement, a long-term power sales agreement. The Service Agreement calls for EAI to provide Union Electric with 165 MW of capacity and associated energy at the White Bluff Steam Electric Station 500 kV bus (White Bluff), or at another generation bus if capacity from White Bluff is not available. The Service Agreement establishes a fixed monthly charge of \$11.25/kW-month for capacity and also establishes a formulaic Fuel and Purchased Energy Rate that includes only certain specified components.²

¹ 16 U.S.C. § 824e (2006).

² Union Electric April 30, 2008 Complaint at 3-4.

II. Complaint

3. Union Electric states that, on July 5, 2007, EAI sent Union Electric an invoice for amounts it claimed were due under the Service Agreement for service provided during the month of June 2007. That invoice included amounts represented to be an allocation to Union Electric of certain rough production cost equalization payments made by EAI to the other Entergy Operating Companies.³ Union Electric adds that EAI subsequently issued additional monthly invoices through January 2008 in which it sought to recover additional equalization payments. Union Electric contends that Entergy thus has billed Union Electric under the Fuel and Purchased Energy Rate component of the Service Agreement a total of approximately \$14.5 million in equalization payments.

4. Union Electric argues that no provision of the Service Agreement allows for the recovery of equalization payments, and that the charges therefore violate section 205 of the FPA⁴ and the filed rate doctrine. It argues that recovery of any or all of the equalization payments from Union Electric is contrary to the Service Agreement's plain language because these costs are not a purchased energy expense, and do not represent an expense to EAI for any purchase of energy by EAI.⁵

5. Union Electric explains that Entergy has been charging Union Electric an allocated portion of the equalization payments under the purchased energy component of the Fuel and Purchased Energy Rate formula, even though the purchased energy component does not allow EAI to pass through or recover the equalization payments, and even though they do not represent a purchased energy expense.⁶ Union Electric argues

³ In Opinion Nos. 480 and 480-A, the Commission found that rough production cost equalization had been disrupted on the Entergy system. The Commission concluded that if the addition of resources to the Entergy system did not maintain rough production cost equalization, then an annual bandwidth of +/- 11 percent would be utilized to keep the Entergy system in rough production cost equalization, i.e., only if total production costs of one or more Operating Companies deviate from the system average total production cost by more than +/- 11 percent would the bandwidth become applicable. The application of the bandwidth remedy would be the potential reallocation of costs from Operating Companies with low production costs to Operating Companies with high production costs. *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 136, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005).

⁴ 16 U.S.C. § 824d (2006).

⁵ Union Electric April 30, 2008 Complaint at 9.

⁶ *Id.* at 11.

that the costs instead reflect payments EAI must provide to other Entergy Operating Companies merely because EAI's production costs were lower than the Entergy system average by more than the 11 percent bandwidth.

6. Union Electric argues that recovery of equalization payments through the Service Agreement is also contrary to the Service Agreement's intent. It contends that the Service Agreement is intended to provide Union Electric with energy prices typical of base load resources, and certainty and protection against any large energy-related price increases such as those associated with natural gas-fired peaking resources.⁷ Union Electric also argues that provisions in the Service Agreement stating that capacity is to be delivered to it at the White Bluff bus (unless that capacity is unavailable) demonstrate that the parties' intent was that Union Electric would be served primarily from the White Bluff facility rather than from the Entergy system as a whole.

7. Union Electric also contends that Entergy has not provided it with a precise breakdown of the amount of equalization payment costs reflected in EAI's invoices, and requests that the Commission require that Entergy provide a detailed and transparent accounting of such costs.⁸ Union Electric also requests that the Commission require Entergy to provide refunds with interest for amounts collected in violation of the Service Agreement.

8. Union Electric contends that its complaint raises issues similar to those raised by Union Electric in Docket No. ER07-956-000, and requests that its complaint be held in abeyance until the Commission issues an order on the merits in that proceeding.⁹ Alternatively, Union Electric requests that the Commission consolidate its complaint with Docket No. ER07-956-000 so that all issues regarding the equalization payments under the Service Agreement can be addressed in one proceeding.

III. Notice and Responsive Pleadings

9. Notice of Union Electric's complaint was published in the *Federal Register*, 73 Fed. Reg. 26,102 (2008), with answers, protests and interventions due on or before May 20, 2008. The Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention. Entergy filed an answer to the complaint.

⁷ *Id.* at 13.

⁸ *Id.* at 14-15.

⁹ The proceeding in Docket No. ER07-956-000 addresses Entergy's first annual bandwidth formula implementation filing, containing Entergy's calculation of the production costs of each of the Entergy Operating Companies for calendar year 2006.

10. In its answer, Entergy agrees with Union Electric that the same issues raised in the complaint are before the Commission in Docket No. ER07-956-000. Entergy requests that the Commission hold the complaint in abeyance, subject to the outcome of Docket No. ER07-956-000.

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the Arkansas Commission's notice of intervention serves to make it a party to this proceeding.

B. Commission Determination

12. Union Electric and Entergy both state that the issues raised in Union Electric's complaint are being addressed in Docket No. ER07-956-000, and request that the Commission hold the complaint in abeyance until that proceeding is resolved. We find that it is appropriate to hold the instant complaint in abeyance until the Commission issues an order on the merits in Docket No. ER07-956-000.

The Commission orders:

The proceeding in Docket No. EL08-60-000 is hereby held in abeyance, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.