

132 FERC ¶ 61,065
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Entergy Services, Inc.

Docket No. ER10-1350-000

ORDER ACCEPTING AND SUSPENDING PROPOSED RATES AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 23, 2010)

1. Entergy Services, Inc. (Entergy), on behalf of the Entergy Operating Companies,¹ submitted for filing rates pursuant to Service Schedule MSS-3 of the Entergy System Agreement (System Agreement), implementing the Commission's decision in Opinion Nos. 480 and 480-A.² In this order, we accept these proposed rates for filing, and suspend them for a nominal period, to become effective June 1, 2010, as requested, subject to refund. We also establish hearing and settlement judge procedures.

I. Background

2. In Opinion Nos. 480 and 480-A, the Commission found that rough production cost equalization had been disrupted on the Entergy system. Opinion Nos. 480 and 480-A approved a numerical bandwidth of +/- 11 percent of the Entergy system average production cost in order to maintain the rough equalization of production costs among the Entergy Operating Companies and required annual bandwidth implementation filings beginning in June 2007. The Commission stated that the bandwidth would be

¹ The Entergy Operating Companies are Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States), Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc. (Entergy Mississippi), Entergy Texas, Inc. (Entergy Texas), and Entergy New Orleans, Inc. (Entergy New Orleans).

² *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in relevant part sub nom. La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

implemented prospectively and would be effective for calendar year 2006, and that any equalization payments would be made in 2007 after a full calendar year of data became available. Entergy included the formulas for implementing the rough production cost equalization bandwidth remedy required by Opinion No. 480 in Service Schedule MSS-3 and the Commission stated in its order accepting Entergy's compliance filing implementing the directives of Opinion Nos. 480 and 480-A, that Entergy must follow the methodology set for in Exhibits ETR-26 and ETR-28.³

3. On May 29, 2007, in Docket No. ER07-956-000, Entergy submitted its first annual bandwidth implementation filing that set forth rates pursuant to Service Schedule MSS-3 of the System Agreement, implementing the Commission's decisions in Opinion Nos. 480 and 480-A (2007 Bandwidth Calculation). The Commission accepted those rates for filing, suspended them for a nominal period and made them effective June 1, 2007, subject to refund.⁴ The Commission also established hearing and settlement judge procedures, which produced an initial decision that the Commission affirmed in part and reversed in part.⁵ Entergy submitted a compliance filing in response to Opinion No. 505 on March 12, 2010.

4. On May 30, 2008, in Docket No. ER08-1056-000, Entergy submitted its second annual bandwidth implementation filing that set forth rates pursuant to Service Schedule MSS-3 of the System Agreement, based on calendar year 2007 data (2008 Bandwidth Calculation). The Commission accepted those rates for filing, suspended them for a nominal period and made them effective June 1, 2008, subject to refund.⁶ The Commission also established hearing and settlement judge procedures. The parties submitted a partial uncontested settlement that was certified by the Presiding Judge on June 19, 2009, and the Presiding Judge issued an initial decision on the remaining issues on September 9, 2009, contingent upon exceptions currently pending before the Commission.⁷

³ *La Pub. Serv. Comm'n. v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203, at P 69 (2006).

⁴ *Entergy Servs., Inc.*, 120 FERC ¶ 61,094 (2007).

⁵ *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010).

⁶ *Entergy Servs., Inc.*, 124 FERC ¶ 61,101 (2008).

⁷ This partial uncontested settlement was accepted by the Commission on August 24, 2009. *Entergy Servs., Inc.*, 128 FERC ¶ 61,181 (2009).

5. On May 29, 2009, in Docket No. ER09-1224-000, Entergy submitted its third annual bandwidth implementation filing that set forth rates pursuant to Service Schedule MSS-3 of the System Agreement, based on calendar year 2008 data (2009 Bandwidth Calculation). The Commission accepted those rates for filing, suspended them for a nominal period and made them effective June 1, 2009, subject to refund.⁸ The Commission also established hearing and settlement judge procedures. The hearing was held in April 2010.

II. Entergy's Filing

6. On May 27, 2010, Entergy filed its fourth annual bandwidth implementation filing (2010 Bandwidth Calculation) pursuant to section 205 of the Federal Power Act (FPA)⁹ to implement the Commission's decisions in Opinion Nos. 480 and 480-A.

7. Entergy states that it calculated the payments and receipts under the Service Schedule MSS-3 bandwidth formula using data as reported in the Operating Companies' 2009 FERC Form No. 1, or such other supporting data as provided for in Service Schedule MSS-3. Entergy also states that each Operating Company's allocated Average Production Costs are compared to the Operating Company's Actual Production Costs to determine the dollar and percentage disparity. Based on these calculations, Entergy Arkansas will make payments to the other Operating Companies. Entergy notes that the 2010 data indicates a sharp decline in Entergy Arkansas's bandwidth payment from 2009 to 2010 (\$390 million to \$27 million) due to the significant reduction in the price of natural gas. Entergy requests that the Commission accept the proposed rates for filing, effective June 1, 2010, without suspension or hearing. Entergy states that the requested effective date implements the Commission's directive that bandwidth remedy billing commence in June.¹⁰

8. Entergy highlights five items contained in the rate calculation to provide the Commission with a summary of the components in the 2010 Bandwidth Calculation that have been addressed in prior bandwidth proceedings. First, Entergy states that it has reflected the Accumulated Deferred Income Taxes (ADIT) associated with production-related storm costs recorded in Account No. 190 in the 2010 Bandwidth Calculation. Additionally, Entergy states that it has also reflected the ADIT associated with the production-related storm costs recorded in Account No. 282 (Casualty Loss), consistent

⁸ *Entergy Servs., Inc.*, 128 FERC ¶ 61,091 (2009).

⁹ 16 U.S.C. § 824e (2006).

¹⁰ Entergy's May 27, 2010 Filing, Transmittal Letter at 4 (*citing La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095, at P 20 (2007)).

with Opinion No. 505. Entergy states that in Opinion No. 505, the Commission did not address whether ADIT associated with the production-related storm costs should be functionalized consistent with all other ADIT amounts or should be directly assigned. Therefore, in its request for rehearing and clarification of Opinion No. 505 Entergy has requested clarification on this issue. Entergy states that, as in its Opinion No. 505 compliance filing, the 2010 Bandwidth Calculation currently includes the production-related storm costs in the ADIT amounts that are functionalized. Entergy states that this issue is subject to the outcome of the Opinion No. 505 compliance filing proceeding that is currently pending before the Commission.

9. Next, Entergy states that in Opinion No. 505, the Commission determined that the appropriate accounting treatment for the Spindletop regulatory asset should be to record the amortization in Account No. 501 on Entergy Gulf States Louisiana's books. Entergy states that while the Commission has modified the Spindletop regulatory asset accounting to include such amortization in Account No. 501 – a bandwidth formula eligible account – Opinion No. 505 did not address the treatment of such costs in the bandwidth calculation. Entergy contends that in Opinion No. 505, the Commission explicitly notes that regardless of the accounting for the Spindletop regulatory asset, “the issue of whether or not the investment in the Spindletop regulatory asset should be included in Entergy Gulf States’ production costs, and reflected in the 2006 Bandwidth Calculation will be decided in Docket No. EL08-51-000.”¹¹ For these reasons, Entergy has removed the amortization in Account No. 501 for the Spindletop regulatory asset from the 2010 Bandwidth Calculation pending a decision in Docket No. EL08-51-000, and Entergy notes that this issue is subject to the outcome of the Opinion No. 505 compliance filing proceeding and Docket No. EL08-51-000.

10. Third, Entergy states that in Opinion No. 506,¹² it was unclear whether the Commission ruled that Entergy should use labor ratios to functionalize the ADIT related to general plant alone or to both general and intangible plant.¹³ As a result, Entergy submitted two versions of the revised tariff sheets in its Opinion No. 506 compliance filing (to address both situations). In the Opinion No. 506 compliance filing, Entergy requested that the Commission indicate which version complies with Opinion No. 506 and accept for filing the appropriate version of the tariff sheets. Entergy states that because the Commission has not yet acted on the Opinion No. 506 compliance filing, for purposes of the 2010 Bandwidth Calculation, Entergy used labor ratios to functionalize

¹¹ Opinion No. 505, 130 FERC ¶ 61,023, at P 261 (2010).

¹² *Entergy Servs., Inc.*, Opinion No. 506, 130 FERC ¶ 61,026 (2010).

¹³ See Entergy's May 27, 2010 Filing, Transmittal Letter at 7.

the ADIT associated with general plant only. Entergy states that this issue is subject to the outcome of the Opinion No. 506 compliance filing proceeding.

11. Fourth, Entergy references the partial settlement agreement in Docket No. ER08-1056-000. Entergy states that this settlement provides, among other things, that the 2009 Bandwidth Calculation: (1) will not be adjusted for the Texas rate freeze; (2) will not include short-term debt in determining the capital structure of any Entergy Operating Company; and (3) will use the Entergy Arkansas actual capital cost structure. In addition, Entergy explains that pursuant to the settlement: (1) Entergy Arkansas's actual production costs will not include \$16,000,000 associated with Blytheville turbine costs; and (2) Entergy Louisiana's actual production costs will include the River Bend rebilling. Entergy states that to the extent that these items apply to the 2009 test period currently at issue, it has followed the approach outlined in the settlement.

12. Fifth, Entergy states that in Docket No. ER09-1224-000 (its third annual bandwidth filing), the parties agreed that the amounts previously recorded in Account Nos. 571, 593, 921 and 924 related to Entergy Arkansas's write-off of a regulatory asset of \$52.8 million for certain storm losses will be recorded in Account No. 426.5 in 2008. Entergy also notes that the parties agreed that Entergy Arkansas's insurance proceeds related to those storm losses will be recorded in Account No. 426.5 in 2009.

13. Entergy requests that the Commission accept its rates for filing, effective June 1, 2010, without suspension or hearing. If the Commission establishes a hearing, Entergy requests that it be limited to the issue of whether the actual calendar year 2009 formula inputs were correctly applied to the bandwidth calculation and to issues that have not been previously litigated in other bandwidth-related filings.

III. Notice of Filing and Responsive Pleadings

14. Notice of Entergy's filing was published in the *Federal Register*, 75 Fed. Reg. 32,938 (2010), with interventions and protests due on or before June 17, 2010. The Louisiana Public Service Commission (Louisiana Commission) and the Council of the City of New Orleans (Council) filed notices of intervention and protests. The Mississippi Public Service Commission and the Arkansas Public Service Commission filed notices of intervention. Texas Industrial Energy Consumers, East Texas Cooperatives, and Occidental Chemical Corporation filed motions to intervene. Entergy filed an answer.

15. The Louisiana Commission argues that Entergy's first three annual bandwidth filings have not been fully resolved. The Louisiana Commission states that it adopts and raises all of the issues it previously raised in those earlier dockets that have not been settled or resolved in order to preserve those issues to the extent that they are relevant to this docket. The Louisiana Commission states that these issues relate to: (1) Account No. 190 ADIT Net Operating Loss Carry Forwards; (2) Inclusion of Interruptible Load Revenues and Costs; (3) Inclusions of Out-of-Period Revenues and Costs; (4) Grand Gulf

Retained Share Sales; (5) Reclassification of ADIT; (6) Spindletop; (7) ADIT Associated with Waterford 3 Capital Lease Amounts; (8) Other ADIT Amounts; (9) Account No. 924; (10) Vidalia Capital Structure; (11) Depreciation and Decommissioning; (12) Double-Count Exclusion of A&G Expense; (13) Prudence Issues; and (14) Timing.

16. The Louisiana Commission states that it anticipates this proceeding will be no different than the previous cases, and that the issues not addressed directly in this protest may be later discovered. The Louisiana Commission requests that: (1) hearing procedures be established to allow discovery on the application in this docket; (2) the bandwidth remedy payments be re-calculated in accordance with this protest and in compliance with Opinion Nos. 480 and 480-A; and (3) additional bandwidth payments and receipts be ordered as required.

17. The Louisiana Commission also raises issues that it states were not identified in the prior cases: (1) ADIT Related to Intangible Plant; (2) Nuclear Depreciation Expense; (3) Waterford 3 Capital Lease Amortization; (4) Spindletop Regulatory Asset Amortization Changes; (5) Account No. 282 – Casualty Losses; (6) Out-of-Period Revenues and Expenses; (7) ADIT for IPP Advances; (8) Differences Between Entergy's Form 10-K filed with the Securities and Exchange Commission and its FERC Bandwidth Calculation; (9) Entergy Texas Production Costs; and (10) Shifts in Debt Ratios. The Louisiana Commission adds that issues are often uncovered through discovery, and alleges that Entergy has not shown that its filing is just, reasonable and not unduly discriminatory. As a result, the Louisiana Commission argues that a hearing is required to examine the Entergy cost calculation.

18. The Louisiana Commission argues that the errors and changes in Entergy's filing in this proceeding, compared to Exhibits ETR-26 and ETR-28 (as discussed in P 2), reduce the payments from Entergy Arkansas to Entergy Gulf States, Entergy Texas, Entergy Louisiana, Entergy New Orleans, and Entergy Mississippi based on the 2009 test year. The Louisiana Commission contends that these errors make the bandwidth payment unjust, unreasonable and unduly discriminatory.

19. The Louisiana Commission further asserts that it has tried to identify changes to the proposed methodology from Entergy's application and supporting work papers, but it may be impossible to identify all issues without further discovery from Entergy related to its 2009 test year figures. Additionally, the Louisiana Commission states that in Docket Nos. ER07-956-000 and ER08-1056-000, the Commission allowed issues to be subjected to hearing that were not specifically identified during the short time period allowed for protests. It states that issues identified during discovery can affect the justness and reasonableness of the bandwidth rate. Therefore, the Louisiana Commission reserves its right to raise other issues during the hearing process.

20. The Council argues that the Commission should further investigate the filing because the payments set forth in Entergy's 2010 Bandwidth Calculation vary from the payments made in prior years and from estimates made earlier this year. The Council argues that Entergy Arkansas's payment decrease of 90 percent in the 2010 bandwidth filing as compared with every prior year warrants a hearing. The Council also argues that the 2010 bandwidth filing's significant deviations from Entergy's February 2010 Form 10-K filing with the Securities and Exchange Commission warrant further investigation.

21. Entergy argues that the Commission should dismiss the protests because most of the issues they raise are impermissible collateral attacks on the prior bandwidth proceedings. Entergy contends that the parties have already been given the opportunity to advocate their positions in hearings in Docket Nos. ER07-956-000, ER08-1056-000 and ER09-1224-000, and that the Louisiana Commission has not attempted to offer new material evidence or changed circumstances sufficient to justify the Commission's reconsideration of those issues. Entergy also argues that the Form 10-K filing contained only preliminary estimates of the bandwidth calculation, and that its 2010 Bandwidth Calculation is consistent with the Service Schedule MSS-3 formula on file with the Commission. Entergy again asks the Commission to accept Entergy's 2010 Bandwidth Calculation for filing without a hearing, and with an effective date of June 1, 2010, subject to the outcome of the other bandwidth-related proceedings. But if the Commission does set the 2010 Bandwidth Calculation for hearing, Entergy requests that the Commission limit the hearing to issues that have not been previously litigated in other bandwidth-related filings.

IV. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Entergy's answer because it has provided information that assisted us in our decision-making process.

B. Hearing and Settlement Judge Procedures

23. Entergy's proposed rates raise issues of material fact that cannot be resolved based on the record before us. These issues of material fact are more appropriately addressed in the hearing procedures and settlement judge procedures ordered below.

24. Our preliminary analysis indicates that Entergy's proposed rate schedule has not been shown to be just and reasonable and may be unjust, unreasonable, unduly

discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Entergy's proposed rates for filing, suspend them for a nominal period, make them effective June 1, 2010,¹⁴ as requested, subject to refund, and set them for hearing and settlement judge procedures.

25. The Louisiana Commission raises issues concerning Entergy's 2010 Bandwidth Calculation that it acknowledges are pending in other proceedings, including Docket Nos. ER07-956-000, EL08-51-000, ER08-1056-000 and ER09-1224-000. These issues include: (1) Account No. 190 ADIT Net Operating Loss Carry Forwards; (2) Inclusion of Interruptible Load Revenues and Costs; (3) Inclusion of Out-of-Period Revenues and Costs; (4) Grand Gulf Retained Share Sales; (5) Reclassification of ADIT; (6) Spindletop, the costs of which the Louisiana Commission argues should be included in the bandwidth calculation because Spindletop facility costs represent production costs; (7) ADIT Associated with Waterford 3 Capital Lease Amounts; (8) Other ADIT Amounts, which the Louisiana Commission states includes amounts in Account Nos. 190, 281, and 282 and argues should be included in the bandwidth; (9) Account No. 924; (10) Vidalia Capital Structure; (11) Depreciation and Decommissioning; (12) Double-Count Exclusion of A&G Expenses; (13) Prudence Issues, which the Louisiana Commission argues involves various business decisions made by Entergy that will affect the bandwidth calculation; and (14) Timing, which the Louisiana Commission argues involves determining the appropriate date for implementing the formula rate that is the basis for the bandwidth calculation.

26. The Louisiana Commission also raises issues in its protest that it claims have not been raised in other proceedings.¹⁵ We make no finding on whether these issues may

¹⁴ *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203, at P 10 (2006). See also *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,338 (1992), *reh'g denied*, 61 FERC ¶ 61,089 (1992) (Commission will generally grant waiver of notice when rate change and effective date are already prescribed). We reject, for the same reasons discussed in prior orders, the Louisiana Commission's argument that to be consistent with the remedy adopted in Opinion No. 480, the proposed revisions should not be permitted to take effect until a future calendar year. See, e.g., *Entergy Servs., Inc.*, 119 FERC ¶ 61,190, at P 19, *order on reh'g*, 121 FERC ¶ 61,126, at P 12 (2007).

¹⁵ These issues include: (1) ADIT Related to Intangible Plant; (2) Nuclear Depreciation Expense; (3) Waterford 3 Capital Lease Amortization; (4) Spindletop Regulatory Asset Amortization Changes; (5) Account No. 282 – Casualty Losses; (6) Out-of-Period Revenues and Expenses; (7) ADIT for IPP Advances; (8) Differences Between Entergy's Form 10-K filed with the Securities and Exchange Commission and its FERC Bandwidth Calculation; (9) Entergy Texas Production Costs; and (10) Shifts in Debt Ratios. See Louisiana Commission's Protest at 5-9.

also be pending in other proceedings, but we direct the Presiding Judge to not allow re-litigation of issues that are the subject of other proceedings pending before the Commission. The hearing in this proceeding should be limited to whether Entergy's actual calendar year 2009 formula inputs were correctly applied in the bandwidth calculation.

27. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁷ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Entergy's proposed rates are hereby accepted for filing and suspended for a nominal period, to become effective June 1, 2010, as requested, subject to refund, and subject to the outcome of Docket Nos. ER07-956-000, ER08-1056-000, ER09-1224-000, and EL08-51-000, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Entergy's proposed rates pursuant to Service Schedule MSS-3 of the System Agreement implementing the Commission's decisions in Opinion

¹⁶ 18 C.F.R. § 385.603 (2010).

¹⁷ If the parties decide to request a specific judge, they must make their joint request to the chief Judge in writing or by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of the Commission's judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

Nos. 480 and 480-A. However, the hearing will be held in abeyance to give the parties time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.