

133 FERC 61,025
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. ER08-767-001

ORDER DENYING REQUESTS FOR REHEARING

(Issued October 8, 2010)

1. Arkansas Cities¹ and Arkansas Electric Cooperative Corporation (AECC) (collectively, Petitioners) filed requests for rehearing of the Commission's order that addressed recovery of Schedule 9 costs under the existing formula rates for Entergy Arkansas Inc.'s (Entergy Arkansas) grandfathered customers.² In this order, we deny rehearing.

I. Background

2. On October 30, 2006, in Docket No. ER07-93-000, Entergy Services, Inc. (Entergy) filed a new Schedule 9 to its Open Access Transmission Tariff (OATT) (Recovery of Regional Transmission Operator (RTO) and Independent Coordinator of Transmission (ICT) Development and Start-Up Costs) to recover the RTO start-up costs from point-to-point and network transmission service customers served under Entergy's

¹ Arkansas Cities are the City of Osceola, Arkansas (Osceola), and the Hope Water & Light Commission.

² *Entergy Services, Inc.*, 123 FERC ¶ 61,223 (2008) (May 29 Order). The grandfathered agreements that contain formula rates at issue in this proceeding are: the Power Coordination Interchange and Transmission Service Agreements (PCITSA) between Entergy Arkansas and Osceola and the City of Thayer, Missouri (Thayer), and AECC, and the Transmission Service Agreement between Entergy Arkansas and the City of Hope, Arkansas (Hope).

OATT. Subsequently, the Commission accepted and suspended the new Schedule 9 and set it for hearing and settlement proceedings.³

3. On August 21, 2007, Entergy filed a settlement agreement in Docket No. ER07-93-000 (August 21 Settlement Agreement) that, in part, established a “black box” total system recovery amount for Schedule 9 charges of \$69.5 million, to be amortized over a recovery period projected to be 48 months (or approximately \$17.375 million per year for four years). In addition, the August 21 Settlement Agreement separately addressed Entergy’s grandfathered customers. Petitioners state that, in the August 21 Settlement Agreement, Entergy agreed that the Schedule 9 costs were not currently included in the grandfathered customers’ rates and that Entergy would be required to seek Commission authorization to include the Schedule 9 costs in the grandfathered customers’ formula rates. The Commission approved the August 21 Settlement Agreement in November 2007.⁴

4. In separate proceedings, in Docket Nos. ER07-628-000,⁵ ER07-629-000,⁶ and ER07-630-000,⁷ Entergy Arkansas submitted its 2007 wholesale formula rate updates applicable to different entities. The Commission concurrently issued separate orders in the three dockets accepting the proposed rate updates, suspending them for a nominal period, then making them effective subject to refund and establishing hearing and settlement judge procedures.⁸ On November 2, 2007, Entergy, as agent for Entergy Arkansas, filed a settlement agreement resolving all issues in these proceedings (November 2 Settlement Agreement).⁹ The November 2 Settlement Agreement included in the rate formula the input variables Transmission Net Regulatory Deferral (TNRD

³ *Entergy Services, Inc.*, 117 FERC ¶ 61,320 (2006).

⁴ *Entergy Services, Inc.*, 121 FERC ¶ 61,133 (2007).

⁵ The filing in Docket No. ER07-628-000 applied to the Cities of Hope; Thayer; Campbell, Missouri; North Little Rock, Arkansas; West Memphis, Arkansas; and Prescott, Arkansas (Prescott).

⁶ The filing in Docket No. ER07-629-000 applied to AECC.

⁷ The filing in Docket No. ER07-630-000 applied to Osceola.

⁸ *Entergy Arkansas*, 119 FERC ¶ 61,334 (2007) (Docket No. ER07-628-000); *Entergy Arkansas*, 119 FERC ¶ 61,335 (2007) (Docket No. ER07-629-000); *Entergy Arkansas*, 119 FERC ¶ 61,336 (2007) (Docket No. ER07-630-000).

⁹ Entergy filed an erratum to the settlement on November 15, 2007.

transposed as TRND) and Transmission Regulatory Cr/Dr Amortization (TRDCA) for the inclusion and amortization of any Commission-approved regulatory deferral plan in its rate schedule with AECC. The Commission approved the November 2 Settlement Agreement in February 2008.¹⁰

5. On March 31, 2008, in Docket No. ER08-767-000, Entergy filed a request for authorization to recover previously deferred start-up costs incurred to develop an RTO or ICT under the existing formula rates for Entergy Arkansas Inc.'s (Entergy Arkansas) grandfathered customers. In the May 29 Order, the Commission accepted and suspended and made effective on June 1, 2008, subject to refund, the requested authorization and established hearing and settlement judge procedures to address the appropriate level of Schedule 9 costs to be allocated to Entergy's grandfathered customers

6. In the May 29 Order, the Commission acknowledged that the August 21 Settlement Agreement required Entergy to seek Commission authorization before it could include Schedule 9 costs in the respective formula rates, but found that Entergy had sought such authorization in its filing in Docket No. ER08-767-000. Specifically, the Commission determined that the tariff sheets filed in the November 2 Settlement Agreement set forth the formula rates that included the variables TRND¹¹ and TRDCA. While the letters in the TRND variable were transposed, the Commission explained that the "TRND variable clearly refers to 'Transmission costs associated with any FERC-approved Deferral Plan.'"¹² The Commission further explained that since Schedule 9 is a FERC-approved plan, these variables are the appropriate place through which to flow through these costs.

II. Requests for Rehearing

7. Arkansas Cities and AECC argue that allowing Entergy to recover the Schedule 9 costs using the variables TNRD and TRDCA violates the August 21 Settlement Agreement. In support, they cite section 4 of the August 21 Settlement Agreement that states that Schedule 9 costs "are not currently included in the [Entergy Arkansas] formula rates."¹³ They assert that several of the grandfathered customers' formula rates contained

¹⁰ *Entergy Services, Inc.*, 122 FERC ¶ 61,109 (2008).

¹¹ TNRD was transposed as TRND.

¹² May 29 Order, 123 FERC ¶ 61,223 at P 20.

¹³ *Citing* August 21 Settlement Agreement at P 5.

the variables TNRD and TRDCA before the August 21 Settlement Agreement.¹⁴ Accordingly, they argue that the formula rates that already contained the variables TNRD and TRDCA would require additional modification in order to provide for recovery of Schedule 9 start-up costs. In addition, both Arkansas Cities and AECC argue that any ambiguity in the settlement language should be resolved against Entergy. Arkansas Cities state that Entergy drafted the August 21 Settlement Agreement and, therefore, where the deciding tribunal must choose among reasonable meanings of an agreement, the preferred meaning is that which operates against the party who drafts the language in question.

8. Regarding Osceola, Arkansas Cities argue that under the 1988 rate formula agreement between Entergy and Hope in Docket No. ER89-159 and as further modified by the settlement in Docket No. ER04-663, to which Osceola was a party, the parties agreed that future changes to the relevant rate formulas, if any, would be proposed every third year beginning in 1992. Accordingly, Arkansas Cities state that parties could have proposed changes for 2007 (an eligible year) by giving notice of proposed changes by December 1, 2006. Arkansas Cities argue that Entergy gave notice of proposed changes by the deadline, but these changes did not include the costs or the proposed changes at issue in Docket ER08-767-000.

9. Regarding Hope, Arkansas Cities state that the same three-year period for changes applied and the last proposed changes to the formula rates were proposed and accepted in 2007 in Docket No. ER07-399. They state that the next time Entergy is eligible to propose changes to the formula rates with regard to Hope is not until December 1, 2009 for the year 2010.

10. Moreover, Arkansas Cities argue that, in the settlement of Entergy Arkansas' 2004 wholesale formula rate update, Entergy agreed that neither it nor Osceola could propose any modifications to the formula rates applicable to Osceola during the next period that changes could be proposed, and that no modifications to the formulas would be proposed during the 2007-2009 timeframe at all.¹⁵ They note that the Commission accepted the

¹⁴ AECC asserts that Entergy added the variables TNRD and TRDCA for the first time on June 10, 2005, as part of the settlement agreement in Docket No. ER04-663-000, which included revised tariff sheets for the City of Conway, Arkansas (Conway); Prescott; Farmer's Electric Cooperative Corporation (Farmer's); the West Memphis Utilities Commission (West Memphis); and Osceola.

¹⁵ Entergy Services, Inc., Offer of Settlement, Docket No. ER04-663-000 at P 6 (filed June 10, 2005) (Entergy's Offer of Settlement).

settlement agreement filed in Docket No. ER04-663.¹⁶ They argue that Entergy acknowledged that there would be no change to the formulas in relation to Osceola in its most recent wholesale rate formula rate update filing in 2008.

11. Similarly, AECC argues that the May 29 Order erred in rejecting AECC's argument that the formula rate cannot be changed in the "off-year." AECC argues that whether the formula rate can be changed in an "off-year" hinges on whether there was mutual agreement to changing AECC's formula rate to include the TNRD and TRDCA variables. AECC states that the Commission provides no evidence to show that AECC and Entergy mutually agreed to add the new variables to AECC's formula and, therefore, the Commission inappropriately rejected AECC's argument that Entergy did not have the right to modify the formula contrary to the PCITSA provisions.

12. AECC argues that the November 2 Settlement Agreement provided for three formula rate changes: (1) the transmission loss factor; (2) the exclusion from the formula of retail-related taxes other than income taxes; and (3) cost adjustments associated with independent power producer prepayments. It argues that the TNRD and TRDCA variables that Entergy included in the formula rate have nothing to do with any of these three agreed-upon changes. AECC asserts that these variables relate only to the Voluntary Severance Package provision of the settlement agreement, which, as Entergy's November 15, 2007 errata filing in Docket No. ER07-629 explained, was not supposed to have been included in the November 2 Settlement Agreement in the first place.

13. AECC states that it filed in Docket No. ER07-629 a motion to correct Entergy's error in failing to remove the TNRD and TRDCA variables from the relevant tariff sheets.¹⁷ It states that the November 15, 2007 errata filing deleted the Voluntary Severance Package-related provision from both the November 2 Settlement Agreement and the explanatory statement and that Entergy's own listing of the changes to the November 2 Settlement Agreement did not include the formula rate variables associated with deferred costs such as the Voluntary Severance Package. AECC contends that it never agreed to the inclusion of the TNRD and TRDCA variables in the formula. In support, it argues that the new variables were not discussed at either of the settlement

¹⁶ *Entergy Services, Inc.*, Docket No. ER04-663-000 (July 22, 2005) (unpublished letter order) (approving an uncontested settlement agreement between Entergy Arkansas, AECC, Conway Corporation, West Memphis, Osceola; Prescott; and Farmer's (collectively, ACC)).

¹⁷ AECC states that its filing was in conformance with the November 15, 2007 errata settlement agreement filed in Docket No. ER07-629 and in conformance with the bargain struck by the parties.

conferences convened by the settlement judge and were not part of the settlement in principle that was reached on October 5, 2007.

14. AECC also argues that the tariff sheet that Entergy filed with the November 2 Settlement Agreement that includes the variable TNRD in the formula does not properly mark as redlined either the definition of TNRD or the accompanying note: “Transmission costs associated with any FERC-approved Deferral Plan such as the Voluntary Severance Plan offered in 2003 using a three year amortization beginning with test year 2003, net of any accumulated deferred income taxes.”¹⁸ Given its omission from the November 2 Settlement Agreement and the lack of redlining, there is no reason that the Commission should have known this language was being added to the filed rate. AECC argues that Entergy’s transmittal letter and the accompanying settlement agreement and explanatory statement filed in Docket No. ER07-629, including the tariff page without appropriate redlining, all failed to provide any notice of the additional change to the formula rate.

15. In addition, AECC argues that the transposition of letters in the variable from TNRD to TRND is a flaw in the formula rate that means that the formula does not include TNRD and, therefore, does not allow for recovery of transmission costs associated with any Commission-approved deferral plan. It argues that Commission policy requires the formula in the tariff to explicitly identify the cost elements allowed in the tariff.¹⁹ AECC argues that Entergy cannot have it both ways: if it is entitled to have the changes it made to the tariff sheets without AECC’s consent honored as the filed rate, it is bound by the changes it actually made. And the changes Entergy actually made—insertion of a factor denominated TRND to recover certain deferred costs and, at the same time, addition of a factor denominated TNRD, but not defined, to the formula—do not provide for recovery of ICT costs in AECC’s transmission rate.

III. Discussion

16. We deny Arkansas Cities’ and AECC’s rehearing requests. Contrary to their arguments, allowing Entergy to recover the Schedule 9 costs using the variables TNRD and TRDCA does not violate the August 21 Settlement Agreement. As such, it is appropriate for Entergy to recover Schedule 9 costs from the grandfathered Arkansas customers, and the variables TNRD and TRDCA are the appropriate instruments for collecting Schedule 9 costs. We disagree with AECC’s and Arkansas Cities’

¹⁸ AECC June 30, 2008 Rehearing Request at 11.

¹⁹ *Id.* (citing *American Electric Power Serv. Corp.*, 120 FERC ¶ 61,205, at P 32, *order on reh’g*, 121 FERC ¶ 61,245 (2007)).

interpretation that the parties agreed in the August 21 Settlement Agreement that Entergy had to change the formula rates before it could recover the Schedule 9 costs. Though we agree that the August 21 Settlement Agreement is ambiguous, we reiterate that Entergy agreed to request Commission authorization to include the Schedule 9 costs in the formula rates, not that the formulas themselves had to change.²⁰

17. This is the most reasonable interpretation given the overall structure and purpose of the August 21 Settlement Agreement. Section 4 of the August 21 Settlement Agreement begins by acknowledging that sections 1 through 3 of the August 21 Settlement Agreement, which establish a total recovery amount and a four-year amortization method for recovering it, do not apply to the grandfathered customers. Specifically, the beginning of section 4 states that “[Entergy] and the parties in this proceeding who have grandfathered Entergy Arkansas, Inc. contracts agree that the Schedule 9 costs are not currently included in the [Entergy Arkansas] formula rates.” This is consistent with section 3, which states that “the charges established pursuant to this Settlement Agreement apply only to services rendered to wholesale transmission customers under [Entergy’s] OATT.”

18. However, after acknowledging that the August 21 Settlement Agreement does not apply to the grandfathered customers, section 4 provides that, similar to wholesale OATT transmission customers, Entergy Arkansas and the grandfathered customers are bound to the \$69.5 million total recovery amount and four-year amortization method for recovering the costs. Section 4 provides that:

[I]f [Entergy Arkansas] proposes to modify the [Entergy Arkansas] rate formulas to include the Schedule 9 costs and if the Commission permits [Entergy Arkansas] to do so, then the system recovery amount set forth in this Settlement Agreement (\$69.5 million) will be multiplied times the [Entergy Arkansas] load ratio share of the Entergy System as of December 31 of the year preceding the effective date of such formula change, and the resulting amount will be amortized over a four-year prospective period. The costs booked to intangible plant will not accrue amounts of interest or carrying charges in addition to amounts of interest or

²⁰ May 29 Order, 123 FERC ¶ 61,223 at P 13 (“We also agree that Entergy agreed that it would submit to the Commission a filing seeking authorization for the collection of the RTO and ICT development and Start-up costs for the Entergy Arkansas grandfathered customers.”).

carrying charges included in the black-box settlement amount agreed to in this proceeding.

Thus, the overall purpose of section 4 is to acknowledge that the grandfathered customers are treated differently from the rest of the settling parties, while at the same time ensuring that if the Commission did authorize Entergy to recover the Schedule 9 costs in the future, the grandfathered customers would be bound to the same total recovery amount and recovery method as the rest of the settling parties.

19. Therefore, the ambiguity involves what Entergy agreed to do to recover the Schedule 9 costs from the grandfathered customers. Petitioners argue that Entergy agreed to seek to change the formula rates by adding a new variable to all the formula rates. In support, Petitioners point to the first sentence of section 4 that states “that the Schedule 9 costs are not currently included in the [Entergy Arkansas] formula rates.” As explained above, however, this sentence merely acknowledges that sections 1-3 of the August 21 Settlement Agreement do not apply to the grandfathered customers and does not bear on what Entergy must do to recover the Schedule 9 costs from the grandfathered customers.

20. At the time of the August 21 Settlement Agreement, each customer agreement contained a different rate formula. As Petitioners point out, some of the grandfathered customers’ agreements already had the variables TNRD and TRDCA in their formula rate at the time that the parties executed the August 21 Settlement Agreement.²¹ Thus, not every grandfathered customer’s formula rate required a new variable for Entergy to recover the Schedule 9 costs. Accordingly, Entergy’s agreement to seek the Commission’s authorization to recover the Schedule 9 costs ensured that even if a grandfathered customers’ formula rate already included an appropriate variable through which Entergy could recover the Schedule 9 cost, that grandfathered customer would have the opportunity to contest whether it was appropriate for it to pay the Schedule 9 costs.

21. As we also explained in the May 29 Order, we disagree with AECC’s and Arkansas Cities’ argument that the formula cannot be changed in an “off-year.” In that order, we stated that “[n]othing prevents parties by mutual agreement from changing the

²¹ The variables TNRD and TRDCA first appeared in the revised tariff sheets for Conway, Prescott, Farmer’s, West Memphis, and Osceola in a settlement agreement. Entergy Services, Inc., Offer of Settlement, Docket No. ER04-663-000 (filed June 10, 2005). The Commission later approved the settlement agreement. *Entergy Services, Inc.*, Docket No. ER04-663-000 (July 22, 2005) (unpublished letter order).

formula, and this is what occurred in the November 2 Settlement Agreement.”²² AECC’s argument that it did not agree to add the variables TNRD and TRDCA to the formula rates ignores that the August 21 Settlement Agreement was the result of a mutually executed agreement that Petitioners cannot now contest.

22. AECC also argues that Entergy’s failure to properly mark in redline the definition of the variable TNRD in the tariff sheets filed with the November 2 Settlement Agreement bars Entergy from recovering Schedule 9 costs through this variable now. Although AECC is correct that the definition of TNRD was not redlined, the formula where the variable TNRD was added was redlined. The purpose of redlining is to ensure that all parties and the public are aware of amendments to the formula rate. In this instance, AECC should have been aware of the amendment to the formula rate because the variable TNRD was properly redlined.

23. We also disagree with AECC’s argument that the transposition of letters in the variable from TNRD to TRND is a flaw in the formula rate that does not allow for recovery of the Schedule 9 costs through that variable. Although the letters were transposed in the definition section, the variable TNRD was properly described in the formula and the definition was correctly expressed as “Transmission Net Regulatory Deferral” in the definition section. Therefore, contrary to AECC’s argument, it is apparent that the variable TNRD in the formula is defined as “Transmission Net Regulatory Deferral.”

24. Furthermore, we disagree with Petitioners’ argument that any ambiguity should be construed against Entergy because Entergy drafted the November 2 Settlement Agreement and the August 21 Settlement Agreement. Petitioners are correct that when choosing among reasonable interpretations of an agreement, any ambiguity should be construed against the drafter because the drafter is usually in the best position to know what the words of the agreement mean. However, that rationale does not apply here. The August 21 Settlement Agreement memorializes agreements reached between Entergy and Petitioners during settlement negotiations and thus reflects an understanding between the parties. Furthermore, Petitioners had a number of opportunities to review the draft agreement and raise their concerns and did not. In fact, in one instance AECC did raise concerns that resulted in a change to the August 21 Settlement Agreement.²³ Thus, both parties were in a position to know what the words meant and what was included in the settlement agreements.

²² May 29 Order, 123 FERC ¶ 61,223 at P 23.

²³ AECC Request for Rehearing at 8-9 (discussing communications between Entergy and AECC regarding the August 21 Settlement Agreement).

The Commission orders:

Arkansas Cities' and AECC's requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.