

134 FERC ¶ 61,079
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. ER11-2161-000

ORDER ACCEPTING AND SUSPENDING REVISED DEPRECIATION RATES,
SUBJECT TO REFUND, AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued February 2, 2011)

1. On November 19, 2010, pursuant to section 205 of the Federal Power Act (FPA),¹ Entergy Services, Inc. (Entergy) filed revised depreciation rates (Depreciation Rates) on behalf of Entergy Texas, Inc. (Entergy Texas) for use in all applicable FERC formula rates relating to steam production accounts. In this order, we accept Entergy's revised Depreciation Rates, suspend them for a nominal period, to become effective January 1, 2009, as requested. We also establish hearing and settlement judge procedures.

I. Background

2. On September 26, 2007, Entergy Gulf States, Inc. (Entergy Gulf States)² made a base rate filing at the Public Utility Commission of Texas (Texas Commission). Although Entergy Gulf States did not propose any changes to its currently-approved depreciation rates, during the course of the proceeding, intervenors raised a number of depreciation-related issues. On February 4, 2009, the parties submitted a Stipulation and Settlement Agreement (Settlement Agreement) in which the parties agreed that Entergy Texas would adjust its depreciation related to its fossil generation plants to reduce depreciation expense by \$2.7 million, effective January 1, 2009.

¹ 16 U.S.C. § 824d (2006).

² On July 20, 2007, the Commission authorized Entergy Gulf States to implement a jurisdictional separation plan. Pursuant to the jurisdictional separation plan, Entergy Gulf States was restructured into Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana) and Entergy Texas. *Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007).

3. Entergy states that, in the Docket No. EL10-55-000 proceeding,³ Trial Staff and the Louisiana Commission argued that Entergy should have made a section 205 filing to include the revised River Bend and Entergy Texas steam depreciation rates in the bandwidth calculation.⁴ Entergy states that it disagrees with this argument, but, out of an abundance of caution, Entergy is making this filing to eliminate any possibility of doubt as to Entergy Texas' steam production depreciation rates.⁵

4. Entergy Texas has three Commission-jurisdictional formula rates that include depreciation costs relating to production. Consequently, Entergy states that it submits this filing in order to permit its revised steam production depreciation rates adopted by the Texas Commission to also be used in Commission-jurisdictional formula rates that incorporate Entergy Texas's expense related to steam production plant. Entergy states that the revised steam production depreciation rates for Entergy Texas will affect the formula rate calculations under Service Schedules MSS-1, MSS-3, and MSS-4 of the Entergy System Agreement.

5. Entergy states that it has used the actual depreciation expense recorded in the FERC Form No. 1 (Form 1), which primarily reflects the application of the depreciation rates used to set retail rates. In this filing, Entergy is proposing to continue this practice with respect to the depreciation rates for steam production plant adopted by the Texas Commission. Entergy states that using this approach will allow Entergy Texas's depreciation costs used for formula rate purposes (including in the MSS-3 bandwidth formula) to continue to be based on the actual depreciation costs recorded in Entergy Texas's Form 1 accounts. Entergy notes that, in Opinion No. 505,⁶ the Commission emphasized the use of actual depreciation data in the bandwidth formula.⁷ Entergy further notes that in Opinion No. 505 the Commission stated that the purpose of the bandwidth formula filings is to apply the formula using actual data to determine whether or not there was rough equalization, and not to determine what production costs would have been if different depreciation rates had been in effect for the relevant period.⁸

³ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 132 FERC ¶ 61,003 (2010).

⁴ Entergy's Transmittal at 5.

⁵ *Id.*

⁶ *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010).

⁷ Entergy's Transmittal at 4 n.7.

⁸ *Id.*

6. Entergy also states that, as part of the Settlement Agreement, the parties agreed that Entergy Texas would adjust its calculation of nuclear depreciation and decommissioning costs effective January 1, 2009, to reflect a 20-year life extension adjustment for the River Bend nuclear generating station (River Bend). Entergy states that, with respect to the decrease in River Bend's depreciation rates, Entergy previously made a section 205 filing in Docket No. ER08-31-000 that the Commission accepted by unpublished letter order on December 19, 2007.⁹ Entergy Gulf States Louisiana sells a portion of the 70 percent regulated portion of River Bend to Entergy Texas pursuant to a River Bend Agreement under Service Schedule MSS-4. Entergy explains that in Docket No. ER08-31-000, it requested and received from the Commission authorization to use in the Service Schedule MSS-4 formula depreciation rates for River Bend as approved by the Texas Commission. Therefore, Entergy states that it is not requesting any Commission authorization relating to the change in River Bend depreciation rates approved by the Texas Commission. Entergy states that this lower depreciation rate has been used in the MSS-4 billings from Entergy Gulf States Louisiana, LLC to Entergy Texas as of January 1, 2009. Entergy states that in this filing it is simply providing the Commission with additional information regarding the depreciation rate in the River Bend Agreement under MSS-4.

7. Entergy requests waiver of the Commission's prior notice requirement to allow this filing to become effective on January 1, 2009. Entergy states that waiver is appropriate in order to allow the lower, steam production depreciation rates to become effective as of January 1, 2009 for use in Entergy Texas's formula rates to coincide with the use of the lower rates established for retail rate purposes.

II. Notice of Filing and Responsive Pleadings

8. Notice of Entergy's filing was published in the *Federal Register*, 75 Fed. Reg. 74,038 (2010), with interventions or protests due on or before December 10, 2010. A notice of intervention was filed by the Arkansas Public Service Commission. On January 5, 2011, the Louisiana Public Service Commission (Louisiana Commission) filed a motion to intervene out-of-time and a protest. On January 12, 2011, Entergy filed an answer to the Louisiana Commission's protest.

9. The Louisiana Commission argues that Entergy's request for waiver of the prior notice requirement should be denied. The Louisiana Commission states that Entergy's

⁹ See *Entergy Services, Inc.*, Docket No. ER08-31-000 (December 19, 2007) (delegated letter order) (accepting a Service Agreement between Energy Gulf States Louisiana, LLC and Entergy Texas, as well as accepting adjustments to some of the inputs into the Service Schedule MSS-4 formula to reflect decisions made by the Texas Commission).

request for waiver should be denied for the same reasons set forth in the Commission's order issued September 22, 2010 in Docket No. ER10-2001-000.¹⁰

10. The Louisiana Commission states that the proposed depreciation rate changes are not just and reasonable because Entergy seeks to change those rates without making a section 205 filing, supported by depreciation studies, to secure authorization for the changes. The Louisiana Commission states that, in Order No. 618,¹¹ the Commission determined that a utility may change depreciation rates for accounting without Commission approval, but must obtain approval through a section 205 filing to change depreciation in wholesale rates.¹² The Louisiana Commission adds that any such request for a change must be supported by a study.¹³

11. The Louisiana Commission states that the depreciation rates underlying the expenses reflected in ETR-26 and ETR-28 were fixed by Order No. 480, which adopted the ETR-26/ETR-28 methodology for comparing operating company production costs and established the +/- 11 percent bandwidth. It states that the Commission determined that the ETR-26/ETR-28 methodology could not be changed without a section 205 or 206 filing.¹⁴ Further, the Louisiana Commission states that, in a subsequent order, the Commission confirmed that depreciation rates and the rate of return on equity were fixed inputs in the rate methodology.

12. The Louisiana Commission states that the Texas depreciation rates are not supported by any study in the Texas docket. It concedes that, although Entergy did not seek a depreciation rate change, Entergy agreed to reduce its depreciation rates by \$2.7 million as a result of a settlement. Therefore, the Louisiana Commission argues that the proposed changes to wholesale steam depreciation rates from those used in ETR-26 and ETR-28 are invalid because they are not supported by a study.¹⁵

13. The Louisiana Commission states that the additional information that Entergy provides concerning the applicable depreciation rate in the River Bend Agreement under Service Schedule MSS-4 is, in fact, a proposed change in the nuclear depreciation rate

¹⁰ *Entergy Services, Inc.*, 132 FERC ¶ 61,252, at P 18 n.13 (2010).

¹¹ *Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104 (2000).

¹² Louisiana Commission's Protest at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

and that it is also unsupported. The Louisiana Commission states that the Texas Settlement provides that "...the Company shall adjust its calculation of nuclear depreciation and decommissioning costs effective January 1, 2009 to reflect a 20 year life extension adjustment for the River Bend nuclear generating station."¹⁶ The Louisiana Commission states that this extension violates Commission policy for wholesale ratemaking purposes because no license extension has yet been obtained from the NRC for the River Bend unit. The Louisiana Commission references *Boston Edison Co.*,¹⁷ contending that the Commission consistently bases its depreciation costs on the license life of a nuclear plant. The Louisiana Commission adds that the Commission has recently applied this rule, at Entergy's urging, to Entergy's Grand Gulf nuclear unit.¹⁸

14. The Louisiana Commission states that the Commission has exclusive jurisdiction over wholesale rates and that this Commission has ruled that it has the authority to determine depreciation and decommissioning expenses for purposes of settlement wholesale rates.¹⁹ According to the Louisiana Commission, not only does Entergy seek approval to implement depreciation rates that violate Commission policy based on a retail decision, but the retail decision was made by the Texas Commission, which approved the Settlement Agreement even though the River Bend unit is owned 100 percent by Entergy Gulf States Louisiana, LLC; Entergy Gulf States Louisiana, LLC, which is regulated exclusively by the Louisiana Commission for retail ratemaking purposes. As a result of the Settlement Agreement, the Louisiana Commission states that the River Bend depreciation rates are being reduced for wholesale rate purposes, while there is no request to change depreciation rates under section 205 of the FPA, nor is there a depreciation study to support any such change. The Louisiana Commission contends that this violates Order No. 618 and the Commission's decisions it references above.

15. Lastly, the Louisiana Commission states that the propriety of Entergy's depreciation rates is being litigated in Docket No. EL10-55-000 for purposes of the MSS-3 bandwidth remedy calculation. In addition, the Louisiana Commission states that the approval of MSS-4 in Docket No. ER08-31-000, which Entergy relies upon in its application, is a delegated letter order and is not approval of any changed depreciation rates.

¹⁶ *Id.* at 4 (citing Entergy's Transmittal at 5).

¹⁷ 59 FERC ¶ 63,028, at 65,238 (1992).

¹⁸ Louisiana Commission's Protest at 4 (citing *Public Service Electric and Gas Co.*, 124 FERC ¶ 61,303 (2005)).

¹⁹ Louisiana Commission's Protest at 4 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 173).

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), Arkansas Public Service Commission's notice of intervention serves to make it a party to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant the Louisiana Commission's late-filed motion to intervene and protest given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

17. Section 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 are not persuaded to accept Entergy's answer and will, therefore, reject it.

B. Substantive Matters

18. The revised Depreciation Rates filed by Entergy raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

19. Our preliminary analysis indicates that Entergy's revised Depreciation Rates have 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 revised Depreciation Rates for filing, suspend them for a nominal period, to become effective on January 1, 2009, as requested,²⁰ subject to refund, and set them for hearing and settlement judge procedures.

20. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²¹ If the parties desire, they may,

²⁰ We deny the Louisiana Commission's request to deny waiver of our prior notice requirement. *See Central Hudson Gas and Elec. Corp.*, 60 FERC ¶ 61,106, at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*) ("We will generally grant waiver of the 60-day prior notice requirement in the following instances:...filings that reduce rates and charges....").

²¹ 18 C.F.R. § 385.603 (2010).

by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.²² The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the 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 revised Depreciation Rates are hereby accepted for filing for all applicable rate schedules and suspended for a nominal period, to become effective January 1, 2009, subject to refund, 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 the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Entergy's revised Depreciation Rates. However, the hearing shall be held in abeyance to provide 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 power 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

²² If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

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 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)

Kimberly D. Bose,
Secretary.