

137 FERC ¶ 61,030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Arkansas Public Service Commission

Docket No. EL09-43-001

v.

Entergy Corporation
Entergy Services, Inc.
Entergy Louisiana, L.L.C.
Entergy Arkansas, Inc.
Entergy Mississippi, Inc.
Entergy New Orleans, Inc.
Entergy Gulf States Louisiana, L.L.C.
Entergy Texas, Inc.

ORDER DENYING REQUESTS FOR REHEARING

(Issued October 7, 2011)

1. In this order, we address requests for rehearing by the Arkansas Public Service Commission (Arkansas Commission) and by Entergy Services, Inc. (Entergy) of the Commission's order denying a complaint by the Arkansas Commission.¹ For the reasons discussed below, we deny the requests for rehearing.

I. Background

2. The Entergy System has operated for over fifty years under some form of a System Agreement that acts as an interconnection and pooling agreement, provides for the joint planning, construction and operation of the Operating Companies' facilities, and maintains a coordinated power pool among the six companies. In 2005, the Commission

¹ *Arkansas Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 (2009) (July 14 Order).

issued Opinion No. 480,² which found that the Operating Companies' production costs were not roughly equal, and that the System Agreement was therefore no longer just and reasonable. In Opinion Nos. 480 and 480-A, the Commission 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. On November 17, 2006, in Docket No. EL01-88-004, the Commission accepted amendments to Entergy's Service Schedule MSS-3 of the System Agreement to include a formula to calculate bandwidth payments/receipts to achieve rough equalization of production costs.³

3. On May 29, 2007, in Docket No. ER07-956-000, Entergy filed, in accordance with Service Schedule MSS-3 of the System Agreement, the bandwidth payments and receipts using data as reported in the Operating Companies' 2006 FERC Form No. 1 (First Annual Bandwidth Filing). The filing was set for hearing by the Commission.⁴ The Presiding Judge issued his Initial Decision on September 23, 2008.⁵

4. In the relevant portion of the Initial Decision, the Presiding Judge required Entergy to change the depreciation rates approved by retail regulators in the bandwidth filing for certain nuclear generating units to conform to Commission policy. The Presiding Judge found that the Commission has previously held that nuclear depreciation and decommissioning expenses should be consistently measured by the remaining life left in the license set by the Nuclear Regulatory Commission (NRC). The Presiding Judge ordered Entergy to recalculate the nuclear depreciation and decommissioning expenses for the applicable Operating Companies and to readjust the bandwidth calculation to reflect the actual operational life as determined by the NRC granted license.⁶

² *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 173-184 (2005) (Opinion No. 480), *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282, at P 70-76 (2005) (Opinion No. 480-A), *order on compliance filing*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

³ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006).

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

⁵ *Entergy Services, Inc.*, 124 FERC ¶ 63,026 (2008) (Initial Decision).

⁶ *See* Initial Decision, 124 FERC ¶ 63,026, at P 447, 492.

5. On January 11, 2010, the Commission issued Opinion No. 505 affirming in part and reversing in part the Initial Decision.⁷ The Commission reversed the Presiding Judge's determination on depreciation, finding that section 30.12 of Service Schedule MSS-3 mandates that Entergy use the actual depreciation data that exists on the Operating Companies' books included on the FERC Form No. 1.⁸

6. Prior to the issuance of Opinion No. 505, on March 20, 2009, the Arkansas Commission filed a complaint (Complaint), pursuant to sections 206 and 306 of the Federal Power Act (FPA),⁹ against Entergy Corporation and its subsidiaries, Entergy and six operating companies.¹⁰ In the Complaint, the Arkansas Commission sought to modify certain text in section 30.12 of Service Schedule MSS-3 to the Entergy System Agreement relating to depreciation expense, nuclear decommissioning expense, and accumulated provision for depreciation and amortization. The Arkansas Commission noted that Nuclear Accumulated Provision for Depreciation (NAD) is defined in section 30.12 as: "Nuclear Accumulated Provision for Depreciation and Amortization excluding [Asset Retirement Obligations] associated with [Nuclear Production Plant in Service] above, as recorded in FERC Accounts 108 and 111 (consistent with the accounting related to Statement of Financial Accounting Standards (SFAS) 143 approved by the retail regulator having jurisdiction over the Company, *unless the [Commission] determines otherwise.*" (Emphasis added). In addition, it noted that Nuclear Depreciation and Amortization Expense (NDE) is defined in section 30.12 as: "Nuclear Depreciation and Amortization Expense associated with [Nuclear Production Plant in Service] as recorded in Accounts 403 and 404 and Decommissioning Expense, as approved by Retail Regulators, *unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the [Commission] under otherwise applicable law.*" (Emphasis added). The Arkansas Commission referred to these two provisions in section 30.12 of Service Schedule MSS-3 as the "unless" clause. The Arkansas Commission sought removal of the italicized language from Service Schedule MSS-3.

7. The Arkansas Commission asserted that this modification would remove certain language from section 30.12 that had been construed by the Presiding Judge in the First Annual Bandwidth Filing in Docket No. ER07-956-000 to provide this Commission with

⁷ *Entergy Services, Inc.*, 130 FERC ¶ 61,023 (2010) (Opinion No. 505).

⁸ *Id.* P 170.

⁹ 16 U.S.C. §§ 824e, 825(e) (2006).

¹⁰ Entergy Louisiana, L.L.C., Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy New Orleans, Inc., Entergy Gulf States Louisiana, L.L.C., and Entergy Texas, Inc.

authority to substitute imputed depreciation and decommissioning expenses for those actual expenses that are approved by retail regulators and, as such, reported on the FERC Form No. 1 filings. The Arkansas Commission argued that such substitution can lead to unintended, perverse outcomes, rendering Service Schedule MSS-3 unjust and unreasonable.

8. Entergy answered the Complaint, arguing that the Commission should hold the Complaint in abeyance pending the outcomes of Docket Nos. ER07-956-000 and ER08-1056-000.¹¹

9. In the July 14 Order, the Commission denied the Complaint.¹² The Commission stated that most of the Arkansas Commission's arguments were directed at the Initial Decision issued in Docket No. ER07-956-000 and were beyond the scope of the Complaint. The July 14 Order further stated that the Commission had acted in Opinion Nos. 480 and 480-A pursuant to its authority under the FPA to regulate wholesale transactions of electricity in interstate commerce. The Commission determined that the allocation among Operating Companies of production costs was no longer just and reasonable, and established the rough production cost equalization bandwidth as a remedy. The July 14 Order stated that in order for the bandwidth calculation to provide a just and reasonable result under the FPA, the Commission must ensure that the inputs used to calculate the bandwidth are also just and reasonable. The Commission concluded that the authority to determine the payments under the bandwidth necessarily must include the ability to examine the inputs used to calculate the bandwidth, including nuclear depreciation, decommissioning expenses, and accumulated provision for depreciation and amortization.¹³ The Commission found that the language at issue was appropriate and consistent with the Commission's authority under the FPA. The July 14

¹¹ As noted above, Docket No. ER07-956 is the proceeding involving the first annual bandwidth filing made by Entergy on May 29, 2007. Docket No. ER08-1056 is the proceeding involving the second annual bandwidth filing made by Entergy on May 30, 2008 (Second Annual Bandwidth Filing).

¹² July 14 Order, 128 FERC ¶ 61,020 at P 25.

¹³ See *Ark. Pub. Serv. Comm'n. v. Entergy Services, Inc.*, 119 FERC ¶ 61,223, at P 47, *reh'g denied*, 121 FERC ¶ 61,226 (2007) (*Arkansas PSC*) ("The annual filings thus provide the Commission and all interested parties the opportunity to analyze all production-related costs of each of the Entergy Operating Companies to make sure all such costs are just and reasonable and prudently incurred.").

Order concluded that the Arkansas Commission had provided no justification that would warrant removing the language.¹⁴

A. Requests for Rehearing

1. Arkansas Commission

10. The Arkansas Commission asserts in its request for rehearing that the Commission erroneously concluded that issues raised by the Complaint are pending in Docket No. ER07-956-000. It argues that the Complaint sought to remove language from the existing tariff that some parties interpret as allowing the use of imputed depreciation rates to replace the actual as-reported depreciation rates. Thus, it argues, the Complaint raises an issue not considered in the Initial Decision: whether to remove certain tariff language prospectively. The Arkansas Commission argues that the Commission has indicated that a change in the filed Service Schedule MSS-3 language can only be brought by filing a section 206 complaint.¹⁵ It contends that an order by the Commission on the Initial Decision would not address removal of the existing section 30.12 language as the Complaint seeks.

11. The Arkansas Commission asserts that the need for the broader prospective relief sought in the Complaint is highlighted by the history of the bandwidth remedy. In the first two bandwidth implementation proceedings, the challenged section 30.12 provisions have been interpreted by some parties to require the Commission to impute depreciation rates that deviate from the actual, cost-based production cost calculation methodology used in all other aspects of the bandwidth formula. The Arkansas Commission seeks to resolve the issue once and for all by modifying the language in the future so that all bandwidth cost elements are treated in the same manner.

12. The Arkansas Commission argues that the July 14 Order's reliance on *Arkansas PSC* is flawed. The Arkansas Commission states that the *Arkansas PSC* ruling is limited to whether Entergy's production-related costs were unjust and unreasonable because they were imprudently incurred and that such limited analysis cannot be expanded to give the Commission unfettered authority to evaluate any cost-of-service aspect of Entergy's annual bandwidth filings. Entergy's bandwidth filings have not proposed any change to

¹⁴ The Commission also concluded that because it was rejecting the Complaint for failure to meet the required burden under section 206, it was not necessary to hold this proceeding in abeyance as requested by Entergy. July 14 Order, 128 FERC ¶ 61,020 at P 26.

¹⁵ Arkansas Commission Request for Rehearing at 7, citing *Louisiana Pub. Serv. Comm'n. v. Entergy Services, Inc.*, 117 FERC ¶ 61,203, at P 69 (2006).

the Commission-approved method to implement the bandwidth calculations. The Arkansas Commission states that the Commission expressly recognized that section 30.12 provides the formula for determining each Operating Company's actual production costs, defined as the sum of the actual variable production costs and the actual fixed production costs.¹⁶

13. The Arkansas Commission alleges that the July 14 Order has nullified all of section 30.12 except the "unless" clause.¹⁷ The Arkansas Commission argues that retail regulator approval becomes an empty gesture that can be overturned at will by the Commission even though the Commission would otherwise lack jurisdiction to override state decisions about depreciation matters that fall within state jurisdiction. The Arkansas Commission also argues that the July 14 Order's overarching interpretation of the "unless" clause violates the principle of contract interpretation that every word, phrase, or term should be given effect and a reasonable meaning. The Arkansas Commission alleges that reading the "unless" clause as making the Commission the final arbitrator of whether state-approved depreciation rates are valid renders the preceding text of "as approved by Retail Regulators" superfluous. The Arkansas Commission alleges that the July 14 Order's interpretation of the "unless" clause also eviscerates Service Schedule MSS-3's requirement to use actual data for inputs. The Arkansas Commission states that Note 1 to section 30.12 directs that all expense items included as inputs to the bandwidth formula be the unchanged actual amounts drawn directly from FERC Form No. 1 accounts. The Arkansas Commission states that the July 14 Order would nullify this mandate in Note 1 by allowing the Commission and parties to examine, question and replace the actual depreciation expenses that have been approved by retail regulators.

¹⁶ Arkansas Commission Request for Rehearing at 11, citing *Louisiana Pub. Serv. Comm'n. v. Entergy Services, Inc.*, 117 FERC ¶ 61,203, at P 26 (2006).

¹⁷ As noted above, the Arkansas Commission's reference to the "unless" clause refers to the following language in section 30.12 of Service Schedule MSS-3: "Nuclear Accumulated Provision for Depreciation and Amortization excluding [Asset Retirement Obligations] associated with [Nuclear Production Plant in Service] above, as recorded in FERC Accounts 108 and 111 (consistent with the accounting related to Statement of Financial Accounting Standards (SFAS) 143 approved by the retail regulator having jurisdiction over the Company, *unless the [Commission] determines otherwise.*" (emphasis added) In addition, it noted that Nuclear Depreciation and Amortization Expense (NDE) is defined in section 30.12 as: "Nuclear Depreciation and Amortization Expense associated with [Nuclear Production Plant in Service] as recorded in Accounts 403 and 404 and Decommissioning Expense, as approved by Retail Regulators, *unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the [Commission] under otherwise applicable law.*" (Emphasis added).

14. The Arkansas Commission faults the July 14 Order's assertion that in order for the bandwidth calculation to provide a just and reasonable result under the FPA, the Commission must ensure that the inputs used to calculate the bandwidth are also just and reasonable. According to the Arkansas Commission, this assertion overlooks the prior Commission determination, reached in accepting Entergy's compliance filing in response to Opinion No. 480, that using actual as-reported costs in the bandwidth calculations is just and reasonable.¹⁸ The Arkansas Commission argues that the approved formula itself is the just and reasonable rate, not the numeric inputs that are placed into the formula annually. The rate remains just and reasonable as long as the utility follows the approved formula and the Commission is not free to replace the previously approved use of actual cost inputs with imputed cost to achieve what it considers to be a just and reasonable result. The Arkansas Commission alleges that the July 14 Order treats the bandwidth implementation filings as new cost-of-service rate filings that must be separately found to be just and reasonable rather than as the ongoing implementation of a formula rate that has been approved as producing just and reasonable results.

15. The Arkansas Commission argues that the July 14 Order impermissibly departs from the actual cost input methodology used in Exhibits ETR-26 and ETR-28¹⁹ in Docket No. EL01-88. The Arkansas Commission states that the D.C. Circuit has upheld following the methodology of Exhibits ETR-26 and ETR-28 in the bandwidth calculations.²⁰ However, according to the Arkansas Commission, the July 14 Order departs from the judicial mandate by allowing for substitution of imputed depreciation expenses for the actual expenses relied on in Exhibit ETR-26. The Arkansas Commission argues that consistency in rate treatment requires that the same baseline, Exhibit ETR-26's use of actual as-reported costs, be used to govern future proceedings just as actual as-reported costs were used to make the initial finding.

¹⁸ Arkansas Commission Request for Rehearing at 18, citing *Louisiana Pub. Serv. Comm'n. v. Entergy Services, Inc.*, 117 FERC ¶ 61,203, at P 18 (2006), *order on reh'g and compliance*, *Louisiana Pub. Serv. Comm'n. v. Entergy Services, Inc.*, 119 FERC ¶ 61,095 (2007).

¹⁹ Exhibits ETR-26 and ETR-28 are exhibits produced by Entergy in Docket No. EL01-88-001, the proceeding that resulted in the establishment of the bandwidth formula in Opinion No. 480. Exhibit ETR-26 compares historical production costs of the Operating Companies for years 1983-2001 and for the twelve months ending 2002. Exhibit ETR-28 is a production cost analysis for the Operating Companies for the twelve months ending August 31, 2002 and details the figures supporting the data in Exhibit ETR-26.

²⁰ Arkansas Commission Request for Rehearing at 21, citing *Louisiana Pub. Serv. Comm'n. v. FERC*, D.C. Cir. Docket No. 07-1228, judgment issued July 6, 2009 at 2.

16. The Arkansas Commission argues that the July 14 Order is inconsistent with the Commission's previous policy against usurping an area normally subject to state regulation, the setting of depreciation expense for production facilities.²¹ The Arkansas Commission asserts further that replacing the actual depreciation rate paid by retail customers with an imputed lower rate for bandwidth purposes has the perverse effect of increasing the overall costs to retail customers. This outcome results from retail customers receiving no benefit from the lower depreciation rate imputed by the Commission yet having to pay a higher bandwidth payment that is directly attributable to the imputed depreciation rate.

2. Entergy

17. Entergy states that the Commission should have held the Complaint in abeyance pending the outcomes of Docket Nos. ER07-956-000 and ER08-1056-000, where Entergy is challenging on exceptions the authority given to the Commission to use bandwidth formula depreciation expenses that differ from those actually reported in the FERC Form No. 1. By holding this complaint in abeyance Entergy concludes that the underlying issues will be resolved in a more appropriate proceeding. In addition, Entergy cites precedent for holding the complaint in abeyance pending the resolution of an initial decision, specifically *Union Electric Co. v. Entergy Arkansas, Inc.*, 124 FERC ¶ 61,111 (2008).

18. Entergy further argues that the Commission does not have the authority under the FPA to substitute different depreciation expenses for actual, regulator-approved depreciation expenses as reported in Entergy's FERC Form No. 1. Entergy contends that the System Agreement is a formula rate approved by the Commission and uses actual expenses. Entergy states that when it submits depreciation expense inputs under the formula, parties can either argue that the inputs are inconsistent with what is required under the formula, the depreciation expense inputs required under the formula were not accurately reflected in Entergy's books, or the depreciation expense inputs are not accurately incurred. Entergy contends that absent an accounting error any other challenge is a challenge to the formula which can only be done through section 205 or 206 of the FPA. Entergy also argues that the Commission misinterprets language contained in section 30.12 of Service Schedule MSS-3 that addresses depreciation expenses in finding that the Commission has authority to substitute depreciation expenses in the bandwidth proceeding.

²¹ Arkansas Commission Request for Rehearing at 22, citing Opinion No. 480, 111 FERC ¶ 61,311 at P 66-67.

II. Discussion

19. We deny the requests for rehearing to the extent that we affirm our finding that the language that the Arkansas Commission sought to remove from section 30.12 of Service Schedule MSS-3 was appropriate and consistent with the Commission's authority under the FPA and that the Arkansas Commission had provided no justification that would warrant removing the language. Given the Commission's clarification in a number of orders issued after the July 14 Order of the treatment of depreciation expenses in the annual bandwidth proceedings, we find that it is unnecessary to revise the language of section 30.12 of Service Schedule MSS-3 as requested in the Complaint. However, in the interests of certainty, we will again clarify the Commission's intent regarding the treatment of depreciation expenses in the annual bandwidth proceedings.

20. In Opinion No. 505, issued after the July 14 Order, the Commission reversed the findings of the Presiding Judge in the Initial Decision related to the depreciation expenses at issue here.²² The Commission found that for calculating the 2006 production payments to be made in 2007, section 30.12 of Service Schedule MSS-3 mandates that Entergy use the actual data that exists on the Operating Companies' books for 2006 included on the FERC Form No. 1. The Commission agreed with the Presiding Judge that the bandwidth proceeding required the use of actual data from the year in question.²³

21. The Commission again addressed the depreciation issue in an order denying interlocutory appeal in the third annual bandwidth proceeding in Docket No. ER09-1224-000, issued March 10, 2010.²⁴ In that order, the Commission noted that the purpose of the bandwidth proceeding was to determine whether Entergy properly implemented the bandwidth formula, not whether the formula itself was just and reasonable. The Commission also stated that any modifications to the currently effective Service Schedule MSS-3 formula must be made through a separate section 205 or 206 filing. Additionally, the order stated that:

We acknowledge, however, that prior to Entergy's annual bandwidth filings, when neither we nor the parties had any experience with such filings, the Commission did make some general statements that could be interpreted as suggesting that parties had the opportunity in Entergy's annual bandwidth filings to challenge the reasonableness of any cost inputs in

²² *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010).

²³ *Id.* P 173.

²⁴ *Entergy Services, Inc.*, 130 FERC ¶ 61,170 (2010).

the Service Schedule MSS-3 bandwidth formula, including the depreciation rates effective for Entergy's annual bandwidth filings. Such statements, however, were made prior to final Commission action on the first annual bandwidth filing and thus did not benefit from experience in addressing these annual bandwidth filings.²⁵

22. Finally, the Commission addressed the issue of the treatment of depreciation expenses in the order on the second bandwidth filing in Docket No. ER08-1056-002, issued concurrently with this order.²⁶ In that order, the Commission again rejected requests to examine the justness and reasonableness of depreciation inputs within the bandwidth proceedings themselves. The Commission addressed arguments by the parties on whether the definitions of the "DEXN" and "ADXN" variables²⁷ allowed the Commission to substitute its own depreciation expenses for those recorded on FERC Form No. 1. The Commission found that the references to Commission jurisdiction in these variables refer to depreciation expenses charged to traditional wholesale customers that were approved by the Commission, rather than being a reference to the Commission substituting its own depreciation expenses in the bandwidth proceedings for those otherwise determined by retail regulators that have been adopted for use in the bandwidth formula.

23. In the July 14 Order, the Commission stated that "the authority to determine the payments under the bandwidth necessarily must include the ability to examine the inputs used to calculate the bandwidth, including nuclear depreciation, decommissioning expenses, and accumulated provision for depreciation and amortization."²⁸ Consistent with our interpretation of the treatment of depreciation expenses in the annual bandwidth proceedings in the three orders discussed above, we clarify that the cited language from the July 14 Order was not intended to suggest that the justness and reasonableness of the various inputs to the bandwidth formula was open to challenge in the bandwidth proceedings. Instead, that language was intended to mean that each input in the bandwidth formula should be examined to make sure that the correct data was used in determining the bandwidth payments. Thus, if parties believe that Entergy has inputted data from the wrong parts of FERC Form No. 1 in its bandwidth formula, or that the data

²⁵ *Id.* P 20.

²⁶ *See* 137 FERC ¶ 61,029.

²⁷ The definitions of "DEXN" and "ADXN" are analogous to the definitions of NAD and NDE at issue here.

²⁸ July 14 Order, 128 FERC ¶ 61,020 at P 25.

used was incorrectly calculated, such objections are properly raised in the bandwidth proceeding. If parties believe that the methodology in Service Schedule MSS-3 with respect to depreciation expenses should be changed, they should file a separate section 206 complaint (or, in the case of Entergy, a section 205 filing).²⁹

24. With respect to the specific provisions at issue here, we find that the terms in Service Schedule MSS-3 subject to the Complaint are valid statements of Commission authority and should not be removed. Accordingly, we deny the requests for rehearing.

The Commission orders:

The rehearing requests of the Arkansas Commission and Entergy are hereby denied.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁹ See 137 FERC ¶ 61,029.