

125 FERC ¶ 61,331
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket Nos. ER08-774-000 and
ER08-774-001

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued December 19, 2008)

1. On October 15, 2008, Entergy Services, Inc. (ESI) filed an unopposed Offer of Settlement (Settlement)¹ to resolve all issues set for hearing in the above-captioned dockets,² including ESI's calculation to determine each Entergy Operating Company's average variable production costs. In particular, the Settlement Agreement addresses the source data to be used to calculate the variable "ER" (Energy Ratio) for each operating company.

2. On November 4, 2008, Commission Trial Staff filed initial comments supporting the Settlement. No other comments were filed. The presiding judge certified the Settlement to the Commission as uncontested on November 17, 2008.³

3. Section II.7 of the ESI Settlement states that:

It is the intent of the Parties that, in any future proceeding involving this Settlement Agreement, the Parties and Commission shall be subject to the "just and reasonable" standard of review. Changes to this Settlement

¹ The Settling Parties include: The Arkansas Public Service Commission, the Louisiana Public Service Commission (LPSC), Occidental Chemical Corporation, Union Electric Company d/b/a Ameren UE, and the Council of the City of New Orleans. ESI states that the Settling Parties either support or do not oppose the Settlement Agreement.

² *Entergy Services, Inc.*, 124 FERC ¶ 61, 163 (2008).

³ *Entergy Services, Inc.*, 125 FERC ¶ 63, 016 (2008).

Agreement proposed by non-settling third parties shall be subject to the most stringent standard of review permissible under applicable law.⁴

4. The Proposed Settlement states that the effective date of the settlement is June 1, 2008, subject to the outcome of the LPSC's rehearing request filed on September 12, 2008, in the captioned docket. ESI states that if LPSC prevails, ESI commits to revise the tariff sheet (First Revised Sheet No. 48J) submitted by ESI in this proceeding to reflect the new effective date required by the Commission.

5. The subject Settlement is fair and reasonable and in the public interest and is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. The Commission retains the right to investigate the rates, terms, and conditions under the just and reasonable and not unduly discriminatory or preferential standard of section 206 of the Federal Power Act, 16 U.S.C. § 824e (2006).

6. This order terminates Docket Nos. ER08-774-000 and ER08-774-001.

By the Commission. Commissioners Kelly and Wellinghoff dissenting in part with a separate joint statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴ ESI, Proposed October 15, 2008, Settlement at 5.

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WELLINGHOFF and KELLY, Commissioners, dissenting in part:

In this order, the majority approves a settlement in which the proposed standard of review for future changes sought by the parties or the Commission acting *sua sponte* is the “just and reasonable” standard. By contrast, the instant settlement would impose the “most stringent standard of review permissible under applicable law” with respect to future changes sought by “non-settling third parties”.¹

We believe that this disparity is inconsistent with an important principle set forth in the Commission’s precedent. The instant settlement leaves open the possibility that a higher burden would apply to non-parties than the parties were willing to apply to their own unilateral changes. The Commission has previously held that “as a general matter, for unilateral modifications, the Settling Parties may not impose a higher burden on the Commission while leaving the signatory parties subject to the ‘just and reasonable’ standard.”² We believe that this principle is sound, and that parties also should not be permitted to impose a higher burden on non-parties than they are willing to accept for themselves.

We disagree with the majority’s decision to ignore the inconsistency between the instant settlement and the above-noted principle from the Commission’s precedent. For this reason, we respectfully dissent in part from this order.

Jon Wellinghoff
Commissioner

Suede G. Kelly
Commissioner

¹ *Entergy Services, Inc.*, 125 FERC ¶ 61,331, at P 3 (2008).

² *Virginia Elec. and Power Co.*, 119 FERC ¶ 61,004, at P 5 (2007) (citing *Southern Co. Services, Inc.*, 67 FERC ¶ 61,080 (1994)).