123 FERC ¶ 61,223
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc. Docket No. ER08-767-000

ORDER ACCEPTING AND SUSPENDING FILING AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued May 29, 2008)

1. On March 31, 2008, Entergy Services, Inc. (Entergy) submitted a request for authorization to recover previously deferred start-up costs incurred to develop a Regional Transmission Organization (RTO) or Independent Coordinator of Transmission (ICT) under the existing formula rates for Entergy Arkansas Inc.'s (Entergy Arkansas) grandfathered customers. In this order, we accept and suspend for a nominal period, to become effective June 1, 2008, as requested, subject to refund, authorization to recover these costs. We also establish hearing and settlement judge procedures with regard to the appropriate levels of the costs.

I. Background

2. On October 30, 2006, in Docket No. ER07-93-000, Entergy filed a new Schedule 9 (Recovery of RTO and ICT Development and Start-Up Costs) (October 30 Filing). The October 30 Filing proposed to recover those start-up costs from point-to-point and network service customers served under Entergy's OATT, given that the Commission conditionally approved Entergy's proposal to establish the ICT in April 2006.

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 purposes of recovering Schedule 9 charges at $69.5 million, which is to be amortized over a recovery period projected to be 48 months (or approximately $17.375 million per year for four years).[1]

[1] The August 21 Settlement Agreement specifically addressed Entergy's grandfathered customers and recognized that Entergy would have to seek Commission authorization to include the Schedule 9 costs in the formula rates for Entergy Arkansas'
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4. The grandfathered agreements that contain formula rates subject to this filing are the Power Coordination Interchange and Transmission Service Agreements (PCITSA) between Entergy Arkansas and the City of Osceola, Arkansas (Osceola); the City of Thayer, Missouri; Arkansas Electric Cooperative Corporation (AECC); and the Transmission Service Agreement between Entergy Arkansas and the City of Hope, Arkansas.

II. Entergy's Filing

5. Entergy states that the purpose of the instant filing is to obtain Commission approval for Entergy Arkansas to recover Schedule 9 costs under the existing formula rates for Entergy Arkansas' grandfathered customers, which will allow Entergy to recover the previously deferred start-up costs it incurred to develop or join an RTO and to develop the ICT. Entergy states that the formula rates that are on file with the Commission contain input variables for the amortization of transmission-related costs.[2] Entergy states that because these two existing formula variables are appropriate for the recovery of the deferred start-up costs included in Schedule 9, no formula changes are necessary for the inclusion and assignment of such costs to the Entergy Arkansas grandfathered customers.

6. Entergy explains that in the concurrently-filed 2008 informational update to the formula rates, Entergy has calculated Entergy Arkansas' Full Load Ratio Share to be 0.2211,[3] which makes Entergy Arkansas' share of the Schedule 9 costs $15.366 million, or a monthly amortization over a four-year period of $320,134 on a total company basis. Entergy states that the Entergy Arkansas grandfathered customers will be responsible for their proportional share of these formula rate inputs.

7. Entergy believes that it is appropriate to recover Schedule 9 costs from Entergy Arkansas' grandfathered customers and that such recovery is consistent with the Commission's prior rulings. Entergy states that the Commission specified in Order No.

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grandfathered customers. The Commission accepted the August 21 Settlement Agreement without modification in November 2007, *Entergy Services, Inc.*, 121 FERC ¶ 61,133 (2007).

[2] The input variables are included in the Monthly Transmission and Distribution Demand Rates under the formula rates in the grandfathered agreements and include Transmission Net Regulatory Deferral (TNRD) and Transmission Regulatory Cr/Dr Amortization (TDRCA).

[3] Entergy's 2008 informational update to the formula rates was filed in Docket Nos. ER08-750-000, ER08-751-000 and ER08-752-000.

2000 that the reasonable costs of developing an RTO may be included in transmission rates. Entergy states that the Commission accepted the Schedule 9 filing to make Entergy and other similarly situated entities more likely to pursue the development of an RTO or other proposals that move toward greater independence over the provision of transmission service and provide confidence in the operation of markets.[4]

8. Entergy adds that it is appropriate for the Entergy Arkansas grandfathered customers in this instance to share in these costs because they are similarly situated to all other customers taking transmission service on the Entergy system. According to Entergy, the only difference between these grandfathered customers and customers taking post-Order No. 888 OATT service is that the grandfathered customers also have generation associated with their service. Entergy states that, despite this difference, they take transmission service like all other OATT customers and should bear their allocated portion of the costs associated with Schedule 9.

9. Entergy states that the Entergy Arkansas grandfathered customers agreed in the August 21 Settlement Agreement that if the Commission permits Entergy Arkansas to recover the Schedule 9 costs through the existing rate formulas, the system recovery amount set forth ($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 time period. Entergy states that, consistent with the August 21 Settlement Agreement, the Entergy Arkansas load ratio share of the Entergy System as of December 31, 2007 was 0.2211 and the resulting Entergy Arkansas allocation of Schedule 9 costs is $15.366 million for the formula input TNRD. Similarly, Entergy states that the formula input for TRDCA is $320,134/month on a total-company basis. Entergy adds that, consistent with the August 21 Settlement Agreement, such costs will not accrue amounts of interest or carrying charges in addition to amounts of interest or carrying charges included in the black-box settlement amount previously included in the August 21 Settlement Agreement.

III. Notice of Filing and Responsive Pleadings

10. Notice of the filing was published in the Federal Register, 73 Fed. Reg. 19,210 (2008), with protests or interventions due on or before April 21, 2008. A timely joint protest and petition to intervene was filed by Osceola and the Hope Water and Light Commission (HWL) (together, Arkansas Cities). A timely motion to intervene, motion to reject and, in the alternative, protest and request for evidentiary hearing was filed by AECC. On May 6, 2008, Entergy filed an answer in opposition to Arkansas Cities' and AECC's protests. On May 21, 2008, AECC filed an answer to Entergy's answer.

[4] *Entergy Services, Inc.*, 117 FERC ¶ 61,320 (2006).

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the 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) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers and will therefore reject them.

B. Substantive Matters

1. Recovery of Schedule 9 Costs from Grandfathered Agreements

a. Comments

12. AECC argues that Entergy has not demonstrated that AECC is similarly situated to the transmission customers that take service under the OATT or that a change to the formula is just and reasonable. The reason for allocating the Schedule 9 costs to transmission customers that take service under the OATT, according to AECC, is that the ICT is supposed to provide some service to OATT customers independent of Entergy. AECC contends that the ICT provides it no such services since AECC continues to look to Entergy Arkansas for PCITSA transmission services. Thus, AECC argues that it and the other Entergy Arkansas grandfathered transmission customers receive no benefits from ICT's administration of OATT services, and, thus, there is no support for allocating Schedule 9 costs to the Entergy Arkansas grandfathered transmission customers.

b. Commission Determination

13. We agree with AECC that the question of the recovery of Schedule 9 costs from Entergy Arkansas' grandfathered agreements was not decided in the August 21 Settlement Agreement. 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. That is now what is before us in this case.

14. We conclude that it is appropriate for Entergy to pass through start-up and development costs to Entergy Arkansas' grandfathered customers. The Commission has already determined that Entergy should receive its start-up costs, finding that the ICT provides benefits in Entergy's footprint.[5] The Commission explained that these benefits

[5] *Entergy Services, Inc.*, 117 FERC ¶ 61,320, at P 21 (2006).

include greater transparency and system reliability. The Commission further explained that denying such costs would only serve to make Entergy and other similarly situated entities less likely to pursue proposals that move transmission service toward greater independence and that provide confidence in the operation of the markets. AECC has provided no substantive basis for having customers receiving transmission service under grandfathered agreements escape responsibility for a pro-rata share of the costs at issue. Accordingly, we conclude that these customers should pay a pro-rata share of the previously deferred costs incurred by Entergy to comply with Commission directives.[6]

2. Mechanism to Recover Schedule 9 Costs in Entergy Arkansas' Formula Rates

a. Comments

15. AECC argues that its grandfathered agreement with Entergy Arkansas does not provide for recovery of Schedule 9 costs. It states that the August 21 Settlement Agreement explicitly excluded Entergy Arkansas' grandfathered transmission customers and that at the time of the settlement, Entergy agreed that AECC's grandfathered agreement did not provide for recovery of Schedule 9 costs. AECC states that at no point between the August 21 Settlement and Entergy's instant filing did Entergy make a filing with the Commission proposing to modify AECC's grandfathered agreement to include the Schedule 9 costs.

16. AECC contends that it never was afforded its right recognized by the August 21 Settlement Agreement to contest whether a change should be made to its rate formula to include the Schedule 9 costs because Entergy never made a filing to change AECC's formula rate. AECC argues that, because Entergy never made such a filing, the Commission never issued an order permitting Entergy to modify AECC's grandfathered agreement with Entergy in order to recover Schedule 9 costs. AECC states further that since Schedule 9 cost recovery violates its PCITSA with Entergy, it violates the Commission's filed rate doctrine.

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[6] *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,033 (2001) (order finding that all users of the grid operated by RTO will benefit from the RTO's operational and planning responsibilities for the transmission system as well as grid reliability), *reh'g denied*, 98 FERC 61,141 (2002), *voluntary remand*, 102 FERC ¶ 61,192 (2003), *reh'g denied*, 104 FERC ¶ 61,012 (2003), *affirmed*, *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (2004) (affirming the Commission decision to allocate an RTO cost adder to all users of the Midwest ISO grid since all customers draw benefits from being a part of the regional transmission system).

17. AECC states that the first time the variables TNRD and TRDCA appeared in its grandfathered agreement formula rate was in settlement documents that Entergy filed with the Commission on November 2, 2007, a settlement of the 2007 Wholesale Formula Rate Update in Docket Nos. ER07-629-000, *et al.* (November 2 Settlement Agreement).[7] AECC claims it did not realize those variables had been added to its formula rate because they were not part of the settlement to which it agreed. It states that for Entergy to now attempt to exploit an error in preparation of settlement documents by contending that AECC's formula rates as they are currently on file with the Commission provide for Schedule 9 cost recovery would not only deprive AECC of proper notice of the change and an opportunity to protest it and the Commission of an opportunity to rule on the change, but would also represent the worst kind of bad faith.

18. AECC states that, pursuant to the terms of its PCITSA, Entergy is only allowed to seek to change the formula once every three years. AECC states that the latest year for which such changes would have been authorized is 2007, and, therefore, no further changes to the formula can be made until 2010. Arkansas Cities similarly claim that Entergy is precluded from making such a formula change by a provision in the 1988 Rate Formula Agreement between Entergy and HWL. In that agreement, according to Arkansas Cities, it was agreed that any future changes to the rate formulas contained in the agreements, if any, would be proposed every third year beginning in 1992. Although 2007 was an eligible year for proposing changes to the rate formulas, Arkansas Cities state that Entergy did not propose the changes attempted in this filing by the December 1, 2006 deadline. Arkansas Cities contend that the next time Entergy may seek to change the formula is December 1, 2009 for the year 2010.

19. Arkansas Cities also state that, pursuant to the PCITSA between Entergy and Osceola, both parties agreed that no changes were to be made to the formulas relating to Osceola in the 2007-2009 timeframe. Further, since Osceola's PCITSA expires in 2009, Arkansas Cities contend that the 2006-2007 timeframe was the last time Entergy could have proposed changes.

b. Commission Determination

20. AECC's argument that the November 2 Settlement Agreement accepted by the Commission does not provide a mechanism for the recovery of Schedule 9 costs is

[7] On February 6, 2008, the Commission issued a letter order approving the November 2 Settlement Agreement, *Entergy Services, Inc.*, 122 FERC ¶ 61,109 (2008).

without merit.[8] The tariff sheets filed with the November 2 Settlement Agreement included tariff sheets that set forth the formula rate, including the variables TRND and TRDCA. The TRND variable clearly refers to "Transmission costs associated with any FERC-approved Deferral Plan." Because Schedule 9 is a FERC-approved deferral plan, the appropriate place to flow through these costs is through these variables.

21. All parties, including AECC, agreed to this settlement. The fact that AECC was unaware of these variables that were explicitly set forth on the tariff sheets attached to the November 2 Settlement Agreement is no basis for finding that the Commission-accepted formula is now no longer just and reasonable. It had a number of opportunities to raise its concerns, but for whatever reason did not. Thus, AECC's argument that it was not afforded the opportunity to contest Entergy's formula rate changes is not persuasive.

22. Therefore, we find that the proper variables used to recover Schedule 9 costs under Entergy Arkansas' existing grandfathered agreements are present in the relevant tariff sheets.

23. We also disagree with AEEC's and Arkansas Cities' argument that the formula cannot be changed in an "off-year." Nothing prevents parties by mutual agreement from changing the formula, and this is what occurred in the November 2 Settlement Agreement.

3. Level of Schedule 9 Costs to be Allocated to Entergy Arkansas' Grandfathered Customers

a. Comments

24. Arkansas Cities states that, if the Commission does not reject the proposal outright, it objects to the way Entergy seeks to recover the schedule 9 costs. Arkansas Cities states that Entergy agreed in the August 21 Settlement that costs booked to intangible plant will not accrue amounts of, or carrying charges in addition to, the amount of interest or carrying charges in the black-box settlement amount agreed to in that proceeding. Arkansas Cities argues that Entergy is seeking additional carrying costs in this filing, which conflicts with the August 21 Settlement.

25. Arkansas Cities argues that Entergy should, if the filing is not rejected, base its collection of schedule 9 costs on the amount of electricity actually transmitted by the

[8] On November 2, 2007, Entergy submitted a settlement in Docket No. ER07-629-000 and included the input variables TNRD and TRDCA for the amortization of transmission-related costs in its tariff sheets in First Revised Rate Schedule FERC No. 82 which relates to AECC.

customer, rather than a customer's system peak transmission demand. Arkansas Cities states that Entergy's proposal is inconsistent with the August 21 Settlement. Arkansas Cities also states that there is nothing in Entergy's filing to prevent Entergy from collecting more than the $69.5 million dollars, as was agreed on in the August 21 Settlement.

26. AECC requests that the Commission set this case for an evidentiary hearing to: (1) explore whether it is just and reasonable to change AECC's formula rate to include schedule 9 costs; (2) determine when any such change should be allowed to take effect; and (3) investigate Entergy's calculation of the schedule 9 costs allocated to AECC. AECC holds that the filing raises several issues of material fact that require further investigation.

27. AECC states that Entergy's determination of rates for AECC may rest on an improper calculation of Entergy Arkansas's load ratio share of schedule 9 Costs. AECC notes that Entergy's transmittal letter states that Entergy Arkansas' load ratio share is 0.2211, while Entergy's schedule E.1 in the same filing uses a load ratio share for Entergy Arkansas of 0.2234. AECC states that schedule E.4 in the filing explains that the 0.2211 factor is derived using the entire Entergy system load, including interruptible load, while the factor of 0.2234 excludes interruptible load. AECC states that Entergy provides no explanation as to why one factor is more appropriate than the other, nor is there an explanation as to why there is a discrepancy between the transmittal letter and schedule E.1.

28. AECC states that it is unsure based on Entergy's filing whether or not Entergy uses a 12 coincident peak (12-CP) approach, but if it does, the full load allocation factor is the appropriate factor to use because it includes all loads. AECC states that Entergy provides no justification for its exclusion of interruptible loads from the determination of the allocation factor used to allocate costs to AECC. AECC argues that, given that the system can and does accommodate and benefit these interruptible loads, Entergy should include such loads in the determination of its coincident peak demands and the development of the allocation factors used to allocate costs to Entergy Arkansas and AECC in this proceeding. AECC states further that Entergy's filing fails to explain why Entergy uses the twelve months ending November 2007, considering that data for the full 2007 calendar year should have been available at the time of Entergy's filing.

29. AECC also argues that Entergy improperly excluded the City of Jonesboro, Arkansas' (Jonesboro) load from the calculation of the allocation factors used to determine AECC's rate. To the extent that AECC is allocated any portion of the schedule 9 costs, AECC argues that it would be unlawfully subsidizing transmission service provided to Jonesboro because of the exclusion of the Jonesboro load from the denominator.

30. Finally, AECC is concerned that Entergy's proposal to treat schedule 9 costs as a regulatory deferral appears to allow recovery of carrying costs on the unamortized balance in violation of the August 21 Settlement. AECC argues that Article II, section 4 of the August 21 Settlement provides that "[t]he costs booked to intangible plant will not accrue amounts of interest or carrying charges in addition to amounts of interest or carrying charges included in the black-box settlement amount agreed to in this proceeding." AECC states that Entergy's treatment of the unamortized balance of the schedule 9 costs as a regulatory deferral in the workpapers for the determination of AECC's rates attached to the filing in this case violates the August 21 Settlement.

b. Commission Determination

Hearing and Settlement Judge Procedures

31. Our preliminary analysis indicates that Entergy's level of Schedule 9 costs to be allocated to Entergy Arkansas' grandfathered customers 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 and suspend for a nominal period, make effective June 1, 2008, subject to refund, authorization to recover previously deferred RTO and ICT development and start-up costs and set for hearing and settlement judge procedures the appropriate levels of Schedule 9 costs.

32. While we are setting the level of Schedule 9 costs to be allocated to Entergy Arkansas' grandfathered customers 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.[9] If the parties desire, they may, 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.[10] 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

[9] 18 C.F.R. § 385.603 (2007).

[10] 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 and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

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 authorization to recover Schedule 9 costs is hereby accepted for filing and suspended for a nominal period, to become effective June 1, 2008, 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 the appropriate levels of the Schedule 9 costs. 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 (2007), 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 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, N.E., 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.