

124 FERC ¶ 61,101
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 No. ER08-1056-000

ORDER ACCEPTING AND SUSPENDING PROPOSED RATES AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 29, 2008)

1. Entergy Services, Inc. (Entergy),¹ on behalf of Entergy Operating Companies,² submitted for filing rates pursuant to Service Schedule MSS-3 of the Entergy System Agreement (System Agreement), implementing the Commission's decision in Opinion Nos. 480 and 480-A. In this order, we accept these proposed rates for filing, and suspend them for a nominal period, to become effective June 1, 2008, as requested, subject to refund. We also establish hearing and settlement judge procedures.

I. Background

2. In Opinion Nos. 480 and 480-A, the Commission found that rough production cost equalization had been disrupted on the Entergy system.³ Opinion Nos. 480 and 480-A 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 and required annual filings beginning in June 2007. The

¹ Entergy Services, Inc. is wholly owned subsidiary of Entergy Corporation.

² The Entergy Operating Companies are Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf), Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc. (Entergy Mississippi), Entergy Texas, Inc., and Entergy New Orleans, Inc. (Entergy New Orleans).

³ *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005), *order on reh'g*, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in relevant part sub nom. La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

Commission stated that the bandwidth would be implemented prospectively and would be effective for calendar year 2006, and that any equalization payments would be made in 2007 after a full calendar year of data became available.

3. On May 29, 2007, in Docket No. ER07-956-000, Entergy submitted its first annual bandwidth implementation filing that set forth rates pursuant to Service Schedule MSS-3 of the System Agreement, implementing the Commission's decisions in Opinion Nos. 480 and 480-A.⁴ The Commission accepted those rates for filing, suspended them for a nominal period and made them effective June 1, 2007, subject to refund. The Commission also established hearing and settlement judge procedures. The hearing commenced on June 17, 2008.

II. Entergy's Filing

4. On May 30, 2008, Entergy filed rates (second annual bandwidth implementation filing) pursuant to section 205 of the Federal Power Act (FPA)⁵ to implement the Commission's decisions in Opinion Nos. 480 and 480-A.

5. Entergy states that it calculated the payments and receipts under the Service Schedule MSS-3 bandwidth formula using data as reported in the Operating Companies' 2007 FERC Form No. 1, or such other supporting data as provided for in Service Schedule MSS-3. It states that each Operating Company's allocated Average Production Costs are compared to the Operating Company's Actual Production Costs to determine the dollar and percent disparity. Based on these calculations, Entergy Arkansas will make payments to the other operating companies. Entergy requests that the Commission accept the proposed rates for filing, effective June 1, 2008, without suspension, hearing, or investigation. Entergy states that the requested effective date implements the Commission's directive that bandwidth remedy billing commence in June.⁶

6. For informational purposes, Entergy highlights five items contained in the rate calculation. First, it references a Louisiana Commission complaint in which Louisiana Commission argued that the formula rate should be modified so that the Waterford 3 plant capital lease amounts are removed from the plant allocation factor used to allocate Accumulated Deferred Income Taxes (ADIT).⁷ Entergy states that while it does not

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

⁵ 16 U.S.C. § 824e (2006).

⁶ *Citing La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095, at P 20 (2007).

⁷ Louisiana Commission March 31, 2008 Complaint, Docket No. EL08-51-000.

oppose Louisiana Commission's proposed modification, the calculation in Entergy's filing includes the Waterford 3 Plant Capital Leases because the Commission has not yet issued an order on the Louisiana Commission's complaint to modify Service Schedule MSS-3.⁸

7. Next, Entergy states that it has included the effect of its proposed amendment to section 30.12 of Service Schedule MSS-3 to exclude from the bandwidth calculation certain increased costs resulting from the amendment to the Toledo Bend Power Sales Agreement. Entergy states that the Commission has not yet acted on the proposed amendment, but notes that Louisiana Commission does not oppose the amendment and that, to the extent that the Commission rejects or does not accept the proposal, Entergy agrees to revise the rate calculation to remove the amendment's effect.⁹

8. Third, Entergy states that it has included in its rate calculation four amendments to Service Schedule MSS-3 currently being litigated in Docket No. ER07-682.¹⁰ It states that three of these amendments concern the factors or ratios used to functionalize two classifications of common, indirect costs, administrative and general (A&G) expenses and general and intangible plant costs, on each Operating Company's books to the production function. The fourth amendment involves the state income tax rate for Entergy Gulf.

9. Fourth, Entergy states that it has also included in its rate calculation an amendment to section 30.12 of Service Schedule MSS-3 to exclude from the calculation of each Operating Company's actual production costs the amount of storm cost accrual expense recorded in FERC Account No. 924. Entergy notes that it has filed with the Commission a settlement agreement that amends section 30.12 to exclude the storm cost accrual expense.¹¹

⁸ The Commission has since directed Entergy to remove the Waterford 3 capital lease amounts from the computations of the nuclear production plant ratio and the production plant excluding nuclear ratio, effective March 31, 2008. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 124 FERC ¶ 61,010, at P 28 (2008).

⁹ The Commission has since accepted Entergy's May 8, 2008 filing in Docket No. ER08-927. *Entergy Servs., Inc.*, 124 FERC ¶ 61,020 (2008).

¹⁰ We note that on June 27, 2008, the administrative law judge in Docket No. ER07-682-002 issued an initial decision concerning the four amendments to Service Schedule MSS-3. *Entergy Servs., Inc.*, 123 FERC ¶ 63,020 (2008).

¹¹ Entergy's May 20, 2008 settlement agreement is contested, and is currently pending before the Commission in Docket No. ER07-985-000.

10. Finally, Entergy states that it previously proposed to amend section 30.13 of Service Schedule MSS-3 to more clearly define variable “ER,” which is the energy ratio used to allocate average variable production costs. In particular, Entergy states that it clarified that the input data source for the variable “ER” should be FERC Form No. 1 data. Entergy thus notes that in the rate calculation it has used the FERC Form No. 1 data for the variable “ER.”¹²

III. Notice of Filing and Responsive Pleadings

11. Notice of Entergy’s filing was published in the *Federal Register*, 73 Fed. Reg. 33,069 (2008), with interventions and protests due on or before June 20, 2008. Union Electric Company (Union Electric), filed a motion to intervene and protest. Arkansas Public Service Commission (Arkansas Commission) and Louisiana Public Service Commission (Louisiana Commission) filed notices of intervention and protests. The Council of the City of New Orleans, Louisiana, and Mississippi Public Service Commission filed notices of intervention. Occidental Chemical Corporation, Texas Industrial Energy Consumers, and East Texas Cooperatives filed motions to intervene. Entergy then filed an answer in response to the protests.

12. Union Electric argues that Entergy should not be allowed to recover from Union Electric a portion of Entergy Arkansas’ rough production cost equalization payments under Opinion Nos. 480 and 480-A through the rates Entergy Arkansas charges for energy under its power sale agreement with Union Electric (Service Agreement). It states that while the equalization payment may be recorded in Account 555,¹³ these are not costs Entergy Arkansas has incurred to purchase energy, but rather, these are payments that it must provide to other Entergy Operating Companies because its production costs were lower than its allocated share of the Entergy system average production cost by more than the 11 percent bandwidth. Union Electric argues that by flowing through a portion of the equalization payments to Union Electric, Entergy Arkansas is violating the plain terms of the Service Agreement, which provides that only “Purchased Energy Expense charged to Account 555” may be recovered as part of the energy rate calculation.

13. Union Electric not only requests that the Commission reject Entergy’s filing as violating section 205 of the FPA and the filed rate doctrine, it requests that the Commission require Entergy Arkansas and Entergy to provide Union Electric with

¹² Entergy’s proposal in Docket No. ER08-774-000 is currently pending before the Commission.

¹³ Citing *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203, at P 27, 31 (2006).

refunds, including interest calculated under 18 C.F.R. § 35.19a, for all over-collections under the Service Agreement. In the alternative, Union Electric requests that the Commission consolidate this proceeding with the Docket No. ER07-956 proceeding, any related proceeding on remand, and the complaint concerning this issue filed by Union Electric in Docket No. EL08-60.

14. Arkansas Commission argues that there are several anomalies between the current bandwidth filing and the previous bandwidth filing in Docket No. ER07-956-000 that have resulted in significant deviations in comparable data in the bandwidth calculation. Arkansas Commission gives several examples in its filing, but notes that it is not an exhaustive list of issues and is meant to illustrate the fact that Entergy's filing is insufficient to determine whether the proposed rates are just and reasonable without a trial-type evidentiary hearing. Thus, for example, Arkansas Commission argues that the bandwidth payment and receipt calculations in Entergy's filing include an unusual increase in the capital structure common equity ratio for all Entergy Operating Companies except for Entergy Arkansas. It states that Entergy Mississippi's common equity ratio increased from 43 percent to 48 percent, while Entergy Arkansas' decreased.

15. In addition, Arkansas Commission points to the following unexplained increases and/or deviations in Entergy's filing: (1) Entergy New Orleans' non-nuclear (Fixed Production) rate base increased from a negative amount of approximately \$6.4 million in 2006 to a positive amount of approximately \$7.4 million in 2007; (2) Entergy New Orleans' non-nuclear non-fuel operation and maintenance (O&M) increased from approximately \$7.6 million in 2006 to \$12.2 million in 2007 (an unexplained 60 percent increase); (3) the ratio for Entergy Louisiana of production plant in service excluding nuclear plant to total plant excluding intangible plant increased significantly from 2006 to 2007 while comparable ratios for the other Entergy Operating Companies remained approximately the same; (4) Entergy Louisiana's ratio of production plant to electric and gas plant excluding intangible plant increased significantly from 2006 to 2007, while comparable ratios for the other Entergy Operating Companies remained approximately the same; (5) Entergy New Orleans' ratio of production labor to total labor excluding A&G labor increased significantly from 2006 to 2007, while comparable ratios for the other Entergy Operating Companies stayed the same; and (6) the Entergy Operating Companies production cost calculations for 2007 should not include expenditures made by Entergy in connection with its recently initiated proceeding before the Nuclear Regulatory Commission regarding its application for a new nuclear unit at the Grand Gulf site in Mississippi.

16. Louisiana Commission argues that Entergy's filing contains errors and deviations from the methodology in Exhibits ETR-26 and ETR-28 required by Opinion Nos. 480 and 480-A. It argues that the calculation also includes imprudent and unreasonable cost inputs, and states that many of the same issues are currently being litigated in Docket No. ER07-956-000. Louisiana Commission further argues that the errors and deviations

in Entergy's filing improperly reduce payments from Entergy Arkansas to the other Entergy Operating Companies.

17. Specifically, Louisiana Commission revisits issues that it claims are currently being litigated in Docket No. EL08-51-000, including costs for the Spindletop storage facility, ADIT associated with the Waterford 3 capital lease amounts and other amounts included on Exhibits ETR-26 and ETR-28, data used to calculate net area load, inconsistent methods for depreciation and decommissioning rates on nuclear generation, and whether Entergy Arkansas should have been allowed to buy back energy in certain instances.

18. In addition, Louisiana Commission claims that Entergy has double counted the removal of the A&G expenses for the 30 percent share of the River Bend nuclear unit. It states that this issue was admitted by Entergy in testimony in Docket No. ER07-956, and that Entergy attempted to resolve the issue by "double removing" the costs. Louisiana Commission argues that Entergy's solution does not solve the issue and incorrectly decreases production costs.

19. Louisiana Commission also argues that the issue of prudence should be reviewed for the 2007 test year filing in this docket because "in its July 2, 2008 Order in Docket No. EL08-51-000, this Commission ruled that this prudence issue was being litigated in Docket EL08-51-000 based on 2006 test year data, and ruled, 'there is no need to establish a separate proceeding to address it.'"¹⁴ In particular, Louisiana Commission argues that Entergy's decision not to buy back up to 180 megawatts of Independence 2 Steam Electric Station in 1996 and 1997 was imprudent, and that the effects of the imprudence should be excluded from the bandwidth calculation. It further argues that the Commission should require that the bandwidth impacts be assessed to Entergy's shareholders and should not be part of Commission-mandated costs that are flowed through in retail rates.

20. Louisiana Commission further argues that there is a mismatch in MSS-3 and MSS-4 because of specific assignments of certain generation related amounts, and it requests further discovery to determine the full extent of this mismatch. It also argues for more information about ADIT costs associated with the acquisition of the Perryville Plant. Finally, Louisiana Commission argues that the Commission should permit proposed changes in methodology to take effect only for a future calendar year test period, just as it

¹⁴ Louisiana Commission July 7, 2008 Protest at 15. We note that in the July 2, 2008 Order referenced by Louisiana Commission, the Commission stated that there was a separate proceeding in Docket No. ER07-956-000, not Docket No. ER08-51-000. *See La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 124 FERC ¶ 61,010 at P 27.

applied the remedy adopted in 2005 for the first time in the 2006 calendar year test period with payments and receipts commencing thereafter. It states that if the Commission is to be consistent with its prior ruling, it may implement Entergy's modifications to the remedy only to the first calendar year of the data following the filing, after which the first modification remedy payment would occur. It argues that the first calendar year following Entergy's filing is 2009 and any payments should not occur until 2010, if the modifications to the remedy are approved.

IV. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notices of intervention and 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) (2008) 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. Hearing and Settlement Judge Procedures

22. Entergy's proposed rates raise issues of material fact that cannot be resolved based on the record before us. These issues of material fact are more appropriately addressed in the hearing procedures and settlement judge procedures ordered below.

23. Our preliminary analysis indicates that Entergy's proposed rate schedule 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 Entergy's proposed rates for filing, suspend them for a nominal period, make them effective June 1, 2008,¹⁵ as requested, subject to refund, and set them for hearing and settlement judge procedures.

¹⁵ *La. Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 at P 10. See also *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, at 61,338 (1992), *reh'g denied*, 61 FERC ¶ 61,089 (1992) (Commission will generally grant waiver of notice when rate change and effective date are already prescribed). We also reject, for the same reasons discussed in prior orders, Louisiana Commission's argument that the Commission may implement Entergy's modifications to the remedy only to the first calendar year of the data following the filing. See, e.g., *Entergy Services, Inc.*, 119 FERC ¶ 61,190, at P 19, *order on reh'g*, 121 FERC ¶ 61,126, at P 12 (2007).

24. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁷ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of 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 proposed rates are hereby accepted for filing and suspended for a nominal period, to become effective June 1, 2008, as requested, 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 regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Entergy's proposed rates pursuant to Service Schedule MSS-3 of the System Agreement implementing the Commission's decisions in Opinion Nos. 480 and 480-A. However, the hearing will be held in abeyance to give the parties 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 (2008), 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

¹⁶ 18 C.F.R. § 385.603 (2008).

¹⁷ If the parties decide to request a specific judge, they must make their joint request to the chief Judge in writing or by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of the Commission's judges and a summary of their background and experience (www.FERC.gov –click on Office of Administrative Law Judges).

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 the 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, D.C. 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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.