

128 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Arkansas Public Service Commission

Docket No. EL09-43-000

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 COMPLAINT

(Issued July 14, 2009)

1. On March 20, 2009, the Arkansas Public Service Commission (Arkansas Commission) filed a complaint (Complaint) pursuant to sections 206 and 306 of the Federal Power Act (FPA),¹ against Entergy Corporation and its subsidiaries, Entergy Services, Inc., and six operating companies² (together, Operating Companies), (collectively, Entergy). The Complaint seeks modification to certain text in the formula for bandwidth calculations contained in section 30.12 of Service Schedule MSS-3 to Entergy's System Agreement. In this order, we deny the relief requested in the Complaint.

¹ 16 U.S.C. §§ 824e, 825(e) (2006).

² 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.

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. On June 14, 2001, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint against Entergy, alleging that the System Agreement no longer operated to produce rough production cost equalization. In 2005, the Commission issued Opinion No. 480,³ 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. The 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. Entergy amended Service Schedule MSS-3 to incorporate the rough production cost equalization bandwidth calculation.

3. On May 29, 2007, in Docket No. ER07-956-000, Entergy filed rates in accordance with Service Schedule MSS-3 of the System Agreement, calculating the bandwidth payments and receipts using data as reported in the Operating Companies' 2006 FERC Form No. 1. Each Operating Company's allocated average production costs were compared to the Operating Company's actual production costs to determine the dollar and percent disparity. Entergy Arkansas was the only Operating Company to have an initial disparity exceeding +/- 11 percent, and was therefore obligated to make payments. The filing was set for hearing by the Commission.⁴

Complaint

4. The Arkansas Commission seeks 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

³ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 173-84 (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*, 380 U.S. App. D.C. 353, 522 F.3d 378 (D.C. Cir. 2008).

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

amortization. The Arkansas Commission asserts that this modification would remove certain language from section 30.12 that has been construed by some parties to provide this Commission with 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. It argues that such substitution can lead to unintended, perverse outcomes, rendering Service Schedule MSS-3 unjust and unreasonable.

5. The Arkansas Commission states, for example, 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 Account 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 notes 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 seeks removal of the italicized language from Service Schedule MSS-3, and similar language in the other definitions at issue.

6. The Arkansas Commission argues that the rough production cost equalization formula is not a typical wholesale rate matter, but instead is a reallocation of production costs among Entergy Operating Companies. This reallocation, the Arkansas Commission argues, is based on actual costs that are generally the basis of retail rates established by and approved by retail regulators, with a few exceptions. In a typical wholesale case, the Commission will make its own return on equity analysis, which may often differ from that approved by retail regulators. However, the rough production cost equalization formula is not a typical wholesale rate, the Arkansas Commission argues, and is intended to bring the production costs faced by the retail ratepayers in different states into a range defined by the bandwidth adopted in Opinion Nos. 480 and 480-A. Accordingly, it maintains, it is reasonable to expect that the bandwidth calculation will include actual production costs, including depreciation and nuclear decommissioning costs approved by retail regulators as part of the basis for retail rates.

7. In the Initial Decision in Docket No. ER07-956-000, 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.⁵ The Arkansas Commission argues that the substitution by the Presiding Judge of imputed depreciation rates in place of the actual depreciation rates approved by retail regulators leads to a perverse result, whereby Arkansas ratepayers will have to pay more due to higher bandwidth payments. The Arkansas Commission also states that Opinion No. 480 intended sharing to be on an 80/20 basis, where Entergy Arkansas shares approximately 80 percent of its low production costs with the other Operating Companies, and also shares approximately 20 percent of the other companies' high production costs. Substituting imputed depreciation rates skews the 80/20 sharing rate to the detriment of Entergy Arkansas ratepayers, and is thus unjust, unreasonable and unduly discriminatory, the Arkansas Commission argues.

8. The Arkansas Commission also states that the subject language in section 30.12 of Service Schedule MSS-3 was taken inadvertently from Service Schedule MSS-4. Arkansas Commission argues that Service Schedule MSS-4 is a typical wholesale formula rate for the actual sale of discrete power from one Operating Company to another, and thus the result of the Commission approving different depreciation rates for sales under Service Schedule MSS-4 is different than it would be in the bandwidth calculation.

9. With respect to whether these issues are pending in another proceeding, the Arkansas Commission states that the Commission has not yet issued its opinion on the Presiding Judge's Initial Decision in Docket No. ER07-956-000. However, it argues that the specific issue of whether to modify Service Schedule MSS-3 to remove the language at issue is not pending before the Commission in that matter, and, therefore a ruling in this Complaint is necessary.

Notice and Responsive Pleadings

10. Notice of the Complaint was published in the *Federal Register*, 74 Fed. Reg. 14,121 (2009), with Respondents' answer, comments, interventions, and protests due on or before April 9, 2009.

⁵ The nuclear generating units at issue belonging to Entergy Arkansas, ANO 1 and ANO 2, were granted license extensions by the Nuclear Regulatory Commission, resulting in 60-year license terms. However, the bandwidth filing used 40-year depreciation terms for these units, as approved for retail rates by the Arkansas Commission. The Initial Decision found that a consistent rule was necessary for the purposes of the bandwidth filing requiring depreciation rates to be based on the term of the Nuclear Regulatory Commission license, as required by Commission policy. See *Entergy Services, Inc.*, 124 FERC ¶ 63,026, at P 447 (2008) (Initial Decision).

11. Motions to intervene were filed by: Union Electric Company d/b/a AmerenUE, Occidental Chemical Corporation, NRG Companies, and East Texas Cooperatives. The Mississippi Public Service Commission filed a notice of intervention. The Louisiana Commission filed a notice of intervention and protest. The Council of the City of New Orleans, Louisiana (New Orleans) filed a notice of intervention and conditional protest. Entergy filed an answer to the complaint.⁶ The Arkansas Commission filed an answer to Entergy's answer and the protests. New Orleans filed a response.

Entergy's Answer

12. Entergy states that the issues addressed in the Arkansas Commission's Complaint are currently pending before the Commission in Docket Nos. ER07-956 and ER08-1056.⁷ Accordingly, Entergy requests that the Commission hold this complaint in abeyance subject to the outcome of the proceedings in Docket Nos. ER07-956 and ER08-1056.

Other Responsive Pleadings

13. The Louisiana Commission raises several objections to the Complaint in its protest. First, it argues that the issue of whether it is just and reasonable to use state-set decommissioning rates has already been litigated. The Louisiana Commission argues that neither Commission policy nor Service Schedule MSS-3 require the Commission to accept the depreciation determinations of state Commissions. It argues that the Arkansas Commission is seeking to alter the rate schedule to mandate the use of state-set rates, which was already litigated in the Initial Decision.

14. The Louisiana Commission also states that Commission precedent requires that nuclear depreciation costs be based on service lives consistent with the license lives approved by the Nuclear Regulatory Commission. It notes that using Nuclear Regulatory Commission license life is the only correct and consistent basis for determining nuclear depreciation rates. The Louisiana Commission also argues that the Complaint requests an unjust cross-subsidy among jurisdictions.

15. The Louisiana Commission states that the Arkansas Commission's argument that the application of Commission policy to depreciation rates will have "perverse"

⁶ Entergy's answer was filed by Entergy Services, Inc. on behalf of itself and the Entergy Operating Companies. Entergy Services, Inc. objects to the inclusion of Entergy Corporation in the Complaint.

⁷ As noted above, ER07-956 is the first annual bandwidth filing made by Entergy on May 29, 2007. ER08-1056 is the second annual bandwidth filing made by Entergy on May 30, 2008, and subsequently set for hearing.

consequences is incorrect, and was already litigated in Docket No. ER07-956-000. The Louisiana Commission notes that depreciation is a matter of timing capital cost recovery; if a retail regulator requires customers to pay more today, the customers will pay less later. However, it argues, the attempt by the Arkansas Commission to delay depreciation until after the bandwidth period could create perverse results for ratepayers in jurisdictions that did not attempt to manipulate the rate schedule.

16. The Louisiana Commission also notes that the Commission is not required to accept the Form No. 1 inputs entered by Entergy merely because of the presence of the numbers on the form. Such a requirement would be counter to Commission precedent, and would be unjust and unreasonable. The Louisiana Commission also states that Commission precedent holds that the Commission does not defer to state regulators when setting depreciation rates for wholesale ratemaking purposes.

17. Finally, the Louisiana Commission argues that the current language in Service Schedule MSS-3 related to depreciation and decommissioning is just and reasonable and should not be changed. The Louisiana Commission notes that the Commission has exclusive jurisdiction under the FPA to regulate all aspects of the bandwidth calculation. This authority, it maintains, cannot be delegated to state retail regulators under Commission precedent.⁸

18. New Orleans objects to the Arkansas Commission's Complaint. It asserts that removal of the language at issue in section 30.12 would not deprive the Commission of its authority under the FPA to regulate all aspects of the bandwidth calculation. This is because the Commission's authority to evaluate and modify depreciation and decommissioning expenses used in the bandwidth remedy formula is based on the FPA, not the System Agreement. New Orleans argues that a contract cannot deprive the Commission of its jurisdiction, nor can the Commission abdicate its jurisdiction through approving the contract. However, even if the Commission determines that the language at issue in the Complaint provides its sole jurisdiction, New Orleans believes the Complaint is still mistaken.

19. New Orleans argues that the Commission must have jurisdiction to evaluate the justness and reasonableness of the major cost components that compose a wholesale rate that is itself subject to the Commission's exclusive jurisdiction. It notes that the six Entergy Operating Companies are regulated by five retail regulators, and each regulator may use a different policy to determine inputs. Accordingly, the Commission must be able to serve as an objective arbiter to determine whether the expenses included in wholesale rates are just and reasonable.

⁸ See *Entergy Services, Inc.*, 120 FERC ¶ 61,020, at P 28 (2007).

20. New Orleans also argues that the Arkansas Commission failed to satisfy its burden under section 206 of the FPA to show that the existing rate is unjust and unreasonable. Although the Arkansas Commission points to the perverse outcomes that would be contrary to the Commission's "intended" 80/20 sharing of production costs between Energy Arkansas and the other Entergy companies, New Orleans argues that there is no 80/20 sharing requirement established by the Commission. New Orleans asserts that in both Opinion Nos. 480 and 480-A, the Commission established a +/- 11 percent bandwidth for production costs, and left the manner in which production costs are shared as a function of each company's respective energy usage and annual placement within the bandwidth. Finally, New Orleans argues that the Complaint is merely another attempt by the Arkansas Commission to reduce Entergy Arkansas' bandwidth remedy payments.

Discussion

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 the timely, unopposed motions to intervene serve to make the entities filing them parties to this proceeding.

22. 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 an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Arkansas Commission's or New Orleans' answers and will, therefore, reject them.

23. Section 206 of the FPA requires a complainant to satisfy a dual burden in order to obtain the relief it seeks in a complaint.⁹ The complainant must establish that the current rate is unjust and unreasonable and the complainant must then establish that its alternative rate proposal is just and reasonable.¹⁰ We find that Arkansas Commission has not met its burden under section 206.

24. Initially, we note that most of the Arkansas Commission's arguments are directed at the Initial Decision issued in Docket No. ER07-956-000 and are beyond the scope of its Complaint. Those arguments address how existing section 30.12 should be applied, which is at issue in the Docket No. ER07-956-000 proceeding. As noted above, in the Initial Decision in Docket No. ER07-956-000, 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 Arkansas Commission's complaint in this proceeding, however, seeks to have language that was interpreted by the Initial Decision to require Entergy to change the depreciation rates in

⁹ 16 U.S.C. § 824e (2006).

¹⁰ See *Michigan Electric Transmission Co.*, 116 FERC ¶ 61,164, at P 12 (2006).

the first bandwidth proceeding removed altogether from Entergy's Service Schedule MSS-3.

25. As to the substance of the Arkansas Commission's Complaint, we note that the Commission 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. 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. In other words, 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.¹¹ Therefore, the language at issue is appropriate and consistent with the Commission's authority under the FPA. The Arkansas Commission has provided no justification that would warrant removing the language.

26. Because we are rejecting the Complaint for failure to meet the required burden under section 206, we find that it is not necessary to hold this proceeding in abeyance as requested by Entergy Services, Inc.

The Commission orders:

The Arkansas Commission's Complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹¹ 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) ("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.").