

128 FERC ¶ 61,091  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket No. ER09-1224-000

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

(Issued July 27, 2009)

1. Entergy Services, Inc. (Entergy),<sup>1</sup> on behalf of Entergy Operating Companies,<sup>2</sup> 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, 2009, 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.<sup>3</sup> Opinion Nos. 480 and 480-A approved a numerical bandwidth of +/- 11 percent of the Entergy system average

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<sup>1</sup> Entergy Services, Inc. is a wholly-owned subsidiary of Entergy Corporation.

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

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

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 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.<sup>4</sup> 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.

4. On May 30, 2008, in Docket No. ER08-1056-000, Entergy submitted its second annual bandwidth implementation filing that set forth rates pursuant to Service Schedule MSS-3 of the System Agreement, based on calendar year 2007 data. The Commission accepted those rates for filing, suspended them for a nominal period and made them effective June 1, 2008, subject to refund. The Commission also established hearing and settlement judge procedures. The hearing ended on June 17, 2009. A partial uncontested settlement submitted by the parties was certified by the presiding judge on June 19, 2009.

## II. Entergy's Filing

5. On May 29, 2009, Entergy filed rates (third annual bandwidth implementation filing) pursuant to section 205 of the Federal Power Act (FPA)<sup>5</sup> to implement the Commission's decisions in Opinion Nos. 480 and 480-A.

6. 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' 2008 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, 2009, without suspension, hearing, or investigation. Entergy states that the requested effective date

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<sup>4</sup> *Entergy Services, Inc.*, 120 FERC ¶ 61,094 (2007).

<sup>5</sup> 16 U.S.C. § 824e (2006).

implements the Commission's directive that bandwidth remedy billing commence in June.<sup>6</sup>

7. Entergy highlights five items contained in the rate calculation. First, it references a partial settlement agreement submitted on May 21, 2009 by Entergy in Docket No. ER08-1056 that was supported by all active parties in that proceeding. Entergy states that this settlement provides, among other things, that the 2009 Bandwidth Calculation: (1) will not be adjusted for the Texas rate freeze (section 2.2 of the settlement); (2) will not include short-term debt in determining the capital structure of any Entergy Operating Company (section 2.3 of the settlement); (3) will use the Entergy Arkansas actual capital structure (section 4.2 of the settlement); and (4) Entergy Arkansas' actual production costs will not include \$16,000,000 associated with Blytheville turbine costs (section 6.2 of the settlement).<sup>7</sup>

8. Next, Entergy states that it has submitted an amendment to section 30.12 of Service Schedule MSS-3 in Docket No. ER09-1185 to ensure purchased power costs are reflected in an Operating Company's actual production costs in the year in which the costs are incurred, but without limiting a regulator's discretion to determine when such costs are recovered from an Operating Company's retail customers. Entergy requested an effective date of May 31, 2009 for this amendment, which is supported by the Arkansas Public Service Commission, the Louisiana Public Service Commission (Louisiana Commission), the Council of the City of New Orleans, the Mississippi Public Service Commission, East Texas Cooperative, and Texas Industrial Energy Consumers. Entergy states that it has included the effect of this amendment in the 2009 Bandwidth Calculation even though the Commission has not yet acted on Entergy's filing in Docket No. ER09-1185.<sup>8</sup>

9. Third, Entergy states that in 2008 seven sub-accounts were reclassified from Account 283 (Accumulated Deferred Income Taxes) to Account 282 (Accumulated Deferred Income Taxes – Other Property). Entergy states that five of these accounts are included in the Ratemaking Balances of Accumulated Deferred Income Taxes and

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<sup>6</sup> Citing *Louisiana Pub. Service Comm'n v. Entergy Services, Inc.*, 119 FERC ¶ 61,095, at P 20 (2007).

<sup>7</sup> This partial uncontested settlement was certified by the Administrative Law Judge on June 19, 2009, and is still pending before the Commission.

<sup>8</sup> We note that, on July 20, 2009, the Commission issued an order in Docket No. ER09-1185 that accepted Entergy's proposed amendment, finding that it was needed to ensure that the Operating Companies' actual production costs are consistently reflected in the bandwidth payments. See *Entergy Services, Inc.*, 128 FERC ¶ 61,069 (2009).

included in the 2009 Bandwidth Calculation, while the other two storm-related transfers are not. Entergy states that three other storm-related sub-accounts were also not included in the 2008 or 2009 Bandwidth Calculations. The five storm-related accounts consist of deferred income taxes relating to: (1) Net Operating Loss carry forward (federal); (2) casualty loss deduction due to storm losses (federal and state); and (3) contra-securitization for storm expenditures (federal and state).

10. Fourth, 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.<sup>9</sup> 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 States.

11. Fifth, 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.<sup>10</sup>

### **III. Notice of Filing and Responsive Pleadings**

12. Notice of Entergy's filing was published in the *Federal Register*, 74 Fed. Reg. 27,310 (2009), with interventions and protests due on or before June 19, 2009. Union Electric Company (Union Electric) filed a motion to intervene and protest. Louisiana Commission filed a notice of intervention and protest. The Council of the City of New Orleans filed a notice of intervention. Texas Industrial Energy Consumers, Louisiana Energy Users Group, and Arkansas Electric Energy Consumers, Inc. filed motions to intervene. Entergy then filed an answer in response to the protests.

13. Union Electric states that it purchases capacity from other suppliers, such as Entergy Arkansas under a Service Agreement for Market Rate (Schedule SP) Sales, dated

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<sup>9</sup> 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 Services, Inc.*, 123 FERC ¶ 63,020 (2008).

<sup>10</sup> Entergy's May 20, 2008 settlement agreement is contested, and is currently pending before the Commission in Docket No. ER07-985-000.

April 1, 1999 (Service Agreement).<sup>11</sup> Union Electric states that this Service Agreement, which establishes a formulaic Fuel and Purchased Energy Rate, was effective April 1, 1999 and will terminate on August 25, 2009. Union Electric restates arguments it has made in Docket Nos. ER07-956, EL08-60 and ER08-1056 that the bandwidth payments made by Entergy Arkansas to the other Operating Companies do not constitute a “purchased energy expense” within the meaning of the Service Agreement. Union Electric argues that there are no purchase transactions or additional amounts of energy associated with the bandwidth payments. It maintains that it does not receive any additional service under the Service Agreement as a result of Entergy Arkansas making an administratively-determined payment to its affiliated Operating Companies to remedy the fact that Entergy Arkansas’ production costs are lower than the Entergy system average production costs. Thus, it argues, any attempt by Entergy Arkansas to flow through to Union Electric an allocated portion of Entergy Arkansas’ bandwidth payments is in direct violation of the Service Agreement.

14. Union Electric requests that the Commission not only reject Entergy’s filing as violating section 205 of the FPA and the filed rate doctrine, but that the Commission require Entergy to adhere to the rates, terms and conditions of the Service Agreement. Additionally, Union Electric requests that the Commission require Entergy to provide Union Electric with refunds, including interest, for all over-collections under the Service Agreement. Union Electric requests that the Commission reject Entergy’s 2009 bandwidth filing as it pertains to Union Electric. In the alternative, Union Electric requests that the Commission consolidate this proceeding with the proceedings in Docket Nos. ER07-956, EL08-60 and ER08-1056 and hold this proceeding in abeyance pending the outcome of those proceedings.

15. Louisiana Commission argues that Entergy’s first two annual bandwidth filings in Docket Nos. ER07-956 and ER08-1056 have not been resolved. It states that it adopts and raises all of the issues it previously raised in those earlier dockets, as well as in Docket No. EL08-51, that have not been settled or resolved in order to preserve those issues, to the extent that they are relevant to this docket. Louisiana Commission states that these issues relate to: (1) Spindletop; (2) Accumulated Deferred Income Tax associated with Waterford 3 capital lease amounts; (3) Accumulated Deferred Income Tax amounts in Account Nos. 190, 281 and 282; (4) Account No. 924; (5) Vidalia capital structure; (6) depreciation and decommissioning; (7) double-count exclusion of A&G expense; (8) prudence issues; and (9) timing.

16. Louisiana Commission states that it anticipates this proceeding will be no different than the previous cases, and that the issues not addressed directly in this protest may be

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<sup>11</sup> This Service Agreement is Service Agreement No. 38, filed in Docket No. ER99-2731. Entergy Services, Inc., FERC Electric Tariff, First Revised Vol. No. 4.

later discovered. Louisiana Commission requests that: (1) hearing procedures be established to allow discovery on the application in this docket; (2) the bandwidth remedy payments be re-calculated in accordance with this protest and in compliance with Opinion Nos. 480 and 480-A; and (3) additional bandwidth payments and receipts be ordered as required.

17. Louisiana Commission argues that the errors and changes in Entergy's filing in this proceeding, compared to Exhibits ETR-26 and ETR-28, reduce the payments from Entergy Arkansas to Entergy Gulf States, Entergy Texas, Entergy Louisiana, Entergy New Orleans, and Entergy Mississippi based on the 2008 test year. Louisiana Commission argues that these errors make the bandwidth payment unjust and unreasonable and unduly discriminatory in violation of the FPA.

18. Louisiana Commission further contends that it has made every attempt to identify the alterations to the proposed methodology that can be gleaned from Entergy's application and supporting work papers. However, Louisiana Commission notes that like in the previous bandwidth dockets, it may be impossible to identify all issues without the opportunity to obtain further discovery from Entergy related to its 2008 test year figures. Additionally, Louisiana Commission states that in Docket Nos. ER07-956 and ER08-1056, the Commission allowed issues to be subjected to hearing that were not specifically identified during the short time period allowed for protests. It states that issues identified during discovery can have an impact on the justness and reasonableness of the bandwidth rate. Therefore, Louisiana Commission argues that intervenors should not be prejudiced if changes and errors were made by Entergy that are not readily identifiable on the face of its filing, and reserves its right to raise other issues during the hearing process.

19. Louisiana Commission also raises other issues it states were not identified in the prior cases: (1) inclusion of interruptible load revenues and costs; (2) inclusions of out-of-period revenues and costs; (3) Grand Gulf retained share sales; (4) reclassification of accumulated deferred income taxes; (5) Entergy's cost calculation.

20. Entergy contends that the Louisiana Commission incorrectly states that the Commission's order dismissing the Louisiana Commission's complaint to exclude interruptible load from the bandwidth calculation establishes that the revenue credits and costs related to the interruptible load adjustments required by Opinion Nos. 468 and 468-A<sup>12</sup> be excluded from the calculation of Operating Company production costs. Entergy argues that there is no such holding, and that the Louisiana Commission portrays this

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<sup>12</sup> *Louisiana Pub. Service Comm'n and the Council of the City of New Orleans v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *order denying reh'g*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005).

matter as being an implementation of an existing Commission ruling when no such ruling exists. Entergy asserts that the Commission should reject the Louisiana Commission's attempt to litigate the interruptible load issue in this proceeding. Further, Entergy contends that the Louisiana Commission's issue regarding inclusion of refund amounts in the bandwidth formula must be raised in a section 206 complaint, and not in this proceeding.

#### **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 notice 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 will accept Entergy's answer because it has provided information that assisted us in our decision-making process.

##### **B. Union Electric's Request for Consolidation**

22. We will deny Union Electric's request to consolidate this proceeding with Docket Nos. ER07-956, EL08-60 and ER08-1056. Generally, the Commission consolidates cases where there are common issues of law and fact and does so for purposes of settlement, hearing, and decision.<sup>13</sup> The hearing and settlement judge procedures for Docket No. ER07-956 have been completed, and the hearing for Docket No. ER08-1056 has been completed and a settlement has been certified by an administrative law judge. The complaint in Docket No. EL08-60 is being held in abeyance at the request of the parties pending the outcome of the proceeding in Docket No. ER07-956. Consequently, there is no proceeding to consolidate with this proceeding and consolidation would serve no purpose.

##### **C. Hearing and Settlement Judge Procedures**

23. 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.

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<sup>13</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 126 FERC ¶ 61,185, at 62,105 (2009) (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,142, at P 22 (2008)).

24. 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, 2009,<sup>14</sup> as requested, subject to refund, and set them for hearing and settlement judge procedures.

25. 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.<sup>15</sup> 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.<sup>16</sup> 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.

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<sup>14</sup> *Louisiana Pub. Service Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203, at P 10 (2006). 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 to be consistent with the remedy adopted in Opinion No. 480 the proposed revisions should not be permitted to take effect until a future calendar year. 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).

<sup>15</sup> 18 C.F.R. § 385.603 (2008).

<sup>16</sup> 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](http://www.ferc.gov) –click on Office of Administrative Law Judges).

The Commission orders:

(A) Entergy's proposed rates are hereby accepted for filing and suspended for a nominal period, to become effective June 1, 2009, 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 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, NE., 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 )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.