

144 FERC ¶ 61,242  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

September 27, 2013

In Reply Refer to:  
Louisiana Public Service Commission v. Entergy  
Corporation, Entergy Services, Inc., Entergy  
Louisiana, LLC, Entergy Arkansas, Inc., Entergy  
Mississippi, Inc., Entergy New Orleans, Inc.,  
Entergy Gulf States Louisiana, L.L.C., Entergy  
Texas, Inc.,  
Docket No. EL10-65-002

Entergy Services, Inc.  
101 Constitution Avenue, NW  
Suite 200 East  
Washington, DC 20001

Attn: Andrea Weinstein, Esq.  
Attorney for Entergy Services, Inc.

Dear Ms. Weinstein:

1. On November 18, 2011, you filed, in the above-referenced docket, a Settlement Agreement (Settlement) on behalf of Entergy Services, Inc. (Entergy) and the Settling Parties.<sup>1</sup> On December 8, 2011, Commission Trial Staff submitted initial comments in support of the Settlement. No other comments were received. On January 11, 2012, the Settlement Judge certified the uncontested Settlement to the Commission.<sup>2</sup>

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<sup>1</sup> The Settling Parties are Entergy, the Arkansas Public Service Commission, the Louisiana Public Service Commission, the Mississippi Public Service Commission, and the Council of the City of New Orleans.

<sup>2</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 138 FERC ¶ 63,002 (2012). On January 12, 2012, the Administrative Law Judge issued an errata correcting the docket number of that Certification of Uncontested Settlement order to EL10-65-002. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Docket No. EL10-65-002, at 1 (Jan. 12, 2012).

2. The Settling Parties agree to revisions to Service Schedules MSS-3 and MSS-4 of the Entergy System Agreement that address the treatment of acquisition adjustments, both positive and negative, in the plant ratio variables, on a generic basis.
3. Section II.(8) of the Settlement provides a “just and reasonable” standard of review for unilateral modifications by Settling Parties and/or the Commission. In contrast, section II.(8) seeks to bind (non-settling) third parties to the *Mobile-Sierra* “public interest” standard of review. Because the Settlement appears to invoke the *Mobile-Sierra* “public interest” presumption with respect to third parties, we will analyze the applicability here of that more rigorous application of the just and reasonable standard.
4. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,<sup>3</sup> however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.
5. The Entergy System Agreement, a Commission-approved rate schedule that governs, among other things, the allocation of certain costs associated with the integrated operations of the Entergy affiliates, was negotiated among Entergy affiliates.<sup>4</sup> For this reason, the Entergy System Agreement does not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Consequently, the Entergy System Agreement does not embody “contract rates, terms, or conditions that *necessarily* qualify for a *Mobile-Sierra* presumption.”<sup>5</sup>

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<sup>3</sup> *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

<sup>4</sup> See Entergy System Agreement, Preface (Preamble and Sections 0.05 and 1.03).

<sup>5</sup> *Panhandle Eastern Pipe Line Co.*, 143 FERC ¶ 61,041, at P 84 (2013); *Entergy Arkansas, Inc.*, 143 FERC ¶ 61,299, at P 92 (2013).

6. As we have stated recently, in the context of reviewing settlements that do not involve “contract rates,” the Commission has discretion as to whether to approve a request to impose on third parties the more rigorous application of the statutory “just and reasonable” standard of review that is often characterized as the *Mobile-Sierra* “public interest” standard of review.<sup>6</sup> The Commission also stated in these orders that it will not approve imposition of that more rigorous application of the statutory “just and reasonable” standard of review on future changes to an agreement sought by non-settling third parties, absent compelling circumstances such as were found to exist in *Devon Power*. We find that the circumstances presented here do not satisfy that test. Thus, we find it unjust and unreasonable to impose the more rigorous application of the statutory “just and reasonable” standard of review in the instant proceeding with respect to future changes to the Settlement sought by a non-settling third party.

7. The Settlement, and hence this order, resolves only the acquisition adjustment issue that was set for hearing in this sub-docket.<sup>7</sup> With the exception of the issue discussed above, the Settlement appears to be fair and reasonable and in the public interest.<sup>8</sup> As such, the Settlement is conditionally approved subject to the Settling Parties filing, within 30 days of the date of this order, a revised settlement agreement reflecting a revision to the standard of review provision that applies to third parties.

8. Within 30 days of the date of this order, Entergy is required to submit a compliance filing through eTariff to ensure that its electronic tariff data base reflects the

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<sup>6</sup> See, e.g., *MidAmerican Energy Co.*, 138 FERC ¶ 61,028, at P 7 (2012) (citing *Devon Power, LLC*, 134 FERC ¶ 61,208, *order on reh’g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*), *aff’d*, *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364 (D.C. Cir. 2013); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 24 (2011)).

<sup>7</sup> The Commission set four additional issues for hearing in Docket No. EL10-65-000: (1) Accumulated Deferred Income Taxes direct assignments; (2) Spindletop Regulatory Asset capital lease accounting; (3) interruptible load; and (4) Waterford 3 capital lease Accumulated Deferred Income Taxes. The settlement procedures and hearing on these four issues are being held in abeyance pending the outcome of other proceedings currently before the Commission. This order does not address these four issues and the Settling Parties reserve all rights with respect to the settlement procedures/hearing on these issues held in abeyance.

<sup>8</sup> Likewise, with the exception of the issue discussed above, the Commission’s approval of the Settlement Agreement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

Commission's action in this proceeding.<sup>9</sup> In its compliance filing, Entergy should request an effective date for the revisions to Service Schedule MSS-3 of "the date that the positive acquisition adjustment for the Acadia Power Block Two transaction is included in the Bandwidth Formula (Service Schedule MSS-3)."<sup>10</sup> For the revisions to Service Schedule MSS-4, Entergy should request an effective date of "the first full monthly billing cycle after Commission acceptance of the Settlement," in accordance with the terms of the Settlement.<sup>11</sup>

By the direction of the Commission. Commissioner Norris is concurring with a separate statement attached.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>9</sup> See *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).

<sup>10</sup> Settlement, Section II.(3). See *Entergy Servs., Inc.*, 141 FERC ¶ 61,018, at P 5 & n.4 (2012) (citing *Entergy Servs., Inc.*, 133 FERC ¶ 61,099, at P 20, ordering para. (A) (2010)); see also *Entergy Servs., Inc.*, 140 FERC ¶ 61,111, at P 20 (2012).

<sup>11</sup> Settlement, Section II.(3).

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Louisiana Public Service Commission v. Entergy  
Corporation, Entergy Services, Inc., Entergy Louisiana,  
LLC, Entergy Arkansas, Inc., Entergy Mississippi, Inc.,  
Entergy New Orleans, Inc., Entergy Gulf States  
Louisiana, L.L.C., Entergy Texas, Inc.

Docket No. EL10-65-002

(Issued September 27, 2013)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves the Settlement between Entergy and the Arkansas Public Service Commission, the Louisiana Public Service Commission, the Mississippi Public Service Commission, and the Council of the City of New Orleans that addresses revisions to Service Schedules MSS-3 and MSS-4 of the Entergy System Agreement. The Commission approves the Settlement conditioned upon the Settling Parties filing a revised settlement that changes the standard of review provision as it applies to third parties to no longer bind third parties to the *Mobile-Sierra* public interest standard of review. I agree with the order that the Entergy System Agreement that is the subject of the Settlement is not the kind of contract rate to which the public interest presumption would apply. However, while the D.C. Circuit has determined that the Commission may exercise discretion under the Federal Power Act to apply the public interest standard where the *Mobile-Sierra* presumption does not apply,<sup>1</sup> I continue to disagree, as a policy matter, that the Commission should exercise such discretion.<sup>2</sup>

I believe the Commission can exercise its respect for rate certainty and stability and recognize the value of settlements, while protecting the rights of third parties and without sacrificing a future Commission's ability to review rates that may no longer be just and reasonable due to a change in circumstances. Therefore, I disagree with the analysis in this order of whether the Commission should permit the application of the public interest standard to future changes to the Settlement.

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<sup>1</sup> *New England Power Generators Ass'n, Inc. v. FERC*, No. 11-1422, at 10-12 (D.C. Cir Feb. 15, 2013).

<sup>2</sup> *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *Norris, dissenting in part*.

For these reasons, I respectfully concur.

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John R. Norris, Commissioner