

145 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Entergy Arkansas, Inc.	Docket Nos. ER13-1508-000
Entergy Gulf States Louisiana, L.L.C.	ER13-1509-000
Entergy Louisiana, LLC	ER13-1510-000
Entergy Mississippi, Inc.	ER13-1511-000
Entergy New Orleans, Inc.	ER13-1512-000
Entergy Texas, Inc.	ER13-1513-000

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

(Issued December 16, 2013)

1. On May 17, 2013, pursuant to section 205 of the Federal Power Act (FPA),¹ Entergy Services, Inc. (Entergy), as agent and on behalf of the Entergy Operating Companies,² submitted a tariff that is designed to govern cost-based unit power sales and sales of designated power purchases (Unit Power Sales Tariff) between Entergy Arkansas and its Operating Company affiliates, once Entergy Arkansas withdraws from the Entergy System Agreement (System Agreement), effective December 18, 2013, and, along with the other Operating Companies, joins the Midcontinent Independent System

¹ 16 U.S.C. § 824d (2012).

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

Operator, Inc. (MISO), effective December 19, 2013.³ In this order, we accept Entergy's proposed tariff for filing and suspend it for a nominal period, to become effective December 19, 2013, as requested, subject to refund. We also establish hearing and settlement judge procedures.

I. Background

2. On April 25, 2011, the Operating Companies announced a proposal to join MISO, with a target implementation date of December 19, 2013, to coincide with Entergy Arkansas' withdrawal from the System Agreement. To facilitate the MISO integration, Entergy filed, in Docket No. ER13-432-000, amendments to the System Agreement that: (1) allocate six categories of MISO Market Settlement charges and credits (i.e., losses, ancillary services, uplift, congestion, energy purchases and sales at locational marginal price, and administrative charges) to the Operating Companies that remain within the System Agreement; and (2) remove all references to Entergy Arkansas from the System Agreement. Entergy also committed to make an FPA section 205 filing by mid-2013 to establish an "MSS-4-like" rate schedule to govern ongoing sales of energy and capacity between Entergy Arkansas and the other Operating Companies at cost-based rates outside of the System Agreement. Entergy's filing in Docket No. ER13-432-000 is pending before the Commission.

II. Entergy's Filings

3. Pursuant to its commitment in Docket No. ER13-432-000, on May 17, 2013, Entergy submitted in the instant dockets a Unit Power Sales Tariff that Entergy states is nearly identical to Service Schedule MSS-4⁴ of the System Agreement. Entergy states

³ On November 19, 2009, the Commission accepted Notices of Cancellation that terminate the participation of Entergy Arkansas and Entergy Mississippi in the System Agreement, effective December 18, 2013 and November 7, 2015, respectively. *Entergy Services, Inc.*, 129 FERC ¶ 61,143, at PP 58-59 (2009).

⁴ Under the System Agreement, Service Schedule MSS-4 governs unit power purchases between Operating Companies and sales of power purchased by another Operating Company. Any Operating Company making a unit power purchase from a Designated Generating Unit is entitled to receive each hour the proportionate share of energy generated by the Designated Generating Unit. Service Schedule MSS-4 prescribes a formula rate for calculating the payment by one Operating Company to another for a sale of the capability and associated energy of a Designated Generating Unit. The formula rate is calculated monthly based on costs booked to certain accounts included in FERC's Uniform System of Accounts. Service Schedule MSS-4 also prescribes the rate for the resale from one Operating Company to another Operating

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that the Unit Power Sales Tariff ensures that the six existing Service Schedule MSS-4 transactions in which Entergy Arkansas is obligated to sell capacity and energy to the other Operating Companies⁵ beyond December 18, 2013, will continue after Entergy Arkansas withdraws from the System Agreement and, along with the other Operating Companies, joins MISO. The Unit Power Sales Tariff will also govern any new agreements for capacity and energy sales between Entergy Arkansas and the other Operating Companies, and sales between other Operating Companies if and when they withdraw from the System Agreement.⁶

4. Entergy claims that the Unit Power Sales Tariff replicates, with limited modifications to the rates, terms and conditions, the existing Service Schedule MSS-4 formula rate. According to Entergy, the Unit Power Sales Tariff merely passes through MISO's ancillary services charges and credits, uplift charges and credits, and administrative charges, and carries forward the 11 percent return on equity (ROE) contained in Service Schedule MSS-4.

5. Entergy notes that its revised System Agreement filing in Docket No. ER13-432-000 allocates, to the Operating Companies that remain within the System Agreement, some of the same categories of MISO Market Settlement charges and credits that its instant filings allocate between Entergy Arkansas and the other Operating Companies, after Entergy Arkansas withdraws from the System Agreement. As a result, to ensure that the ancillary services and uplift charges and credits are treated the same way under Service Schedule MSS-4 and under the Unit Power Sales Tariff, Entergy commits to be bound in the instant docket by the tariff language that the Commission ultimately finds to be just and reasonable in Docket No. ER13-432-000.⁷

Company, which is priced at the delivered cost of the purchase as recorded in FERC Accounts 555 and 565.

⁵ The six existing agreements, whose terms extend beyond December 18, 2013, appear in Attachment A to Entergy's filing.

⁶ The System Agreement will continue to govern sales of capacity and energy between the Operating Companies that remain within it.

⁷ Entergy Transmittal Letter at 5. Entergy does not commit to make the MISO administrative charges subject to the outcome of Docket No. ER13-432-000, because the revised System Agreement tariff recovers those costs *from the Operating Companies that remain within the System Agreement*, under a new Service Schedule MSS-8. As a result, Entergy seeks to recover the MISO administrative charges separately here, under the Unit

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6. Entergy states that the Unit Power Sales Tariff reflects a formula rate that is already on file with the Commission, and therefore requests that the Commission accept the Unit Power Sales Tariff without a hearing, effective December 19, 2013.⁸ To ensure that Entergy Arkansas' six Service Schedule MSS-4 transactions with terms that extend beyond December 19, 2013 continue uninterrupted after Entergy Arkansas withdraws from the System Agreement, Entergy also requests waiver of the 120-day notice requirement contained in section 35.3 of the Commission's regulations, 18 C.F.R. § 35.3 (2013).

III. Notice and Responsive Pleadings

7. Notice of Entergy's filing was published in the *Federal Register*, 78 Fed. Reg. 31,914 (2013), with interventions and protests due on or before June 7, 2013. The Arkansas Public Service Commission filed a notice of intervention. The Louisiana Public Service Commission (Louisiana Commission) filed a notice of intervention and a protest. Council of the City of New Orleans (New Orleans Council) filed a notice of intervention and protest. Entergy filed an answer, to which the New Orleans Council responded.

8. The New Orleans Council challenges Entergy's assertion that it seeks only to reflect Entergy Arkansas' status as a stand-alone company, and rejects Entergy's claim that because the Unit Power Sales Tariff reflects a formula rate that is already on file, the Commission should summarily approve it. The New Orleans Council states that the fact that the Commission found Service Schedule MSS-4 and its formula rate to be just and reasonable for the six-member Entergy system does not mean that the Unit Power Sales Tariff and its formula rate are just and reasonable for transactions between stand-alone Operating Companies and their affiliates. The New Orleans Council emphasizes that under section 205 of the Federal Power Act (FPA)⁹ and *Council of the City of New Orleans v. FERC*,¹⁰ the Commission must ensure that every term of the instant tariff, and

Power Sales Tariff, from Entergy Arkansas and other Operating Companies, if and when they depart from the System Agreement. *Id.*

⁸ *Id.* at 6.

⁹ 16 U.S.C. § 824d (2012).

¹⁰ *Council of the City of New Orleans v. FERC*, 692 F.3d 172, 177 (D.C. Cir. 2012) (*New Orleans v. FERC*).

of the post-withdrawal arrangement it represents, is just, reasonable and not unduly discriminatory.¹¹

9. Further, the New Orleans Council states that although Entergy is proposing to add a variety of new components and cost allocations to Service Schedule MSS-4's formula rate, it fails to: (1) define the new charges and credits; (2) disclose how they are calculated; (3) demonstrate how they will affect the individual Operating Companies; and (4) support them with testimony or cost analyses. Likewise, the New Orleans Council notes that Entergy has modified other Service Schedule MSS-4 provisions, such as Designated Power Purchase sections 3.08 and 3.09. In addition, the New Orleans Council states that Entergy has not proposed language to limit the administrative charges solely to actual energy purchases under the relevant purchased power agreement, or explained how it will attribute the ancillary services and uplift charges and credits to a particular purchased power agreement. Given the absence of information from which to determine whether the ancillary services and uplift charges and credits are just and reasonable, the New Orleans Council does not agree to be bound by the outcome of Docket No. ER13-432-000.¹² Finally, the New Orleans Council expresses concern that, despite Entergy's repeated testimony to the contrary,¹³ Entergy Arkansas' departure from the System Agreement will adversely affect the purchased power agreements' economic benefits.

10. For all of these reasons, the New Orleans Council states that Entergy has failed to show that its proposed rate is just and reasonable under section 205 of the FPA.

11. The Louisiana Commission challenges the new ancillary services charges and credits, uplift charges and credits and administrative charges. It notes, however, that the Commission has directed Entergy to ensure that its post-withdrawal operating arrangements are just and reasonable, and that the D.C. Circuit has confirmed the Commission's obligation to examine the new arrangements to ensure that they are just,

¹¹ New Orleans Council Comments at 2-8.

¹² *Id.* at 6-7.

¹³ The New Orleans Council cites the testimony of Entergy Services, Inc. witnesses David Harlan, Tr. 4306:15-4307:21 (Aug. 3, 2004), Docket No. ER03-682-000, *et al.* and Bruce Louiselle, Tr. 5814:8-21 (Aug. 27, 2004) and Tr. 6075:18-6079:12 (Aug. 30, 2004), Docket No. ER03-682-000, *et al.* New Orleans Council comments at 7, n.17.

reasonable and not unduly discriminatory.¹⁴ For this reason, the Louisiana Commission states that Entergy should be required to honor its commitment to amend the Unit Power Sales Tariff to reflect the just and reasonable language the Commission ultimately approves for the ancillary services and uplift charges and credits in Docket No. ER13-432-000, following its thorough review.¹⁵ With regard to the administrative charges, the Louisiana Commission contends that they should relate solely to generation and not to load. Regarding ROE, while the Louisiana Commission does not challenge Entergy's continued use of 11 percent in the existing Service Schedule MSS-4 agreements, it objects to Entergy "hard-wiring" an 11 percent ROE into the Unit Power Sales Tariff, given Entergy's failure to provide any support for its use in all future unit power sales and designated power purchase agreements.¹⁶

12. Entergy's answer claims that the protestors' comments: (1) recognize the need to replace the existing tariff in order to maintain Entergy Arkansas' Service Schedule MSS-4 transactions; but (2) misapprehend the nature of the MISO charges and credits. Entergy therefore clarifies that the instant filing seeks only to include administrative charges assessed to generators, and confirms its commitment to adopt the language the Commission ultimately approves for ancillary services and uplift charges and credits in Docket No. ER13-432-000. In response to allegations that it has not provided cost support for the MISO charges, Entergy states that it is merely passing-through the formula MISO charges and credits that are already on file with the Commission.¹⁷ Entergy further asserts that the 11 percent ROE should stand because Entergy has not proposed to change it, and therefore cannot be compelled to justify it.¹⁸

13. The New Orleans Council filed a motion to respond and response to Entergy's answer. In its response, the New Orleans Council states that Entergy's answer misstates or misunderstands the New Orleans Council's concerns. The New Orleans Council states that the crux of its comments was that the Commission bears a statutory responsibility to evaluate all of the Unit Power Sales Tariff's terms to determine if they are just and

¹⁴ The Louisiana Commission cites *La. Pub. Serv. Comm'n. v. Entergy Corp., et al.*, 119 FERC ¶ 61,224, at PP 47-49 (2007); *Entergy Services, Inc.*, 129 FERC ¶ 61,143, *aff'd*, *New Orleans v. FERC*, 692 F.3d at 177 (D.C. Cir. 2012).

¹⁵ Louisiana Commission Protest and Comments at 2-3.

¹⁶ *Id.* at 3-4.

¹⁷ Entergy Answer at 3-4.

¹⁸ *Id.* at 7.

reasonable, based on substantial record evidence, and not to “rubber-stamp” the tariff because a similar rate is already on file for different entities.¹⁹

14. For this reason, the New Orleans Council states that Entergy is not automatically entitled to use the 11 percent ROE that is contained in Service Schedule MSS-4, without first providing cost support to demonstrate that the proposed charges are just and reasonable. The New Orleans Council notes that Entergy has failed to support, with a discounted cash flow or other analysis, the use of an 11 percent ROE under the Unit Power Sales Tariff, and states that Entergy is wrong to assert that ratepayers bear the burden of proving that the unchanged ROE is unjust and unreasonable.²⁰

15. Likewise, the New Orleans Council states that Entergy is not automatically entitled to pass through the MISO charges and credits as a “black box;” Entergy must first provide cost support that demonstrates that the proposed charges and credits, and Entergy’s allocation of them (first to generators, and then to counterparties), are just and reasonable. The New Orleans Council points out that Entergy is not simply adjusting inputs to the formula rate, but is changing the formula to include new costs and allocations, and is therefore obligated to support the changes under section 205 of the FPA.²¹

16. Further, the New Orleans Council rejects Entergy’s assertion that the New Orleans Council recognizes the need to replace Service Schedule MSS-4 in order to maintain the existing transactions between Entergy Arkansas and the other Operating Companies. To the contrary, the New Orleans Council states that the Entergy Arkansas/Entergy New Orleans purchased power agreements are life-of-the-unit contracts that do not terminate upon withdrawal of one party from the System Agreement.²² Moreover, the New Orleans Council states that Entergy has repeatedly testified that Entergy Arkansas’ departure from the System Agreement does not affect the purchased power agreements.²³

¹⁹ New Orleans Council Motion for Leave to Respond and Response at 2 and 4, n.15.

²⁰ *Id.* at 2-4. The New Orleans Council states that while it does not challenge the 11 percent ROE in the existing purchased power agreements under Service Schedule MSS-4, it does oppose Entergy’s proposal to lock in the 11 percent ROE for all future Entergy Arkansas sales under the Unit Power Sales Tariff. *Id.* at 4.

²¹ *Id.* at 4.

²² New Orleans Council Motion for Leave to Respond and Response at 4-5.

²³ *Id.* at 5, n.17 (citing testimony identified in n.14, *supra*).

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notices of intervention 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) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Entergy's answer and the New Orleans Council's response thereto because they provide information that assisted us in our decision-making process.

B. Hearing and Settlement Judge Procedures

18. Entergy's proposed tariff raises issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures we order below.

19. Our preliminary analysis indicates that Entergy's proposed tariff 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 tariff for filing and suspend it for a nominal period, to become effective December 19, 2013, as requested, subject to refund, and set it for hearing and settlement judge procedures.²⁴

20. While we are setting this matter 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.²⁵ 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.²⁶ The settlement judge

²⁴ Given the New Orleans Council's unwillingness to be bound by the outcome of these issues in Docket No. ER13-432-000, we will not make the instant proceeding subject to the tariff language that the Commission ultimately finds to be just and reasonable in Docket No. ER13-432-000.

²⁵ 18 C.F.R. § 385.603 (2013).

²⁶ 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.

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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 continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

C. Request for Waiver

21. We will grant Entergy's request for waiver of the 120-day notice requirement under section 35.3 of our regulations, 18 C.F.R. § 35.3 (2013). We find that good cause exists to grant the waiver, to allow the Commission sufficient time to address the filing and ensure uninterrupted service on December 19, 2013, following Entergy Arkansas' withdrawal from the System Agreement and integration into MISO, along with the other Operating Companies' integration into MISO.

The Commission orders:

(A) Entergy's Unit Power Sales Tariff is hereby accepted for filing and suspended for a nominal period, to become effective December 19, 2013, 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 the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Entergy's proposed tariff. 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 (2013), 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.

The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

(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, 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.