

155 FERC ¶ 61,118  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, and Tony Clark.

Louisiana Public Service Commission

Docket No. EL01-88-014

v.

Entergy Services, Inc.

ORDER ON REHEARING AND CLARIFICATION

(Issued April 29, 2016)

1. On November 13, 2015, the Arkansas Public Service Commission (Arkansas Commission) requested rehearing of the Commission's ruling in its October 15, 2015 order in this proceeding<sup>1</sup> that found, *inter alia*, that Entergy Arkansas, Inc. (Entergy Arkansas) is not excluded from making bandwidth payments in this proceeding due to its withdrawal from the Entergy System Agreement on December 18, 2013. For the reasons discussed below, the request for rehearing is denied.

**I. Background**

2. The Commission has held that the System Agreement requires that production costs be "roughly equal" among those Entergy Operating Companies participating in the System Agreement.<sup>2</sup> In Opinion Nos. 480 and 480-A, the Commission held that the

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<sup>1</sup> *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 153 FERC ¶ 61,032 (2015) (October 15 Order).

<sup>2</sup> *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 136 (2005), *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006) (November 2006 Compliance Order), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part sub nom. La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (Louisiana Remand), *order on remand*, 137 FERC ¶ 61,047 (2011)

(continued...)

Entergy System was no longer in rough production cost equalization and adopted a numerical bandwidth remedy. This bandwidth remedy achieves rough production cost equalization on the Entergy System by not allowing any Operating Company to have production costs that are more than 11 percent above or below the system average production costs. Under the bandwidth remedy, each calendar year, the production costs of each Operating Company are calculated, with payments made by the low cost Operating Company(ies) to the high cost Operating Company(ies) such that, after reflecting the payments and receipts, no Operating Company would have production costs more than 11 percent above the Entergy System average or more than 11 percent below the Entergy System average. The Commission determined that a +/- 11 percent bandwidth would apply if the Entergy System exceeded historical cost disparities, but would otherwise allow the Entergy System to maintain the flexibility that it had traditionally enjoyed.<sup>3</sup>

3. In Opinion No. 480, issued June 1, 2005, the Commission found that the bandwidth remedy should apply prospectively in calendar year 2006, with the first payments, based on calendar-year 2006 production costs, occurring in 2007.

4. In its remand<sup>4</sup> of Opinion Nos. 480 and 480-A, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that the Commission had not provided a reasonable explanation for the Commission's decision to delay implementation of the bandwidth remedy until a full year of data had become available for the 2006 test year. The court held that the Commission's argument that use of the first calendar year of data is "the most appropriate and equitable way" to implement the bandwidth remedy was a conclusion rather than a reason, and that the Commission had failed to explain why it believes that the first calendar year is the most equitable time.<sup>5</sup>

5. In the Order on Remand, the Commission held that it would implement the bandwidth remedy on June 1, 2005, the date the Commission issued Opinion No. 480 determining that the rates were unjust and unreasonable. The Commission stated that allowing the bandwidth remedy to be implemented on June 1, 2005 is consistent with the

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(Order on Remand), *order dismissing reh'g*, 137 FERC ¶ 61,048 (2011), *order on reh'g*, 146 FERC ¶ 61,152 (2014), *order rejecting compliance filing*, 146 FERC ¶ 61,153 (2014) (Order Rejecting Compliance Filing).

<sup>3</sup> Opinion No. 480, 111 FERC ¶ 61,311 at P 144.

<sup>4</sup> Louisiana Remand, 522 F.3d 378.

<sup>5</sup> *Id.* at 400.

court's direction that, absent a reasonable explanation for a delay to implement the bandwidth remedy, it would be arbitrary and capricious for the Commission to delay implementation of a just and reasonable rate.<sup>6</sup> The Commission directed Entergy Services, Inc. (Entergy) to submit a compliance filing calculating the bandwidth payments and receipts for the period June 1, 2005 through December 31, 2005.<sup>7</sup>

6. On February 28, 2014, the Commission issued an order<sup>8</sup> rejecting a compliance filing submitted by Entergy on December 19, 2011 in response to the Order on Remand. The Commission rejected Entergy's use of six months of data as a basis for calculating the seven-month period at issue, rather than actual data for all seven months, and required Entergy to submit a subsequent compliance filing. The Commission stated that in its subsequent compliance filing, Entergy must perform bandwidth calculations for the seven-month period of June 1, 2005 through December 31, 2005 using monthly data for the seven individual months wherever possible. The Commission ruled that for components of the bandwidth formula where month-to-month variations in costs are not meant to be captured, end-of-year amounts should be used.<sup>9</sup> The Commission also ruled that payments associated with the seven-month period must include interest.<sup>10</sup>

7. On April 29, 2014, as amended on May 7, 2014 and May 23, 2014, Entergy submitted a compliance filing in response to the Order Rejecting Compliance Filing.

## **II. October 15 Order**

8. In the October 15 Order, the Commission established hearing and settlement judge procedures to examine Entergy's compliance filing. Also, as pertinent here, the Commission rejected a request by the Arkansas Commission to exclude Entergy Arkansas from making bandwidth payments in this proceeding due to Entergy Arkansas' withdrawal from the System Agreement as of December 18, 2013. The Commission noted that nothing in the Order Rejecting Compliance Filing indicated that Entergy Arkansas was to be omitted from making bandwidth payments, and the

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<sup>6</sup> Order on Remand, 137 FERC ¶ 61,047 at P 34.

<sup>7</sup> *Id.*

<sup>8</sup> *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,153 (2014) (Order Rejecting Compliance Filing).

<sup>9</sup> *Id.* PP 26-27.

<sup>10</sup> *Id.* P 30.

Arkansas Commission had failed to request rehearing.<sup>11</sup> The Commission also ruled that even if it were to accept, *arguendo*, that this is the appropriate time for the Arkansas Commission to raise this issue, it would reject the Arkansas Commission's request, finding that the bandwidth payments are obligations required by the System Agreement and are for a period when Entergy Arkansas was subject to the System Agreement.<sup>12</sup>

### **III. Request for Rehearing**

9. The Arkansas Commission argues that it was unreasonable for the Commission to reject the Arkansas Commission's request merely because the Arkansas Commission "could have requested rehearing of the Order Rejecting Compliance Filing but failed to do so."<sup>13</sup> The Arkansas Commission contends that this reasoning ignores the timing and posture of Entergy's initial compliance filing and related pleadings. It explains that Entergy's initial compliance filing was submitted on December 19, 2011, two years prior to the date (December 18, 2013) on which Entergy Arkansas withdrew from the System Agreement. It contends that because in December 2011 Entergy Arkansas would still be a participant in the System Agreement for another two years, it is not surprising that the Arkansas Commission did not challenge Entergy Arkansas' inclusion.

10. The Arkansas Commission argues that the Commission exercised flawed reasoning when it found that the Arkansas Commission could have sought rehearing of the Order Rejecting Compliance Filing because nothing in that order indicated that Entergy Arkansas would be excluded from subsequent compliance filings. It contends that it is difficult to discern how the Order Rejecting Compliance Filing put the Arkansas Commission on notice that the withdrawal issue was in play when the impact of the withdrawal was neither mentioned nor discussed. It argues that under the circumstances the Arkansas Commission cannot be faulted for failing to seek rehearing of an unidentified issue.<sup>14</sup>

11. The Arkansas Commission also argues that it is difficult to discern how the withdrawal issue could have been raised on rehearing of a compliance filing that was rejected. It explains that under long-established law, rejection means "a filing is either

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<sup>11</sup> *Id.* P 19.

<sup>12</sup> *Id.* P 20.

<sup>13</sup> Arkansas Commission Request for Rehearing at 7.

<sup>14</sup> *Id.* at 8.

deficient in form or a substantive nullity,” and thus is no longer in effect.<sup>15</sup> It contends that because after the Order Rejecting Compliance Filing was issued, Entergy’s compliance filing became a substantive nullity that was shortly to be replaced, seeking rehearing of that order for the purpose of revising that filing to exclude Entergy Arkansas from further payment would have been an exercise in futility. The Arkansas Commission argues that because it would have been fruitless to seek rehearing where, as here, the rejected filing was replaced shortly with a new filing, the Arkansas Commission appropriately challenged Entergy Arkansas’ inclusion in the replacement filing.<sup>16</sup>

12. The Arkansas Commission further argues that, regardless of the timing, Entergy Arkansas’ withdrawal from the System Agreement ended its obligations to make further bandwidth payments. It notes that, in the order approving Entergy Arkansas’ Notice of Cancellation with regard to participation in the System Agreement, the Commission found no contract provision establishing an obligation to pay, and that “the System Agreement requires no continuing obligation upon the withdrawing Operating Companies.”<sup>17</sup> It contends that the Commission failed to explain how that ruling can be squared with the instant ruling. The Arkansas Commission notes that this ruling was upheld by the D.C. Circuit.<sup>18</sup>

13. The Arkansas Commission notes that other agreements impose a condition on withdrawing parties to pay obligations incurred while they were subject to the agreement.<sup>19</sup> The Arkansas Commission also notes that reliance on the governing agreement’s language to decide what obligations survive withdrawal should override any equitable claims as to what those obligations should be. It contends that the Commission

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<sup>15</sup> *Id.* (citing *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971)).

<sup>16</sup> *Id.* at 10.

<sup>17</sup> *Id.* at 11 (citing *Entergy Servs., Inc.*, 129 ¶ 61,143, at P 62 (2009)).

<sup>18</sup> *Council of the City of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012).

<sup>19</sup> *Id.* P 14 (citing, *e.g.*, *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 31 (2008) (agreement provides that a withdrawn party “shall remain liable for any and all obligations under this Agreement that such Party incurred, that were incurred on behalf of such Party, or that arose hereunder prior to the date upon which such Party’s withdrawal ... became effective”)).

has previously rebuffed claims based on equitable principles, while finding instead that its rulings should be based on existing tariff provisions.<sup>20</sup>

14. The Arkansas Commission argues that if parties intend to impose post-withdrawal payment obligations, then it is the parties' responsibility to include the necessary language in the governing agreement. The Arkansas Commission contends that the parties to the System Agreement were aware of the System Agreement's inadequacy for imposing post-withdrawal payment obligations. It contends that the Commission indicated several years before Entergy Arkansas' withdrawal that the System Agreement's silence regarding withdrawal obligations "could be interpreted as imposing no obligations on a departing member."<sup>21</sup> It notes that in a subsequent case, the Louisiana Commission specifically raised concerns that a delay in resolving the case until after Entergy Arkansas withdrew could affect the refund determination.<sup>22</sup> The Arkansas Commission adds that, despite recognition of the issue, the parties did not seek to amend the language of the System Agreement.

15. The Arkansas Commission adds that requiring parties to amend an agreement to include post-withdrawal payment obligations prior to any party's withdrawal is consistent with the need for prior notice of rate obligations "because the filed rate doctrine prohibits assessing charges against former customers."<sup>23</sup> It argues that the System Agreement's requirement that a withdrawing party provide 96-months' notice was the only condition for withdrawal, and therefore Entergy Arkansas was not on notice that after withdrawal it would still be obligated to make the bandwidth payments at issue. The Arkansas

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<sup>20</sup> *Id.* at 15 (citing *Midwest Ind. Trans. Sys. Operator, Inc.*, 124 FERC ¶ 61,219, at P 173 (2008) (*MISO*) (finding regarding PJM Interconnection, L.L.C. (PJM) that although it might be just and reasonable for PJM to adopt a withdrawal obligation for regionally-allocated transmission costs in the future, the Commission declined to impose liability for such costs on the withdrawing transmission owner in that proceeding because it was required to interpret PJM's tariff as currently drafted)).

<sup>21</sup> *Id.* at 16 (citing *La. Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,224, at P 47 (2007)).

<sup>22</sup> *Id.* (citing Louisiana Commission, Motion to Permit Interlocutory Appeal of Order Staying Proceeding, Docket No. ER10-1350-001, at 8-9 (filed March 18, 2011)).

<sup>23</sup> *Id.* (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 706 (D.C. Cir. 2000) (*TAPS v. FERC*)).

Commission argues that absent a clear indication of such obligation, the necessary notice is not present.<sup>24</sup>

16. Lastly, the Arkansas Commission requests that the Commission clarify that the Commission's determination regarding Entergy Arkansas' obligation to make bandwidth payments constitutes final agency action. The Arkansas Commission explains that although decided in an interlocutory order setting other matters for hearing, the Commission fully resolved this issue by concluding as a legal matter that the bandwidth payments "are obligations specifically required by the System Agreement and are for a period when Entergy Arkansas was subject to the System Agreement." The Arkansas Commission notes that this finding contrasts with the remaining portion of the October 15 Order, which dealt with questions regarding the composition of the compliance filing and established hearing and settlement procedures. The Arkansas Commission argues that, as a result, the Commission's determination on Entergy Arkansas' obligation to pay constitutes final agency action even though the remainder of the order involves an interlocutory ruling that establishes further hearing procedures.<sup>25</sup>

17. The Arkansas Commission explains that as a legal matter, for agency action to be considered final, two conditions must be met: (1) the action must mark the consummation of the agency's decision-making process with respect to the matter at issue, and (2) the issue must be one by which the rights or obligations have been determined, or from which the legal consequences will flow.<sup>26</sup> It argues that the Commission's ruling that Entergy Arkansas must continue to make bandwidth payments despite no longer being subject to the System Agreement meets these conditions. The Arkansas Commission explains that the Commission did not indicate that its decision was in any way tentative or interlocutory and that its finding directly and immediately affects Entergy Arkansas (and its customers) by imposing a binding obligation to make bandwidth payments despite having withdrawn from the System Agreement.

18. The Louisiana Public Service Commission (Louisiana Commission) filed an answer.

#### **IV. Commission Determination**

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<sup>24</sup> *Id.* (citing *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 579-80 (D.C. Cir. 1990) (*Transwestern v. FERC*)).

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations omitted)).

**A. Procedural Matters**

19. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2015), prohibits answers to a request for rehearing. Therefore, we reject the Louisiana Commission's answer.

**B. Discussion**

20. We deny the Arkansas Commission's request for rehearing. First, we disagree with the Arkansas Commission's contention that it was unreasonable for the Commission to find that the Arkansas Commission could have requested rehearing of the Order Rejecting Compliance Filing. The Entergy Arkansas withdrawal from the System Agreement took effect on December 18, 2013. On February 28, 2014, the Commission issued the Order Rejecting Compliance Filing.<sup>27</sup> In that order, the Commission, *inter alia*, directed Entergy to perform a bandwidth calculation for the seven-month period at issue. As the Commission noted in the October 15 Order, nothing in the Order Rejecting Compliance Filing indicated that Entergy Arkansas was to be omitted from the bandwidth calculation in Entergy's subsequent compliance filing.<sup>28</sup> To the contrary, Entergy was directed to submit a new compliance filing and the Commission did not exclude Entergy Arkansas from any further stages of this proceeding. We reject the Arkansas Commission's contention that the rejected compliance filing was a substantive nullity, and that seeking rehearing of the Order Rejecting Compliance Filing would have been an exercise in futility. Although the Order Rejecting Compliance Filing rejected that particular compliance filing, that order is part of an ongoing proceeding establishing the obligations of parties with regard to the seven-month period at issue in 2005. We note that the Order Rejecting Compliance Filing also made other findings, including a ruling that bandwidth payments associated with the seven-month period must include interest,<sup>29</sup> and was therefore clearly subject to a request for rehearing.

21. Additionally, the Commission issued a second order in this proceeding on February 28, 2014.<sup>30</sup> In that order, the Commission, *inter alia*, confirmed that the

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<sup>27</sup> Order Rejecting Compliance Filing, 146 FERC ¶ 61,153 at PP 26-27.

<sup>28</sup> October 15 Order, 153 ¶ 61,032 at P 19.

<sup>29</sup> Order Rejecting Compliance Filing, 146 FERC ¶ 61,153 at P 30.

<sup>30</sup> *La. Pub. Serv. Comm'n v. Entergy Services, Inc.*, 153 ¶ 61,033 (2014) (Order on Rehearing).

bandwidth remedy would be implemented effective June 1, 2005, and, again, clarified that any resulting bandwidth payments must include interest. As a sophisticated entity and experienced participant in the Entergy System, the Arkansas Commission should have been aware that its interests were at stake and it has no basis for arguing that it had no notice that Entergy Arkansas would be required to make payments despite its withdrawal.

22. Further, we decline to reconsider our ruling that Entergy Arkansas remains obligated to make bandwidth payments in this proceeding. Bandwidth payments are required under the System Agreement for services exchanged among the Operating Companies during seven months in 2005 that fall entirely within the period of Entergy Arkansas' participation. Due to delays in litigation, the obligation of Entergy Arkansas to make other Operating Companies whole for costs pertaining to bandwidth payments for the seven-month period in 2005 was not finally determined until after Entergy Arkansas' withdrawal. However, having received the benefits of the System Agreement in 2005, Entergy Arkansas may not escape its obligations that accrued at that time.

23. The Arkansas Commission has not provided any persuasive authority that would persuade us that a party's contractual obligation, which accrued during the contractual relationship, may be erased if one party exercises an option to terminate the agreement. To the contrary, the Supreme Court has affirmed the principle that accrued contractual obligations do not vanish upon termination of the agreement.<sup>31</sup> In *Nolde Brothers*, the contract at issue contained an obligation to arbitrate differences arising under the contract. One of the parties argued that the obligation to arbitrate terminated with the expiration of the contract. The Supreme Court rejected this argument, finding that "it could not seriously be contended . . . that the expiration of the contract would terminate the parties' contractual obligation to resolve such a dispute in an arbitral, rather than a judicial forum."<sup>32</sup> Decisions of the lower courts also confirm that accrued contract rights do not disappear with the cancellation of the contract.<sup>33</sup>

24. Further, the cases cited by the Arkansas Commission do not support its position that liabilities accrued during the term of an agreement are extinguished when one party

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<sup>31</sup> See *Nolde Brothers, Inc. v. Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977) (*Nolde Brothers*).

<sup>32</sup> See *id.* at 251.

<sup>33</sup> See, e.g., *Int'l Ass'n of Machinists & Aerospace Workers v. Osco Brush Div. of Vistron Corp.*, 517 F.2d 239 (6<sup>th</sup> Cir. 1975) (finding that contract termination did not extinguish the right of workers to claim accrued vacation pay).

cancels its participation. Instead, the cases address the notice required to impose liability for costs recoverable in rates effective after withdrawal. For example, in *TAPS v. FERC*, the court simply observed that the Commission could not approve a new rate, and apply it to departed customers, without prior notice.<sup>34</sup> In *Transwestern v. FERC*, the court ruled that the Commission could not adopt a new rate imposing liability for rate under-collections accrued prior to the notice of the new rate.<sup>35</sup> In *MISO*, the Commission held that the withdrawing party remained liable for obligations incurred during the term of the agreement.<sup>36</sup>

25. In addition, the Commission has confirmed that the Operating Companies are bound by the terms of the System Agreement until the agreement terminates or the Operating Company withdraws. Specifically, in *Arkansas Electric Entergy Consumers, Inc. v. Entergy Corp.*,<sup>37</sup> the Commission rejected an argument that Entergy Arkansas should plan for its own operations, rather than plan on a system basis, after giving its 96-month notice of withdrawal. The Commission stated that “until Entergy Arkansas leaves the System Agreement, it continues to be part of the System Agreement and is bound by its terms.”<sup>38</sup> As a result of planning its operations on a system basis in the 96 months prior to its withdrawal (i.e., between 2005 and 2013), Entergy Arkansas received the benefits of participating in the System Agreement.

26. In addition, the Operating Companies fulfilled their obligations imposed by the System Agreement since 2005. They engaged in joint planning, single system dispatch and cost sharing through the service schedules contained in the System Agreement. The rough equalization of production costs through bandwidth payments is part of the mutual obligation undertaken by all the Operating Companies in the System Agreement. Having availed itself of the System Agreement benefits, Entergy Arkansas may not now escape its System Agreement obligations due to the delay in their determination and quantification.

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<sup>34</sup> *TAPS v. FERC*, 225 F.3d 667, 706.

<sup>35</sup> *Transwestern v. FERC*, 897 F.2d 570, 580.

<sup>36</sup> *MISO*, 124 FERC ¶ 61,219 at P 169 (holding that Duquesne remains liable after withdrawing from PJM for paying “prior allocations and previously-incurred costs (even if payable in the future)”).

<sup>37</sup> 126 FERC ¶ 61,029 (2009).

<sup>38</sup> *Id.* P 37.

27. Lastly, we clarify that denial of the Arkansas Commission's request for the rejection of Entergy's 2014 compliance filing constitutes final agency action regarding Entergy Arkansas' obligation to make bandwidth payments in this proceeding. Although the remainder of the October 15 Order addressed the establishment of hearing and settlement judge procedures, the legal question of whether Entergy Arkansas was liable for payments was resolved in that order.

The Commission orders:

(A) The request for hearing is hereby denied, as discussed in the body of this order.

(B) The request for clarification is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.