

156 FERC ¶ 61,220
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

September 26, 2016

In Reply Refer To:
Louisiana Public Service Commission
and the Council of the City of
New Orleans v. Entergy Corporation
Docket No. EL00-66-012

Entergy Corporation
101 Constitution Avenue,
Suite 200 East
Washington, DC 20001

Attention: Andrea J. Weinstein,
Assistant General Counsel

Dear Ms. Weinstein:

1. On May 11, 2011, you filed, on behalf of Entergy Services, Inc. (Entergy Services), a proposed offer of Settlement in the above-referenced proceeding.¹ On May 31, 2011, Commission Trial Staff filed comments in support of the Settlement. No other comment was filed. On June 23, 2011, the Settlement Judge certified the Settlement to the Commission as an uncontested settlement.²

2. The Settlement addresses the proper amount of refunds for the 15-month refund period of May 14, 1995 through August 13, 1996. The Settlement recognizes that, at the time of the Settlement, the questions of: (1) the Commission's authority to order refunds in the public interest; and (2) if it has such authority, whether refunds are appropriate, remained pending before the Commission. The Settlement provides that, if the Commission determines that it does not have authority to order refunds or that refunds for

¹ The parties in this proceeding are Louisiana Public Service Commission, Arkansas Public Service Commission, Mississippi Public Service Commission, and the Council for the City of New Orleans.

² *Entergy Services, Inc.*, 135 FERC ¶ 63,019 (2011).

the 15-month refund period are not appropriate in this context, then any refund amounts paid and received for the 15-month refund period will be reversed through the Entergy Intra-System Bill.

3. On July 20, 2011, you filed, on behalf of Entergy Services, and with the agreement of the other parties, a motion requesting that the Commission defer acting on the proposed Settlement until the Commission acted on the request for rehearing of the Commission's order in this proceeding issued on June 9, 2011.³ After consideration and briefing, the matter was appealed and remanded back to the Commission. On April 29, 2016, the Commission issued an order on remand affirming its decision to exercise its discretion not to order refunds and explaining the reasons why this decision was made and why this determination was the appropriate determination.⁴ In addition, in an order being issued concurrently with this order, in Docket No. EL00-66-020, the Commission denies a request for rehearing of the Remand Order. Thus, it is no longer necessary to defer acting on the pending Settlement regarding the proper amount of refunds during the 15-month refund period. As the Commission's final determination is that no refunds were appropriate, the Settlement provides that the refunds already made will be reversed through the Entergy Intra-System Bill.

4. Article 2, section 8, of the Settlement provides that “[t]he standard of review for any modifications to this [Settlement], including any modifications resulting from the Commission acting *sua sponte*, will be the just and reasonable standard of review, except that the standard of review for any modifications proposed by any non-party shall be the public interest standard or the most stringent standard permissible under applicable law.” Because the Settlement appears to invoke the *Mobile-Sierra* “public interest” presumption⁵ with respect to third parties, we will analyze the applicability here of that more rigorous application of the just and reasonable standard.

5. 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:

³ *Louisiana Public Serv. Comm'n v. Entergy Servs., Inc.*, 135 FERC ¶ 61,218 (2011).

⁴ *Louisiana Public Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120 (2016) (Remand Order).

⁵ See *United Gas Pipe Line Co. v. Mobil Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

(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*,⁶ 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.

6. 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.⁷ 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."⁸

7. As we stated in past cases, 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.⁹ 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-

⁶ *New England Power Generators Ass'n v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

⁷ See *Louisiana Public Serv. Comm'n v. Entergy Corp.*, 144 FERC ¶ 61,242, at P 5 (2013) (September 2013 Entergy Order) (citing Entergy System Agreement, Preface (Preamble and Sections 0.05 and 1.03)).

⁸ *Id.* (citing *Panhandle Eastern Pipe Line Co., LP*, 143 FERC ¶ 61,041, at P 84 (2013); *Entergy Arkansas, Inc.*, 143 FERC ¶ 61,299, at P 92 (2013)).

⁹ See *id.* P 6 (citing *MidAmerican Energy Co., LP*, 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 v. FERC*, 707 F.3d 364; *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 24 (2011)).

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.

8. The Settlement resolves all issues in dispute in this proceeding. With the exception of the issue discussed above, the Settlement appears to be fair and reasonable and in the public interest.¹⁰ As such, the Settlement is conditionally approved, subject to Entergy Services 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.

By direction of the Commission. Commissioner Honorable is not participating.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

cc: All Parties

¹⁰ Likewise, with the exception of the issue discussed above, the Commission’s approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.