

119 FERC ¶ 61,190  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket No. ER07-682-000

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

(Issued May 25, 2007)

1. On March 30, 2007, Entergy Services, Inc. (Entergy), on behalf of the Entergy Operating Companies,<sup>1</sup> submitted for filing proposed amendments to the Entergy System Agreement (System Agreement). In this order, we accept and suspend them for a nominal period, to become effective May 30, 2007, subject to refund. We also establish hearing and settlement judge procedures and deny a request to consolidate.

**I. Background**

2. On June 14, 2001, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint pursuant to section 206 of the Federal Power Act (FPA).<sup>2</sup> The Louisiana Commission alleged that the System Agreement, a rate schedule that includes various service schedules governing, among other things, the allocation of certain costs associated with the integrated operations of the Entergy system, no longer operated to produce rough production cost equalization.

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<sup>1</sup> The Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States, Inc. (Entergy Gulf States), Entergy Louisiana LLC, Entergy Mississippi, Inc., and Entergy New Orleans, Inc.

<sup>2</sup> 16 U.S.C. § 824e (2000).

3. In Opinion No. 480,<sup>3</sup> the Commission found that rough production cost equalization had been disrupted on the Entergy system. Opinion Nos. 480 and 480-A approved a numerical bandwidth of +/- 11 percent of the Entergy system average 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.

4. On April 10, 2006, Entergy submitted a compliance filing to implement the directives of Opinion Nos. 480 and 480-A. The compliance filing included proposed revisions to Service Schedule MSS-3<sup>4</sup> that had not been ordered by the Commission in Opinion Nos. 480 and 480-A. In its order accepting the compliance filing,<sup>5</sup> the Commission rejected these non-compliant amendments and denied, as beyond the scope of the compliance filing, Entergy's request to make adjustments to the methodology reflected in Exhibits ETR-26 and ETR-28. The Commission explained that Entergy must comply with the requirements of Opinion Nos. 480 and 480-A, including the requirement to follow the methodology set forth in Exhibits ETR-26 and ETR-28. The Commission also stated that Entergy should make a section 205 filing if it desired to make any changes to the methodology in Exhibits ETR-26 and ETR-28.

## II. Entergy's Filing

5. On March 30, 2007, Entergy filed four revisions to Service Schedule MSS-3. First, Entergy proposes to revise section 30.12 to provide that net general and intangible plant and related depreciation and amortization expenses be allocated on the basis of

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<sup>3</sup> *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005) (Opinion No. 480), *aff'd*, *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005) (Opinion No. 480-A).

<sup>4</sup> Service Schedule MSS-3 includes a methodology for pricing energy exchanged among the Operating Companies and provides for an after-the-fact, hour-by-hour allocation of the cost of energy from an Operating Company whose generation provided energy in excess of that company's load to an Operating Company that produced less than its load. Entergy also has included the formulas for implementing the rough production cost equalization bandwidth remedy required by Opinion No. 480 in Service Schedule MSS-3.

<sup>5</sup> *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006).

labor ratios, not plant ratios as initially calculated in Exhibit ETR-26. Second, Entergy proposes to revise section 30.12 and footnote 5 to provide that payroll costs charged to each Operating Company by Entergy Operations, Inc. (Entergy Operations) and Entergy be included as part of each Operating Company's labor costs. Third, Entergy proposes to change the state income tax rate utilized in Service Schedule MSS-3 for Entergy Gulf States to include the average of the state income tax rates for Texas and Louisiana, rather than using Louisiana's state income tax rate alone. Fourth, Entergy proposes to allocate Account 923 (Outside Services) on the basis of labor ratios, not plant ratios as initially calculated in Exhibit ETR-26.

6. Entergy states that the proposed changes are consistent with long-standing Commission policy and are similar to those used in the Commission-approved Service Schedule MSS-4 of the System Agreement.<sup>6</sup> With respect to the state tax rate for Entergy Gulf States, Entergy argues that Entergy Gulf States operates in both Texas and Louisiana and that it is appropriate to use both state tax rates.

7. Entergy requests that the proposed revisions be allowed to go into effect without suspension or hearing and that any waivers be granted to allow the revisions to take effect no later than 60 days after the filing date. Entergy requests an effective date of May 29, 2007.

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

8. Notice of Entergy's filing was published in the *Federal Register*, 72 Fed. Reg. 17,548 (2007) with interventions and protests due on or before April 20, 2007. The Arkansas Public Service Commission (Arkansas Commission), the Council of the City of New Orleans (New Orleans), the Louisiana Public Service Commission (Louisiana Commission) and the Mississippi Public Service Commission (Mississippi Commission) filed notices of intervention.

9. On April 9, 2007, the Arkansas Commission, the Mississippi Commission, the Louisiana Commission and New Orleans filed a joint motion requesting a 14 day extension of the deadline to file interventions, protests and comments. On April 10, 2007, the Commission issued a notice extending the deadline until April 27, 2007.

10. Subsequent to the issuance of the extension notice, Occidental Chemical Corporation and the Louisiana Energy Users Group filed motions to intervene. The

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<sup>6</sup> Service Schedule MSS-4 includes formulas for calculating the payment by one Operating Company to another for the sale of capacity and energy from designated system generation resources. Service Schedule MSS-4 also contains provisions for pricing power purchased by one Operating Company and sold to another Operating Company.

Arkansas Commission and the Mississippi Commission filed joint comments in support of Entergy's filing.<sup>7</sup> The Louisiana Commission and the Arkansas Electric Energy Consumers (AEEC) filed protests. On May 14, 2007, Entergy filed an answer to the protests. On May 17, 2007, the Louisiana Commission filed an answer to Entergy's answer.

11. The Louisiana Commission states that the Commission recently rejected the same modifications that Entergy proposes in the instant filing and argues that Entergy provides no basis for determining that the proposed changes are just and reasonable. The Louisiana Commission contends that Entergy's suggestion that the change to the use of labor ratios is consistent with the use of labor ratios in Service Schedule MSS-4 is inappropriate because Service Schedule MSS-4 differs from Service Schedule MSS-3, and the labor ratio allocator adopted in Service Schedule MSS-4 was the result of a settlement.

12. Arguing that Entergy's proposed allocation method bears no relationship to cost causation, the Louisiana Commission asserts that Entergy's proposal to use labor ratios and include the payroll costs of Entergy and Entergy Operations in the development of the labor ratios is unjust, unreasonable and unduly discriminatory.

13. The Louisiana Commission argues that if the Commission approves Entergy's proposed revisions, it must do so prospectively to be consistent with Opinion No. 480. The Louisiana Commission states that the proposed revisions should not be permitted to take effect until a future calendar year test period just as the remedy adopted in Opinion No. 480 in 2005 was applied for the first time to 2006. As the instant filing was made in 2007, the Louisiana Commission states that the first calendar year following the year in which the filing was made would be 2008 and any payments reflecting the revisions would not be made until 2009.

14. Arguing that the change to labor ratios results in a substantial reallocation of administrative and general expenses, the Louisiana Commission asserts that Entergy failed to provide adequate notice of the proposed rate change because the impact on administrative and general expenses is not mentioned in the transmittal letter. The Louisiana Commission also asserts that the use of labor ratios to allocate administrative and general expenses is improper absent a showing that these expenses are primarily related to labor costs.

15. Further, the Louisiana Commission states that the Commission should reject all of the proposed changes or, alternatively, set them for an evidentiary hearing. However, the

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<sup>7</sup> The Arkansas Commission and the Mississippi Commission assert that Entergy's proposed revisions are reasonable and consistent with Commission-approved Service Schedule MSS-4.

Louisiana Commission does not disagree with the use of the average state income tax rate for Entergy Gulf States if the change is implemented prospectively for the calendar year test period 2008.

16. AEEC states that it cannot determine whether Entergy's filing is just and reasonable because Entergy failed to provide sufficient information. AEEC argues that the Commission should allow parties to conduct appropriate discovery and should order a hearing. AEEC also requests that the proceedings in this and several other dockets<sup>8</sup> related to the System Agreement be consolidated for efficiency.

#### **IV. Discussion**

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest and to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy's answer or the Louisiana Commission's answer and will, therefore, reject them.

19. We disagree with the 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. The Commission's holding in Opinion Nos. 480 and 480-A did not change the fundamental tenets of section 205 of the FPA.<sup>9</sup> Public utilities have a statutory right to amend their rates and charges and to propose that, absent waiver, the amendments be made effective after 60 days' notice. We cannot and did not change that basic right accorded by the FPA. Entergy made its filing consistent with section 205 of the FPA and, as provided below, we accept it and make it effective May 30, 2007, after 60 days' notice.

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<sup>8</sup> The other dockets mentioned by AEEC include Docket Nos. ER07-683-000 and ER07-684-000, which also incorporate proposed changes to Service Schedule MSS-3. AEEC also lists Docket No. EL07-48-000, which involves a petition for declaratory order by Entergy seeking to have a generator, constructed or purchased by an Operating Company to serve system load, found to be in the public interest and declared a System Resource with costs reflected in the System Agreement formula rates. The fourth docket is Docket No. EL07-52-000, and involves a complaint by the Louisiana Commission to revise Service Schedule MSS-3 to exclude interruptible load from the allocation of capacity costs among the Operating Companies and to revise the pricing of energy from the Vidalia hydroelectric plant.

<sup>9</sup> 16 U.S.C. § 824d (2000).

20. We find that Entergy has not demonstrated good cause to justify waiver of the 60-day prior notice requirement for its proposed amendments. Accordingly, we will establish an effective date of May 30, 2007 (i.e., the date following 60 days' notice).<sup>10</sup>

21. We will deny AEEC's request to consolidate the instant proceeding with Docket Nos. ER07-683-000, ER07-684-000, EL07-48-000 and EL07-52-000. Generally, we consolidate cases where there are common issues of law and fact for purposes of settlement, hearing and decision.<sup>11</sup> Here, there are no common issues of law and fact that would warrant consolidation.

### **Hearing and Settlement Judge Procedures**

22. Entergy's proposed amendments to the Entergy System Agreement, including the use in Service Schedule MSS-3 of an average of the Texas and Louisiana state income tax rates for Entergy Gulf States,<sup>12</sup> raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

23. Our preliminary analysis indicates that Entergy's proposed amendments have 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 amendments for filing, suspend them for a nominal period, make them effective May 30, 2007, subject to refund, and set them for hearing and settlement judge procedures.

24. While we are setting these matters 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.<sup>13</sup> If the parties desire, they may,

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<sup>10</sup> Absent waiver of the prior notice provisions, the earliest date that a filing may become effective is the day after the 60-day notice period has expired or, as in this case, May 30, 2007. 16 U.S.C. § 824(d) (2000). *E.g.*, *Utah Power & Light Co.*, 30 FERC ¶ 61,015, at P 61,024, n.9 (1985).

<sup>11</sup> *See Cal. Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,391, at P 45 (2004); and *Cleco Power LLC*, 118 FERC ¶ 61,074, at P 32 (2007).

<sup>12</sup> We note that Entergy is unclear as to the methodology it used in determining an average of the tax rates of Texas and Louisiana.

<sup>13</sup> 18 C.F.R. § 385.603 (2006).

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.<sup>14</sup> The settlement judge 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.

The Commission orders:

(A) Entergy's proposed amendments to the Entergy System Agreement are hereby accepted for filing and suspended for a nominal period, to become effective May 30, 2007, 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 amendments to the Entergy System Agreement. 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 (2005), 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

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<sup>14</sup> 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. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

(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, N.E., 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 )

Kimberly D. Bose,  
Secretary.