

121 FERC ¶ 61,133
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. ER07-93-000

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued November 6, 2007)

1. On August 21, 2007, Entergy Services, Inc. (Entergy) submitted a Settlement Agreement (Settlement) that resolves all issues set for hearing in this docket.¹ Specifically, the Settlement resolves objections to proposed new Schedule 9 (Recovery of Regional Transmission Organization and Independent Coordinator of Transmission (ICT) Development Start-Up Costs) and Schedule 10 (Recovery of Ongoing ICT Operation Costs) to Entergy's Open Access Transmission Tariff. Entergy states that the Settling Parties² (Parties) either support or do not oppose the terms of the Settlement. On September 10, 2007, Commission trial staff and Arkansas Cities³ filed separate comments. Trial staff supports approval of the Settlement. Arkansas Cities' comment

¹ Entergy is acting as agent for Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, LLC, Entergy Mississippi, Inc., and Entergy New Orleans, Inc.

² The Settling Parties include: Mississippi Public Service Commission; Arkansas Public Service Commission; South Mississippi Electric Power Association; NRG Companies; Arkansas Electric Cooperative Corporation; Mississippi Delta Energy Agency; Clarksdale Public Utilities Commission; Public Service Commission Of Yazoo City; Lafayette Utilities System; Municipal Energy Agency Of Mississippi; Louisiana Energy and Power Authority; Duke Energy Carolinas, LLC; East Texas Electric Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; Tex-La Electric Cooperative Of Texas, Inc.; Conway Corporation; West Memphis, Arkansas Utilities Commission; the City of Osceola, Arkansas; the City of Prescott, Arkansas; and the Louisiana Public Service Commission.

³ The Arkansas Cities are composed of the Conway Corporation, the City of West Memphis, Arkansas, the City of Osceola, Arkansas, and the City of Prescott, Arkansas.

clarifies a typographical error in another filing which, it states, may potentially affect the settlement rates. No other comments were received. On September 12, 2007, the Settlement Judge certified the Settlement to the Commission as uncontested.⁴

2. The Settlement resolves all issues that the Commission set for hearing and settlement judge procedures.⁵ It provides in pertinent part:

It is the intent of the Parties that in any future proceeding involving a proposed modification of section II.1 of this Settlement Agreement the ‘public interest’ standard set forth in [the *Mobile-Sierra Doctrine*⁶] shall apply. With respect to proposed modifications of any other portion of this [Settlement], it is the intent of the Parties that the ‘just and reasonable’ standard of review shall apply.⁷

Section II.1 of the Settlement provides for a “black-box” total system recovery amount for purposes of calculating Schedule 9 charges.

3. The Settlement is fair and reasonable and in the public interest, and is hereby approved. The tariff sheets contained in the Settlement are in compliance with Order No. 614 and are accepted effective as noted in the Settlement.⁸ The Commission’s approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. All other modifications shall be subject to the just and reasonable standard.

⁴ *Entergy Services, Inc.*, 120 FERC ¶ 63,020 (2007).

⁵ *Entergy Services, Inc.*, 117 FERC ¶ 61,320 (2006).

⁶ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPA v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

⁷ Settlement at § II.10.

⁸ See Designation of Electric Rate Schedule Sheets, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

4. The standard of review applicable to any modifications to section II.1 of the Settlement sought by the Commission *sua sponte* shall be the *Mobile-Sierra* public interest standard.⁹ With respect to proposed modifications of any other portion of this Settlement, the just and reasonable standard of review shall apply.

5. Within 30 days from the issuance of this order, any amounts collected in excess of the Settlement rates shall be refunded together with interest computed under section 35.19a of the Commission's Rules and Regulations.¹⁰ Within 15 days after making such refunds, Entergy shall file with the Commission a compliance refund report showing monthly billing determinants, revenue receipt dates, revenues under the prior, present and Settlement rates, the monthly revenue refund, and the monthly interest computed, together with a summary of such information for the total refund period. Entergy shall furnish copies of the report to the affected wholesale customers and to each state commission within whose jurisdiction the affected wholesale customers distribute and sell electric energy at retail.

6. This order terminates Docket No. ER07-93-000.

By the Commission. Commissioner Kelly concurring with a separate statement attached.
Commissioner Wellinghoff concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

⁹ As a general matter, parties may bind the Commission to a public interest standard. *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993). Under limited circumstances, such as when the agreement has broad applicability, the Commission has the discretion to decline to be so bound. *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir. 2006). In this case, we find that the public interest standard should apply to section II.1 of the Settlement as proposed by the parties.

¹⁰ 18 C.F.R. § 35.19a (2007).

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KELLY, Commissioner, *concurring*:

The settling parties request that the Commission apply the *Mobile-Sierra* “public interest” standard of review for any future changes to the Section II.1 of this settlement agreement, whether proposed by a non-party or the Commission acting *sua sponte*. With respect to proposed modifications to any other portion of this settlement, the parties state it is their intent for the “just and reasonable” standard of review to apply. Section II.1 provides a “black-box” total system recovery amount related to Entergy’s RTO and independent coordinator of transmission (ICT) development and start-up costs. This settlement provision resolves issues concerning recovery of Entergy’s previously-incurred RTO and ICT development and start-up costs. It does not contemplate ongoing performance into the future, which would raise the issue of what standard the Commission should apply to review any possible future modifications sought by non-parties or the Commission. Indeed, in a sense, the standard of review is irrelevant here. Therefore, while I do not agree with the order’s statements regarding the applicability of the *Mobile-Sierra* “public interest” standard of review (*see* footnote 9), I concur with the order’s approval of this settlement agreement.

Suedeem G. Kelly

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WELLINGHOFF, Commissioner, concurring in part and dissenting in part:

The Settling Parties in this case have asked the Commission to apply the “public interest” standard of review when it considers certain future changes to the instant settlement that may be sought by a non-party or the Commission acting *sua sponte*. Specifically, the Settling Parties state that they intend for the “public interest” standard to apply in any future proceeding involving a proposed modification of Section II.1 of the instant settlement, which provides a “black box” total system recovery amount for purposes of calculating the Schedule 9 charges through which Entergy will recover its regional transmission organization (RTO) and independent coordinator of transmission (ICT) development start-up costs. The Settling Parties further state that they intend for the “just and reasonable” standard to apply with respect to proposed modifications of any other portion of the instant settlement.

The Commission issued its original order approving the ICT Agreement prior to my becoming a commissioner.¹ However, when the Commission addressed a filing submitted in compliance with that order, I wrote a separate concurring statement to explain my conclusion that it was appropriate for the Commission to grant the request made by the parties to the ICT Agreement to apply the “public interest” standard not only to future changes to that agreement sought by any of those parties, but also to such changes sought by a non-party or the Commission acting *sua sponte*.² Because the Schedule 9 charges through which Entergy will recover its RTO and ICT development start-up costs are so closely related to the facts underlying my above-noted conclusion in *Entergy*, I concur with the Commission’s finding that it is appropriate to apply the “public interest” standard in the narrow circumstances proposed by the Settling Parties.

¹ *Entergy Services, Inc.*, 115 FERC ¶ 61,095, *errata notice* May 4, 2006, *order on reh’g*, 116 FERC ¶ 61,275 (2006).

² *Entergy Services, Inc.*, 117 FERC ¶ 61,055 (2006) (*Entergy*), *order on reh’g*, 119 FERC ¶ 61,187 (2007). I continue to believe that the approach set forth in my statement in *Entergy* has the benefit of being a clear policy on these issues and also strikes the appropriate balance between recognizing contracting parties’ needs for certainty with respect to their agreements and protecting the interests of electric consumers.

For the reasons that I identified in *Southwestern Public Service Co.*,³ however, I disagree with the majority's characterization of case law on the applicability of the "public interest" standard. Therefore, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

³ 117 FERC ¶ 61,149 (2006).