

124 FERC ¶ 61,163  
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 Nos. ER08-774-000 and  
ER08-774-001

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

(Issued August 15, 2008)

1. On April 1, 2008, Entergy Services, Inc. (Entergy), on behalf of the Entergy Operating Companies,<sup>1</sup> submitted for filing an amendment to the Entergy System Agreement (System Agreement) for the purpose of more clearly defining the Energy Ratio variable that is used to determine average variable production costs. In this order, we accept the proposed amendment for filing, and suspend it for a nominal period, to become effective June 1, 2008, subject to refund. We also establish hearing and settlement judge procedures.

**I. Background**

2. In Opinion Nos. 480 and 480-A,<sup>2</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

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<sup>1</sup> Entergy made its filing on behalf of the Entergy operating companies, which are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, LLC, Entergy Louisiana, LLC, Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc.

<sup>2</sup> *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005), *aff'd*, *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in relevant part sub nom. La Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

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.

3. 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 that had not been ordered by the Commission in Opinion Nos. 480 and 480-A. In its order accepting the compliance filing,<sup>3</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, which forms the basis for calculation of bandwidth payments. 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 filing pursuant to section 205 of the Federal Power Act (FPA) if it desired to make any changes to the methodology in Exhibits ETR-26 and ETR-28.<sup>4</sup>

4. On May 29, 2007, in Docket No. ER07-956-000, Entergy submitted its first annual bandwidth implementation filing that set forth rates pursuant to Service Schedule MSS-3 of the System Agreement, implementing the Commission's decisions in Opinion Nos. 480 and 480-A. The Commission accepted those rates for filing, suspended them for a nominal period and made them effective June 1, 2007, subject to refund.<sup>5</sup> The Commission also established hearing and settlement judge procedures. The hearing commenced on June 17, 2008.

5. On May 30, 2008, in Docket No. ER08-1056-000, Entergy submitted its second annual bandwidth implementation filing. The Commission accepted those rates for filing, suspended them for a nominal period and made them effective June 1, 2008, subject to refund.<sup>6</sup> The Commission established hearing and settlement judge procedures. The hearing is scheduled to commence on August 21, 2008.

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<sup>3</sup> *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006) (November 2006 Compliance Order).

<sup>4</sup> 16 U.S.C. § 824e (2006).

<sup>5</sup> *Entergy Servs., Inc.*, 120 FERC ¶ 61,094 (2007).

<sup>6</sup> *Entergy Servs., Inc.*, 124 FERC ¶ 61,101 (2008).

## II. Entergy's Filing

6. On April 1, 2008, Entergy filed an amendment to section 30.13 of Service Schedule MSS-3 of the Entergy System Agreement pursuant to section 205 of the FPA to more clearly define the Energy Ratio variable that is used to determine the average production cost of each Operating Company. Specifically, Entergy proposes to amend Service Schedule MSS-3 to permit the use of FERC Form No. 1 data to calculate the Energy Ratio. Entergy states that an issue has been raised in the 2007 bandwidth proceeding (Docket No. ER07-956-001) as to whether the source of information used to calculate the Energy Ratio should be from Entergy's Intra-System Bill data or FERC Form No. 1.
7. Entergy states that in developing Exhibits ETR-26 and ETR-28, Entergy used data from the Intra-System Bill to calculate the Energy Ratio. However, in determining the values for variable ER used in the bandwidth calculation filed with the Commission on May 29, 2007, Entergy states that it used data directly from the FERC Form No. 1.<sup>7</sup>
8. Entergy states that the use of Energy Ratio variable is inextricably linked to the Revenue Credits variable, which results from the revenue received from customers outside the company's net area for production service. Entergy states that the Energy Ratio and Revenue Credits are both used to determine the bandwidth payment contained in its May 29, 2007 filing. Entergy contends that in preparing the May 29, 2007 filing it determined that use of Intra-System Bill data to determine Energy Ratio would introduce an inconsistency between the Energy Ratio and Revenue Credits. It explains that the data in the Intra-System Bill includes certain non-requirement sales. Consequently, it maintains, were the Energy Ratio to rely on Intra-System Bill data, the Energy Ratio would include these non-requirement sales; and, therefore, it would no longer be consistent with the Revenue Credits.
9. Entergy states that it was in recognition of this synchronization error that it determined to use the FERC Form 1 data as the source of the input data for calculating the Energy Ratio. It states that it does not believe that the change in the input data source constitutes a change in methodology, but makes its filing out of an abundance of caution to ensure that Service Schedule MSS-3 continues to be internally consistent.
10. Entergy requests that the Commission accept its amendment for filing, effective May 31, 2008, without suspension or hearing.
11. On June 16, 2008, Entergy responded to a May 30, 2008 data request from the Commission.

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<sup>7</sup> Entergy April 1, 2008 Filing at 5.

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

12. Notice of Entergy's filing and data request response were published in the *Federal Register*, 73 Fed. Reg. 19,210 (2008) and 73 Fed. Reg. 35,681 (2008), with interventions and protests due on or before April 22, 2008 and July 7, 2008, respectively. Occidental Chemical Corporation and Union Electric Company filed motions to intervene. The Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention and comments. The Louisiana Public Service Commission (Louisiana Commission) filed a notice of intervention and a protest.

13. The Louisiana Commission asserts that Entergy seeks to amend section 30.13 of the System Agreement to obtain Commission approval for a change Entergy made in its Docket No. ER07-956-000 filing. The Louisiana Commission argues that Entergy's request should be rejected because Entergy has not demonstrated that the proposed change is just and reasonable or, at a minimum, the Commission should set the matter for hearing. The Louisiana Commission argues that despite Entergy's claim that use of Intra-System Bill data would introduce a synchronization error, Entergy included off-system sales in the net area requirements in Exhibits ETR-26 and ETR-28.<sup>8</sup>

14. The Louisiana Commission also argues that Entergy's position in this filing is inconsistent with its position in Docket No. ER03-583-000 because Entergy now urges that non-requirement sales made directly by an Operating Company and included in its load responsibility should be removed from the calculation of the ER energy allocation factor because they are not "requirements" sales. The Louisiana Commission contends that in Docket No. ER03-583-000 Entergy consistently argued that these opportunity sales were, in fact, requirement sales of the Operating Company making the sale. The Louisiana Commission contends that Entergy's inconsistent position on these issues is unjust and unreasonable.

15. The Louisiana Commission argues that the Commission should only allow Entergy's filing to go into effect prospectively, just as it applied the bandwidth remedy adopted in 2005 for the first time in the 2006 calendar test period. The Louisiana Commission notes that Opinion Nos. 480 and 480-A were remanded back to the Commission for further consideration of the Commission's decision to delay implementation of the bandwidth remedy, but argues that until the remand is addressed by the Commission, the Commission must be consistent with its prior ruling.

16. The Arkansas Commission filed comments in support of Entergy's filing. The Arkansas Commission states that the filing will eliminate any possibility of doubt as to the source of data to be used in calculating the rough production cost equalization

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<sup>8</sup> Louisiana Commission April 22, 2008 Protest at 4.

bandwidth payments and receipts pursuant to Service Schedule MSS-3. It adds that failure to make the proposed amendment effective for the calendar 2007 bandwidth payment year will perpetuate the synchronization error discussed by Entergy.

#### **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 (2008), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

##### **B. Commission Determination**

18. Entergy's proposed amendment to the Entergy System Agreement to define the source of data used to determine the Energy Ratio raises 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.

19. Our preliminary analysis indicates that Entergy's proposed amendment 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 amendment for filing, suspend it for a nominal period, make it effective June 1, 2008,<sup>9</sup> subject to refund, and set it for hearing and settlement judge procedures. The hearing should address the appropriateness of Entergy's proposed amendment, including consideration of how off-system sales and revenue credits should be treated in the determination of each Operating Company's actual production costs and allocated share of average system production costs in the bandwidth calculation.<sup>10</sup>

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<sup>9</sup> Absent waiver, this is the earliest date the proposed amendment can be made effective, i.e., after 60-days notice. Further, we reject, for the same reasons discussed in prior orders, the Louisiana Commission's argument that the Commission may implement Entergy's modifications to the remedy only to the first calendar year of the data following the filing. *See e.g., Entergy Services, Inc.*, 119 FERC ¶ 61,190, at P 19, *order on reh'g*, 121 FERC ¶ 61,126, at P 12 (2007).

<sup>10</sup> For instance, in response to the Commission's data request, Entergy indicates that Intra-System Bill data, and thus off-system sales data, is used in the demand allocator (Demand Ratio) used to allocate certain fixed production costs. Yet Entergy has not established how its proposal to remedy the inconsistency between the Revenue Credits and Energy Ratio variables, by eliminating the off-system sales from the Energy Ratio, is just and reasonable given the inclusion of off-system sales in the Demand Ratio variable.

20. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes 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>11</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>12</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 amendment is hereby accepted for filing and suspended for a nominal period, to become effective June 1, 2008, 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 regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Entergy's proposed amendment. However, the hearing will be held in abeyance to give the parties 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 (2008), 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

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<sup>11</sup> 18 C.F.R. § 385.603 (2008).

<sup>12</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge in writing or by telephone at (202) 502-8500 within five days of the date of this order. FERC's website contains a listing of the Commission's judges and a summary of their background and experience ([www.FERC.gov](http://www.FERC.gov) –click on Office of Administrative Law Judges).

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 (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 )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.