

124 FERC ¶ 61,223  
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.

ExxonMobil Corporation

v.

Docket No. EL03-230-004

Entergy Services, Inc.

ORDER ESTABLISHING HEARING  
AND SETTLEMENT JUDGE PROCEDURES

(Issued September 4, 2008)

1. On August 17, 2007, Entergy Services, Inc., acting as agent for Entergy Gulf States, Inc., (collectively, Entergy) submitted a filing in compliance with the Commission's July 18, 2007 order rejecting a compliance filing made by Entergy.<sup>1</sup> In this order, we establish hearing and settlement judge procedures regarding Entergy's August 17, 2007 compliance filing, finding that it 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.

**Background**

2. On October 22, 2001, Entergy filed an Interconnection and Operating Agreement and Generator Imbalance Agreement (Original IA) to accommodate ExxonMobil Corporation's (ExxonMobil) 165 MW generator at an oil refinery in Beaumont, Texas. On December 7, 2001, the Commission accepted the Original IA for filing pursuant to

---

<sup>1</sup> *ExxonMobil Corp. v. Entergy Services, Inc.*, 120 FERC ¶ 61,051 (2007) (July Compliance Order), *order on reh'g*, 122 FERC ¶ 61,168 (2008).

delegated authority.<sup>2</sup> The Original IA identified certain facilities in that agreement as interconnection facilities (Original Transmission Facilities) and directly assigned the cost of these facilities to ExxonMobil, without requiring Entergy to provide transmission credits.

3. ExxonMobil installed two additional generators that required additional transmission facilities (New Transmission Facilities) and Entergy filed, in Docket No. ER03-851-000, an unexecuted revised Interconnection and Operating Agreement (Unexecuted Revised IA) to accommodate the New Transmission Facilities. ExxonMobil filed a protest, stating that *all* of the facilities (both Original and New Transmission Facilities) are network upgrades entitled to transmission credits. The Commission granted ExxonMobil's protest with respect to the New Transmission Facilities, but stated that, with respect to the Original Transmission Facilities, ExxonMobil's request was, in effect, a complaint. The Commission therefore rejected this portion of ExxonMobil's protest, without prejudice to ExxonMobil's filing a separate complaint on that issue.<sup>3</sup>

4. ExxonMobil filed a complaint and on January 19, 2007, the Commission granted that complaint and directed Entergy to provide ExxonMobil with transmission credits for the cost of the Original Transmission Facilities.<sup>4</sup> The Commission directed Entergy to provide ExxonMobil with transmission credits as follows: (a) before April 15, 2004 (the start of the refund effective period), Entergy provides no transmission credits; (b) from April 15, 2004 through July 15, 2005 (the refund effective period), Entergy provides transmission credits, with interest; (c) from the end of the 15-month refund effective period until the date of the Commission order (January 19, 2007), Entergy may not provide any transmission credits or interest on those credits; and (d) to the extent that ExxonMobil has not previously taken service for which credits either did accrue or would have accrued, Entergy must provide ExxonMobil transmission credits, with interest, on a prospective basis from the date of the Commission's order.<sup>5</sup> The Commission also directed Entergy to file revisions to the Unexecuted Revised IA reflecting the Commission's decision and to file a compliance report.

---

<sup>2</sup> See *Entergy Services, Inc.*, Docket No. ER02-144-000 (December 7, 2001) (unpublished letter order).

<sup>3</sup> See *Entergy Services, Inc.*, 104 FERC ¶ 61,084, at P 13 (2003) (July 15 Order).

<sup>4</sup> *ExxonMobil Corp. v. Entergy Services, Inc.*, 118 FERC ¶ 61,032, at P 1, 14 (2007) (*ExxonMobil I*).

<sup>5</sup> *Id.* P 15-16.

5. On June 8, 2007, the Commission denied rehearing of *ExxonMobil I*.<sup>6</sup> The Commission discussed ExxonMobil's claim that it should be entitled to refunds, but noted that section 206 of the FPA limits our refund authority.<sup>7</sup>

6. On February 20, 2007, before *ExxonMobil II*, Entergy filed a revised Interconnection and Operating Agreement and a revised Generator Imbalance Agreement (together, the Revised IA) between Entergy and ExxonMobil purporting to comply with *ExxonMobil I* (compliance filing).<sup>8</sup> The Revised IA reclassified the Original Transmission Facilities as required system upgrades, as directed by the Commission.<sup>9</sup>

7. In the July Compliance Order, the Commission found that Entergy had not complied with our instructions in *ExxonMobil I* because Entergy proposed to pay to ExxonMobil all of ExxonMobil's upfront payments for the Original Transmission Facilities without deducting the sum of the transmission service payments associated with the transmission service that ExxonMobil took from the end of the 15-month refund effective period (July 15, 2005) until the date of the Commission order (January 19, 2007). Therefore, we rejected Entergy's compliance filing and directed Entergy to re-file its compliance filing in accordance with the rate we established in *ExxonMobil I*.<sup>10</sup>

### **Entergy's Compliance Filing**

8. In Entergy's August 17, 2007 compliance filing, Entergy states that ExxonMobil paid over \$5.1 million in upfront payments for the Original Transmission Facilities. In addition, Entergy states that ExxonMobil took over \$10.3 million in transmission service from July 16, 2005 through January 19, 2007, exceeding the amount of upfront payments made by ExxonMobil for the Original Transmission Facilities. Entergy does not specifically identify the amount of transmission service taken from April 15, 2004 through July 15, 2005. Entergy states further that, even after taking into account ExxonMobil's \$3.5 million balance of pre-existing credits for the New Transmission Facilities, Entergy had overcompensated ExxonMobil by approximately \$1.3 million for the upfront payment that ExxonMobil made for the Original Transmission Facilities. As

---

<sup>6</sup> *ExxonMobil Corp. v. Entergy Services, Inc.*, 119 FERC ¶ 61,261 (2007) (*ExxonMobil II*).

<sup>7</sup> *Id.* P 22 (footnotes omitted).

<sup>8</sup> Entergy also submitted what it refers to as "blackline pages," which reflect the revisions made in the Revised IA.

<sup>9</sup> *ExxonMobil II* at P 8.

<sup>10</sup> *ExxonMobil I*, 118 FERC ¶ 61,032 at P 17.

a result, Entergy states that it has overpaid ExxonMobil and that it sent ExxonMobil an invoice for the amount of the overpayment.

### **Data Request**

9. On April 15, 2008, a data request was issued directing Entergy to answer various questions pertaining to its compliance filing. Entergy was requested to provide the following information separately for the Original Transmission Facilities and the New Transmission Facilities: (1) a monthly breakdown of the amount of transmission service, in dollars, taken by ExxonMobil over the facilities from the time the facilities went into service through the date of the compliance filing, August 17, 2007; (2) the monthly breakdown should be separated into four periods;<sup>11</sup> (3) the calculations should also include calculations of the monthly interest associated with the transmission credits; and (4) the amount of ExxonMobil's upfront payment for the facilities at issue.

### **Entergy's Response to the Data Request**

10. On May 15, 2008, Entergy submitted a response to the April 15, 2008, data request. In its response, Entergy notes that the four distinct periods are inapplicable to credits earned for the New Transmission Facilities because the Commission ordered Entergy to provide transmission credits with interest to ExxonMobil for the New Transmission Facilities.<sup>12</sup> Further, Entergy states that the cost of the Original Transmission Facilities eligible for credits in this proceeding was \$5,141,347.88.

11. Entergy states that the first month that ExxonMobil used transmission service over both the Original Transmission Facilities and New Transmission Facilities was in May 2005. According to Entergy, ExxonMobil used a total of \$16,134,456 of transmission service during the period May 2005 through July 2007 over both sets of facilities. Entergy maintains that it is unable to break out ExxonMobil's transmission service between Original Transmission Facilities and New Transmission Facilities because they were both constructed at the same Beaumont location and ExxonMobil does not have separate transmission transactions over the Original Transmission Facilities and New Transmission Facilities.

---

<sup>11</sup> The four periods were: (1) prior to April 15, 2004; (2) April 15, 2004 through July 15, 2005; (3) July 16, 2005 through January 18, 2007; and (4) from January 19, 2007. If a month included more than one refund period, Entergy was asked to specify the date on which one refund period ended, the date on which the next refund period began, and the amount of transmission service that was taken during each refund period in that month.

<sup>12</sup> See *Entergy Services, Inc.*, 104 FERC ¶ 61,084 (2003).

12. Entergy states that the total interest for the Original Transmission Facilities during the period from April 15, 2004 through July 15, 2005 was \$293,667. Entergy maintains that it did not resume the interest calculation for the Original Transmission Facilities on January 19, 2007 because at that time, ExxonMobil's transmission credits for the Original Transmission Facilities were exhausted.

13. Entergy states that, pursuant to the Commission's July 15 Order ExxonMobil was entitled to interest for the New Transmission Facilities beginning on the date that ExxonMobil first paid for the facilities in July 2003. According to Entergy, ExxonMobil paid for the New Transmission Facilities in stages from July 2003 until November 2004. Entergy states that the total interest for the New Transmission Facilities for the period July 2003 until December 2006 is \$1,253,533. Entergy states that it stopped the interest calculation for the New Transmission Facilities in December 2006 because at that time, ExxonMobil's transmission credits for the New Transmission Facilities were exhausted.

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

14. Notice of Entergy's compliance filing was published in the *Federal Register*, 72 Fed. Reg. 50,348 (2007), with interventions and protests due on or before September 10, 2007. ExxonMobil filed a timely motion to intervene and protest. Entergy filed an answer on September 13, 2007. ExxonMobil filed an answer to Entergy's answer on September 20, 2007.

15. Notice of Entergy's response to the data request was issued on May 20, 2008, with interventions and protests due on or before June 5, 2008. ExxonMobil filed a timely protest. Entergy filed an answer on June 23, 2008. ExxonMobil filed a motion requesting rejection of Entergy's answer and requesting a technical conference or paper hearing, and an alternative motion and answer to Entergy's answer on July 8, 2008.

#### **ExxonMobil Protest To Data Response**

16. In its protest to Entergy's data response, ExxonMobil contends that Entergy's data response calculations are rife with inconsistency with prior Entergy filings, including the (a) cost of the facilities at issue; (b) amount of transmission credits; and (c) amount of transmission service taken. According to ExxonMobil, this calls into question the mathematical basis for everything that Entergy has supplied to the Commission. Further, ExxonMobil maintains that Entergy's data response erroneously implies that ExxonMobil

contracted for transmission service, and therefore provides inaccurate responses to Staff's request for the amount of transmission service taken by ExxonMobil.<sup>13</sup>

### **Entergy Answer**

17. Entergy argues that ExxonMobil fails to acknowledge that Entergy has provided consistent calculations throughout the various compliance filings and has meticulously followed the Commission's directives for these calculations, in the format requested by the Commission. According to Entergy, ExxonMobil has re-cast the data and attempted to "back into" what it believes are accurate numbers. Entergy maintains that none of the data included in ExxonMobil's protest is supported and ExxonMobil only serves to confuse the issue by "slicing and dicing the data" without any basis for doing so.

18. Entergy disagrees with ExxonMobil's arguments it has not contracted for transmission service from Entergy. According to Entergy, the Commission has previously ruled that entities that purchase power produced by Exxon Mobil's facility use transmission service, which should be credited to ExxonMobil.<sup>14</sup> Entergy argues that ExxonMobil cannot choose when to be a transmission customer and when to exclude as it benefits itself. Entergy also contends that ExxonMobil must remain consistent in calculating transmission credit payments and that ExxonMobil has received credits for the transmission service used to deliver power from its facility.

### **ExxonMobil's Answer**

19. ExxonMobil argues that the Commission should convene a technical conference or a paper hearing to determine whether Entergy has provided transmission credits as required by the Commission and to determine whether ExxonMobil owes Entergy any additional payments in addition to the upfront payments already made. ExxonMobil asks the Commission to reject Entergy's answer or alternatively accept it and allow ExxonMobil to respond. ExxonMobil reiterates that Entergy's data response provided data that are inconsistent and irreconcilable with data provided in the August 17, 2007 compliance filing. According to ExxonMobil, Entergy's answer simply denies the existence of any discrepancies between its previous filings.

---

<sup>13</sup> ExxonMobil claims that it sells to Entergy puts under the Public Utility Regulatory Policies Act (PURPA) and ExxonMobil's third party customers contract directly with Entergy for transmission service. *See* ExxonMobil June 5, 2008 protest at 5-6.

<sup>14</sup> *See* Entergy June 23, 2008 Answer at 7, citing Revised IA, section 8.3, filed in Docket No. EL03-230-000 on September 16, 2003; Order No. 2003-B at P 615; and *Tenaska Alabama II Partners, et al.*, 118 FERC ¶ 61,037, at P 26 (2007).

## **Discussion**

### **Procedural Matters**

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), ExxonMobil's timely, unopposed motion to intervene serves to make it a party to this proceeding.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Entergy's and ExxonMobil's answers as they have provided us with information that have helped us in our decision making.

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

22. First, the Commission disagrees with ExxonMobil's assertion that Entergy's data request was incorrect because ExxonMobil does not contract for transmission service. As we stated in *Tenaska*, where the generator is not the transmission customer, the credits accrue based on the transmission service taken by the transmission customer with the generator as the receipt point during the appropriate refund periods.<sup>15</sup> Therefore, it was not inappropriate for Entergy's data response to respond to staff's question regarding the amount of transmission service taken by ExxonMobil by including transmission service not taken by ExxonMobil itself.

23. Regardless of this finding, Entergy's compliance filing raises issues of material fact that cannot be resolved based on the record before us. For example, ExxonMobil's protest and Entergy's answers have not provided the answers to the following: (1) when transmission service actually began, (2) the actual upfront payments, (3) the amount of credits due, and (4) the amount of interest earned during the refund period. The issues of material fact are more appropriately addressed in the hearing and settlement judge procedures ordered below.

24. Our preliminary analysis indicates that Entergy's proposed compliance filing 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 compliance filing and set it for hearing and settlement judge procedures.

25. 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

---

<sup>15</sup> *Tenaska Alabama II Partners, L.P. v. Southern Company Services, Inc.*, 118 FERC ¶ 61,037, at n.17 (2007), *order on reh'*g 119 FERC ¶ 61,315 (*Tenaska*).

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>16</sup> If the parties desire, they may, 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>17</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 compliance filing is hereby accepted for filing, 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 compliance filing. 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 (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 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.

---

<sup>16</sup> 18 C.F.R. § 385.603 (2008).

<sup>17</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).

(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 )

Kimberly D. Bose,  
Secretary.