



## I. Background

2. This matter began when, on March 31, 2003 and April 14, 2003, Entergy filed, in four separate dockets, eight power purchase agreements (PPAs or contracts) with the Commission for approval. Four of the PPAs consisted of market-based sales of electric capacity and associated energy from four Entergy affiliates<sup>4</sup> to two other Entergy affiliates<sup>5</sup> resulting from a request for proposals auction process conducted in the Fall of 2002 (2002 RFP). The other four proposed PPAs consisted of market-based sales of electric capacity and associated energy among Entergy affiliates that were negotiated and executed outside of the 2002 RFP process.<sup>6</sup> After the proceedings commenced, the Commission approved a settlement involving Entergy's Service Schedule MSS-4 formula rates under its System Agreement.<sup>7</sup> During the course of the hearing, Entergy revised its position, agreeing to reprice the four non-RFP contracts, including the Entergy Arkansas Base Load PPAs, using the revised provisions of the Service Schedule MSS-4 formula rate.

---

<sup>4</sup> EWO Marketing LP (EWO Marketing), Entergy Power, Inc. (Entergy Power), Entergy Gulf States, Inc. (Entergy Gulf States) and Entergy Arkansas, Inc. (Entergy Arkansas).

<sup>5</sup> Entergy Louisiana, Inc. (Entergy Louisiana) and Entergy New Orleans, Inc. (Entergy New Orleans).

<sup>6</sup> The RFP agreements include two three-year term (term ending June 2006) contracts from EWO Marketing's RS Cogen facility sold to Entergy Louisiana and Entergy New Orleans and two life-of-unit (LOU) contracts from Entergy Power's Independent System Electric Union Station Unit 2 facility also sold to Entergy Louisiana and Entergy New Orleans (Entergy Power ISES 2 PPAs). The four non-RFP agreements include two life-of-unit sales from Entergy Gulf States to Entergy Louisiana and to Entergy New Orleans from Entergy Gulf States' share of the River Bend Nuclear Station. The remaining two non-RFP agreements are life-of-unit sales from six of Entergy Arkansas' coal and nuclear units to Entergy Louisiana and Entergy New Orleans (the Entergy Arkansas Base Load PPAs).

<sup>7</sup> *Entergy Services, Inc.*, 111 FERC ¶ 61,035 (2005). Service Schedule MSS-4 of the Entergy System Agreement 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.

3. The Commission reviewed these contracts and in Opinion No. 485,<sup>8</sup> the Commission announced its findings regarding the eight contracts. Among its determinations, the Commission found that Entergy improperly used information obtained through the 2002 RFP process to price the two Entergy Arkansas Base Load PPAs. Accordingly, in Opinion No. 485, the Commission affirmed the presiding judge's finding that the two Entergy Arkansas Base Load PPAs were unjust, unreasonable, and unduly discriminatory and accepting Entergy's proposed repricing of these PPAs at MSS-4 rates. In Opinion No. 485-A, the Commission denied requests for rehearing and provided clarification on certain code of conduct issues.<sup>9</sup> In response to Opinion Nos. 485 and 485-A, Entergy submitted a compliance filing on November 6, 2007 that was protested by Council and by the Louisiana Public Service Commission. This was the compliance filing that was addressed in the March 2008 Order. In line with its earlier change of position, and the Commission's findings in Opinion No. 485, Entergy included in the compliance filing the two Entergy Arkansas Base Load PPAs (i.e., with Entergy Louisiana and with Entergy New Orleans) resubmitted as MSS-4 service agreements.

4. The question of when the revised rates under the Entergy Arkansas Base Load PPAs, revised in accordance with Service Schedule MSS-4, would commence was raised by Council in its Dec. 27, 2007 answer and addressed in the March 2008 Order. Council argued that Entergy New Orleans should not be permitted to charge New Orleans ratepayers a surcharge arising from repricing the Entergy Arkansas Base Load PPA with Entergy New Orleans under Service Schedule MSS-4. Council stated that Entergy had committed to absorbing any cost increase resulting from the change to MSS-4 cost-based rates from the previously submitted market-based rates.<sup>10</sup> Council, citing testimony by Entergy witness Harlan in this proceeding, stated that Entergy had committed to absorbing any cost increase resulting from the change to MSS-4 cost-based rates from the

---

<sup>8</sup> Opinion No. 485 at P 90-92, 102-105.

<sup>9</sup> *Entergy Services, Inc. and EWO Marketing, L.P.*, Opinion No. 485-A, 119 FERC ¶ 61,019 (2007).

<sup>10</sup> Council argued that it had entered into a global settlement with Entergy New Orleans in 2003, predicated in part on Entergy New Orleans being able to charge ratepayers the market-based rates. In responding to Council, Entergy argued that the Commission approved the MSS-4 charges for the PPAs as of September 27, 2006 when it found in Opinion No. 485 that the agreements are just and reasonable as repriced under Service Schedule MSS-4.

previously submitted market-based rates up through July of 2007.<sup>11 12</sup> In addition, Council stated that Entergy repriced the contracts at issue in July of 2007 and that Entergy's commitment to absorb any difference between the MSS-4 rate and the previous market-based rates thus ended in July of 2007 and not when Opinion No. 485 was issued on September 27, 2006.<sup>13</sup>

5. The Commission disagreed with Council, stating that in Opinion No. 485, the Commission approved Entergy's plan to use MSS-4 pricing for the Entergy Arkansas Base Load PPAs. Thus, the Commission concluded that, as of September 27, 2006, the date of the issuance of Opinion No. 485, the MSS-4 charges were to be applied prospectively and that no basis existed for New Orleans ratepayers to pay a rate different from the Commission-approved rate.

6. On rehearing, Council repeats its argument that Entergy did not revise the charges in the contracts to reflect the MSS-4 pricing approved in Opinion Nos. 485 and 485-A until July of 2007. Council argues that the Commission erred in limiting the protection offered by Entergy, absorbing the difference between the MSS-4 rate and the market-based rate, to no later than the date of the issuance of Opinion No. 485 because in this case the protection is not a refund but rather is necessitated by an increase in charges that resulted from Entergy's mishandling of affiliate information during the RFP process. Council states further that the courts have found that rate increases approved by the Commission become effective on the date the Commission accepted the compliance filing rather than on the date that the opinion authorizing the increase was issued.<sup>14</sup>

7. Council argues that Entergy did not incorporate the repricing required by Opinion No. 485 into the Entergy Arkansas Base Load PPAs until July of 2007. Council states that section 205 of the Federal Power Act requires that, when so ordered by the

---

<sup>11</sup> By contrast, Entergy maintains that Mr. Harlan was referring to September 27, 2006, the date of issuance of Opinion No. 485. *See* Entergy Answer filed on Jan. 11, 2008 at 2-3.

<sup>12</sup> Citing rebuttal testimony of David C. Harlan, Ex. ETR-60, filed May 1, 2004 at 101.

<sup>13</sup> Council first raised its argument, that the MSS-4 rates should become effective in July 2007, in its answer to Entergy's answer to its protest of Entergy's compliance filing. Council's protest of Entergy's compliance filing is silent on this issue. Council now renews this argument in its request for rehearing of the March 2008 Order.

<sup>14</sup> Council cites *Pub. Serv. Co. of New Mexico v. FERC*, 857 F.2d 833 (D.C. Cir. 1988) (*PSC New Mexico*) for this proposition.

Commission, a utility must refund all charges found not justified. Council argues that Entergy should refund all excess charges until such time as Entergy changed its rates to reflect the Commission's orders, which occurred when Entergy re-priced the contracts at issue in July of 2007.

## II. Discussion

8. Council raised the argument that the effective date for repricing the Entergy Arkansas Base Load PPA using Service Schedule MSS-4 should be July 2007 in the answer that it filed to Entergy's answer to its protest of Entergy's compliance filing.<sup>15</sup> Entergy's reply argued that the July 2007 date is arbitrary, without basis, and unsupported.<sup>16</sup> We deny Council's request for rehearing.

9. Council cites *PSC New Mexico* in support of its contention that the effective date for repricing the Entergy Arkansas Base Load PPA should be July of 2007. However, *PSC New Mexico* involved a dispute over whether the effective date for new rates should be the date of issuance of an order deciding the rate principles to be applied in the case (but not specifically fixing the actual rates to be paid) or the date of issuance of the compliance order that, in that case, fixed the rates.<sup>17</sup>

10. The Commission agrees with the court in *PSC New Mexico* and in *Electrical District No. 1* that, in cases where the ratemaking order only decides general ratemaking issues, but does not fix the actual rates to be charged to customers, then the effective date properly should be set based on the date when the rates were fixed, rather than the date of issuance of the ratemaking order. In the case before us here, however, the question is whether the rates were fixed in Opinion No. 485 (as determined by the Commission) or in July of 2007 (as contended by Council). Here, the Commission fixed the actual rates to be charged to customers in the ratemaking order, i.e., Opinion No. 485. This being the case, the Commission properly established an effective date based on the date of issuance of Opinion No. 485.

---

<sup>15</sup> Council Answer at 4 (dated December 27, 2007).

<sup>16</sup> Entergy Answer at 3-4 (dated January 11, 2008).

<sup>17</sup> The court based its decision on the fact that, while Opinion No. 164 decided the pertinent ratemaking issues, the rates PNM would charge its customers were fixed in the compliance filing. This same basic distinction was made in an earlier case that the court relied on in *PSC New Mexico* (i.e., *Electrical District No. 1 v. FERC*, 774 F.2d 490 (1985) (*Electrical District No. 1*)).

11. In Opinion No. 485, the Commission did not merely make findings on general ratemaking principles that required translation into something more concrete in the compliance filing. Instead, the Commission determined that the customers should be charged under Service Schedule MSS-4, a tariff specifying the actual rates to be charged to customers. In fact, at the time of issuance of Opinion No. 485, the rates specified in Service Schedule MSS-4 had already been applied to Entergy customers in other contexts.

12. In addition, we agree with Entergy that the July 2007 date advanced by Council appears completely without foundation. Council has pointed to no event that transpired in July 2007 nor presented any documentation that would support its contention that this is the time period when the rates were fixed.

13. Finally, as noted above, Entergy resubmitted the Entergy Arkansas Base Load PPAs as Service Schedule MSS-4 agreements after the Commission found that the predecessor market-based rate agreements were unjust, unreasonable and unduly discriminatory.<sup>18</sup> Thus, setting an effective date of July, 2007, would allow Entergy to continue to charge New Orleans ratepayers a rate that the Commission had determined to be unjust, unreasonable, and unduly discriminatory. This would be contrary to the court's findings in two recent cases involving Entergy.<sup>19</sup> In both of these cases, the court instructed the Commission that it would be arbitrary and an abuse of discretion to delay implementing a remedy for rates that we have found to be discriminatory. Having found the previous market-based rates in the Entergy Arkansas Base Load PPAs to be unduly discriminatory, the Commission is bound to implement the remedy at the earliest possible date. In this case, the earliest possible date would be the issuance date of Opinion No. 485 (September 27, 2006).

---

<sup>18</sup> See Opinion No. 485 at P 80.

<sup>19</sup> *Louisiana Public Service Commission v. FERC*, 482 F.3d 510 (D.C. Cir. 2007); *Louisiana Public Service Commission v. FERC*, No. 05-1462, decided April 15, 2008.

The Commission orders:

Council's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.