

127 FERC ¶ 61,126  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services Inc.

Docket No. ER09-833-000

ORDER REJECTING PROPOSED SYSTEM AGREEMENT AMENDMENT

(Issued May 8, 2009)

1. On March 10, 2009 Entergy Services, Inc. (Entergy), a wholly owned subsidiary of Entergy Corporation, submitted pursuant to section 205 of the Federal Power Act (FPA)<sup>1</sup> an amendment to the Entergy System Agreement (System Agreement) that it had previously proposed in March of 2007,<sup>2</sup> and that had been rejected by the Commission as premature. Entergy also submitted an alternative, more narrowly tailored version of the amendment. For the reasons stated below, we reject the proposed amendments.

**I. Background**

**A. System Agreement and the Bandwidth Remedy**

2. The Entergy system operates under a System Agreement that acts as an interconnection and pooling agreement, provides for the joint planning, construction and operation of the six Operating Companies' facilities,<sup>3</sup> and maintains a coordinated power pool among the Operating Companies.<sup>4</sup> In Opinion Nos. 234, 234-A, 292, and

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> *Entergy Services, Inc.*, 119 FERC ¶ 61,191 (2007).

<sup>3</sup> The six Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana LLC, Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc. Entergy Gulf States Louisiana, L.L.C. and Entergy Texas, Inc. were previously operating divisions of Entergy Gulf States, Inc. (EGS), and became two separate Operating Companies on December 31, 2007.

<sup>4</sup> A detailed history of Entergy's rough production cost equalization under the

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292-A,<sup>5</sup> the Commission found that the Entergy system is highly integrated and that generation facilities are planned, constructed and operated for the benefit of the whole system.<sup>6</sup> Subsequently, in Opinion No. 480, the Commission found that “rough production cost equalization on the Entergy system had been disrupted.”<sup>7</sup> The Commission imposed a “bandwidth remedy” to help keep the Entergy system in rough production cost equalization and to help avoid drastic rate disparities in the future.<sup>8</sup> The Commission also required that annual bandwidth filings be made to determine any necessary payments among the Operating Companies.

3. To effectuate the bandwidth remedy, Entergy submitted its compliance filing under Opinion No. 480, proposing certain changes to Service Schedule MSS-3 of the Entergy System Agreement. These changes include formulas to calculate actual and average production costs to determine receipts and payments under the +/- 11 percent bandwidth remedy. The Commission accepted, with modifications, Entergy’s proposed changes and directed Entergy to make a further compliance filing to reflect the Commission’s modifications.<sup>9</sup> The further compliance filing was filed on December 18, 2006 and the Commission accepted this filing on April 27, 2007.<sup>10</sup>

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System Agreement can be found in Opinion No. 480. *Louisiana Public Service Comm’n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *aff’d*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *remanded Louisiana Pub. Serv. Comm’n v. FERC*, 522 F.3d 378 (2008)

<sup>5</sup> *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305, *reh’g denied*, Opinion No. 234-A, 32 FERC ¶ 61,425 (1985), *aff’d*, *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir.), *vacated and rev’d in part and remanded*, 822 F.2d 1104 (D.C.Cir. 1987), *cert. denied*, 484 U.S. 985 (1987), *order on remand*, *System Energy Resources, Inc.*, Opinion No. 292, 41 FERC ¶ 61,238 (1987), *reh’g denied*, Opinion 292-A, 42 FERC ¶ 61,091 (1988), *aff’d sub nom. City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

<sup>6</sup> Opinion No. 292, 41 FERC ¶ 61,238 at 61,614; Opinion No. 234, 31 FERC ¶ 61,305 at 61,650-51, 61,654-56.

<sup>7</sup> Opinion No. 480, 111 FERC ¶ 61, 311 at P 136.

<sup>8</sup> *Id.* P 44.

<sup>9</sup> *Louisiana Public Service Comm’n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006).

<sup>10</sup> *Louisiana Public Service Comm’n v. Entergy Services, Inc.*, 119 FERC ¶ 61,095

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4. On May 29, 2007, in Docket No. ER07-956-000, Entergy submitted its 2007 bandwidth filing, the first annual filing required under Opinion No. 480. The Commission accepted that filing subject to refund and hearing.<sup>11</sup>

**B. Commission Order in Docket No. ER07-683-000**

5. In Docket No. ER07-683-000, Entergy filed a proposed amendment to Service Schedule MSS-3 of the System Agreement, to add a new section 30.15 to confirm the allocation of an individual Operating Company's bandwidth payment or receipt to wholesale loads, if any, and to establish the allocation between retail jurisdictions in the case of operating companies that provided retail service in two separate states (2007 Allocation Amendment). Entergy stated that the purpose of the 2007 Allocation Amendment was to provide certainty as to how an Operating Company's bandwidth payments (or receipts) would be allocated. More specifically, Entergy explained the filing was to set forth the allocation between the Operating Company's wholesale customers, if any, and retail customers, and the allocation between that Operating Company's retail customer jurisdictions, if any. Entergy alleged that the proposed amendment was necessary in the case of EGS, for example, because EGS provided retail service to customers in two separate state retail jurisdictions.

6. In its May 2007 order addressing the 2007 Allocation Amendment, the Commission determined that the filing was premature. The Commission provided that "Entergy may raise any of its concerns" once a state-ordered allocation of an Operating Company's bandwidth payments or receipts results in a trapping of costs.<sup>12</sup>

**C. Texas Commission Decision**

7. Entergy claims that a state-ordered allocation of an Operating Company's bandwidth receipts resulting in trapped costs has now come to pass due to a decision issued on January 7, 2009 by the Public Utility Commission of Texas (Texas Commission) that requires EGS to disburse \$18.6 million over the amount of bandwidth receipts owed to EGS in 2007. According to Entergy, in determining the portion of EGS's bandwidth receipts allocable to Louisiana, the Louisiana Public Service Commission (Louisiana Commission) utilized the methodology in the bandwidth formula for determining payments/receipts between Operating Companies to allocate EGS's

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(2007).

<sup>11</sup> *Entergy Services, Inc.*, 120 FERC ¶ 61,094 (2007).

<sup>12</sup> *Entergy Services, Inc.*, 119 FERC ¶ 61,191, at P 25 (2007) (May 2007 Order).

bandwidth receipts between EGS's retail jurisdictions, while the Texas Commission utilized a different allocation methodology that favors Texas retail customers. Entergy maintains that the discrepancy in the formulas has resulted in the Texas Commission's claim of an additional \$18.6 million in bandwidth payments. Entergy contends that as a result of the Texas Commission's utilization of a different methodology the sum of the bandwidth receipts that are to be allocated to Louisiana and Texas retail customers exceeds EGS's actual bandwidth receipts by \$18.6 million.

8. Entergy further asserts that the Texas Commission found that the allocation method in the bandwidth formula was reasonable but not equitable to Texas customers. Entergy asserts that the Texas Commission concluded that bandwidth "receipts are most appropriately allocated between the Texas and Louisiana retail jurisdictions according to each jurisdiction's relative share of EGS's actual production costs," which method, according to Entergy, bears no relationship to the bandwidth formula's method for remedying disparity from system average production costs.

## **II. Proposed Amendments**

9. In this filing, Entergy claims that it is invoking the Commission's invitation in the May 2007 Order that Entergy renew its request to the Commission because a mismatch now has been created by virtue of a state commission's order.<sup>13</sup> Entergy provides two alternative mechanisms by which it believes the allocation discrepancy can be rectified. Entergy states that it prefers the second of the two alternative amendments discussed below.

10. Option 1: the 2007 Allocation Amendment. Entergy asserts that the 2007 Allocation Amendment is the same as the one rejected in the May 2007 Order, which would add a new section to MSS-3 to confirm the allocation of an individual Operating Company's bandwidth payment or receipt to wholesale loads, if any, and to establish the allocation between retail jurisdictions for those Operating Companies subject to more than one retail regulatory jurisdiction. Entergy explains that it offers this option in the event that the Commission determines that a May 30, 2007 effective date requires submission of the exact amendment submitted on March 30, 2007 in Docket No. ER07-683-000. Entergy further states that the proposed mechanism for allocating payments or receipts between an Operating Company's retail jurisdictions is identical to the methodology ordered by the Commission in Opinion Nos. 480 and 480-A for determining bandwidth receipts and payments between Operating Companies.

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<sup>13</sup> Transmittal Letter at 7.

11. Option 2: the EGS Allocation Amendment. Entergy states that the EGS Allocation Amendment is preferred because it is narrowly tailored to address the only cost trapping issue that has arisen to date, the allocation of EGS's bandwidth receipts between Louisiana and Texas and is also identical to the methodology ordered by the Commission to allocate receipts among the Operating Companies in Opinion Nos. 480 and 480-A. The EGS Allocation Amendment adds a new section 30.15 to require the use of the bandwidth formula methodology for allocating EGS's 2007 bandwidth receipts between Louisiana and Texas.

12. Entergy states that the 2007 Allocation Amendment as originally filed, and rejected in the May 2007 Order, addresses a broader range of allocation issues than is necessary to remedy the current situation. Thus, it explains, it is proposing the narrowly tailored alternative EGS Allocation Amendment. Entergy notes that no other cost trapping issues have arisen in relation to the 2007 bandwidth payments and receipts because other retail regulatory authorities have allocated the bandwidth receipts attributable to the retail jurisdictions consistent with the MSS-3 bandwidth formula provisions for allocating payments and receipts among the Operating Companies. Entergy states a preference for adoption of the EGS Allocation Amendment because it addresses the only inconsistency that has arisen thus far.

13. Entergy argues that the Commission has jurisdiction over the allocation of bandwidth payments among the states served by the Entergy system because, while Opinion Nos. 480 and 480-A did not alter the scope of the Commission's jurisdiction, the Commission there exercised jurisdiction over all of the production costs of the Entergy Operating Companies. Accordingly, it maintains, the interstate allocation of bandwidth payments/receipts under the System Agreement is now subject to the Commission's exclusive jurisdiction. Entergy alleges that the Texas Commission has sought to capture bandwidth receipts beyond those that would be due to the Texas jurisdiction under the allocation methodology approved by the Commission. Entergy further contends that the Commission should exercise its jurisdiction to prevent the Texas Commission's interference with the Commission-ordered bandwidth formula and the allocation of costs essential therewith.

14. Entergy requests an effective date of May 30, 2007, sixty-one days after the initial submission of the 2007 Allocation Amendment in Docket No. ER07-683-000. Entergy states that it anticipates that the 2007 Allocation Amendment or the alternative EGS Allocation Amendment need only be effective until December 31, 2007, to capture the time period during which EGS spanned two retail jurisdictions. In addition, it explains, the Texas Commission order addressed the disbursement of 2007 bandwidth receipts. Entergy argues that the requested effective date is permissible and appropriate, and that the filed rate doctrine and rule against retroactive ratemaking do not apply here.

### **III. Notice, Interventions and Protests**

15. Notice of Entergy's filing was published in the *Federal Register*, 74 Fed. Reg. 12,349, with interventions and protests due March 31, 2009. The Arkansas Public Service Commission filed a notice of intervention. The Louisiana Commission and the Texas Commission filed notices of intervention, protests and comments. The Council of the City of New Orleans (New Orleans) filed a notice of intervention and protest on March 31, 2009. Texas Cities (consisting of the cities of Beaumont, Bridge City, Conroe, Groves, Nederland, Pine, Forest, Port Neches, Rose City, Shenandoah, Silsbee, Sour Lake, and West Orange, Texas) filed a motion to intervene and comments on March 31, 2009. Texas Industrial Energy Consumers (Texas Industrials) filed a motion to intervene, protests and comments on March 31, 2009. Timely motions to intervene raising no issues were filed by East Texas Cooperatives<sup>14</sup> and Occidental Chemical Corporation. Entergy filed an answer to the protests and the Texas Commission filed an answer to Entergy's answer.

16. New Orleans, as well as the Louisiana Commission, state that they take no position on the provisions of the proposed amendments that would allocate a portion of each Entergy Operating Company's bandwidth payment or receipt to wholesale loads. All of the parties that filed comments and protests, however, argue that the Commission lacks the authority to make retail rate determinations as Entergy requests. They argue that while states must permit utilities to pass through Commission-approved wholesale costs to their retail customers, the allocation of such costs between state jurisdictions and classes of retail customers has traditionally been a retail regulator determination. Texas Cities assert that Entergy's request is an improper and unprecedented expansion of the Commission's jurisdiction and that the Commission's authority "extends only to those matters which are not subject to regulation by the state"<sup>15</sup> in regulating the business of transmitting and selling electric energy. The Texas Commission contends that the FPA establishes a bright line between federal and state authority over electric rates. Further, the Texas Commission argues that no one would dispute that retail rate making authority is an inherent part of the retail rate setting process if Entergy's customers were located within a single state and subject to only one regulatory authority. Texas Industrials assert that whether or not the Texas Commission's allocation methodology is reasonable is not a Commission jurisdictional matter but rather a matter for judicial review in the pending appeals of the Texas Commission's decision brought by Entergy in both state and federal

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<sup>14</sup> East Texas Cooperatives consist of East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc.

<sup>15</sup> 16 U.S.C. § 824a (2006).

court. They assert that it is not and never has been the role of the Commission to arbitrate differences in allocation decisions between a single utility's retail jurisdictions.

17. The Louisiana Commission states that the use of different methodologies between the Texas Commission and the Louisiana Commission may give grounds for an appeal of the Texas Commission decision, but states that the Texas Commission's decision does not create new jurisdiction for the Commission that does not otherwise exist. The Louisiana Commission concludes that if the Texas Commission has set rates in an unreasonable manner, Entergy's remedy is in the court system by challenging directly the Texas decision. According to the Louisiana Commission, "asking [the Commission] to set the jurisdictional allocation between the historical Louisiana and Texas portions of one company is unprecedented and exceeds [the Commission's] authority."<sup>16</sup>

18. The Louisiana Commission and others argue that the risk that two states may order different allocation methods is a risk that a utility assumes when operating in two separate jurisdictions and the Commission has never interfered with these allocations in the past. The Louisiana and Texas Commissions argue that Entergy is asking the Commission to extend the formula establishing the allocation of rough production cost equalization payments among Operating Companies to the intra-utility allocation of those receipts among retail ratepayer groups, which is an infringement on state rate-setting procedures. The Texas Commission states that even the Louisiana Commission, whose ratepayers would benefit from Entergy's proposed allocation, agrees that the Commission does not have jurisdiction over retail level allocations.

19. Texas Cities contend that there is no conflict between the Texas Commission's decision and Order Nos. 480 and 480-A because the Texas Commission began its inquiry into cost allocation with the total amount of rough production cost equalization payments made to EGS, as determined by the Commission and then allocated the retail portion of those payments between retail jurisdictions based upon each jurisdiction's relative production cost. Texas Cities also argue that Entergy should not be permitted to create a conflict between two state regulatory allocation decisions so that a company may have the issue decided at the Commission. New Orleans contends that if the Commission determines that it does indeed have authority to make such allocations, it requests that the Commission adopt the narrower of the two alternatives (EGS Allocation Amendment) so as to minimize its encroachment and notes that Entergy itself would prefer adoption of this narrower amendment.

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<sup>16</sup> The Louisiana Commission maintains that rather than extend its jurisdiction in the dubious fashion Entergy requests, the Commission should allow the state or federal courts to adjudicate the 2007 allocation issue.

20. Texas Industrials, as well as the Texas Commission, argue that the Texas Commission's decision honored the Commission's determination of bandwidth payments and receipts for Entergy, and exercised its retail authority to make a determination of how those payments should be allocated. Texas Industrials assert that Entergy's reliance on *Maryland v. Louisiana*,<sup>17</sup> for the proposition that any state action that affects a Commission interstate allocation of costs is preempted by the FPA is misplaced. Texas Industrials point out that in that case Louisiana shifted costs away from Louisiana pipeline owners for certain expenses that the Commission's regulatory scheme would have allocated to pipeline owners. Here, however, Texas Industrials maintain, the Texas Commission has not usurped the Commission's authority. According to Texas Industrials, the Texas Commission honored the Commission's determination of bandwidth payments and receipts for EGS, and exercised its retail authority to make a determination of how those payments should be allocated to its retail jurisdiction. Texas Industrials assert that whether or not the Texas Commission's methodology is reasonable is a matter for judicial review in the pending appeals and that the Commission should not take Entergy's bait to embark into an area of regulation that would certainly be inconsistent with prior Commission precedent and the FPA. Additionally, both Texas Industrials and the Texas Commission argue the Texas Commission did not act in any way inconsistent with the Commission approved tariff and, therefore, did not offend the Supremacy Clause.

21. Several parties also contend that the amendments should be denied because they violate the filed rate doctrine. The Louisiana Commission states that for the Commission to remain consistent with precedent it would need to implement this proposed change prospectively rather than retroactively, which makes the proposed change moot. Further, Texas Industrials and the Texas Commission both contend that even if the Commission had authority to allocate costs between a single utility's retail jurisdictions, Entergy's tariff amendment should be rejected as unlawful retroactive ratemaking because good cause simply does not exist to waive the FPA's notice requirements and rules regarding retroactive ratemaking. Finally, Texas Industrials state that Entergy's proposed tariff is not a just and reasonable rate because Entergy is seeking to extend the application of the remedy in Opinion Nos. 480 and 480-A to retail jurisdictions without any showing that those jurisdictions are in production cost imbalance under the terms of the formula.

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<sup>17</sup> *Maryland v. Louisiana*, 451 U.S. 725 (1981).

#### IV. Discussion

##### A. Procedural Matters

22. 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. 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 and an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by Entergy and the Texas Commission and will, therefore, reject them.

##### B. Commission Determination

23. We will reject Entergy's proposed amendments. As all of the protesters maintain, any issues related to the allocation of an individual utility's payments or receipts to retail customers are beyond the jurisdiction of this Commission.<sup>18</sup> We disagree with Entergy's assertion that the Commission has jurisdiction to determine the share of the bandwidth receipts originally allocated to EGS that, in turn, should be allocated by EGS to its Louisiana and Texas retail customers. Rather, this is a matter for the courts to review in the pending appeals of the Texas Commission's decision brought by Entergy in both state and federal court. In this regard, we note that the Texas Commission's retail allocation decision does not conflict with the Commission's allocation for wholesale sales between the Entergy Operating Companies, but rather accepts the Commission's determination of the amount of receipts to be distributed to EGS under Service Schedule MSS-3.

24. Further, we disagree with Entergy's reliance on *Maryland v. Louisiana*, for its assertion that the Texas Commission's determination interferes with the Commission's authority to regulate the determination of the proper allocation of costs associated with wholesale sales of electric power. In *Maryland v. Louisiana*, Louisiana had enacted a tax statute, coupled with a tax credit scheme, that shifted costs away from Louisiana pipeline owners for certain expenses that the Commission's regulatory scheme would have allocated to pipeline owners. The Court held that Louisiana had impermissibly usurped the Commission's authority to dictate to pipelines the allocation of processing costs for the interstate shipment of natural gas.<sup>19</sup> Here, however, the Texas Commission has accepted the Commission's interstate allocation of bandwidth receipts to EGS and merely determined what share of those payments should be allocated to Texas retail customers.

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<sup>18</sup> See, e.g., *Entergy Services, Inc.*, 120 FERC ¶ 61,094, at P 17 (2007).

<sup>19</sup> *Maryland v. Louisiana*, 451 U.S. at 749.

The Louisiana Commission acted similarly. Thus, no conflict with the Commission's regulations exists.

25. The potential for retail regulators to adopt different retail allocations of payments for multi-jurisdictional utilities has always existed, and the Commission has never claimed that a Commission-approved allocation has been violated because two states allocated the receipts differently among their respective retail customers. As has long been recognized, when more than one jurisdiction is involved there is an inherent operating risk that one jurisdiction may allocate on a different basis and the allocations may not mesh perfectly.<sup>20</sup> It is axiomatic that different regulatory bodies are not bound to apply the same ratemaking principles, and therefore, the possibility of such imperfection is inherent in this nation's dual system of retail and wholesale rate regulation.<sup>21</sup> This is a risk that Entergy assumed when it established its operating structure.

The Commission orders:

Entergy's proposed amendments to Service Schedule MSS-3 are hereby rejected, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>20</sup> See, e.g., *Utah Power and Light Co.*, 45 FERC ¶ 61,095, at 61,296 (1988), *motion for reh'g granted on other grounds*, 47 FERC ¶ 61,209 (1989).

<sup>21</sup> E.g., *Houlton Water Company v. Maine Public Service Co.*, 60 FERC ¶ 61,141, at 61,514 (1992) (citing *Public Service Co. of Indiana, Inc. v. FERC*, 575 F.2d 1204, 1218 (7<sup>th</sup> Cir. 1978)).