

128 FERC ¶ 61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

Docket No. EL09-50-000

v.

Entergy Services, Inc.

ORDER ON COMPLAINT AND ESTABLISHING HEARING PROCEDURES

(Issued September 4, 2009)

1. On May 1, 2009, as amended on June 5, 2009, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint against Entergy Services, Inc. (Entergy) concerning certain amounts included or excluded in its bandwidth remedy calculations. For the reasons discussed below, we deny the complaint in part and establish hearing procedures regarding the Waterford 3 sale-leaseback Accumulated Deferred Income Tax (ADIT) matter.

I. Background

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,¹ and maintains a coordinated power pool among the Operating Companies.² In Opinion Nos. 234, 234-A, 292, and

¹ The six Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc.

² A detailed history of Entergy's rough production cost equalization under the 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).

292-A,³ 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.⁴ Subsequently, in Opinion No. 480, the Commission found that “rough production cost equalization on the Entergy system had been disrupted.”⁵ 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.⁶ The Commission also required that annual bandwidth filings be made to determine any necessary payments among the Operating Companies.

3. On May 29, 2007, in Docket No. ER07-956-000, Entergy submitted its first annual bandwidth filing, as directed by Opinion No. 480, containing the calculation of production costs for each of the Entergy Operating Companies based on calendar year 2006 data. On July 26, 2007, the Commission accepted the proposed rates for filing and suspended them for a nominal period to become effective June 1, 2007, subject to refund. The Commission also established hearing and settlement judge procedures.⁷ The hearing in Docket No. ER07-956-000 occurred in June of 2008 and the Presiding Judge issued an Initial Decision on September 23, 2008,⁸ which is currently pending on exception before the Commission.

4. On May 30, 2008, in Docket No. ER08-1056-000, Entergy submitted its second annual bandwidth filing, containing the calculation of production costs for each of the Entergy Operating Companies based on calendar year 2007 data. In an order issued on July 29, 2008, the Commission again accepted the proposed rates for filing, and

³ *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 EnergyResources, 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).

⁴ Opinion No. 292, 41 FERC ¶ 61,238 at 61,614; Opinion No. 234, 31 FERC ¶ 61,305 at 61,650-51, 61,654-56.

⁵ Opinion No. 480, 111 FERC ¶ 61, 311 at P 136.

⁶ *Id.* P 44.

⁷ *Entergy Services, Inc.*, 120 FERC ¶ 61,094 (2007).

⁸ *Entergy Services, Inc.*, 124 FERC ¶ 63,026 (2008).

suspended them for a nominal period, to become effective June 1, 2008, subject to refund.⁹ The Commission also established hearing and settlement judge procedures. The hearing in Docket No. ER08-1056-000 was held on June 15, 2009.

II. Complaint and Amended Complaint

5. On May 1, 2009, the Louisiana Commission filed a complaint raising what it terms are four “Implementation Issues” and one “Complaint Issue.” With respect to the so-called “Implementation Issues,” the Louisiana Commission explains that it has filed testimony in Docket No. ER08-1056-000 on these issues, but that some parties have asserted that a complaint is necessary to challenge these issues. While the Louisiana Commission believes that these issues can be properly considered and addressed in Docket No. ER08-1056-000, out of an abundance of caution, it provisionally complains of these issues to ensure they are preserved in the event the Commission should rule that the issues were not properly raised in Docket No. ER08-1056-000. With respect to the “Complaint Issue,” the Louisiana Commission believes a complaint is required to raise the issue.

6. The four “Implementation Issues” raised by the Louisiana Commission are as follows: (1) Entergy deviated from the methodology used in Exhibits ETR-26 and ETR-28 by using a hypothetical capital structure for Entergy Louisiana instead of the actual capital structure that it maintains the tariff requires; (2) Entergy improperly excluded from the bandwidth calculations the \$89.435 million Account 190 ADIT related to the Waterford 3 sale-leaseback contrary to a prior Commission order on the matter; (3) Entergy failed to include in the bandwidth calculation the benefits of a settlement between Entergy Arkansas and Union Pacific concerning a coal contract (Union Pacific Settlement); and (4) Entergy should not have included in the bandwidth calculations the portion of 2007 Entergy Texas production costs that are not recovered from retail ratepayers in Texas due to a state-imposed regulatory scheme that has effectively disallowed base rate costs that exceed 1999 levels (Texas Rate Freeze Disallowance).

7. The Louisiana Commission requests no action on the Implementation Issues unless the Commission determines that a matter or matters are not properly before the Commission in Docket No. ER08-1056-000 and that a complaint must be filed to correct the unjust and unreasonable cost inputs. However, the Louisiana Commission does request action with respect to the Complaint Issue, which relates to the amount of Waterford 3 sale-leaseback ADIT that is assigned to the production function. Specifically, the Louisiana Commission requests that Service Schedule MSS-3 be amended to directly assign the Waterford 3 sale-leaseback ADIT amounts to the production function, as these costs are production related and should not be

⁹ *Entergy Services, Inc.*, 124 FERC ¶ 61,101 (2008).

functionalized using a plant ratio. Also, the Louisiana Commission requests that the Commission summarily correct the deficiency in Entergy's calculation or, alternatively, establish a refund effective date at the earliest date allowed by law and establish hearing procedures. On June 5, 2009, the Louisiana Commission filed an amended complaint stating that on May 21, 2009, a settlement was submitted to the Commission in Docket No. ER08-1056-000 on behalf of all active parties in the proceeding. It explains that, as part of the settlement, two of the issues raised in the original complaint: (1) Union Pacific Settlement and (2) Texas Rate Freeze Settlement have been resolved and thus it is amending its complaint to remove the claims related to these two issues consistent with and subject to final approval of the partial uncontested settlement agreement submitted in Docket ER08-1056.¹⁰

8. In support of its ADIT Implementation Issue, the Louisiana Commission reiterates its issues in the ongoing litigated proceedings. The Louisiana Commission argues that the Commission should require inclusion of the Waterford 3 sale-leaseback Account 190 (Accumulated Deferred Income Taxes) amounts in the bandwidth remedy calculation. The Louisiana Commission asserts that the Waterford 3 sale-leaseback cost is included in the bandwidth formula calculation but that Entergy excluded \$89.435 million in accumulated deferred income taxes related to the Waterford 3 sale-leaseback. The Louisiana Commission further argues that the Commission, in Docket No. ER07-727-000,¹¹ ruled that the actual costs associated with the sale-leaseback should be included in the bandwidth formula and, thus it believes that the ADIT is a cost of the sale-leaseback that should be included in the bandwidth formula.

9. With respect to the Complaint Issue, the Louisiana Commission asserts that under the current Service Schedule MSS-3 formula, only a portion of ADIT in Account No. 190 is functionalized to production using a plant allocator. If its position is adopted on the ADIT implementation issue in Docket No. ER08-1056-000, as mentioned above, the Louisiana Commission maintains that only a portion of the Waterford 3 sale-leaseback ADIT cost would be included in production costs with the remainder of the ADIT costs being functionalized to transmission or distribution. But, it asserts, the sale-leaseback ADIT is 100 percent production related and should be directly assigned to the production function. Accordingly, the Louisiana Commission argues that Service Schedule MSS-3 should be amended to include a direct assignment of the sale-leaseback ADIT, along with other costs of the sale-leaseback.

¹⁰ We note that on June 19, 2009, the Presiding Judge certified to the Commission the partial uncontested settlement agreement. *Entergy Services, Inc.*, 127 FERC ¶ 63,027 (2009).

¹¹ *Entergy Services, Inc.*, 119 FERC ¶ 61,193, at P 6-7 (2007).

III. Notice of Filing and Responsive Pleading

10. Notice of the Louisiana Commission's complaint was published in the *Federal Register*, 74 Fed. Reg. 21,801(2009) with interventions and protests due on or before May 21, 2009. The amended complaint was noticed in the *Federal Register*, 74 Fed. Reg. 28,043 (2009) with interventions and protests due on or before June 25, 2009. Notices of intervention were filed by the Mississippi Public Service Commission and the Arkansas Public Service Commission (Arkansas Commission). Occidental Chemical Corporation, Texas Industrial Energy Consumers, Ameren Services Company, as agent for Union Electric Company, Council of the City of New Orleans, East Texas Cooperatives and the Alliance for Affordable Energy filed motions to intervene. On May 21, 2009, Texas Industrial Energy Consumers and the Arkansas Commission filed protests. Entergy filed its answer to the complaint.

11. On May 21, 2009, Entergy filed its answer asserting that the issues raised by the Louisiana Commission are already being addressed in Docket Nos. ER07-956-000 and ER08-1056-000. Entergy requests that the Commission hold the complaint in abeyance, subject to the outcome of Docket Nos. ER07-956-000 and ER08-1056-000. Entergy argues that Commission precedent supports holding this case in abeyance pending the outcome of Docket Nos. ER07-956-000 and ER08-1056-000, citing the proceedings in Docket No. EL08-60-000. Entergy states that in Docket No. EL08-60-000, Union Electric Company (Union Electric) filed a complaint against Entergy alleging that Entergy was unlawfully recovering bandwidth payments from Union Electric through a service agreement with Entergy Arkansas, Inc. In its answer to Union Electric, Entergy explained that the issues raised were pending in Docket No. ER07-956-000 and requested that the Commission hold the complaint in abeyance. The Commission, in that instance, agreed to hold Union Electric's complaint in abeyance.¹²

12. Entergy also states that in regard to the Complaint Issue raised it has and will continue to challenge the inclusion of the Waterford 3 ADIT issue in the Docket No. ER08-1056-000 proceeding. According to Entergy, exclusion of the categories of accumulated deferred income tax from the 2006 test year from Account 190 in the bandwidth calculation is among the issues that will not be relitigated in Docket No. ER08-1056-000. Further, Entergy states that the initial decision in ER07-956-000 found that the accumulated deferred income tax was properly excluded from the bandwidth calculation.¹³

¹² *Union Electric Co. v. Entergy Arkansas, Inc. and Entergy Services, Inc.*, 124 FERC ¶ 61,111, at P 12 (2008).

¹³ *Entergy Services, Inc.*, 124 FERC ¶ 63,026 (2008).

13. The Arkansas Commission states that the Union Pacific settlement adjustment to the bandwidth calculation issue addressed in the initial complaint is expected to be withdrawn per the settlement filed in Docket No. ER08-1056-000.

14. Texas Industrial Energy Consumers argue that one of the issues raised in the initial complaint relating to whether production related costs of Entergy Gulf States, Inc., were allegedly disallowed in Texas in 2007 because of a rate freeze should be disallowed from the bandwidth calculation, has been resolved in the partial settlement filed in Docket No. ER08-1056-000. Accordingly, they request that the Commission reject the Louisiana Commission's recommendation on this issue if it fails to amend its complaint.

IV. Commission Determination

A. Procedural Matters

15. 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 the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

16. We will accept the Louisiana Commission's offer to amend its complaint to remove paragraphs 32 through 51 of its complaint that relate to the Union Pacific Settlement and Texas Rate Freeze Disallowance (two of the four "Implementation Issues") subject to a final Commission order approving the partial uncontested settlement agreement. As we noted above, that settlement agreement has been certified to the Commission. Also, we will deny the Louisiana Commission's complaint with respect to the two remaining "Implementation Issues." Each of those issues relates solely to whether Entergy properly included or excluded certain amounts in its bandwidth remedy calculations in Docket No. ER08-1056-000. With respect to the imputed capital structure issue, the only relief the Louisiana Commission requests is that the related dollar amounts should be excluded from the bandwidth remedy calculation in Docket No. ER08-1056-000. Similarly, with respect to the Waterford 3 sale-leaseback ADIT issue, the only relief the Louisiana Commission seeks is that the ADIT should be included in the bandwidth remedy calculation in Docket No. ER08-1056-000. The Louisiana Commission does not request action on the remaining Implementation Issues unless the Commission determines that these matters are not properly being raised in Docket No. ER08-1056-000. We agree with the Louisiana Commission that these Implementation Issues are properly before the Commission in Docket No. ER08-1056-000 and, accordingly, we deny the complaint with respect to these issues.

Hearing Procedures

17. The Louisiana Commission's "Complaint Issue" raises an issue of material fact that cannot be resolved based on the record before us, and that is more appropriately addressed in the hearing procedures ordered below. The hearing should address whether Service Schedule MSS-3 should be amended to include a direct assignment of the sale-leaseback ADIT, along with other costs of the sale-leaseback.

18. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date of the filing of the complaint, but no later than five months after the filing of such complaint.¹⁴ Consistent with our general policy of providing maximum protection to customers,¹⁵ we will set the refund effective date as of the date of the filing of the Louisiana Commission's complaint, or May 1, 2009.

19. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Based upon our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of the hearing procedures or, if the case were to go to hearing immediately, June 1, 2010. Thus we estimate that if the case were to go to hearing immediately we would be able to issue our decision within approximately four months of the filing of briefs on and opposing exceptions, or by December 1, 2010.

The Commission orders:

(A) The Louisiana Commission's complaint is hereby denied as to the Implementation Issues, 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

¹⁴ Section 206(b) of the FPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

¹⁵ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,319 (1993); *Canal Electric Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

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 the Waterford 3 sale-leaseback Accumulated Deferred Income Taxes, as well as other costs of the sale-leaseback.

(C) 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.

(D) The refund effective date established pursuant to section 206(b) of the Federal Power Act is May 1, 2009.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.