

129 FERC ¶ 61,194
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. EL09-50-001

v.

Entergy Services, Inc.

ORDER GRANTING CLARIFICATION

(Issued December 2, 2009)

1. On October 5, 2009, Entergy Services, Inc. (Entergy) filed a request for clarification of the Commission's order¹ issued in this proceeding, concerning a Commission statement regarding another proceeding. For the reasons discussed below, we will grant Entergy's request for clarification.

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,² and maintains a coordinated power pool among the Operating Companies.³ In Opinion Nos. 234, 234-A, 292, and 292-A,⁴

¹ *Louisiana Public Service Commission v. Entergy Services, Inc.*, 128 FERC ¶ 61,225 (2009) (September 4 Order).

² 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.

³ 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).

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.⁵ In Opinion Nos. 480 and 480-A,⁶ the Commission ruled that the Entergy System Agreement no longer operated to produce rough equalization of production costs among the Entergy Operating Companies' and, therefore, was no longer just and reasonable. As a result, the Commission imposed a bandwidth remedy, which required the Entergy Operating Companies to make equalization payments to each other if their production costs fell outside the system average production costs by more than a bandwidth of +/- 11 percent. The Commission accepted Entergy's compliance filings establishing the bandwidth formula.⁷

3. The bandwidth remedy required Entergy to make an annual section 205 filing to implement the results of the formula based on data for the prior year. On May 29, 2007, in Docket No. ER07-956-000, Entergy made its first annual bandwidth implementation filing. The Commission set this filing for hearing, and the hearing was held in June 2008.⁸ The presiding judge issued an Initial Decision in Docket No. ER07-956-000 on September 23, 2008, and the Initial Decision is currently pending before the Commission on exceptions.⁹

4. On May 30, 2008, in Docket No. ER08-1056-000, Entergy submitted its second annual bandwidth implementation filing, which was also set for hearing by the

⁴ *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 No. 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).

⁵ Opinion No. 292, 41 FERC ¶ 61,238 at 61,614; Opinion No. 234, 31 FERC ¶ 61,305 at 61,650-51, 61,654-56.

⁶ *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005).

⁷ *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007).

⁸ *Entergy Services, Inc.*, 120 FERC ¶ 61,094 (2007).

⁹ *Entergy Services, Inc.*, 124 FERC ¶ 63,026 (2008).

Commission.¹⁰ Prior to the hearing and submission of pre-filed testimony, the parties entered into a joint stipulation agreeing not to litigate issues that were litigated in other proceedings. One of the stipulated issues that could not be relitigated was the exclusion of the categories of Accumulated Deferred Income Tax (ADIT) that Entergy excluded for the 2006 test year from Account No. 190 in the bandwidth calculation.

5. The hearing in Docket No. ER08-1056 was held in June 2009. One of the issues addressed at the hearing was Entergy's exclusion of the ADIT associated with the Waterford 3 sale-leaseback. Entergy argued that this issue could not be relitigated in Docket No. ER08-1056 because relitigation was barred by the joint stipulation, as well as the doctrines of res judicata and collateral estoppel. The presiding judge issued an Initial Decision in Docket No. ER08-1056-002 on September 10, 2009 and ruled that Entergy improperly excluded the ADIT associated with the Waterford 3 sale-leaseback from the bandwidth calculation and that relitigation of this issue was not barred by the joint stipulation or the doctrines of collateral estoppels or res judicata.¹¹ Entergy filed exceptions to the presiding judge's ruling on the Waterford 3 sale-leaseback ADIT issue.

6. On May 1, 2009, in this proceeding, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint raising four "implementation issues"¹² and one "complaint issue." The Louisiana Commission stated that the implementation issues were being addressed in Docket Nos. ER07-956 and ER08-1056 and thus the complaint requested no specific Commission action on those issues. Therefore, the Louisiana Commission stated that it was asserting these issues in a complaint out of an abundance of caution.

¹⁰ *Entergy Services, Inc.*, 124 FERC ¶ 61,101 (2008).

¹¹ *Entergy Services, Inc.*, 128 FERC ¶ 63,015 (2009).

¹² The four implementation issues raised by the Louisiana Commission were: (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; 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. Issues 3 and 4 were subsequently resolved in a settlement and dropped from the complaint.

7. In the September 4 Order, the Commission denied the complaint with respect to the implementation issues and set the complaint issue for hearing.¹³ The Commission found that two of the implementation issues had been settled and were now moot. In regards to the two remaining implementation issues, one of which was the Waterford 3 sale-leaseback ADIT issue, the Commission denied the complaint stating that it agreed with the Louisiana Commission that “these implementation issues are properly before the Commission in Docket No. ER08-1056-000.”¹⁴

II. Request for Clarification

8. Entergy seeks clarification of the Commission’s statement in the September 4 Order that the Waterford 3 sale-leaseback ADIT issue was “properly before the Commission in Docket No. ER08-1056-000.” Entergy requests that the Commission clarify that this statement was not intended to address or resolve Entergy’s argument that the issue was litigated in Docket No. ER07-956 and cannot be relitigated in Docket No. ER08-1056. Entergy states that its understanding of the Commission’s ruling in the September 4 Order is that the Commission meant that the Louisiana Commission’s challenge to Entergy’s exclusion from the bandwidth calculation of the Waterford 3 sale-leaseback ADIT was an issue that could be raised in an annual bandwidth implementation filing and did not have to be raised in a complaint. Entergy states that the question of whether the Waterford 3 sale-leaseback issue was actually litigated in Docket No. ER07-956 and cannot be relitigated in Docket No. ER08-1056 is a contested question in Docket No. ER08-1056 and will be addressed on exceptions to the Initial Decision in Docket No. ER08-1056. Entergy argues that it is possible for a party in Docket No. ER08-1056 to argue that the Commission rejected Entergy’s relitigation argument in the September 4 Order because it stated that the Waterford 3 sale-leaseback ADIT was “properly before” the Commission in Docket No. ER08-1056. Entergy states that it does not believe this is what the Commission meant in the September 4 Order.

9. Entergy argues that the relitigation argument was not addressed or briefed in any detail in this proceeding. Entergy further contends that it would be neither logical nor fair to conclude that the Commission intended to address and resolve against Entergy this issue that was never briefed. Entergy requests that, in the abundance of caution, and to avoid any potential confusion in Docket No. ER08-1056, the Commission should clarify that it did not intend to address and reject Entergy’s relitigation argument.

¹³ September 4 Order at P 16-17.

¹⁴ *Id.* P 16.

III. Discussion

10. The Commission's September 4 Order addressed the preliminary question posed in the Louisiana Commission's complaint, which is whether or not the four implementation issues, already being addressed in Docket No. ER08-1056, needed to be raised in a complaint. The Commission in the September 4 Order answered this question by stating these issues were "properly before the Commission" in Docket No. ER08-1056. Entergy is correct that by stating that the issues "were properly before the Commission" the Commission was not making a decision on Entergy's relitigation argument but rather answering the preliminary question posed in the Louisiana Commission's initial complaint about the proper forum to bring the implementation issues before the Commission. Therefore, as Entergy asserts, the Commission did not intend to address and reject Entergy's argument that the Waterford 3 sale-leaseback issue was litigated and resolved in Docket No. ER07-956 and cannot be relitigated in Docket No. ER08-1056.

The Commission orders:

Entergy's request for clarification is hereby granted, as explained in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.