

129 FERC ¶ 61,288  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc. Docket No. ER09-1214-000

South Mississippi Electric Power Association, *et al.* Docket No. EL09-78-000

v.

Entergy Services, Inc.

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 30, 2009)

1. On September 28, 2009, in Docket No. EL09-78-000 Complainants<sup>1</sup> filed a complaint, pursuant to sections 206, 306 and 309 of the Federal Power Act (FPA), alleging that Entergy's<sup>2</sup> 2009 Rate Determination, submitted as an informational filing in Docket No. ER09-1214-000, departs from the proper application of Entergy's formula and requesting consolidation and hearing procedures. In this order we establish hearing and settlement judge procedures.

**I. Background**

2. Appendix 1 to Attachment H and Appendix A to Schedule 7 of Entergy's Open Access Transmission Tariff (OATT) provide for an annual redetermination of rates for long-term and short-term firm point-to-point transmission service, non-firm point-to-

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<sup>1</sup> Parties to the Complaint: South Mississippi Electric Power Association, Arkansas Electric Cooperative Corporation, Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, Public Service Commission of Yazoo City, Conway Corporation, West Memphis Utilities Commission, City of Prescott, Arkansas, Louisiana Energy and Power Authority, Lafayette Utilities System, and Municipal Energy Agency of Mississippi.

<sup>2</sup> Entergy Arkansas, Inc., Entergy Gulf States Louisiana, Inc., Entergy Texas, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (Entergy).

point transmission service, and network integration transmission service, according to a formula in Entergy's OATT and based on actual data for the immediately preceding calendar year.<sup>3</sup> Each year, Entergy makes the rate redetermination filing on or about May 1, with the redetermined rates becoming effective, subject to refund, for bills rendered on or after June 1 of that year, and remaining in effect for 12 months.

3. Entergy's OATT provides that all parties (including the Commission's staff) shall have 120 days after each rate redetermination filing to review the redetermined rates and to file a complaint with the Commission regarding them. It also provides that the redetermined rates are subject to refund or surcharge until the latest of: (1) the end of the 120-day review period, if at such time there is no outstanding, unresolved complaint; (2) the final resolution of any complaint filed; or (3) the completion of any required corrections. It further provides that a corrected filing of the redetermined rates shall be submitted to the Commission and, after final acceptance by the Commission, any required refund or surcharge shall be made to each customer on the next normal monthly billing.

**A. 2009 Rate Redetermination Filing**

4. On May 29, 2009, in accordance with Attachment H and Schedule 7 of its OATT and the settlement approved by the Commission in *Entergy Services Inc.*, 85 FERC ¶ 61,163 (1998) (Opinion No. 430), Entergy filed its informational 2009 Rate Redetermination in Docket No. ER09-1214-000. Entergy explains that its OATT provides that such informational rate updates do not constitute rate change filings subject to the requirements of Section 205 of the FPA and public notice of the updates is not required. Entergy states that the charges were determined using historical, actual costs, loads and other inputs as recorded for 2008.

5. Entergy further explains that, in accordance with its OATT, Entergy submits an informational filing to the Commission that updates the charges that will apply for OATT service for the upcoming June 1 through May 31 period using actual data for the immediately preceding calendar year. Here, Entergy adds that its OATT provides the procedure that was agreed to by the parties to the settlement accepted in Opinion No. 430 as an alternative to the routine treatment of rate filing made pursuant to Section 205 of the FPA.

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<sup>3</sup> The annual rate redetermination formula was first established in a partial settlement approved by the Commission in Docket No. ER95-112-000. *Entergy Services, Inc.*, Opinion No. 430, 85 FERC ¶ 61,163 (1998), *order on reh'g*, 91 FERC ¶ 61,153 (2000).

**B. Complaint and Answer**

6. Pursuant to the terms of Entergy's OATT, Complainants filed a complaint in Docket No. EL09-78-000 challenging various aspects of Entergy's 2009 Rate Redetermination. Complainants argue that Entergy has included in its 2009 Rate Determination long-term debt interest expense in excess of the amounts actually incurred by Entergy in 2008. Complainants maintain that Entergy has utilized an annualized interest rate to calculate what the interest expense would have been if the debt issuance had been in place for all of 2008.

7. In addition, Complainants argue that Entergy has failed to demonstrate that certain administrative and general expenses are properly recoverable as transmission costs. Complainants assert that absent sufficient clarification and supporting documentation, Entergy has failed to demonstrate that these expenses are properly included in the update.

8. Complainants further claim that Entergy has not demonstrated that wholesale transmission customers are not paying any costs associated with the spin-off of its nuclear facilities. Complainants argue that in a prior proceeding concerning these issues, Entergy made a commitment to the Commission that "none of the costs of executing the proposed transaction will be passed through in regulated wholesale rates except to the extent of savings created as a result of the transaction."<sup>4</sup> Complainants argue that several elements of Entergy's filing raise serious questions as to whether Entergy has abided by this commitment.

9. Complainants argue that the settlement approved in Opinion No. 430 makes clear that the rates and charges produced by the formula must exclude retail regulatory expenses and all retail related taxes, but that Entergy has violated this principle.

10. Complainants argue that Entergy's filing allocates storm costs to wholesale OATT customers that were incurred by Entergy Arkansas between 2002 (or earlier) and 2006. Complainants claim that Entergy did not seek or receive approval either from the Commission or from the Arkansas Public Service Commission to defer recovery of these previously incurred costs and thus, may not increase test year expenses to recover these storm costs. Complainants also assert that Entergy's proposed treatment of "securitized" storm recovery investment is inconsistent with the rate formula and unduly discriminatory. Complainants argue that there is nothing in the OATT, either explicit or implicit, that permits Entergy to adjust the Form 1 plant investment figures to add amounts for investments funded (and owned) by state instrumentalities.

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<sup>4</sup> Complaint at 22 (quoting *Entergy Nuclear Generation Co.*, Order Authorizing Disposition of Jurisdictional Facilities, 123 FERC ¶ 62,221, at 64,503 (2008)).

11. Complainants further argue that Entergy has impermissibly included certain accumulated deferred income taxes (ADIT) in its formula rate calculation that do not exist and excluded others that belong in the formula rate calculation. Complainants also argue that Entergy has improperly included incentive compensation unrelated to the transmission service at issue. Complainants argue that it is inappropriate for Entergy to include incentive compensation that is unrelated to transmission, but rather is related to Entergy's unregulated merchant generation or tied to financial performance of unregulated subsidiaries.

12. Finally, Complainants argue that Entergy has not provided adequate support for its revenue credit figures. Complainants assert that they have not been able to replicate Entergy's calculations based upon Entergy's OASIS data.

13. Complainants request that the Commission set this case for hearing and settlement judge procedures, and consolidate the proceedings.

14. In its answer to the complaint, Entergy argues that the complaint should be dismissed because Complainants have failed to meet their burden of proof to show that the currently-effective OATT formula rate is unjust and unreasonable. Entergy argues that Complainants have not demonstrated that the cost inputs into the OATT formula rate are incorrect or that there are any errors in the calculation. Further, Entergy argues that Complainants have provided no evidence that the 2008 Form 1 cost inputs as filed in the 2009 Rate Redetermination are unreasonable. However, to the extent that there are any issues that the Commission believes would justify further investigation, Entergy requests the appointment of a settlement judge.

15. Entergy asserts that the majority of the issues raised in the complaint relate to increases in the historical data inputs used to develop the 2009 Rate Redetermination. Entergy asserts that Complainants have only demonstrated that Entergy incurred costs that were higher in calendar year 2008 than in 2007, while loads were down.

16. Entergy maintains that it has met its burden of proof to demonstrate that it has properly applied the formula. Entergy argues that Complainants either misunderstand the basic formulaic calculations or they seek to disallow formula inputs that should properly flow through the Commission accepted formula. Entergy states that where the Complainants seek exclusion of certain inputs, it is a direct challenge to the formula and the burden of proof lies with the Complainants in those instances. Entergy also asserts that the Complainants ignore the fact that the Commission has held consistently that, for formula rates, the formula is the rate.<sup>5</sup>

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<sup>5</sup> Entergy Answer at 5.

17. Entergy asserts that it has properly included annualized interest expense in its long-term debt rate calculation. Entergy further asserts that a line-by-line review of each of the inputs to the formula is a challenge to the formula itself and cannot be justified as a challenge to the inputs to the formula. Entergy argues that its administrative and general expenses have been properly included in the formula and any challenge otherwise needs to be supported by the Complainants.

18. Entergy argues that it has properly included prepayments for retail regulatory costs and city franchise taxes in the formula despite Complainants' insistence that prepayments for retail regulatory costs and city franchise taxes must be eliminated from rates. Entergy asserts that on the rate-base side of the formula, such costs are not expressly excluded as they are on the expense-side. Therefore, if the Complainants seek to change the formula to exclude these costs on the rate-base side of the formula, then, Entergy maintains, they must demonstrate that the change is both just and reasonable and warranted for prospective application.

19. Entergy asserts that it has properly handled incentive compensation under the formula despite Complainants claim that that incentive compensation program is driven by non-transmission business. Entergy argues that the Complainants seek a change to the formula to prevent the recovery of a portion of the actual compensation paid.

20. Entergy argues that Complainants' allegation that the revenue credits included in the rate calculation is wrong. Entergy maintains that Complainants have inexplicably omitted the amount of imputed short-term firm and imputed non-firm revenues.

21. Entergy asserts that it has properly treated ADIT in its 2009 Rate Redetermination. Entergy argues that Complainants are incorrect in asserting that this issue is settled with the Internal Revenue Service and that Energy has received refunds for all previous taxes paid on Independent Power Producers prepayments.

22. Entergy also argues that wholesale customers are not paying any costs associated with the spin-off of nuclear facilities. Entergy contends that no costs were billed to OATT customers in 2008 from the non-utility nuclear related projects either through the service company billing process, cascade billings or any other billing process and Complainants have not pointed to any specific costs that have been inappropriately included.

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

23. Entergy's filing in Docket No. ER09-1214-000 is an informational filing that, accordingly, was not noticed. East Texas Cooperatives, NRG Companies and Louisiana Energy and Power Authority filed motions to intervene. Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, the Public Service Commission of Yazoo City, Arkansas Electric Cooperative Corporation and South Mississippi Electric

Power Association (collectively, Joint Intervenors) filed a motion to intervene and preliminary protest. Joint Intervenors argue that the Commission should either issue an order setting the 2009 Rate Redetermination for hearing, or defer issuing an order until after the full 120-day review period provided for under the OATT. In the event that the Commission acts at the time of Joint Intervenors' filing, Joint Intervenors present several problems with Entergy's filing that warrant further review.

24. Notice of the complaint was published in the *Federal Register*, 74 Fed. Reg. 51845 (2009), with protests or interventions due on or before October 19, 2009. The Arkansas Public Service Commission filed a notice of intervention. Cleco Power LLC filed a timely motion to intervene. East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas (collectively, "Cooperatives") filed a timely motion to intervene and comments. Entergy filed an answer to the complaint on October 19, 2009, as summarized above. On November 3, 2009, Complainants filed a response to Entergy's answer.

25. In their comments, Cooperatives argue that Entergy has included \$110,151,385 in securitized storm recovery investment in the OATT rate as transmission plant. Cooperatives argue that this plant is not owned by Entergy – it is plant that was financed through securitization programs approved by the states of Louisiana and Texas and owned by special state entities. Cooperatives maintain that Entergy proposes to treat this investment as if it were any other transmission plant owned by Entergy by seeking to earn a return at Entergy's overall rate of return, including its approved return on equity. Cooperatives argue that this has the effect of increasing the revenue requirement for the securitized plant to a level greater than Entergy's cost for that plant.

26. Cooperatives request that the Commission set this case for hearing and settlement judge procedures, and consolidate the proceedings.

### **III. Discussion**

#### **A. Procedural Matters**

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

28. 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 an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Complainants' response to Entergy's answer, and will, therefore, reject it.

**B. Hearing and Settlement Judge Procedures**

29. The complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set the complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA. Because Entergy's filing in Docket No. ER09-1214-000 is only an informational filing, we will deny the requests to consolidate that proceeding with the complaint proceeding in Docket No. EL09-78-000.

30. While we are setting this case for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing 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, 18 C.F.R. § 385.603 (2009). 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>6</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.

31. Based on Entergy's OATT and the settlement in Opinion No. 430, the 2009 redetermined rates are effective June 1, 2009, and are subject to refund from that date until the latest of the final resolution of the complaint or the completion of any required corrections.

**The Commission orders:**

(A) 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 section 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 1), a public hearing shall be held concerning this complaint. However, the hearing shall be held in abeyance

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<sup>6</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).

to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), 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.

(C) 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.

(D) 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.

(E) The 2009 redetermined rates are effective June 1, 2009, and are subject to refund from that date, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.