

130 FERC ¶ 61,170
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket No. ER09-1224-001

ORDER DENYING INTERLOCUTORY APPEAL

(Issued March 10, 2010)

1. This order addresses the Louisiana Public Service Commission's (Louisiana Commission) motion to permit interlocutory appeal of the Presiding Administrative Law Judge's January 27, 2010 order¹ granting Entergy Services, Inc.'s (Entergy) motion to remove depreciation issues from the hearing proceeding in Docket No. ER09-1224. The presiding judge issued an order granting the motion to permit interlocutory appeal and referred the matter to the Commission for full review. As discussed below, we deny the Louisiana Commission's interlocutory appeal.

I. Background

A. The Entergy System

2. The Entergy System has operated for over fifty years under the Entergy System Agreement (System Agreement), which acts as an interconnection and pooling agreement that provides for the joint planning, construction and operation of Entergy and its six operating companies' (together, Operating Companies)² facilities. In 2001, the Louisiana Commission filed a complaint against Entergy, alleging that the System Agreement no longer operated to produce rough production cost equalization. In 2005, the Commission

¹ *Entergy Services, Inc., Order Granting Motion to Remove Depreciation Issues*, Docket No. ER09-1224-001 (Jan. 27, 2010).

² Entergy Operating Companies are: Entergy Louisiana, L.L.C, Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy Orleans, Inc., Entergy Gulf States Louisiana, L.L.C., and Entergy Texas, Inc.

issued Opinion No. 480,³ which found that the Operating Companies' production costs were not roughly equal, and that the System Agreement was therefore no longer just and reasonable. In Opinion Nos. 480 and 480-A, the Commission approved a numerical bandwidth of +/- 11 percent of the Entergy system average production cost in order to maintain the rough equalization of production costs among the Operating Companies. The Commission stated that the bandwidth would be implemented prospectively and would be effective for calendar year 2006, and that any equalization payments would be made in 2007 after a full calendar year of data became available. The Commission accepted Entergy's amended Service Schedule MSS-3⁴ that incorporated the rough production cost equalization bandwidth calculation.⁵

3. On May 29, 2007, in Docket No. ER07-956-000 (first bandwidth filing), on May 30, 2008, in Docket No. ER08-1056-000 (second bandwidth filing), and on May 29, 2009, in Docket No. ER09-1224-000 (third bandwidth filing), respectively, Entergy filed rates in accordance with Service Schedule MSS-3 of the System Agreement. These filings are the first, second, and third annual bandwidth filings implementing the Commission's directives in Opinion Nos. 480 and 480-A. In these filings, Entergy calculated the bandwidth payments and receipts under the Service Schedule MSS-3 bandwidth formula using data as reported in each Operating Companies' FERC Form 1. In all three filings, the Commission accepted the rates for filing, suspended them for nominal periods and established hearing and settlement judge procedures.⁶

³ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 173-84 (2005) (Opinion No. 480), *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282, at P 70-76 (2005) (Opinion No. 480-A), *order on compliance filing*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

⁴ Service Schedule MSS-3 has two separate and distinct functions. One function includes a methodology for pricing energy exchanged among the Operating Companies and provides for an after-the-fact, hour-by-hour allocation of the cost of energy from an Operating Company whose generation provided energy in excess of that company's load to an Operating Company that produced less than its load. The second function contains the formula to calculate the annual bandwidth remedy payments and receipts.

⁵ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007).

⁶ *Entergy Services, Inc.*, 120 FERC ¶ 61,094 (2007); *Entergy Services, Inc.*, 124 FERC ¶ 61,101 (2008); and *Entergy Services, Inc.*, 128 FERC ¶ 61,091 (2009).

4. The Louisiana Commission submitted protests in all three annual bandwidth filings, raising a number of issues, including the argument that Entergy's calculation includes imprudent and unreasonable cost inputs.⁷ The Louisiana Commission also noted that the issues raised in its protests were being litigated in Docket No. ER07-956.

5. On March 31, 2008, in Docket No. EL08-51, the Louisiana Commission also filed a section 206 complaint raising many of the same issues that it raised in protests to the first annual bandwidth filing, in Docket No. ER07-956.⁸ The Commission dismissed the complaint with respect to seven of the ten issues (including a depreciation issue) raised by the Louisiana Commission because these issues were before the Commission in Docket No. ER07-956, accepted the Louisiana Commission's position with respect to one issue, and set two other issues for hearing.⁹

B. Opinion No. 505 (First Bandwidth Filing)

6. On January 11, 2010, the Commission issued Opinion No. 505,¹⁰ which addressed the initial decision¹¹ issued in Entergy's first annual bandwidth filing in Docket No. ER07-956. The initial decision addressed a number of issues, including the question of whether the nuclear depreciation expenses recorded in FERC Form 1 filings should be used or whether those expenses could be challenged in the context of the annual bandwidth filings. The initial decision held that the depreciation costs recorded in the Form 1 filings were not calculated using the Nuclear Regulatory Commission (NRC)-approved license lives for Entergy's nuclear units and required that different depreciation costs calculated based on the NRC license lives be substituted in the bandwidth calculation.¹² The initial decision concluded that a consistent rule was necessary for the

⁷ See, e.g., *Entergy Services, Inc.*, 124 FERC ¶ 61,101 at P 16.

⁸ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 124 FERC ¶ 61,010 (2008) (Louisiana Commission Complaint Order).

⁹ *Id.* P 27-29.

¹⁰ *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010) (Opinion No. 505).

¹¹ *Entergy Services, Inc.*, 124 FERC ¶ 63,026 (2008).

¹² The nuclear generating units at issue belonging to Entergy Arkansas, ANO 1 and ANO 2, were granted license extensions by the NRC, resulting in 60-year license terms. However, the bandwidth filing used 40-year depreciation terms for these units, as approved for retail rates by the Arkansas Public Service Commission (Arkansas Commission). *Id.* P 490-92.

purposes of the bandwidth filing requirements requiring depreciation rates to be based on the term of the NRC license, as required by Commission policy.

7. In Opinion No. 505, the Commission affirmed the initial decision on a number of issues, but reversed the holding on depreciation. In particular, the Commission held that Entergy correctly accounted for 2006 nuclear depreciation and decommissioning expense data for the nuclear units owned by the Operating Companies by using the actual data that existed on the Operating Companies' books for 2006. The Commission stated that the bandwidth formula in Service Schedule MSS-3 that was accepted by the Commission in 2006 is the lawful rate that is effective for that proceeding. The Commission explained that it "has the authority to change the depreciation and decommissioning expenses included in the bandwidth formula," but that it "will not do so in a proceeding established to determine the actual production costs of the Operating Companies."¹³ The purpose of such a proceeding is "to establish the payments and receipts necessary under the bandwidth formula set forth in Service Schedule MSS-3," rather than to determine "what production costs would have been if different depreciation rates had been in effect."¹⁴ Instead, the Commission explained that the proper avenue to make changes to the bandwidth formula would be to file a section 205 or 206 filing.¹⁵

C. Proceeding in Docket No. ER09-1224 (Third Bandwidth Filing)

8. In the hearing on Entergy's third annual bandwidth filing, on December 1, 2009, the presiding judge issued an Order on Scope of Hearing and Motion to Compel,¹⁶ holding that the depreciation costs used by Entergy in its bandwidth calculation could be challenged in the instant proceeding. The presiding judge concluded that, based on a prior Commission determination, there is a need to examine depreciation costs in this proceeding to ensure a just and reasonable result under the bandwidth calculation.¹⁷ The

¹³ Opinion No. 505, 130 FERC ¶ 61,023 at P 172.

¹⁴ *Id.* P 173.

¹⁵ *Id.* P 170, 172. We note that an initial decision in the second bandwidth proceeding, in Docket No. ER08-1056-002, was issued on September 10, 2009. *Entergy Services, Inc.*, 128 FERC ¶ 63,015 (2009). This case is currently pending before the Commission on exceptions.

¹⁶ *Entergy Services, Inc.*, Order on Scope of Hearing and Motion to Compel, Docket No. ER09-1224-001 (Dec. 1, 2009).

¹⁷ The presiding judge noted that in *Arkansas Pub. Serv. Comm'n v. Entergy Services, Inc.*, 128 FERC ¶ 61,020 (2009), the Commission held that to provide a just and reasonable result under the FPA, the Commission must make sure that the inputs used in
(continued...)

presiding judge required that new depreciation studies be filed in this proceeding and established dates in the procedural schedule to address depreciation issues.

9. Subsequent to the issuance of Opinion No. 505, on January 15, 2010, Entergy filed a motion to remove depreciation issues from the instant proceeding. Entergy noted that the Commission in Opinion No. 505, which issued on January 11, 2010, ruled that the reasonableness of the depreciation cost inputs could not be resolved in a bandwidth proceeding and must be determined in a new section 205 or section 206 proceeding. Therefore, Entergy urged the presiding judge to remove depreciation issues from the purview of the instant proceeding and vacate the date on the procedural schedule relating to the depreciation matter, as established in the presiding judge's December 1, 2009 order.

10. The Arkansas Commission submitted an answer in support of Entergy's motion. The Arkansas Commission agreed that the Commission's rulings in Opinion No. 505 regarding depreciation expenses should apply to the instant proceeding and any further litigation of the depreciation issue would constitute an "impermissible collateral attack on Opinion No. 505." Thus, the Arkansas Commission urged the presiding judge to apply the ruling in Opinion No. 505 and find that claims that Entergy should not have used the actual Form 1 depreciation data in the bandwidth calculation may not be raised in the instant proceeding.

11. The Commission Trial Staff (Trial Staff) submitted an answer to Entergy's motion, stating that Entergy's motion is premature because no testimony on depreciation issues had been presented. While Trial Staff agreed that clarifications provided in Opinion No. 505 would remove any remaining depreciation expense issues from the instant proceeding, Trial Staff argued that parties should still be able to present their case on depreciation issues and that the parties may file motions to strike any testimony that is inconsistent with Opinion No. 505. Accordingly, Trial Staff recommended that the presiding judge deny Entergy's motion.

12. The Louisiana Commission opposed Entergy's motion to remove depreciation issues from this proceeding. According to the Louisiana Commission, the Commission has issued conflicting rulings regarding the proper forum to address depreciation matters. According to the Louisiana Commission, in Opinion No. 505, the Commission held that the reasonableness of the depreciation cost inputs could not be resolved in a bandwidth proceeding and must be determined in a new section 205 or a section 206 proceeding. However, the Louisiana Commission alleged that in prior orders, the Commission

the bandwidth formula are also just and reasonable and that "the authority to determine the payment under the bandwidth necessarily must include the ability to examine the inputs used to calculate the bandwidth" *Id.* P 25.

determined that the tariff language allows the determination of the depreciation issue in a bandwidth proceeding and that the unreasonableness of cost inputs should be determined in bandwidth proceedings.

13. For instance, the Louisiana Commission stated that in dismissing the Arkansas Commission's section 206 complaint in 2007, which questioned the prudence and reasonableness of Entergy's generation planning, transmission access and wholesale power purchases, the Commission held that annual bandwidth proceedings will allow all interested parties the opportunity to address the prudence and reasonableness of all cost inputs in the formula.¹⁸ The Louisiana Commission also argued that in its complaint alleging that certain aspects of Entergy's formula were unjust and unreasonable, including cost inputs related to depreciation expenses, the Commission dismissed the depreciation issue along with other implementation issues, holding that they should be litigated in the bandwidth proceeding in Docket No. ER07-956.¹⁹ Further, the Louisiana Commission claimed that such holdings were affirmed in other Commission orders.²⁰ Given these alleged conflicting rulings, the Louisiana Commission contended that the depreciation issue should be heard and resolved in the instant hearing, especially since full depreciation studies are available to use as a basis to establish reasonable depreciation rates. Otherwise, it argued, removing depreciation issues from the instant proceeding would be harmful to Louisiana consumers.

14. On January 27, 2010, the presiding judge issued an order granting Entergy's motion to remove depreciation issues from the instant proceeding.²¹ Based on the Commission's ruling on the depreciation matter in Opinion No. 505, the presiding judge noted that the instant proceeding, like the proceeding in Docket No. ER07-956, is an annual bandwidth filing. Citing to Opinion No. 505, the presiding judge held that the purpose of annual bandwidth proceedings is to establish the payments and receipts necessary under the bandwidth formula set forth in Service Schedule MSS-3, rather than

¹⁸ *Arkansas Pub. Serv. Comm'n v. Entergy Services, Inc.*, 119 FERC ¶ 61,223, at P 47 (2007) (Arkansas Commission Complaint Order).

¹⁹ Louisiana Commission Complaint Order, 124 FERC ¶ 61,010 at P 27.

²⁰ *See, e.g., Arkansas Pub. Serv. Comm'n v. Entergy Services, Inc.*, 128 FERC ¶ 61,020 at P 25; *Entergy Services, Inc.*, 120 FERC ¶ 61,094 at P 16.

²¹ *Entergy Services, Inc.*, Order Granting Motion to Remove Depreciation Issues, ER09-1224-001 (Jan. 27, 2010).

to determine what production costs would have been if different depreciation rates had been in effect.²²

15. On February 12, 2010, the Louisiana Commission filed a motion to permit interlocutory appeal of the presiding judge's order granting Entergy's motion to remove depreciation issues from the instant proceeding. The Louisiana Commission argued that the presiding judge's January 27, 2010 order incorrectly adopted an interpretation of conflicting orders that denies it the right to present evidence on depreciation issues and may deny relief for 2009 under the bandwidth remedy to customers who are bearing unduly discriminatory costs. The Louisiana Commission reiterated the arguments from its opposition to Entergy's motion, claiming that the Commission issued conflicting holdings regarding the proper forum in which to address bandwidth issues and that the Commission's prior orders indicate that issues related to the justness and reasonableness of cost inputs for depreciation expenses should be addressed in bandwidth proceedings.²³ The Louisiana Commission asserted that the Commission should resolve its conflicting decisions regarding this issue through the interlocutory appeal. If its request for interlocutory appeal is not granted, the Louisiana Commission argued that it may be without a forum to litigate issues implicating millions of dollars in remedy payments. Thus, given the extraordinary circumstances that exist in this case, the Louisiana Commission urged the Commission to grant the interlocutory appeal.

16. The Louisiana Commission also filed a motion to suggest relevant issues for Commission consideration if the interlocutory appeal is granted: (1) Are the parties prohibited from litigating whether Entergy's current depreciation rates are unjust, unreasonable and unduly discriminatory in an annual bandwidth case such as Docket ER09-1224, even with the availability of full depreciation studies for each of the Operating Companies?; and (2) Did Opinion No. 505 determine that parties may not litigate the correctness of Entergy's depreciation accounting under the FERC Uniform System of Accounts for the purpose of determining whether accounting changes are appropriate and the impact of the changes on the bandwidth filing?

17. Entergy filed an answer in opposition to the Louisiana Commission's motion to permit interlocutory appeal. Entergy asserted that the Louisiana Commission's arguments in its motion constitute an impermissible collateral attack on Opinion No. 505 and should be resolved in a pending rehearing of Opinion No. 505. Therefore, Entergy stated that the Louisiana Commission's motion should be denied.

²² *Id.* at 2.

²³ *See supra* discussion at P 13.

18. On February 23, 2010, the presiding judge issued an order granting the Louisiana Commission's motion to permit interlocutory appeal.²⁴ The presiding judge stated that "extraordinary circumstances" exist in this case that warrants prompt review by the Commission to prevent any detriment to the public interest and irreparable harm to the parties. The presiding judge also issued an accompanying memorandum describing the issues involved in this proceeding and an explanation for his ruling for full review by the Commission.²⁵

II. Discussion

19. The dispute in the instant proceeding over depreciation expense inputs arises, in large part, from a disagreement over the interpretation of Entergy's bandwidth formula. Based on our review, we find that, consistent with Opinion No. 505, the justness and reasonableness of depreciation expense inputs is not at issue in Entergy's annual bandwidth filings, such as Docket No. ER09-1224. Rather, the issue is whether Entergy correctly applied the actual Form 1 data and the depreciation rates effective for its annual bandwidth filings. We clarify below our prior orders relevant to this matter and deny the Louisiana Commission's interlocutory appeal.

20. We emphasize, as we did in Opinion No. 505, that under Entergy's Service Schedule MSS-3 bandwidth formula,²⁶ the purpose of the annual bandwidth filings is to apply the specified formula using *actual* data to determine whether or not there was rough equalization, and not to determine what production costs would have been if different depreciation rates had been in effect for the relevant period.²⁷ In other words, the focus of litigation in those annual bandwidth filings is whether Entergy properly implemented the formula. The focus is not whether the formula is just and reasonable. We acknowledge, however, that prior to Entergy's annual bandwidth filings, when neither we nor the parties had any experience with such filings, the Commission did

²⁴ *Entergy Services, Inc., Order Granting Motion to Permit Interlocutory Appeal*, Docket No. ER09-1224-001 (Feb. 23, 2010).

²⁵ *Entergy Services, Inc., Presiding Judge's Memorandum on Grant of Interlocutory Appeal*, Docket No. ER09-1224-001 (Feb. 23, 2010).

²⁶ Section 30.12 Actual Production Cost of Service Schedule MSS-3 provides that all revenue and expense items "shall be based on the actual amounts on the Company's books for the twelve months ended December 31 of the previous year as reported in FERC Form 1 or such other supporting data as may be appropriate for each Company" Entergy Service Schedule MSS-3, Section 30.12 (emphasis added).

²⁷ Opinion No. 505, 130 FERC ¶ 61,023 at P 171, 173.

make some general statements that could be interpreted as suggesting that parties had the opportunity in Entergy's annual bandwidth filings to challenge the reasonableness of any cost inputs in the Service Schedule MSS-3 bandwidth formula, including the depreciation rates effective for Entergy's annual bandwidth filings.²⁸ Such statements, however, were made prior to final Commission action on the first annual bandwidth filing²⁹ and thus did not benefit from experience in addressing these annual bandwidth filings. Consequently, the language in the Arkansas Commission Complaint Order,³⁰ in hindsight, was not as precise as it could have been and may have been unintentionally misleading.

21. In acting on the first annual bandwidth filing in Opinion No. 505, the Commission explained the purpose of these filings and what is and is not at issue in these proceedings with respect to depreciation expenses:

There is no question that the Commission has the authority to determine depreciation and decommissioning expenses for purposes of setting a wholesale rate. However, that is *not* what is before us in this proceeding. Here, the purpose is to establish the payments and receipts necessary under the bandwidth formula set forth in Service Schedule MSS-3. It is, thus, *not* about what production costs would have been if different depreciation rates had been in effect in 2006, but simply about applying the formula using actual 2006 data. Indeed, while the Presiding Judge contends that adjusting the depreciation rates of ANO 1 and ANO 2 would be more equitable for ratepayers (and upon which we take no issue),

²⁸ Arkansas Commission Complaint Order, 119 FERC ¶ 61,223 at P 47 (stating that “[t]he annual section 205 filings thus provide the Commission and all interested parties the opportunity to analyze all production-related costs of each of the Entergy Operating Companies to make sure all such costs are just and reasonable and prudently incurred”).

²⁹ The Arkansas Commission Complaint Order was issued on June 1, 2007 and the final order on Entergy's first annual bandwidth filing (Opinion No. 505) was issued on January 11, 2010. The other orders cited by the Louisiana Commission as referencing similar language, including the Louisiana Commission Complaint Order, were also issued prior to Opinion No. 505.

³⁰ We note that Arkansas Commission's complaint in that proceeding, in fact, did not challenge the depreciation expense inputs in the bandwidth formula, but rather questioned the prudence and reasonableness of Entergy's generation planning, transmission access and wholesale power purchases.

that is a matter solely for a future section 205 or 206 proceeding, *not* this bandwidth remedy proceeding.^[31]

22. We also emphasize that, prior to Opinion No. 505, the Commission explained that any modifications to the currently effective Service Schedule MSS-3 bandwidth formula must be through a section 205 or 206 filing.³² This would include any necessary amendment or deficiencies that are discovered in the underlying methodology of Exhibits ETR-26 and ETR-28. As the Commission explained:

Any time Entergy seeks to make a change, *e.g.*, a change to return on equity, it must make a section 205 filing with the Commission. Similarly, customers may file section 206 complaints if they seek to make a change, and the Commission may institute a section 206 proceeding on its own motion if it seeks a change.^[33]

The Commission orders:

The Louisiana Commission's interlocutory appeal is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³¹ Opinion No. 505, 130 FERC ¶ 61,023 at P 173 (emphasis added).

³² *See, e.g., Entergy Services, Inc.*, 117 FERC ¶ 61,023 at P 69. Also, the Commission has held that changes to the elements, including the fixed components such as a return on equity and depreciation, that make up a formula rate do not adjust automatically. *See American Elec. Power Serv. Corp.*, 120 FERC ¶ 61,025, at P 38 (2007) (explaining that depreciation rates included in a formula rate do not adjust automatically just because the depreciation rates underlying the FERC Form 1 numbers change; rather, a separate section 205 filing is required to change such rates); *see generally Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104, at n.25 (2000).

³³ *Entergy Services, Inc.*, 117 FERC ¶ 61,203 at P 69.