

131 FERC ¶ 61,227
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. ER09-833-001

ORDER DENYING REHEARING

(Issued June 7, 2010)

1. On May 8, 2009, the Commission issued an order rejecting Entergy Services, Inc.'s (Entergy) proposal to amend Service Schedule MSS-3 by adopting one of two alternative amendments requiring use of a particular method to calculate certain payments (and receipts) under the bandwidth formula.¹ On June 8, 2009, Entergy filed a request for rehearing of the May 2009 Order. For the reasons discussed below, we deny rehearing.

I. Background

2. In Docket No. ER07-683-000, Entergy filed a proposed amendment (Allocation Amendment) to Service Schedule MSS-3 of the System Agreement to establish the allocation between retail jurisdictions for Entergy's Operating Companies² that provide retail service in two separate states. Entergy alleged that the proposed amendment was necessary for Entergy Gulf States, Inc. (Entergy Gulf States), because Entergy Gulf States provided retail service to customers in two separate state retail jurisdictions. In an order addressing the Allocation Amendment, the Commission determined that the

¹ *Entergy Services, Inc.*, 127 FERC ¶ 61,126 (2009) (May 2009 Order).

² The Entergy Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, LLC, 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, (as stated in Entergy's initial filing in March of 2009 at P 3 n. 1).

Allocation Amendment was premature and stated 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.”³

3. In March of 2009, Entergy asserted that it was invoking the Commission’s invitation in the 2007 Allocation Order to renew its request because of a decision issued in January of 2009 by the Public Utility Commission of Texas (Texas Commission) that Entergy maintains results in trapped costs. Entergy states that the discrepancy in the formulas used by the Louisiana Public Service Commission (Louisiana Commission) and the Texas Commission has resulted in the Texas Commission’s claim of an additional \$18.6 million in bandwidth payments. Entergy proposed two alternative amendments to rectify the allocation discrepancy. The Commission rejected the proposed amendments and explained that any issues related to the allocation of an individual utility’s payments or receipts to retail customers are beyond the jurisdiction of this Commission.⁴

4. The Commission disagreed with Entergy’s assertion that it has jurisdiction to determine the share of the bandwidth receipts that should be allocated by Entergy Gulf States to its Louisiana and Texas retail customers. Rather, the Commission stated that 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.⁵ Further, the Commission noted that the Texas Commission’s retail allocation decision does not conflict with the Commission’s allocation for wholesale sales among the Entergy Operating Companies, but rather accepts the Commission’s determination of the amount of receipts to be distributed to Entergy Gulf States under Service Schedule MSS-3.⁶

5. The Commission further found that 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

³ *Entergy Services, Inc.*, 119 FERC ¶ 61,191, at P 25 (2007) (2007 Allocation Order).

⁴ *Entergy Services, Inc.*, 127 FERC ¶ 61,126, at P 4 (citing *Entergy Services, Inc.*, 120 FERC ¶ 61,094 at P 17 (2007)).

⁵ *Id.* P 23.

⁶ *Id.*

has been violated because two states allocated the receipts differently among their respective retail customers. The Commission determined that Entergy assumed this risk when it established its operating structure.⁷

II. Entergy's Rehearing Request

6. Entergy argues that the Commission does have jurisdiction to address its proposed amendments. Entergy also asserts that the Texas Commission's order conflicts with the Commission's existing orders and regulations, specifically, Opinion Nos. 480 and 480-A.⁸ Entergy further contends that its proposed amendments are important as a matter of policy, because it believes that the bandwidth formula is a zero-sum calculation in which total payments should equal total receipts. According to Entergy, the bandwidth formula was never intended to require shareholders to make additional bandwidth payments resulting from trapped costs. Entergy also states that the United States Supreme Court has made clear that such transactions are binding on state regulators for purposes of retail rate setting.⁹

III. Discussion

7. While Entergy claims that the Commission should have made its jurisdictional argument in the 2007 Allocation Order, the issue was not ripe at that time for the Commission to make a determination. As the Commission explained in that order,

Entergy's concerns about trapped costs and 100 percent recovery of payments or disbursements of any receipts are premature. . . . Entergy simply raises pending

⁷ *Id.* P 25.

⁸ *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).

⁹ Entergy cites *Entergy Louisiana v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 43 n.1 (2003); *Mississippi Power & Light Co.*, 487 U.S. 354, 371 (1998) (*MP&L*); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (*Nantahala*); *Appalachian Power Co. v. Pub. Serv. Comm'n of West Virginia*, 812 F.2d 898, 900-03 (4th Cir. 1987); *AEP Generating Co. and Kentucky Power Co.*, 39 FERC ¶ 61,158 (1987). Entergy further cites *MP&L* for the proposition that "what goes along with the [Commission's] jurisdiction is the responsibility, where the issue is appropriately raised, to protect against allocations that have the effect of making the ratepayers of one state subsidize those of another." Request for Rehearing at 22 (citing *MP&L*, 487 U.S. at 383).

proceedings before the Arkansas and Louisiana Commissions and speculates as to the possibility of costs being trapped.^[10]

8. There was no controversy before it, and the Commission was under no obligation to speculate as to a possible solution to a possible controversy. Only upon the Texas Commission issuing an order and Entergy making its filing in Docket No. ER09-833-000 was there an issue that was ripe for Commission consideration. At that time, the Commission appropriately considered the matter and, in the May 2009 Order, rejected the proposed amendments submitted by Entergy.

9. Entergy goes on to opine that the Commission has authority over the matter at issue – the allocation or assignment of costs within a single operating company (Entergy Gulf States) whose divisions happen to operate in different states (Louisiana and Texas) – but fails to cite to any precedent that supports its thesis. Indeed, the formula in Opinion Nos. 480 and 480-A explicitly provides for the rough equalization of production costs *among the Entergy Operating Companies*, which is consistent with our authority under the Federal Power Act to regulate wholesale transactions.¹¹ To require rough equalization *within an operating company*, as Entergy seeks, is beyond our authority and would interfere with the retail ratemaking authority of the states. In the May 2009 Order, the Commission explicitly explained that “any issues related to the allocation of an individual utility’s payments or receipts to retail customers are beyond the jurisdiction of this Commission.”¹² Rather, as the Commission further explained, “this is a matter for the courts to review in the pending appeals of the Texas Commission’s decision brought

¹⁰ 119 FERC ¶ 61,191 at 62,193.

¹¹ Entergy itself recognizes this when it states that “[t]he purpose of the bandwidth remedy ordered in Opinion No. 480 is to quantify the Operating Companies production costs and establish a particular method for assigning those costs *among the Operating Companies* in order to achieve a specific production cost disparity within the specified bandwidth.” Rehearing Request at 20 (emphasis added). There is simply no mention in Opinion Nos. 480 and 480-A of assigning or allocating production costs between retail divisions of a particular operating company. Thus, there is no conflict with the Commission’s determination in Opinion Nos. 480 and 480-A.

¹² 127 FERC ¶ 61,126 at P 23.

by Entergy in both state and federal court.”¹³ None of the cases cited by Entergy involve the issue before us – rough equalization *within an Operating Company* – and thus are not determinative of this matter.¹⁴

10. Moreover, implicit in Entergy’s arguments is the notion that Entergy must be made whole, i.e., there should be a single, consistent formula applicable to each of the retail divisions of each operating company that ensures full cost recovery by Entergy. We disagree. There is simply no regulatory guarantee of full cost recovery.¹⁵ Moreover, as the Commission explained in the May 2009 Order,

[i]t 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. This is a risk that Entergy assumed when it established its operating structure.^{16]}

11. Finally, we disagree with Entergy that any subsidization of one state by another has occurred here. Rather, as Entergy itself notes, the subsidization would be of Texas customers at the expense of Entergy’s shareholders, not Louisiana customers, hardly the subsidization referenced in *MP&L* and quoted by Entergy.¹⁷

¹³ *Id.*

¹⁴ *See supra* note 9.

¹⁵ *See, e.g., ANR Pipeline Co.*, 49 FERC ¶ 61,439, at 62,546 (1989) (There is no statutory or other requirement that the Commission guarantee recovery of prudently incurred costs; it need only provide a reasonable opportunity to recover prudently incurred costs) (citing *Transwestern Pipeline Co. v. FERC*, 820 F.2d 733, 741-42 (5th Cir. 1987); *Tennessee Gas Pipeline Co. v. FERC*, 824 F.2d 78, 80 (D.C. Cir. 1987)).

¹⁶ 127 FERC ¶ 61,126 at P 25. Further, while Entergy asserts that “it is easy to imagine that failure of the Commission to amend the bandwidth formula as requested would signal other retail regulators that they are free to attempt to seize more in bandwidth receipts than are wholesale payments due under the Commission’s stated criteria,” it fails to identify, and the Commission is not aware of, any other situations that are similar to the facts that the Commission is addressing here. Indeed, even the situation that is present in this proceeding is for only a limited period (May 30, 2007 to December 31, 2007), as Entergy has since restructured EGS into two separate operating companies, thus obviating the need for any future resolution of this matter.

¹⁷ *See* Request for Rehearing at 22 (citing *MP&L*, 487 U.S. at 383), and *supra* note 9.

The Commission orders:

Entergy's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.