

133 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket Nos. ER10-1676-000
AC10-139-000

ORDER ACCEPTING TARIFF SHEETS AND ACCEPTING AND SUSPENDING
PROPOSED RATES, AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued October 29, 2010)

1. On June 30, 2010, pursuant to section 205 of the Federal Power Act (FPA),¹ Entergy Services, Inc. (Entergy),² on behalf of Entergy Operating Companies,³ submitted proposed amendments to revise the rate schedule sheets for Service Schedules MSS-3⁴

¹ 16 U.S.C. § 824e (2006).

² Entergy Services, Inc. is a wholly-owned subsidiary of Entergy Corporation.

³ The Entergy Operating Companies are Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States), Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc. (Entergy Mississippi), Entergy Texas, Inc. (Entergy Texas), and Entergy New Orleans, Inc. (Entergy New Orleans).

⁴ As relevant here, Service Schedule MSS-3 contains the bandwidth formula to ensure rough production cost equalization among the Entergy Operating Companies in accordance with Opinion Nos. 480 and 480-A. *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *aff'd*, *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005).

and MSS-4⁵ of the Entergy System Agreement (System Agreement) to include a generic provision for recovery of an acquisition adjustment (including the related amortization expenses), subject to prior Commission authorization for recovery in rates of acquisition adjustments associated with specific generating plants. Also, Entergy seeks specific Commission authorization for Entergy Louisiana to recover an acquisition adjustment of \$103 million and related amortization expenses, associated with the purchase of a generating facility, Power Block Two, and 50 percent of the common facilities in the Acadia Energy Center.⁶ Entergy also seeks Commission approval for accounting purposes to record the amortization expenses associated with the Power Block Two acquisition adjustment in Account No. 406.

2. In this order, we accept the proposed tariff sheets for Service Schedules MSS-3 and MSS-4 to include a generic provision for recovery of acquisition adjustments, to be effective on the closing date of Entergy Louisiana's acquisition of Power Block Two, as requested. Additionally, we accept Entergy's proposed rates for recovery of the Power Block Two acquisition adjustment, and suspend them for a nominal period, to be effective on the closing date of Entergy Louisiana's acquisition of Power Block Two, as requested, subject to refund. We also establish hearing and settlement judge procedures for the proposed rates, but hold those procedures in abeyance pending the outcome of the Louisiana Public Service Commission's (Louisiana Commission) proceeding concerning the acquisition of Power Block Two by Entergy Louisiana, in Docket No. U-31196. Finally, we grant Entergy's request to amortize the acquisition adjustment related to the Power Block Two purchase to Account No. 406.

⁵ Service Schedule MSS-4 contains a formula rate that calculates the investment costs and other expenses associated with a Designated Generating Unit that is the subject of a unit power purchase or sale of power between the Entergy Operating Companies.

⁶ The Acadia Energy Center has two power blocks of gas-fired, combined cycle generation, designated as Power Block One and Power Block Two. Power Block One was sold to Cleco Power, LLC in 2009.

I. Entergy's Filing

3. Entergy states that Acadia Power Partners, LLC (Acadia Power)⁷ and Entergy Louisiana entered into a purchase and sales agreement on October 30, 2009.⁸ Under that agreement, and depending on the final closing date, Entergy Louisiana will purchase Power Block Two for at least \$300 million, which reflects an acquisition premium of \$103 million above Acadia's net book cost for Power Block Two of \$197 million.⁹ After the close of the transaction, Entergy Louisiana will sell one-third of the capacity and output from Power Block Two to Entergy Gulf States on a life-of-unit basis. Entergy notes that this sale will be a unit power sale between Entergy Operating Companies under Service Schedule MSS-4 of the System Agreement.¹⁰

4. Entergy Louisiana and Entergy Gulf States filed an application with the Louisiana Commission on November 13, 2009, seeking approval of Entergy Louisiana's Power Block Two purchase and the related sale of one-third of the capacity and output to Entergy Gulf States. Entergy states that the application is currently pending before the Louisiana Commission, and a ruling is expected in the first quarter of 2011.¹¹ In its application to the Louisiana Commission, Entergy Louisiana requested authorization to include the Power Block Two acquisition adjustment in retail rates, and if the Louisiana Commission does not approve such recovery, Entergy states that it will not complete the purchase of Power Block Two.¹²

5. Entergy argues that the proposed amendments to add a generic provision for recovery of acquisition adjustments to Service Schedules MSS-3 and MSS-4 are just and

⁷ Acadia Power is an exempt wholesale generator and a public utility that sells power at market-based rates. Acadia Power is 50 percent owned by Acadia Power Holdings, LLC, which, in turn is wholly owned by Cleco Midstream Resources, LLC, a direct subsidiary of Cleco Corporation, and is 50 percent owned by Cajun Gas Energy, LLC.

⁸ On June 4, 2010, the Commission authorized the acquisition of Power Block Two under section 203 of the FPA. *Acadia Power Partners, LLC*, 131 FERC ¶ 62,212 (2010).

⁹ Entergy's June 30, 2010 Filing, Transmittal Letter at 6.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 8 (citing *Louisiana Public Serv. Comm'n*, Docket No. U-31196).

¹² *Id.* at 7-8.

reasonable, consistent with Commission precedent,¹³ and would have no effect on rates absent prior Commission approval for recovery of specific acquisition adjustments on a case-by-case basis.¹⁴ Also, according to Entergy, the proposed amendments are consistent with the Commission's accounting regulations which allow utilities to record amortization expenses related to acquisition adjustments in Account No. 406, to the extent that the utility obtains Commission approval to do so.¹⁵ Thus, Entergy asks the Commission to accept the proposed amendments to add a generic provision for recovery of acquisition adjustments to Service Schedules MSS-3 and MSS-4, without a hearing, regardless of its ruling on its request for approval to include the Power Block Two acquisition adjustment in Service Schedules MSS-3 and MSS-4.

6. In addition, Entergy argues that the Commission should approve its request for recovery of an acquisition adjustment, and related amortization expenses, for the purchase of Power Block Two. According to Entergy, Entergy Louisiana's purchase of Power Block Two: (1) satisfies Entergy System's need for additional capacity; (2) provides Entergy Louisiana, Entergy Gulf States and the Entergy System with a modern, long-term resource that is located within the Entergy System and that serves the base load and load following energy supply roles; (3) represents the lowest reasonable cost option among available alternatives; and (4) could not have been achieved for the benefit of the Entergy System without payment of the acquisition adjustment. Entergy asserts that the Commission should accept the proposed amendments to add the Power Block Two acquisition adjustment to Service Schedules MSS-3 and MSS-4, without a hearing, to take effect on the closing date for Entergy Louisiana's acquisition of Power Block Two, which is expected to occur in the first quarter of 2011.

7. Entergy explains that if the Louisiana Commission approves recovery of the Power Block Two acquisition adjustment in retail rates, Entergy Louisiana's customers will pay the costs of the Power Block Two acquisition adjustments in their rates.¹⁶ However, Entergy states that if the Commission does not allow the acquisition adjustment to be reflected in Entergy Louisiana's life-of-unit sale of one-third of the output from Power Block Two to Entergy Gulf States under Service Schedule MSS-4, then Entergy Gulf States' customers will not bear one-third of the costs of the acquisition adjustment. According to Entergy, this will mean that Entergy Gulf States' customers

¹³ *Id.* (citing *Minnesota Power & Light Co.*, 43 FERC ¶ 61,104, at 61,342 (1988)).

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 10

will pay a different and lower rate than Entergy Louisiana's customers for output from the same resource.¹⁷

8. Also, Entergy adds that if the Power Block Two acquisition adjustment is not reflected in the bandwidth formula under Service Schedule MSS-3, then the bandwidth formula will not accurately reflect Entergy Louisiana's "actual production costs."¹⁸ Entergy argues that this will be contrary to the rough production cost equalization under the bandwidth formula approved by the Commission. Further, if the Commission allows the Power Block Two acquisition adjustment to be included in Service Schedule MSS-4, but not Service Schedule MSS-3, then Entergy Gulf States' one-third share of the costs of the acquisition adjustment would be reflected under the bandwidth formula (as a purchased power expense), but Entergy Louisiana's two-thirds share would not, according to Entergy.¹⁹

9. Entergy states that, traditionally, the Commission has applied a presumption against recovery of acquisition adjustments in rates, allowing utilities to recover positive acquisition adjustments in rates only when the utility demonstrates that there are measurable benefits to ratepayers from the acquisition.²⁰ However, Entergy argues that the Commission should not apply this historical presumption to this particular case because the policies underlying the presumption do not apply to a purchase of a generating plant from a market-regulated seller that has never sold power to captive customers at cost-based rates.²¹ Entergy states that a market-regulated seller sells to customers who choose to buy its services. Therefore, there are no captive customers who would pay twice for depreciation expenses for that asset. Entergy states that the original cost of the seller is irrelevant to the transaction because the seller, Acadia, did not charge rates based on a return on and of its capital investment in the asset. Rather, it charged market prices for its product. Further, according to Entergy, applying the presumption here would be contrary to public policy because it could deter Entergy from purchasing the lowest cost resource.²²

¹⁷ *Id.* at 11.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 13.

²¹ *Id.* at 14.

²² *Id.* at 14, 16.

10. Also, Entergy notes that, under the traditional benefits test, the Commission will allow a utility to recover a positive acquisition adjustment in rates when the utility can demonstrate that the acquisition provides tangible, non-speculative benefits to ratepayers.²³ Entergy states that this test will be satisfied because ratepayers will receive a tangible, non-speculative and quantifiable economic benefit of \$400 million in savings since it would cost about \$700 million to construct a new comparable facility to satisfy the Entergy System capacity needs.²⁴ Also, Entergy adds that the Commission has held that the benefits test is met when: (1) the acquired facility will be put to a new use, and (2) the purchase price is less than the cost of constructing a comparable facility.²⁵ Entergy asserts that the two-prong test is met because after the purchase, Power Block Two will be used in a completely different way to a different set of customers. Currently, according to Entergy, Power Block Two is owned by an exempt wholesale generator who sells power at market-based rates in any available market. However, following the acquisition by Entergy Louisiana, Entergy states that Power Block Two will be under the immediate control of the Entergy System Dispatcher to be committed, decommitted, or dispatched up or down on a real-time basis. Also, Entergy claims that Power Block Two will be upgraded, among other things, with automatic generation control capability to respond automatically to changes in load in the Entergy System and it will serve customers only in the Entergy System.²⁶ Entergy claims that the second prong is satisfied because the acquisition price is significantly lower than the cost of constructing a comparable new resource.

11. Finally, Entergy states that the Commission's accounting regulations require acquisition adjustments to be recorded in Account No. 114 and amortized to Account No. 425. However, when a utility has obtained rate recovery of the acquisition adjustment or reasonably expects recovery to be allowed, the Commission will allow the utility to record amortization expenses associated with acquisition adjustments in Account No. 406. Entergy states that it is hopeful that the Louisiana Commission and the Commission will grant the requested acquisition adjustment amendments to Service Schedules MSS-3 and MSS-4. Accordingly, Entergy requests that the Commission

²³ *Id.* at 21 (citing *Duke Energy Moss Landing, LLC*, 86 FERC ¶ 61,227, at 61,816 (1999); *Minnesota Power & Light Co.*, 43 FERC ¶ 61,104, at 61,341-342).

²⁴ *Id.* at 21.

²⁵ *Id.* at 22 (citing *Rio Grande Pipeline Co.*, 178 F.3d 533, 536-37 (D.C. Cir. 1999); *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211, at P 28 (2005); *Longhorn Partners Pipelines*, 73 FERC ¶ 61,355 (1995)).

²⁶ *Id.* at 23.

approve, for accounting purposes, Entergy's proposal to record the authorized expenses associated with the Power Block Two acquisition adjustment in Account No. 406.²⁷

II. Notice of Filing and Responsive Pleadings

12. Notice of Entergy's filing was published in the *Federal Register*, 75 Fed. Reg. 40,806 (2010), with interventions and comments due on or before July 21, 2010. Occidental Chemical Corporation filed a timely motion to intervene. The Mississippi Public Service Commission and the Council of the City of New Orleans filed notices of intervention. The Louisiana Commission filed a notice of intervention and comments in support of Entergy's filing. The Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention and protest. Entergy filed an answer in response to the Arkansas Commission's protest. The Arkansas Commission filed an answer to Entergy's answer.

13. In its protest, the Arkansas Commission argues that the Commission should deny with prejudice Entergy's request to include a \$103 million acquisition premium in rate calculations under Service Schedule MSS-4 to the Entergy System Agreement.²⁸ It asserts that Entergy's request is contrary to the Commission's policy against inclusion of acquisition adjustments in rates except in limited circumstances. If the Commission does not deny Entergy's request to include the Power Block Two acquisition adjustment in calculations under Service Schedule MSS-4 with prejudice, the Arkansas Commission asserts that a hearing would be necessary to investigate Entergy's claims. However, the Arkansas Commission argues that such a hearing would be premature since the Louisiana Commission has not yet authorized Entergy Louisiana's Power Block Two acquisition and request to recover the acquisition premium through retail rates.²⁹

14. Also, the Arkansas Commission asserts that the Commission should reject Entergy's proposed generic amendments to Service Schedules MSS-3 and MSS-4. According to the Arkansas Commission, it is premature to consider such generic amendments because the matter may be moot if the Louisiana Commission does not approve the Power Block Two acquisition adjustment. It also argues that the inclusion of an acquisition adjustment in wholesale rates must be considered on a case-by-case basis because the benefits test can only be conducted on a case-by-case basis.

²⁷ *Id.* at 24.

²⁸ The Arkansas Commission does not comment on Entergy's proposal to include the acquisition adjustment for Power Block Two in Service Schedule MSS-3.

²⁹ Arkansas Commission Protest at 1, 18.

15. The Arkansas Commission notes that the Commission's policy is that public utilities may only include acquired utility property in rate base at original cost (at the depreciated net book value of the acquired property).³⁰ It adds that the Commission will depart from this original cost policy only in limited circumstances, where the utility can show specific dollar benefits resulting from the acquisition, i.e., benefits test. The Arkansas Commission argues that Entergy fails to satisfy the two-part inquiry under the benefits test because: (1) the Acadia facilities, including Power Block Two, have been used as and will continue to be used as supplies of electric energy at wholesale subject to Commission rate regulation;³¹ and (2) Entergy fails to provide any evidence of tangible, quantifiable benefits to customers. The Arkansas Commission contends that Entergy's claim of \$400 million in savings is speculative because it is based on a hypothetical construction price of a new facility. Moreover, the Arkansas Commission contends that it is inappropriate to compare the purchase price to a hypothetical construction price where pre-existing facilities are available. In such case, the Arkansas Commission argues that there would be no need to build a new facility.³² Further, the Arkansas Commission disputes Entergy's contention that policies underlying the Commission's original cost rate do not apply in the context of the acquisition of a merchant power plant. It argues that the Commission has previously held that the original cost accounting rules and the policies underlying them apply to a situation where a merchant generating plant is purchased by a public utility with captive customers.³³

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notices of intervention and the timely, unopposed motion to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy's answer or the Arkansas Commission's answer to Entergy's answer and will, therefore, reject them.

³⁰ *Id.* at 6.

³¹ *Id.* at 15.

³² *Id.* at 13.

³³ *Id.* at 9-10 (citing *PacifiCorp*, 124 FERC ¶ 61,046 (2008)).

B. Commission Determination**1. Generic Rate Provision**

18. We accept Entergy's proposed amendments to Service Schedules MSS-3 and MSS-4 for a generic provision allowing the recovery of an acquisition premium if that rate recovery is authorized by the Commission. As Entergy contends, the generic provision would have no effect on rates absent prior Commission approval for recovery of an acquisition adjustment on a case-by-case basis. Moreover, the proposed generic amendments are analogous to placeholders that the Commission allows utilities to include in formula rates.³⁴

2. Formula Rate/Hearing and Settlement Judge Procedures

19. Entergy's proposal to include the Power Block Two acquisition adjustment, including the related amortization expenses, in Service Schedules MSS-3 and MSS-4 raises issues of material fact that cannot be resolved based on the record before us. These issues of material fact are more appropriately addressed in the hearing procedures and settlement judge procedures ordered below.

20. Our preliminary analysis indicates that Entergy's proposed rates have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Entergy's proposed rates for filing, suspend them for a nominal period, make them effective at the close of Entergy Louisiana's purchase of Power Block Two, subject to refund, and set them for hearing and settlement judge procedures. However, we will hold those procedures in abeyance pending the outcome of the Louisiana Commission's proceeding in Docket No. U-31196.

21. While we are setting these matters for a trial-type evidentiary hearing, normally we would encourage the parties to make every effort to settle their disputes before hearing procedures are commenced and we would hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of

³⁴ See, e.g., *American Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205, at P 36 (2007) (allowing a utility to include in a transmission formula rate a placeholder that would allow the company to recover transmission rate incentives to the extent that the Commission approved those incentives in a separate section 205 filing). In permitting a placeholder for future acquisition adjustments, we are not prejudging the outcome of future requests by Entergy for authorization of such acquisition adjustments.

Practice and Procedure.³⁵ Here, though, we will hold both procedures in abeyance pending the outcome of the Louisiana Commission's proceeding. We direct the parties to notify the Commission and the Chief Judge within 15 days of the final decision from the Louisiana Commission. Thereafter, if the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁶ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of 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.

22. Also, we will grant Entergy's request to amortize the acquisition adjustment related to Entergy Louisiana's purchase of Power Block Two to Account No. 406, Amortization of Electric Plant Acquisition Adjustments. However, should recovery of the acquisition adjustment not be included in rates, then Entergy must amortize the acquisition adjustment to Account No. 425, Miscellaneous Amortization. Finally, within six months from the date of acquisition of Power Block Two, Entergy must file its proposed journal entries, including amounts related to the transaction along with narrative explanations describing the basis for the entries, to clear amounts from Account No. 102, Electric Plant Purchased or Sold, as required by the instructions to Account No. 102 and Electric Plant Instruction No. 5 (EPI No. 5).³⁷

The Commission orders:

(A) Entergy's proposed tariff sheets are hereby accepted for filing, to become effective on the closing date of the Power Block Two acquisition, as discussed in the body of this order.

(B) Entergy's proposed rates related to the Power Block Two acquisition adjustment, including the related amortization expenses, are hereby accepted for filing

³⁵ 18 C.F.R. § 385.603 (2010).

³⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge in writing or by telephone a (202) 502-8500 within five days of this order. FERC's website contains a listing of the Commission's judges and a summary of their background and experience (www.FERC.gov – click on Office of Administrative Law Judges).

³⁷ 18 C.F.R. Part 101 (2010).

and suspended for a nominal period, to become effective on the closing date of Entergy Louisiana's acquisition of Power Block Two, subject to refund, as discussed in the body of this order.

(C) Entergy's request to amortize the Power Block Two acquisition adjustment to Account No. 406 is hereby granted, as discussed in the body of this order. Entergy shall account for the Power Block Two transaction in accordance with EPI No. 5 and Account No. 102 of the Uniform System of Accounts. Entergy shall submit its final accounting entries within six months of the date that the transaction is consummated, and the accounting submission shall provide all the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.

(D) 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 sections 205 and 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 I), a public hearing shall be held concerning Entergy's proposed rates.

(E) The hearing and settlement judge procedures shall be held in abeyance to provide time for the Louisiana Commission's proceeding in Docket No. U-31196.

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of the notice from the parties regarding the outcome of the Louisiana Commission's proceeding in Docket No. U-31196, as discussed in the body 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.

(G) 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.

(H) 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, NE, 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.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.