

134 FERC ¶ 61,075
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 No. ER09-636-001

ORDER DENYING REQUESTS FOR REHEARING

(Issued February 1, 2011)

1. The Louisiana Public Service Commission (Louisiana Commission) and the Council of the City of New Orleans (New Orleans) filed requests for rehearing of the Commission's order accepting the filing by Entergy Services, Inc. (Entergy)¹ of Notices of Cancellation of Entergy Arkansas and Entergy Mississippi.² In this order, we deny the requests for rehearing.

I. Background

2. On February 2, 2009, Entergy submitted for filing, pursuant to section 35.15 of the Commission's regulations,³ Notices of Cancellation of Entergy Arkansas and Entergy Mississippi to terminate their participation in the Entergy System Agreement (System Agreement). The Notices of Cancellation were submitted pursuant to section 1.01 of the System Agreement, a Commission-accepted rate schedule that governs, among other

¹ Entergy filed on its behalf and on behalf of two of the Entergy Operating Companies, Entergy Arkansas, Inc. (Entergy Arkansas) and Entergy Mississippi, Inc. (Entergy Mississippi). The Operating Companies are Entergy Arkansas; Entergy Mississippi; Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana); Entergy Louisiana, LLC (Entergy Louisiana); Entergy Texas, Inc. (Entergy Texas), and Entergy New Orleans, Inc. (Entergy New Orleans). The generation and bulk transmission systems of all the Operating Companies are collectively referred to as the Entergy System.

² *Entergy Services, Inc.*, 129 FERC ¶ 61,143 (2009) (Withdrawal Order).

³ 18 C.F.R. § 35.15 (2010).

things, the allocation of certain costs associated with the integrated operations of the Entergy system. Entergy Arkansas' cancellation was proposed to take effect December 18, 2013, and Entergy Mississippi's cancellation was proposed to take effect November 7, 2015. In its filing, Entergy argued that the System Agreement explicitly gives any Operating Company the right to withdraw upon proper notice, and is silent as to what rights and obligations pertain to the Operating Companies upon withdrawal. Entergy also noted that it anticipates a post-withdrawal "4-1-1 scenario," where each of the withdrawing companies operates as an individual Balancing Authority alongside the four remaining Operating Companies.

3. In the Withdrawal Order, the Commission accepted Entergy Arkansas' and Entergy Mississippi's proposed Notices of Cancellation.⁴ The Commission found that the System Agreement allowed Operating Companies to exit upon 96 months written notice, without any further conditions upon withdrawal.⁵ The Commission also found that the System Agreement contained no provisions requiring withdrawing Operating Companies to pay an exit fee or otherwise compensate remaining Operating Companies, and the Commission did not impose an exit fee or other payment upon Entergy Arkansas or Entergy Mississippi.⁶ Finally, the Commission found that the System Agreement requires no continuing obligation on the withdrawing Operating Companies, with respect to either the sharing of capacity or payment of rough production cost equalization payments under Opinion Nos. 480 and 480-A.⁷ However, the Commission noted that Entergy has an obligation to ensure that any future operating arrangement is just and reasonable, and encouraged Entergy to make a section 205 filing with successor arrangements as soon as possible.⁸

⁴ Withdrawal Order, 129 FERC ¶ 61,143 at P 58.

⁵ *Id.* P 59.

⁶ *Id.* P 60, 61.

⁷ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

⁸ Withdrawal Order, 129 FERC ¶ 61,143 at P 63.

II. Requests for Rehearing

4. New Orleans maintains that the Commission failed to respond to all substantive issues raised by parties to the proceeding. For instance, New Orleans asserts that it argued that Entergy Arkansas was withdrawing for the purpose of avoiding the Commission-imposed bandwidth remedy, which the Commission dismissed as irrelevant. New Orleans maintains that the Commission's order avoided the issue of whether a Commission-jurisdictional utility may take steps to avoid a Commission-mandated mitigation measure like the bandwidth remedy. New Orleans points to testimony in an Arkansas Commission proceeding in which the Arkansas Commission directed Entergy Arkansas to withdraw from the System Agreement specifically to end the bandwidth remedy payment.⁹ New Orleans maintains that it demonstrated Entergy's corporate strategy to circumvent a Commission-imposed mitigation measure, despite injury to Entergy's captive ratepayers. New Orleans cites to Entergy Arkansas' Chief Executive Officer's statement that the purpose of the withdrawal was unequivocally to circumvent Opinion No. 480-A and the bandwidth remedy payment.¹⁰

5. New Orleans also notes that the Commission stated that concerns that the ability of Entergy to fulfill its responsibilities as a balancing authority under North American Electric Reliability Corporation (NERC) regulations would be hampered after withdrawal were "irrelevant and premature."¹¹ However, New Orleans argues that it is possible that the Entergy System Agreement will continue after the withdrawal, meaning that the Commission would not have the opportunity to review the successor arrangement. A hearing is necessary to determine whether the new Entergy arrangement would satisfy Commission requirements, New Orleans argues.

6. New Orleans also argues that the Commission improperly dismissed its concerns that the withdrawal notice would lead to a cascade of withdrawals that would significantly affect it. New Orleans asserts that the potential for cascading withdrawals from the System Agreement is relevant and not nearly as speculative as the Commission may believe. It states that the withdrawals will necessarily reshuffle the positions of the remaining Operating Companies in the bandwidth remedy by removing valuable system resources without any continuing obligation to the remaining Operating Companies. It asserts that the Withdrawal Order establishes a precedent that would authorize other Operating Companies that disagree with the new calculation to avoid the bandwidth

⁹ New Orleans at 11.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 13 (citing Withdrawal Order, 129 FERC ¶ 61,143 at P 66).

remedy by withdrawing from the System Agreement and removing valuable system resources without any continuing obligation to the remaining Operating Companies.

7. New Orleans states that the Commission committed an about-face in deciding that it would address the withdrawal requests rather than waiting until the time designated in the June 2007 Order.¹² It argues that this gave an unfair advantage to Entergy Arkansas and Entergy Mississippi in negotiations over the future of the System Agreement. New Orleans also argues that the Commission failed to provide a reasoned analysis explaining its departure from the June 2007 Order dismissing the Louisiana Commission's Complaint, as required by precedent. New Orleans points to the language in the June 2007 Order that it states indicated that the Commission would consider the 50-year relationship of the Entergy system in determining obligations under the System Agreement.¹³ Instead, New Orleans argues, the Commission relied only upon the absence of contractual language providing for post-withdrawal compensation in making its findings. Nor, New Orleans states, did the Commission make any finding as to whether the System Agreement continues to be just and reasonable for the remaining members. New Orleans argues that the Commission changed its view that it should review compensation matters and transition plans at the time of the withdrawal without explaining why it was doing so. New Orleans argues that there is nothing in the record to support the finding that allowing withdrawal of system resources is just and reasonable, and that a hearing is therefore required.

8. New Orleans claims that it raised material issues of fact that could not be properly resolved on the record absent an evidentiary hearing and the Commission erred by failing to schedule an evidentiary hearing.¹⁴ New Orleans also argues that the Commission did not sufficiently address the argument that the withdrawal would constitute corporate manipulation of an affiliate agreement and inappropriately shift costs from shareholders to captive ratepayers. New Orleans points to the Arkansas Public Service Commission's threat to withdraw rate riders of almost \$500 million per year from Entergy Arkansas if it did not withdraw from the Entergy system. New Orleans states that Entergy Arkansas withdrawing will cost Entergy ratepayers, particularly those in Louisiana, hundreds of millions of dollars in bandwidth receipts, thus constituting improper cross-subsidization. New Orleans also argues that the Arkansas Commission's action was an improper

¹² New Orleans at 4, 15 (citing *Louisiana Public Service Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,224 (2007) (June 2007 Order)).

¹³ *Id.* at 19 (citing June 2007 Order, 119 FERC ¶ 61,224 at P 43).

¹⁴ *Id.* at 24.

infringement upon the Commission's authority, and thus constituted a violation of the federal preemption doctrine.

9. New Orleans states that the System Agreement is a long-term affiliate transaction, and thus any modification to the agreement requires careful examination from the Commission to prevent abuse or undue preference. New Orleans argues that the Entergy System Agreement is not an arms-length transaction like Regional Transmission Organization (RTO) arrangements, so the Commission's reasoning comparing withdrawal provisions between Entergy and other RTOs was flawed. New Orleans argues that Entergy members do not have the same incentive to protect themselves from financial or operational harm if one member leaves the deal as RTO members do. Accordingly, New Orleans asserts that the Commission has broad authority to fashion a remedy to mitigate or eliminate harms from Entergy withdrawals.

10. New Orleans states that the Commission was incorrect in asserting that any party could have filed under section 206 to revise the System Agreement to add exit provisions. First, New Orleans argues, the Commission stated in its June 2007 Order that issues regarding compensation and continuing obligations would be addressed in the withdrawal filing, which protesting parties relied upon. Second, New Orleans notes that the Louisiana Commission did in fact file a complaint, which led to the June 2007 Order. Third, New Orleans argues that it is unlikely that it would have standing to file a complaint against Entergy regarding exit provisions. New Orleans notes that no potential harm existed until Entergy Arkansas' filing for withdrawal, because no provision of the System Agreement authorizes parties to remove system resources from the system.

11. New Orleans also argues that the Commission should not have postponed ruling on successor arrangements, since such issues are the crux of the matter, and form the basis of the Commission's ruling that the transaction is just and reasonable.

12. Finally, New Orleans argues that the Commission erred in ignoring substantial evidence that parties may not remove system resources free of cost from the system when they withdraw. New Orleans notes that the Entergy system has a history of 50 years of integrated system planning, construction and operations, which require compensation and continuing obligations from withdrawing parties. This history, New Orleans notes, has led the Commission to approve cost equalization on several occasions within the Entergy system. However, New Orleans argues that the Commission has ignored this history in allowing Entergy Arkansas and Entergy Mississippi to exit with system resources planned and operated for the entire system. New Orleans states that the fact that system resources were built for the benefit of the entire system is reflected in Entergy testimony and court findings. New Orleans argues that the fact that the System Agreement makes no mention of an obligation by withdrawing parties to pay for assets removed from the system stems from the fact that parties never expected withdrawing parties to take resources off the system. New Orleans argues that the Commission ignored the parties' intention in forming the System Agreement. New Orleans states that third-party rights

exist with respect to system resources and it argues that it is a third-party beneficiary to the System Agreement.¹⁵ Finally, New Orleans argues that the Commission was incorrect in assuming that the 96-month withdrawal term will be used to build new generation. New Orleans states that financial resources will be diminished following the withdrawals, and that the Commission should hold a hearing to determine whether resources were built for the entire system instead.

13. The Louisiana Commission asserts that the Withdrawal Order¹⁶ does not explain and reverses the holding in a previous Commission order¹⁷ regarding Entergy Arkansas' withdrawal. The Louisiana Commission cites to language from the June 2007 Order that states:

While the System Agreement is silent as to the rights and obligations of a departing member, and thus arguably could be interpreted as imposing no obligations on a departing member and providing no rights to remaining members, the Commission concludes that such a major change to this type of highly integrated system arrangement, which has existed for over 50 years, cannot be viewed in a vacuum if we are to fulfill our obligations under the FPA.[¹⁸]

14. The Louisiana Commission notes that the Withdrawal Order did not consider whether “such a major change to this type of highly integrated system arrangement which has existed for over 50 years” is just, reasonable and non-discriminatory. Further it argues that the Commission did not address the implications of the single-system planning approach and the historical pattern of rough production cost equalization, nor the extent to which the withdrawals will change cost responsibilities for the existing Entergy system units.

15. The Louisiana Commission states that section 206 of the Federal Power Act imposes on the Commission the responsibility to evaluate contracts affecting wholesale rates to determine whether they are just, reasonable and not unduly discriminatory. It alleges that because the Commission permitted the notices under the withdrawal

¹⁵ *Id.* at 42-43.

¹⁶ Withdrawal Order, 129 FERC ¶ 61,143 at P 58.

¹⁷ June 2007 Order, 119 FERC ¶ 61,224 at P 47, 49.

¹⁸ *Id.* P 47.

provision of the System Agreement, the Withdrawal Order fails to fulfill this statutory requirement and, therefore, the Commission should reconsider the decision.

16. The Louisiana Commission maintains that the Withdrawal Order conflicts with the Commission's 2001 ruling¹⁹ that Entergy Arkansas could not withdraw generating capacity from the system without ensuring the continuation of rough production cost equalization. The Louisiana Commission states that in 2000 Entergy proposed to withdraw all the generating assets of Entergy Arkansas from the system for retail competition in Arkansas. Further, it states that, despite the mutual agreement required under the contract, the Commission determined that Entergy Arkansas could not withdraw its generating assets without ensuring the rough equalization of production costs. It argues that the Withdrawal Order does not explain the change in policy and, therefore, it is arbitrary and should be reconsidered.

17. The Louisiana Commission maintains that the reasoning by the Commission in the Withdrawal Order assumes that the individual Operating Companies were free to protect their own interests in the negotiation process, specifically the language from the Withdrawal Order stating that, "[t]he drafters of the Entergy System Agreement chose to condition withdrawal only upon 96 months' notice; had they wished to provide for additional exit requirements, they could have done so." It states that the arrangements among the Entergy affiliates are not arm's length bargains and cannot be evaluated as if they were freely negotiated. It alleges that this reasoning is erroneous and contrary to the Commission's prior determinations concerning the Entergy system.²⁰

18. The Louisiana Commission maintains that the Withdrawal Order erroneously asserts that no party questioned the withdrawal provision previously and erroneously fails to assess the provision under current circumstances. The Louisiana Commission states that it filed a complaint in 2006 that asserted the attempted withdrawal under that provision is unjust, unreasonable and unduly discriminatory. It notes that the Commission deferred ruling on the withdrawal but made clear that the withdrawal provision "cannot be viewed in a vacuum if we are to fulfill our responsibilities under the

¹⁹ *Louisiana Public Service Comm'n v. Entergy Corp.*, 95 FERC ¶ 61,266 (2001).

²⁰ The Louisiana Commission cites to *Middle South Energy, Inc.*, 26 FERC ¶ 63,044 (1984), where the presiding judge noted that the Unit Power Sales Agreement is with affiliated utilities wholly owned by Middle South [Entergy], whose board of directors decided the allocation in the Unit Power Sales Agreement. The Commission affirmed the presiding judge's decision. See *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305 (1985).

FPA.”²¹ It maintains that a 96-month withdrawal provision may have been reasonable at the time the system was in rough equalization, but that under today’s conditions the withdrawals will produce an unlawful preference to Entergy Arkansas and undue discrimination to the other Operating Companies. Therefore, it alleges, the Commission failed to assess the withdrawal provision under today’s circumstances and this renders the Withdrawal Order arbitrary.

19. The Louisiana Commission states that the Withdrawal Order incorrectly assumes that the Operating Companies could have abandoned single-system planning in 2005,²² contrary to the terms of the System Agreement, and that the Withdrawal Order asserts that the 96-month notice period is sufficient to permit Operating Companies to rearrange their mixes of capacity to offset the impact of the withdrawal. It maintains that the individual Operating Companies cannot plan independently for their own needs while they are parties to the System Agreement. It states that the Operating Companies did not change the single-system planning approach when Entergy Arkansas gave its notice in 2005 and that Entergy still plans pursuant to the terms of the System Agreement. It argues that the System Agreement provides the System Operating Committee, not an individual company, the authority to “determine a generation addition plan to provide capacity for the projected system load and furnish reliable service to customers at the lowest cost consistent with sound business practice.”²³

20. The Louisiana Commission contends that the Withdrawal Order fails to address material issues of fact that must be resolved as a prerequisite to dissolving the Entergy System Agreement. It urges the Commission to require an evidentiary hearing to resolve these factual issues and alleges that the following are disputed issues: (1) whether 96 months provides sufficient time for individual companies to correct the current cost imbalances; (2) whether the withdrawal of Entergy Arkansas’ generating resources from the system will create unduly discriminatory cost disparities; (3) whether individual company planning would occur during the 96-month notice period; (4) whether new resources can correct the imbedded cost disparities that resulted from the system planning approach; (5) whether the removal of the Entergy Arkansas and Entergy Mississippi transmission assets from the system’s equalization formula may produce significant cost transfers; (6) whether the structure and impact of the Union Pacific coal transportation

²¹ June 2007 Order, 119 FERC ¶ 61,224 at P 47.

²² December 19, 2005 is the date that Entergy Arkansas notified the other Entergy Operating Companies of its intent to withdraw from the System Agreement and this date started the 96-month notice period for withdrawal.

²³ Entergy System Agreement at section 4.01.

settlement is appropriate in light of the Entergy Arkansas withdrawal; and (7) whether Entergy Arkansas' withdrawal will create a discriminatory allocation to Entergy Louisiana of transmission costs incurred to permit the Ouachita plant purchase by Entergy Arkansas.

21. Entergy filed an answer to the rehearing requests. The Louisiana Commission and New Orleans filed a joint response to Entergy's answer.

III. Discussion

A. Procedural Matters

22. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2010), prohibits an answer to a request for rehearing. Accordingly, we reject Entergy's answer and the joint response of Louisiana Commission and New Orleans.

B. Substantive Matters

23. We deny the Louisiana Commission's and New Orleans' requests for rehearing.

24. As the Commission stated, the purpose of the Withdrawal Order was to answer three specific questions: First, whether Entergy Arkansas and Entergy Mississippi are permitted to leave the System Agreement; second, whether they are required to compensate the remaining Operating Companies before they are allowed to withdraw; and third, whether the withdrawing companies have any continuing obligations to the remaining companies under the System Agreement.²⁴ The purpose of the Withdrawal Order was not to make a determination on the justness and reasonableness of any potential successor arrangements if Entergy Arkansas and Entergy Mississippi withdraw from the Entergy system; such determination will be made at the time Entergy files successor agreements.

25. The basis of the Withdrawal Order's findings was the contractual language of the System Agreement that allows parties to withdraw upon 96-months notice, and that places no further conditions or restrictions upon withdrawal, either prior to or subsequent to leaving the System Agreement. Neither the Louisiana Commission nor New Orleans convincingly refutes the Commission's analysis of the terms of the System Agreement itself. Instead, the parties seeking rehearing rely on claims of historical exigencies and other extrinsic evidence to suggest additional conditions on withdrawal not present in the

²⁴ Withdrawal Order, 129 FERC ¶ 61,143 at P 58.

System Agreement itself. We have reviewed the evidence on the history and surrounding circumstances of the Entergy system, and we find that the parties seeking rehearing have not presented sufficient justification for overturning the meaning of the contractual terms in the System Agreement.

26. Both New Orleans and the Louisiana Commission argue that the Commission contradicted its decision in the June 2007 Order by relying on the terms of the System Agreement in deciding the Withdrawal Order. However, the Commission in the June 2007 Order did not dictate what its ultimate decision would be on whether Entergy Arkansas and Entergy Mississippi had met the requirements to withdraw from the Entergy System Agreement; the Commission stated only that it would not review the claim in a vacuum given the 50-year history of the Entergy arrangement.²⁵ The Commission fulfilled that requirement in the Withdrawal Order. The Commission reviewed the filings of the withdrawing parties, along with the comments of intervenors, and reviewed the history of the Entergy system along with other evidence presented on the meaning of the System Agreement. The Commission also reviewed additional information provided by Entergy on the arrangements that will exist following termination of Entergy Arkansas' and Entergy Mississippi's participation in the System Agreement. This included: a description of the "4-1-1" scenario for post-termination operations that Entergy indicates will take effect in the absence of any successor arrangements; the steps being taken with respect to balancing authority responsibility and long-term resource acquisition; plans to procure additional resources as necessary to reflect the departure of Entergy Arkansas and Entergy Mississippi; as well as transmission arrangements that would allow each company to access various resource options.²⁶

27. Ultimately, the Commission concluded that the System Agreement allows Entergy Arkansas and Entergy Mississippi to leave upon adequate notice as provided in the System Agreement, and that there was no evidence in the record to support placing additional conditions upon the withdrawing parties. Additionally, the Commission advised Entergy to file its successor arrangements as soon as possible, so that the

²⁵ June 2007 Order, 119 FERC ¶ 61,224 at P 47.

²⁶ Entergy explained that the Operating Companies will continue to operate and plan an integrated transmission grid, thereby giving the four remaining Operating Companies continued access to the transmission systems of Entergy Arkansas and Entergy Mississippi through the Entergy Open Access Transmission Tariff (OATT). Entergy's February 2, 2009 Transmittal Letter at 7-8.

Commission could rule on whether the new arrangements are just and reasonable.²⁷ We continue to believe that this two-part analysis is the best way to review the potential withdrawal of Entergy Arkansas and Entergy Mississippi from the Entergy system, and is consistent with our prior rulings.²⁸

28. Neither New Orleans nor the Louisiana Commission present compelling arguments in their requests for rehearing that would justify a reversal of the Commission's decision in the Withdrawal Order. Contrary to their arguments, the Commission did not ignore the 50-year history of the Entergy system when deciding the Withdrawal Order. In fact, it is the parties seeking rehearing that appear in making their arguments to disregard Entergy's history. For instance, New Orleans argues that generation resources were built for the benefit of the whole system, requiring compensation and continuing obligations on the part of withdrawing parties. However, as the history of the System Agreement demonstrates, generation in the Entergy system is, and was intended to be, owned by the individual Operating Companies, rather than by the system as a whole or shared among the various Operating Companies.²⁹

29. Under the System Agreement the primary means of allocating the costs and benefits of new generation resources on the Entergy system is through the Operating

²⁷ Although New Orleans argues that it is possible that the Commission would not have the opportunity to review the Entergy successor arrangement, this argument is incorrect. The withdrawal of one or more members from Entergy would be a significant change to the Entergy system such that the Commission would need to review any successor arrangement to ensure that it is just and reasonable. Additionally, New Orleans always has the right to file a complaint under section 206 of the Federal Power Act (FPA) if it believes that the Entergy System Agreement is no longer just and reasonable.

²⁸ The Louisiana Commission argues that the Withdrawal Order is inconsistent with the Commission's 2001 ruling in Docket No. EL00-66-000. *Louisiana Public Service Comm'n v. Entergy Corp.*, 95 FERC ¶ 61,266 (2001). This case is not relevant here because in Docket No. EL00-66-000 Entergy Arkansas was seeking to exit the System Agreement on the date that retail competition commenced in its jurisdiction, before the 96-month notice period had run. In that circumstance, some determination was necessary on the effect of retail competition on the rough equalization of production costs before the full notice period required under the System Agreement had run its course. That situation is not present here.

²⁹ Section 4.01 of the System Agreement states in part that, "[e]ach Company shall normally own, or have available to it under-contract, such generating capability and other facilities as are necessary to supply all of the requirements of its own customers."

Committee's³⁰ assignment of new generation resources to individual Operating Companies on a rotating basis.³¹ This allocation is long-term in nature and, under this system, the individual Operating Company assumes the responsibility for financing and bearing the costs of new generation plant assigned to it.³² The fixed costs of these facilities are included in the Operating Company's retail rates, and are borne by the retail customers in that jurisdiction. In return for bearing these costs and associated risks, the System Agreement allows an Operating Company and its customers to retain the benefits of the energy produced by units assigned to the Operating Company. For example, under Service Schedule MSS-3, the energy produced by each Operating Company is, for economic purposes, retained by that Operating Company as needed to meet its native load.³³ The second allocation of costs in the System Agreement is the allocation of the costs and benefits associated with particular functions of system integration on a short-term basis. This is achieved by Service Schedules MSS-1 through MSS-7.³⁴ Because the Operating Companies' resources are pooled together as a single electric system, the Entergy System Agreement, through its Service Schedules, allocates the costs of any imbalances in the cost of those facilities used for the mutual benefit of all the Operating Companies.³⁵ For example, Service Schedule MSS-1 equalizes the cost of imbalances of system reserves. It requires that Operating Companies that have a capacity reserve deficiency pay Operating Companies that have excess reserve margins.³⁶ However, as Service Schedule MSS-1 equalizes only the costs of excess capacity on the Entergy system, the charges paid pursuant to Service Schedule MSS-1 represent only a very small

³⁰ The Operating Committee is the entity that administers the System Agreement. It consists of a representative of Entergy Corporation and of each of the Operating Companies. *See* Entergy System Agreement, Article V.

³¹ Opinion No. 480-A, 113 FERC ¶ 61,282 at P 7.

³² *Id.*

³³ *Id.* at n.9 (citing Testimony of Michael Schnitzer at 4).

³⁴ *Id.* P 8.

³⁵ *Id.*

³⁶ Entergy System Agreement, Service Schedule MSS-1, section 10.04 – Reserve Equalization Payment.

fraction of the overall production costs of the Operating Companies.³⁷ These cost equalizations do not represent a sharing of ownership of generation facilities.³⁸

30. If parties within Entergy had intended to share ownership of new or existing generation facilities, it would have been simple enough either to write such requirements into the System Agreement, or to decide to share ownership through the Operating Committee planning process. Additionally, had the drafters of the System Agreement wished to provide for additional exit requirements, they could have done so. Moreover, subsequent to the establishment of the System Agreement, any interested party could have later filed to amend the System Agreement under section 205 or 206 of the FPA.³⁹ Despite arguments to the contrary, the Entergy System Agreement established a structure under which each Operating Company owned its own generation, and under which an Operating Company could exit upon proper notice without compensation or continuing obligation requirements.

31. Both New Orleans and the Louisiana Commission argue that the Commission is mistaken. They argue that since the Entergy system is not an arm's length transaction there was not the same opportunity to object to the terms of the System Agreement.

³⁷ Opinion No. 480-A, 113 FERC ¶ 61,282 at P 8.

³⁸ Indeed, individual Operating Companies have continued to pursue ownership of their own facilities to meet the needs of their load. *See* Entergy's February 2, 2009 Transmittal Letter at 7-8. This refutes New Orleans' argument that Entergy should be "equitably estopped" from arguing over the ownership of generating facilities. In particular, New Orleans argues that it relied on Entergy witness statements, court and Commission decisions stating that Entergy planned and operated its system for the benefit of all of the Operating Companies, and such reliance had caused it not to build as diversified a portfolio as it otherwise might have. *See* New Orleans Protest at 25-26. However, New Orleans has not met the requirements for a claim of equitable estoppel: false representation, a purpose to invite action by the party to whom the representation was made, ignorance of the true facts by that party, reliance, and unjust enrichment. *See Bangor Hydro-Electric Co. v. ISO New England*, 97 FERC ¶ 61,339, at 62,590 (2001). New Orleans provides no proof beyond a bald assertion that it has acted to its detriment in reliance upon statements made by Entergy, and this assertion is refuted by the evidence provided by Entergy above. Additionally, New Orleans makes no showing that Entergy made statements to invite action by New Orleans, beyond stating that Entergy witnesses made general statements about coordinated system planning in the Entergy system in a 1984 Commission proceeding.

³⁹ Withdrawal Order, 129 FERC ¶ 61,143 at P 60.

However, the facts belie this assertion. After the 1982 System Agreement was negotiated it was the subject of extensive litigation and was reviewed by many parties.⁴⁰ At any time during the review of the 1982 System Agreement, and thereafter, a party could have filed a section 206 proceeding objecting to the withdrawal provision or arguing that additional exit provisions were required. Indeed, the Louisiana Commission notes that it filed a complaint challenging the withdrawal notice from Entergy Arkansas in 2006; however, it fails to explain why it never filed a similar complaint challenging the exit provisions of the System Agreement prior to Entergy Arkansas' withdrawal notice. We disagree with the Louisiana Commission's argument that the 96-month withdrawal period may have been just and reasonable at the time the System Agreement was signed, but is no longer just and reasonable since the Entergy system is not in rough production cost equalization. The System Agreement does not tie the notice term to rough production cost equalization, nor do we see any reason for the Commission to do so now. Rough production cost equalization is a remedy imposed by the Commission in Opinion No. 480, in response to a complaint filed by the Louisiana Commission, to ensure that the purpose of the System Agreement is achieved. This remedy applies while the System Agreement is in effect and bears no relationship to whether or not the 96-month withdrawal period is just and reasonable. Additionally, although the Commission issued Opinion No. 480 in 2005, the Commission found that the Entergy system had not been in rough production cost equalization since 2000.⁴¹ The Louisiana Commission did not file its complaint until 2006, after Entergy Arkansas sought to withdraw from the System Agreement. The Commission will not relieve parties from their contractual bargains merely because they turn out to be unfavorable at the time of enforcement.⁴²

32. We also take issue with New Orleans' argument that because the System Agreement is silent as to the obligation of withdrawing parties to pay for assets removed from the system, New Orleans could not have expected withdrawing parties to take resources off the system. As explained above, the System Agreement grants ownership

⁴⁰ See, e.g., *Middle South Services, Inc.*, 20 FERC ¶ 61,112 (1982); *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305 at 61,649, *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).

⁴¹ Opinion No. 480, 111 FERC ¶ 61,311 at P 30.

⁴² See *Enbridge Pipelines (Toledo) Inc.*, 130 FERC ¶ 61,270, at P 33, n.8 (2010).

of generating facilities to individual Operating Companies.⁴³ Given the fact that the System Agreement places only one condition upon withdrawing parties – the notice requirement – New Orleans’ assumption that any withdrawing parties would not retain the generating facilities they owned is unavailing. Moreover, even if withdrawal was not anticipated by some parties to the System Agreement, unforeseen changed circumstances are not enough to warrant contract modification.⁴⁴ Withdrawal does not become impermissible solely upon a party’s assertion that the eventual result was not anticipated at the time of contract formation.

33. We further disagree with the argument that the Commission erred in relying upon the 96-month notice provision as intended to provide time for individual Operating Companies to adjust their long-term plans and acquire any needed capacity. With respect to the notice provision, New Orleans and the Louisiana Commission again argue that because the System Agreement is not an arm’s length agreement, the individual Entergy Operating Companies do not have the same ability or incentive to protect themselves as in other arrangements. This argument is belied by the terms of the System Agreement itself and the history of the Entergy system. Nothing in the System Agreement prohibits individual Operating Companies from seeking to procure new generation. In Opinion No. 234, the Commission stated that, “[a]s shown in the Operating Committee⁴⁵ minutes, there is no doubt that the individual companies have had input in Committee decisions and recommendations, and have actively sought to build certain generation units based on the needs of their individual loads.”⁴⁶

34. Moreover, neither New Orleans nor the Louisiana Commission alleges that the Operating Committee has prevented any Operating Company from procuring resources to reflect the departure of Entergy Arkansas and Entergy Mississippi. In fact, Entergy’s February 2, 2009 filing in this proceeding explained that the Operating Companies were planning to procure additional resources as necessary based on the departure of Entergy Arkansas and Entergy Mississippi.⁴⁷ Entergy stated that Entergy Louisiana and Entergy

⁴³ See section 4.01 of the System Agreement.

⁴⁴ See, e.g., *Pontook Operating Ltd. P’ship*, 94 FERC ¶ 61,144, at 61,552, n.11 (2001); *PPL Univ. Park, LLC*, 109 FERC ¶ 61,190, at 61,293 (2004).

⁴⁵ The System Agreement empowers the Operating Committee to make the key decisions regarding the acquisition and allocation of generating resources or electric energy for the Operating Companies.

⁴⁶ Opinion No. 234, 31 FERC ¶ at 61,649.

⁴⁷ Entergy’s February 2, 2009 Transmittal Letter at 7-8.

New Orleans have each been pursuing additional base-load capability.⁴⁸ The Louisiana Commission has not refuted this statement and there is no indication that the Operating Companies have been thwarted in their pursuit of new generation options.

35. New Orleans relies heavily on the Commission's imposition of a bandwidth payment requirement to roughly equalize production cost payments within Entergy to argue that the Commission should impose further obligations on the withdrawing members. Indeed, many of New Orleans' arguments, including the claim that the withdrawals constitute cross-subsidization⁴⁹ and the suggestion that Entergy Arkansas and Entergy Mississippi are withdrawing to improperly avoid bandwidth payments, assume that the Operating Companies are entitled to bandwidth payments in perpetuity, regardless of whether the Operating Companies making the payments are still parties to the Entergy System Agreement. However, the Commission has already indicated that there is no basis to suggest that bandwidth payments should continue indefinitely even if an Operating Company is no longer a member of the Entergy System Agreement.⁵⁰ Once Entergy Arkansas and Entergy Mississippi withdraw from the Entergy system, they are no longer affiliates of the other Entergy Operating Companies for the purposes of the bandwidth formula. As such, New Orleans' arguments that the withdrawals constitute affiliate abuse or improper cross-subsidization are simply wrong.

36. Further, we disagree with New Orleans' argument that the Commission improperly ruled on Entergy's filing in this proceeding, in light of the Commission's earlier statement in the June 2007 Order that Entergy should file its section 205 filing no earlier than 18 months prior to the date of withdrawal.⁵¹ Given the interest in resolving any disputes within Entergy prior to the date of withdrawal, the Commission determined

⁴⁸ *Id.*

⁴⁹ New Orleans also argues that improper cross-subsidization and violation of the federal preemption doctrine arose from the Arkansas Commission's threat to withdraw rate riders of almost \$500 million per year from Entergy Arkansas if it did not withdraw from the Entergy system. However, New Orleans presents no evidence that the Arkansas Commission actually took any action to improperly influence Entergy Arkansas. Regardless, the motivation behind Entergy Arkansas' withdrawal request is irrelevant to our analysis of the Entergy System Agreement.

⁵⁰ June 2007 Order, 119 FERC ¶ 61,224 at P 47 ("We find no basis to support the Louisiana Commission's request for what in effect would be involuntary continuation of the existing integrated system arrangements, or the virtual equivalent, in perpetuity.").

⁵¹ June 2007 Order, 119 FERC ¶ 61,224 at P 50.

that it would be prudent to rule now on the question of whether Entergy Arkansas and Entergy Mississippi could withdraw, rather than waiting until closer to the withdrawal date.⁵² The 18-month timeframe was not mandated by the System Agreement, but was instead a Commission determination designed to provide a timeline for the parties involved. Given the circumstances, including the formation of a Regional State Committee intended to assist in the evaluation of the future of the Independent Coordinator for Transmission (ICT) and the possibility of Entergy joining an RTO,⁵³ the Commission chose to revise that timeline. We also reject New Orleans' argument that the date of the Withdrawal Order somehow gives an unfair advantage to Entergy Arkansas and Entergy Mississippi in negotiations over the future of the System Agreement. Providing certainty with respect to the terms of the System Agreement is beneficial to all of the parties involved. Other than making the assertion, New Orleans fails to explain how the Withdrawal Order somehow provided Entergy Arkansas and Entergy Mississippi an unfair advantage over New Orleans.

37. Finally, both parties seeking rehearing raise a variety of other issues, including questions about the shape of the post-withdrawal Entergy system, that are irrelevant to the withdrawal issue before us in this proceeding. For example, the Louisiana Commission states that the removal of the Entergy Arkansas and Entergy Mississippi transmission assets from Entergy's equalization formula *may* produce significant cost transfers. Such worries, along with New Orleans' argument that a withdrawal notice could lead to a "cascade of withdrawals," are not only irrelevant to this proceeding, but are also purely speculative. Any legitimate concerns regarding the structure of the post-withdrawal Entergy system will be addressed by the Commission when considering Entergy's filing on transition measures.⁵⁴ It is only logical to address the legal issues regarding interpretation of the System Agreement as it relates to the withdrawals of

⁵² See Withdrawal Order, 129 FERC ¶ 61,143 at P 67.

⁵³ See Press Release, Entergy Regulators form Regional State Committee, Dec. 17, 2009, *available at* <http://www.spp.org/publications/Press%20Release%20RE%20E-RSC%20Formation%2012-17-09.pdf>.

⁵⁴ The concerns raised by the Louisiana Commission regarding the Union Pacific coal transportation settlement and Ouachita transmission costs (*see supra* P 20) are beyond the scope of this proceeding and more appropriately raised in a future proceeding regarding the structure of the post-withdrawal Entergy system. Also, whether a post-withdrawal structure would affect any Commission orders approving mergers within Entergy or the basis for any grants of market-based rates are issues beyond the scope of this proceeding and are more appropriately raised in section 206 complaints concerning any such mergers or market-based rates.

Entergy Arkansas and Entergy Mississippi now, and address the justness and reasonableness of Entergy's successor arrangements when a proposal is filed with the Commission.⁵⁵

The Commission orders:

The Louisiana Commission's and New Orleans' requests for rehearing are hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵⁵ We find that there are no material issues of fact that warrant a hearing on the issue of withdrawals. *See FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289, at P 75 (2008).