

142 FERC ¶ 61,014  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony T. Clark.

Entergy Services, Inc. Docket No. ER12-1895-000

Arkansas Electric Cooperative Corporation; Mississippi  
Delta Energy Agency; Clarksdale Public Utilities  
Commission; Public Service Commission of Yazoo  
City; and South Mississippi Electric Power Association

v.

Entergy Services, Inc.

**ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES**

(Issued January 3, 2013)

1. On September 28, 2012, Arkansas Electric Cooperative Corporation, Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, Public Service Commission of Yazoo City, and South Mississippi Electric Power Association (collectively, Complainants) filed a complaint in Docket No. EL12-110-000 pursuant to sections 206, 306 and 309 of the Federal Power Act (FPA).<sup>1</sup> Complainants allege that the 2012 Rate Determination filing submitted in Docket No. ER12-1895-000 by Entergy Services, Inc. (Entergy) on behalf of the Entergy Operating Companies<sup>2</sup> departs from the proper application of Entergy's formula rate, and they request consolidation and hearing procedures. In this order, we set the complaint for hearing and establish settlement judge procedures.

**I. Background**

2. Appendix 1 to Attachment H and Appendix A to Schedule 7 of Entergy's Open Access Transmission Tariff (OATT) provide for an annual redetermination of rates for

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<sup>1</sup> 16 U.S.C. §§ 824e, 825e, 825h (2006).

<sup>2</sup> The Entergy Operating Companies are Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.

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

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

**A. 2012 Rate Redetermination Filing**

4. On May 31, 2012, as amended on September 28, 2012, in accordance with Attachment H and Schedule 7 of its OATT and the settlement approved by the Commission in Opinion No. 430, Entergy filed its informational 2012 Rate Redetermination in Docket No. ER12-1895-000. Entergy explains that its OATT provides that such informational rate updates do not constitute rate change filings subject to the requirements of section 205 of the FPA<sup>4</sup> and that public notice of the updates is not required. Entergy states that the charges were determined using historical, actual costs, loads and other inputs as recorded for 2011.

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

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

<sup>4</sup> 16 U.S.C. § 824d (2006).

as an alternative to the routine treatment of rate filings made pursuant to section 205 of the FPA.

## **B. Complaint**

6. Complainants challenge various aspects of Entergy's 2012 Rate Redetermination, arguing that Entergy has not properly implemented its formula rate procedures.

7. Complainants argue that Entergy has improperly included the costs associated with radial transmission facilities serving only the Operating Companies' retail load. Complainants state that Entergy has failed to explain the extent to which Entergy has radial facilities that serve only retail load. Complainants assert that Entergy has indicated that it does not provide sufficient detail in its property accounting or other records to determine the value of individual radial lines. Complainants argue that a record-keeping failure does not excuse Entergy's failure to provide information that is necessary to quantify how many retail-only radial facilities are included within its OATT. Complainants claim that Entergy's OATT rate formula does not state that Entergy should include costs relating to radial facilities serving only retail customers in the annual rate redeterminations. Complainants ask the Commission to direct Entergy to (1) exclude costs associated with radial transmission facilities serving only retail load from its annual rate determination; (2) coordinate with the Joint Customers<sup>5</sup> to identify the existing radial transmission lines that serve only retail load; and (3) recalculate the annual rate after excluding costs associated with radial transmission lines serving only retail load.<sup>6</sup>

8. Complainants claim that Entergy has improperly included regional transmission market operations costs. Complainants state that costs booked to regional transmission market operations accounts are related to Entergy's weekly procurement process, which is an issue pending before the Commission.<sup>7</sup> Therefore, Complainants assert that charges booked to the regional transmission market operations accounts should not be included in the 2012 Rate Redetermination until the Commission acts on this issue.<sup>8</sup>

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<sup>5</sup> The Joint Customers are Arkansas Electric Cooperative Corporation; Mississippi Delta Energy Agency; Clarksdale Public Utilities Commission of the City of Clarksdale, Mississippi; Public Service Commission of Yazoo City of the City of Yazoo City, Mississippi; and South Mississippi Electric Power Association.

<sup>6</sup> Complaint at 20.

<sup>7</sup> *Id.* at 21 (referencing *Entergy Services, Inc.*, 139 FERC ¶ 61,173 (2012)).

<sup>8</sup> *Id.*

9. Complainants contend that Entergy should eliminate prepayments for retail regulatory commission costs and city franchise tax. Complainants argue that the formula rate prohibits recovery of retail regulatory commission prepayments. Complainants further assert that Entergy may not require wholesale transmission customers to pay city taxes because city taxes are primarily retail-related.<sup>9</sup>

10. Complainants ask the Commission to require Entergy to reduce its OATT rates to reflect an equitable sharing of incentive compensation costs between ratepayers and shareholders. Complainants argue that payouts for incentive compensation should be shared between Entergy's transmission customers and its stockholders because (1) the incentive compensation expense does not depend on or reflect any demonstrated increased efficiency or savings in Entergy's electric utility or transmission operations, and (2) Entergy's shareholders are the primary beneficiaries of the incentive compensation program and any benefit to transmission customers is incidental.<sup>10</sup>

11. Complainants contend that Entergy has failed to demonstrate that certain operating and maintenance (O&M) and administrative and general (A&G) expenses are recoverable transmission costs. Complainants argue that, because transmission customers pay an allocated share of the transmission plant and general plant costs in Entergy's formula rate, to the extent that Entergy receives revenues from its ownership of those transmission and general plant facilities, those revenues should be directly assigned or allocated to OATT customers. Complainants complain that despite requests from Joint Customers, Entergy has provided only a partial list of sub-expense categories without supporting detail. Complainants also complain that Entergy has included expenses that are part of a Department of Justice antitrust investigation without explaining how those expenses benefit wholesale transmission customers.<sup>11</sup>

12. Complainants assert that Entergy has not demonstrated that the level of revenue credits provided in the 2012 Rate Redetermination is just and reasonable and consistent with the filed rate. Complainants claim that Joint Customers have requested, but not received, information concerning transmission-related revenue credits booked to Account 454000 in 2011. Complainants state that the revenue credits provided in the 2012 Rate Redetermination should include significant transmission-related revenue credits.

13. Complainants argue that Entergy has impermissibly limited the accumulated deferred income taxes (ADIT) in the 2012 Rate Redetermination. Complainants state

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<sup>9</sup> *Id.* at 24.

<sup>10</sup> *Id.* at 26-27.

<sup>11</sup> *Id.* at 30.

that Entergy should include expense-related ADIT in the calculation of the rate if the expense is included in the cost of service, rather than only the ADIT associated with a rate base item. Complainants ask the Commission to direct Entergy to provide the necessary expense and revenue items in the OATT calculations that give rise to the ADIT.<sup>12</sup>

14. Complainants ask the Commission to direct Entergy to remove unauthorized accruals to reserve accounts from the 2012 Rate Redetermination and credit transmission rate base for non-escrowed reserve funds. Complainants assert that, to the extent Entergy is permitted to include in the A&G expense any accruals that are not set aside in restricted external accounts, there should be a rate base offset for the accumulated reserve accruals.

15. Complainants argue that Entergy's revenue credits for short term firm revenues are understated. Complainants challenge these revenues because they have not been able to replicate Entergy's calculations based upon Entergy's Open Access Same-Time Information System data.<sup>13</sup>

16. Complainants request that the Commission set these issues for hearing and settlement judge procedures and consolidate the proceedings.

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

17. Entergy's filing in Docket No. ER12-1895-000 is an informational filing; therefore, it was not publicly noticed. NRG Power Marketing LLC; Bayou Cove Peaking Power LLC; Big Cajun I Peaking Power LLC; Louisiana Generating LLC; NRG Sterlington Power LLC; and Cottonwood Energy Company LP (collectively, NRG Companies); and East Texas Electric Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; and Tex-La Electric Cooperative of Texas, Inc. (collectively, East Texas Cooperatives) filed motions to intervene.<sup>14</sup>

18. Notice of the complaint in Docket No. EL12-110-000 was published in the *Federal Register*, 77 Fed. Reg. 61592 (2012), with interventions and protests due on or before October 18, 2012. Conway Corporation; West Memphis Utilities Commission; City of Osceola, Arkansas; City of Prescott, Arkansas; and City of Benton, Arkansas (collectively, Arkansas Cities) filed a timely motion to intervene. Louisiana Entergy and

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<sup>12</sup> *Id.* at 36.

<sup>13</sup> *Id.* at 39.

<sup>14</sup> The Council of the City of New Orleans, Louisiana filed a motion to intervene, which it subsequently withdrew.

Power Authority; Lafayette Utilities System; and Municipal Energy Agency of Mississippi (collectively, L-M Municipals) and East Texas Cooperatives filed to intervene out-of-time. Entergy filed an answer to the complaint, and Complainants responded to Entergy's answer.

19. In its answer, Entergy argues that the complaint should be dismissed because Complainants have not demonstrated that the cost inputs into the OATT formula rate are incorrect or that there are any errors in the calculation. Further, Entergy argues that Complainants have provided no evidence that the 2011 FERC Form 1 cost inputs, as filed in the 2012 Rate Redetermination, are unreasonable. To the extent that there are any issues that the Commission believes would justify further investigation, Entergy asks the Commission to appoint a settlement judge.

20. Entergy maintains that it has met its burden of proof to demonstrate that it has properly applied the formula. Entergy argues that Complainants either do not understand the basic formulaic calculations or ask the Commission to disallow formula inputs that should properly flow through the Commission-accepted formula. Entergy states that Complainants' requests to exclude certain inputs are direct challenges to the formula and they bear the burden of proof in those instances. Entergy asserts that Complainants ignore the fact that the Commission has consistently found that, for formula rates, the formula is the rate.<sup>15</sup>

21. Entergy acknowledges that its property accounting records are not detailed enough to provide the specific value of individual lines. However, Entergy states that it has not changed its treatment of radial lines in the 2012 Rate Redetermination and that it historically has treated these lines in this fashion within the OATT formula rate.

22. Entergy maintains that it has recovered regional transmission market operations costs properly. Entergy notes that the Commission accepted Entergy's proposed clarifications, effective June 1, 2012, subject to refund.<sup>16</sup> Entergy argues that, therefore, there is no basis or need in this proceeding for the Commission to exclude the charges booked to the regional transmission market operations accounts.

23. Entergy argues that it has properly included prepayments for retail regulatory costs and city franchise taxes in the formula despite Complainants' insistence to the contrary. Entergy explains that, on the rate-base side of the formula, such costs are not expressly excluded as they are on the expense side. Entergy argues that, if Complainants seek to

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<sup>15</sup> Entergy Answer at 5 (citing *Western Power Admin.*, 66 FERC ¶ 61,128, at n.10 (1994)).

<sup>16</sup> *Id.* at 11 (referencing *Entergy Services, Inc.*, 139 FERC ¶ 61,173, at P 1 (2012)).

change the formula to exclude these costs from the rate-base side of the formula, then Complainants must demonstrate that the change is both just and reasonable and prospective application is warranted.

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

25. Entergy asserts that it has treated all O&M expenses properly in the formula calculations. Entergy argues that Complainants' request that certain O&M expenses be removed from the formula rate is a direct challenge to the structure of the formula rate.

26. Entergy disagrees with Complainants' allegation that it is necessary to include an adjustment increasing revenue credits allocated to the transmission function. Entergy argues that the treatment Complainants seek requires a change to the formula.

27. Entergy argues that Complainants have misstated the basis by which Entergy computes ADIT and that it has treated ADIT correctly in its 2012 Rate Redetermination. Entergy explains that, if the asset or liability that gave rise to the ADIT line item is included in rate base in the rate formulas, then that ADIT is included in the "ratemaking" balance. Entergy states that, if that asset or liability is not included in rate base in the rate formulas, then that ADIT is included in the "other" balance.<sup>17</sup>

28. Entergy claims that removal of "unauthorized accruals" to reserve accounts requires a formula change. Entergy states that it has included these accruals in ratemaking proceedings before the various retail regulatory commissions and city councils that regulate its retail rates and those accruals have been approved by those regulatory bodies. Entergy contends that Complainants have alleged that there is no documentation of authorization by any regulatory body without having sought out this documentation.<sup>18</sup>

### **III. Discussion**

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

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene in Docket No. EL12-110-000 serve to make the entities that filed them parties to that proceeding.

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<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 9.

30. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), the Commission will grant L-M Municipals' and East Texas Cooperatives' late-filed motions to intervene in Docket No. EL12-110-000 given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

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

### **B. Hearing and Settlement Judge Procedures**

32. The complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set the complaint in Docket No. EL12-110-000 for investigation and a trial-type evidentiary hearing under section 206 of the FPA. Because Entergy's filing in Docket No. ER12-1895-000 is an informational filing, we will deny the requests to consolidate that proceeding with the complaint proceeding in Docket No. EL12-110-000.

33. What costs of regional transmission market operations may properly be recovered in rates is currently being addressed in the hearing and settlement judge procedures ordered in Docket No. ER12-1428-000.<sup>19</sup> The instant proceeding is, in contrast, focused on challenges to the level and the prudence of those costs that the Docket No. ER12-1428-000 proceeding determines Entergy is permitted to flow through its rates. The presiding judge will be best positioned to rule on what particular issues the parties may litigate in this proceeding.

34. While we are setting this case for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>20</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>21</sup> The settlement judge

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<sup>19</sup> *Entergy Services, Inc.*, 139 FERC ¶ 61,173 (2012).

<sup>20</sup> 18 C.F.R. § 385.603 (2012).

<sup>21</sup> The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

35. Based on Entergy's OATT and the settlement in Opinion No. 430, the 2012 redetermined rates are effective June 1, 2012 and are subject to refund from that date until the latest of the final resolution of the complaint or the completion of any required corrections.

The Commission orders:

(A) The 2012 redetermined rates are hereby effective June 1, 2012, and are subject to refund from that date, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held concerning this complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2012), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) 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.

(E) 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.