

127 FERC ¶ 61,226  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Entergy Services, Inc.

Docket No. ER08-1056-000

ORDER DENYING CLARIFICATION

(Issued June 5, 2009)

1. Entergy Services Inc. (Entergy), on behalf of the Entergy Operating Companies (Operating Companies),<sup>1</sup> requests clarification of a Commission order<sup>2</sup> that established hearing and settlement judge procedures with respect to Entergy's filing. Entergy requests that the Commission clarify that the scope of the hearing established by the July 29 Order is consistent with the applicable legal principles of *res judicata*, collateral estoppel and *stare decisis*. For the reasons discussed below, we deny the request for clarification.

**I. Background**

2. In Opinion No. 480,<sup>3</sup> the Commission found that "rough production cost equalization has been disrupted on the Entergy system." The Commission concluded that, if the addition of resources to the Entergy System did not maintain rough production cost equalization, then an annual bandwidth of +/- 11 percent would be used to keep production costs roughly equal (i.e., payments would be made from companies with low

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<sup>1</sup> The Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, LLC, Entergy Louisiana, LLC, Entergy Mississippi, Inc. (EMI), Entergy Texas, Inc. and Entergy New Orleans, Inc..

<sup>2</sup> *Entergy Services, Inc.*, 124 FERC ¶ 61,101 (2008) (July 29 Order).

<sup>3</sup> *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005), *aff'd*, *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in relevant part sub nom. Louisiana Public Service Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

production costs to companies with high production costs until cost disparities are within +/- 11 percent of the Entergy System average). The bandwidth formula is contained in Service Schedule MSS-3 of the Entergy System Agreement.

3. In Docket No. ER07-956-000, Entergy submitted its first annual bandwidth implementation filing, containing the calculation of production costs for each of the Operating Companies based on calendar year 2006 data as directed by the Commission in Opinion Nos. 480 and 480-A. In an order issued on July 26, 2007, the Commission accepted the proposed rates for filing and suspended them for a nominal period, to become effective June 1, 2007, subject to refund.<sup>4</sup> The Commission also established hearing and settlement judge procedures. An initial decision<sup>5</sup> was issued on September 23, 2008, by the presiding administrative law judge. The decision is currently pending before the Commission on exceptions.

4. On May 30, 2008, Entergy submitted, in the proceeding at issue here, its second annual bandwidth implementation filing based on 2007 calendar year data. This filing was protested. In the July 29 Order, the Commission accepted Entergy's second annual bandwidth implementation filing, subject to refund, and established hearing and settlement judge procedures.

5. On August 28, 2008, Entergy filed a request for clarification of the July 29 Order. The Louisiana Public Service Commission (Louisiana Commission) and the Arkansas Public Service Commission (Arkansas Commission) filed answers.

## **II. Request for Clarification**

6. Entergy argues that the Commission should clarify that the scope of the hearing established in the July 29 Order is consistent with the applicable legal doctrines of *res judicata*, collateral estoppel and *stare decisis*. It contends that the Commission has previously recognized that these three principles are applicable in Commission proceedings.<sup>6</sup> Entergy argues that the intervenors in this proceeding had an opportunity in Docket No. ER07-956 to engage in discovery and to develop and argue their case before an administrative law judge and, after issuance of an initial decision, ultimately before the Commission. Entergy contends that there is no justification for the

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<sup>4</sup> *Entergy Services, Inc.*, 120 FERC ¶ 61,094 (2007).

<sup>5</sup> *Entergy Services, Inc.*, 124 FERC ¶ 63,026 (2008).

<sup>6</sup> Entergy Request for Clarification at 4-5.

Commission to allow intervenors to start all over again, making the same arguments that were made (or that they had the opportunity to make) in the previous proceeding.<sup>7</sup>

7. Entergy argues that the Commission should clarify the scope of the hearing in this proceeding because failure to do so will result in the Commission and all interested parties engaging in a lengthy and wasteful litigation that will hinder the ability of interested parties to achieve finality. Entergy contends that by applying the doctrines of *res judicata*, collateral estoppel and *stare decisis* to the hearing proceeding, the Commission will uphold the integrity of its own rules and established Commission policy disfavoring relitigation.

8. The Louisiana Commission responds that matters litigated and decided in earlier dockets should not be relitigated in this docket absent changed circumstances.<sup>8</sup> It argues, however, that the parties in this docket should not be precluded from litigating matters that were not raised previously and litigated in other dockets. It contends that the procedures adopted by the Commission require Entergy to make annual bandwidth filings and allow limited opportunity for the parties to examine Energy's filing and raise issues. It argues that, therefore, it would be unreasonable to prevent litigation involving subsequent filings of issues that were not previously discovered. The Louisiana Commission argues that no party should be prevented from litigating new issues not discovered and raised in previous bandwidth filing dockets because each year Entergy's filing is based on a new and updated set of costs. It argues that those filings may give rise to new issues that did not exist in previous filings.<sup>9</sup>

9. The Arkansas Commission filed comments in support of Entergy's request for clarification, arguing that, absent changed circumstances, there should be no relitigation of issues once heard and determined by the Commission.<sup>10</sup>

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<sup>7</sup> *Id.* (citing *NSTAR Elec. Co. v. ISO New England Inc.*, 120 FERC ¶ 61,261 at P 33 (2007) (dismissing complaint as a collateral attack on a prior Commission order where the party had the opportunity to raise its concern in its prior filings).

<sup>8</sup> Louisiana Commission Answer at 2.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> Arkansas Commission Answer at 1.

### III. Commission Determination

10. We deny the request for clarification. The Commission applies *res judicata*<sup>11</sup> and collateral estoppel<sup>12</sup> in appropriate circumstances, and as a matter of policy, relitigation of issues already decided on the merits is not sound administrative practice. However, this policy applies only where the issues presented have been fully litigated and decided on the merits, and no new evidence or new circumstances would justify relitigation.<sup>13</sup>

11. Significantly, Entergy does not specify which issues that were litigated and decided in an earlier hearing should be subject to *res judicata* and collateral estoppel. The doctrines of *res judicata* or collateral estoppel depend on the particular facts challenged and arguments raised by a party, and thus are decided in the first instance by the presiding judge. Accordingly, we make no determination here as to as to the scope of the hearing ordered in the July 29 Order with regard to *res judicata* or collateral estoppel.

12. We similarly deny Entergy's motion with respect to *stare decisis*. The principle of *stare decisis* (the policy of adhering to applicable precedent) is not a procedural bar to raising issues at hearing. The Commission has the discretion to follow precedent or, if there is special justification, to depart from it. *Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence

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<sup>11</sup> The doctrine of *res judicata* precludes the relitigation of a claim or issue that was the subject of a prior cause of action between the parties. "The doctrine of *res judicata* holds that a judgment on the merits in a prior suit bars a second suit involving identical parties ... based on the same cause of action." *Nat'l Comm. for the New River, Inc. v FERC*, 433 F.3d 830, 834 (D.C. Cir. 2005) (quoting *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004)).

<sup>12</sup> Collateral estoppel prohibits a party from bringing a different claim on an issue that has already been decided provided the issue was actually litigated and determined, and the determination was essential to that judgment. *Modesto Irrigation Dist. 125 FERC ¶ 61,174*, at n. 16 (2008) (citing *Norfolk and Western Ry. Co. v. United States*, 768 F.2d 373 (D.C. Cir. 1985)).

<sup>13</sup> E.g., *San Diego Gas and Elec. Co. v. Pub. Serv. Co. of N.M.*, 86 FERC ¶ 61,253 (1999); see also *Pac. Gas & Elec. Co.*, 121 FERC ¶ 61,065, at P 38 (2007); *Alamito Co.*, 41 FERC ¶ 61,312, at 61,829 (1987), *order on reh'g*, 43 FERC ¶ 61,274 (1988) ("[I]n the absence of new or changed circumstances requiring a different result, 'it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined.'" (citing *Cent. Kansas Power Co., Inc.*, 5 FERC ¶ 61,291, at 61,621 (1978)).

to the latest decision.”<sup>14</sup> The Commission expects its administrative law judges to appropriately follow this principle in their rulings, and Entergy has not alleged that the presiding judge is incapable of this.

The Commission orders:

Entergy’s request for clarification is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>14</sup> *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). See also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970) (“an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.” (footnotes omitted)).