

129 FERC ¶ 61,205
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

Docket No. EL09-61-000

v.

Entergy Corporation,
Entergy Services, Inc.,
Entergy Louisiana, L.L.C.,
Entergy Arkansas, Inc.,
Entergy Mississippi, Inc.,
Entergy New Orleans, Inc.,
Entergy Gulf States Louisiana, LLC, and
Entergy Texas, Inc.

ORDER ON COMPLAINT AND ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued December 7, 2009)

1. On June 29, 2009, the Louisiana Public Service Commission (Louisiana Commission) filed, pursuant to section 206 of the Federal Power Act (FPA),¹ a complaint against Entergy Corporation and its affiliates² alleging that they violated a Commission-approved generation and transmission pooling arrangement among Entergy Services and the Operating Companies, the Entergy System Agreement (System Agreement), and engaged in imprudent utility conduct when affiliate Entergy Arkansas sold excess electric

¹ 16 U.S.C. § 824e (2006).

² Entergy Corporation is a registered public utility holding company. The Complaint also names as respondents an Entergy services affiliate, Entergy Services, Inc. (Entergy Services), and six Entergy-affiliated public utility operating companies: Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Louisiana, L.L.C., Entergy Mississippi, Inc., Entergy New Orleans, Inc., Entergy Texas, Inc., and Entergy Gulf States Louisiana, LLC (Operating Companies).

energy to certain power marketers. The Louisiana Commission requests that the Commission order refunds and prospectively bar similar off-system sales. In this order, we establish hearing and settlement judge procedures, and establish a refund effective date of June 29, 2009.

Background

2. Entergy and its affiliates are a multi-state, affiliated group of companies that share the costs and benefits of power generation and transmission. Many aspects of this relationship are governed by the System Agreement, a 1982 contract between the Entergy Operating Companies and Entergy Services, Inc. that provides the contractual basis for planning and operating the Operating Companies' generation and bulk transmission facilities on a coordinated, single-system basis.

3. In Opinion Nos. 485 and 485-A in Docket No. ER03-583-000,³ the Commission largely accepted a proposal by Entergy Services and certain Energy affiliates⁴ to improve production cost equalization among the Operating Companies through adoption of new power purchase agreements, over the objections of the Louisiana Commission. In the course of that proceeding, the Louisiana Commission discovered that Entergy Arkansas had been selling some excess electric energy generated by its low-cost, owned-and-operated generation facilities to a variety of third parties that were not members of the System Agreement or native load customers. These sales were made through a series of short-term transactions and were made without first offering the energy to the other Operating Companies.⁵ The Louisiana Commission argued that Entergy Arkansas' off-system sales violated section 3.05 of the System Agreement.⁶

³ *Entergy Services Inc. and EWO Marketing, L.P.*, Opinion No. 485, 116 FERC ¶ 61,296 (2006), *aff'd*, Opinion No. 485-A, 119 FERC ¶ 61,019 (2007), *aff'd in relevant part sub nom. Louisiana Public Service Comm'n v. FERC*, 551 F.3d 1042 (2008).

⁴ EWO Marketing LP, Entergy Power, Inc., Entergy Gulf States, Inc., and Entergy Arkansas.

⁵ *See* Complaint at 10-12, Attach. C.

⁶ *See* Louisiana Commission Post-Hearing Brief in Docket No. ER03-583-000 at 52-82 (February 18, 2005). Section 3.05 states:

It is the long term goal of the Companies that each Company have its proportionate share of Base Generating Units available to serve its customers either by ownership or purchase. Any Company which has generating capacity

(continued...)

4. The presiding judge found that the off-system sales criticized by the Louisiana Commission did not trigger application of section 3.05.⁷ The Commission affirmed this decision in Opinion Nos. 485 and 485-A, finding that section 3.05 did not apply to the short-term sales at issue.⁸ On appeal, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) ruled that the issue of the propriety of Entergy Arkansas' short-term, off-system sales had not been properly set for hearing and that the presiding judge's and the Commission's rulings dismissing the Louisiana Commission's challenges to the sales were therefore *dicta*.⁹ The D.C. Circuit stated that the Louisiana Commission was free to pursue its section 3.05 violation claim in a new proceeding at the Commission.

Complaint

5. The Louisiana Commission seeks a ruling that sales of electric energy by Entergy Arkansas to third-party power marketers and others that are not members of the System Agreement: (1) violated the provision of the System Agreement that prohibits sales of excess capacity and energy to third parties by individual Operating Companies absent an offer of a right of first refusal to the other Operating Companies; (2) violated the provisions of the System Agreement that allocate the energy generated by System resources; (3) imprudently denied the System and its ultimate customers the benefits of low-cost System generating capacity; and (4) imprudently impaired a Commission-ordered remedy to ensure rough equalization of production costs among the Operating Companies.

6. The Louisiana Commission identifies 126 allegedly improper off-system sales made by Entergy Arkansas during an 18-month period and also alleges additional problematic sales that it contends may extend from as early as 2002 through the

above its requirements, which desires to sell all or any portion of such excess generating capacity and associated energy, shall offer the right of first refusal for this capacity and associated energy to the other Companies under Service Schedule MSS-4 Unit Power Purchase.

⁷ *Entergy Services, Inc. and EWO Marketing, L.P.*, 111 FERC ¶ 63,077, at P 181-82 (2005).

⁸ *See* Opinion No. 485, 116 FERC ¶ 61,296 at P 134; Opinion No. 485-A, 119 FERC ¶ 61,019 at P 41.

⁹ *Louisiana Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008).

present.¹⁰ These include short-term sales made to third parties, including power marketers, following the loss by Entergy Arkansas of the City of North Little Rock as a wholesale requirements customer in 2002.

7. The Louisiana Commission alleges that the method used to allocate energy for the off-system sales at issue violates provisions of the System Agreement that require Entergy to dispatch its Operating Companies' generation resources to obtain the lowest cost of energy for those Operating Companies and their "customers," which the Louisiana Commission defines to include retail and wholesale requirements customers for which the Entergy System engages in coordinated planning and operation and that pay associated operations costs.¹¹ The Louisiana Commission contends that Entergy Arkansas' off-system sales deprive these retail and wholesale requirements customers of access to low-cost, excess energy to which they were entitled through the System Agreement by violating the System Agreement's system of priorities for allocation of excess energy. The Louisiana Commission asserts that this forces these customers instead to obtain higher-priced energy from Entergy and violates the overall purpose and intent of the System Agreement to require retail and wholesale requirements customers to support overall System generation development elsewhere in Entergy in exchange for access to excess energy generated from such resources once built.

8. The Louisiana Commission also argues that Entergy Arkansas' off-system sales violate Entergy's duty to operate its System in accordance with prudent utility practice to achieve the lowest reasonable cost for the customers of the System, because low cost energy is sold off-system and must be replaced by higher-cost energy.¹² The Louisiana Commission also claims that the Commission has determined that an Operating Company may not dispose of capacity off-system unless Entergy's Operating Committee¹³

¹⁰ Complaint at 10-12, Attach. C.

¹¹ *Id.* at 13-16 (citing sections 3.01, 4.01, 4.08, 30.02, 30.03, 30.04, 30.05 of the System Agreement).

¹² *Id.* at 18 (citing the System Agreement at § 30.02).

¹³ The Entergy Operating Committee consists of a representative from each Operating Company and a representative of Entergy Corporation, and is responsible for oversight of the day-to-day operations of the Entergy System, and also for decisions regarding the acquisition and allocation of generating resources and electric energy for the Operating Companies.

determines, after performing economic studies, that the sale will be beneficial to the System as a whole.¹⁴

9. The Louisiana Commission claims that the off-system sales are imprudent and that they impair the arrangement of bandwidth payments among the Operating Companies that the Commission accepted in Opinion Nos. 480 and 480-A to assure rough production cost equalization between those companies.¹⁵ The Louisiana Commission states that the off-system sales increase overall Entergy System and Entergy Arkansas energy costs and, as a result, reduce the amounts Entergy Arkansas pays the other Entergy Operating Companies under the bandwidth formula. The Louisiana Commission asserts that while Entergy reflects revenues from off-system sales to power marketers and others as revenue credits in the calculation of Entergy Arkansas' production costs, these revenue credits are less than the incremental cost to the aggregate Entergy System of generating additional electricity to make the sales while still meeting Entergy System requirements, resulting in a net reduction in bandwidth payments from Entergy Arkansas to the other Entergy Operating Companies.

10. Finally, the Louisiana Commission restates its allegations in Docket No. ER03-583-000 that the off-system sales violated section 3.05 of the System Agreement.¹⁶ It states that section 3.05 of the System Agreement requires that an Operating Company with excess capacity, which wishes to sell that capacity to third parties, must offer the other Operating Companies the right of first refusal to the capacity.

11. The Louisiana Commission states that beginning at least in 2002 Entergy Arkansas had excess capacity and desired to sell that capacity on a long-term basis in the wholesale market, and that such desire and intent triggered the section 3.05 right of first refusal. It contends that prior to making sales to third parties, Entergy Arkansas was obligated to offer this capacity to the other Operating Companies under the System Agreement's Service Schedule MSS-4, but that Entergy and Entergy Arkansas did not comply with this requirement. Instead, it argues that Entergy Arkansas entered into a series of repeated short-term sales off-system, with some sales continuing over multiple consecutive months to the same customers for periods of six months or more.

12. The Louisiana Commission contends that, contrary to the Commission's determination in Opinion No. 485-A, section 3.05 makes no distinction between short-

¹⁴ Complaint at 19 (citing *City of New Orleans v. Entergy Corp.*, Opinion No. 386, 65 FERC ¶ 61,333 (1993)).

¹⁵ *Id.* at 20-21.

¹⁶ *Id.* at 21-23.

term and long-term sales with respect to which energy sales trigger a section 3.05 right of first refusal. It states that the System Agreement's Service Schedule MSS-4 permits both short-term and long-term transactions and that the Commission has found that Service Schedule MSS-4 primarily contemplates short-term transactions among the Operating Companies.¹⁷

13. The Louisiana Commission requests an unspecified amount of refunds from Entergy for the off-system sales¹⁸ and also seeks a prospective bar against any future similar sales. The Louisiana Commission asserts that the Commission can order refunds of costs resulting from tariff violations, particularly for violations of a formula rate such as the System Agreement.

Notice of Filing and Responsive Pleadings

14. Notice of the complaint was published in the *Federal Register*, 74 Fed. Reg. 32,909 (2009), with comments, interventions and protests due on or before July 20, 2009. The Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention and a protest. The Council of the City of New Orleans (New Orleans) filed a notice of intervention and comments. The Mississippi Public Service Commission (Mississippi Commission) filed a notice of intervention. Texas Industrial Energy Consumers, Louisiana Energy Users Group, Occidental Chemical Corporation, and Ameren Services Company filed motions to intervene. Entergy filed an answer to the complaint.

15. On August 13, 2009, the Louisiana Commission filed a motion for leave to file a response and a response, as well as a motion to lodge admissions. On August 28, 2009, Entergy filed a response requesting that the Louisiana Commission's motion to lodge admissions be denied.

16. In its answer, Entergy contends that the complaint should be dismissed on the merits without a hearing because the Louisiana Commission has failed to meet its burden under section 206 of the FPA to show any violation of the System Agreement or evidence of imprudent action by Entergy. Entergy states that the allegations in the complaint raise only questions of law, and that there are no material facts in dispute that would warrant an evidentiary hearing.

¹⁷ *Id.* at 22 (citing *Entergy Services, Inc.*, 111 FERC ¶ 61,035, at P 20 n.5 (2005)).

¹⁸ The Louisiana Commission argues that the improper sales resulted in more than \$47.7 million in revenues in the year 2003 alone and states that improper sales "continued after that period and may still be occurring." Complaint at 12.

17. Entergy explains that under the System Agreement, each Operating Company provides the generation resources it owns or controls to the System as capability to serve System requirements. It notes that these resources are scheduled and allocated pursuant to sections 30.02 and 30.03 of the System Agreement. Entergy states that all of Entergy Arkansas' resources at issue were available to the System and included in the queue for scheduling and dispatch, and that none of Entergy Arkansas' resources were earmarked to serve a sale to a retail or wholesale requirements customer versus any type of wholesale customer.

18. Entergy argues that the Louisiana Commission's complaint attempts to create a rule limiting "loads" in section 30.03(a) of the System Agreement to native load, defined as "retail and wholesale requirements customers." It argues that this would require the high fixed costs of base load resources to be borne by shareholders while the energy output to the Louisiana Operating Companies would be priced basically equal to the low fuel costs. Entergy argues that there is nothing in the System Agreement that limits how an individual Operating Company may increase or decrease its load, such as through incentive or economic development rates.

19. Entergy states that the System Agreement does not limit the terms "loads" or "requirements" to an Operating Company's "native load" customers. It argues that where the System Agreement excludes certain load from a rate calculation, it does so expressly, as in the exclusion of energy associated with non-requirement wholesale sales to third parties in section 30.13 of service schedule MSS-3. The fact that the System Agreement does not expressly exclude non-native loads elsewhere, it argues, suggests that such an exclusion cannot be assumed.

20. Entergy states that the sales to third parties were properly included in Entergy Arkansas' load, and thus cannot be said to be excess to the System triggering the right of first refusal. Entergy argues that Entergy Arkansas did not act imprudently in making the off-system sales, as it relied upon the System Agreement.

21. Finally, Entergy argues that the Commission should not grant refunds, since the Louisiana Commission has waited over five years to file a complaint. The Commission, it argues, denied a similar complaint in *Borough of Chambersburg v. PJM*, where the Commission had accepted a methodology for calculating credits four years prior to the complaint.¹⁹ It argues that the Louisiana Commission should have brought its complaint earlier, at which time Entergy Arkansas could have taken any necessary corrective action. Additionally, Entergy notes that under the right of first refusal there is no exclusive right

¹⁹ Entergy Services' Answer at 25 (citing *Borough of Chambersburg v. PJM*, 119 FERC ¶ 61,166 (2007)).

for the Louisiana Commission to exercise, thus there is no meaningful way to calculate refunds.

22. In its comments, New Orleans states that it agrees with the Louisiana Commission that the System Agreement prohibits making unauthorized off-system sales, and that if Entergy Arkansas violated the System Agreement it should make the other Operating Companies whole. However, New Orleans emphasizes that the Commission ruling in this matter should not restrict the ability of an Operating Company to obtain Commission waiver of the System Agreement to allow transactions not otherwise permitted by the System Agreement, such as off-system sales, in the event of a hurricane, natural disaster, or similar circumstance. New Orleans states that Entergy New Orleans, Inc. has relied upon this flexibility to manage its resources in the event of hurricanes to sell power to other Operating Companies and generate revenue for the benefit of Entergy and its ratepayers.

23. The Arkansas Commission argues in its protest that the complaint lacks critical information required by Rule 206(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206(b) (2009), and should therefore be dismissed. Among other things, the Arkansas Commission argues that the complaint fails to adequately identify and explain the financial impact of the burden placed on the complainant, and the specific relief or remedy requested. It also argues that the complaint does not indicate who would be responsible for any refunds.

Discussion

Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the Louisiana Commission's answer and will, therefore, reject it. We also find that the Louisiana Commission's motion to lodge admissions does not assist us in our decisionmaking, and thus we deny the motion to lodge and Entergy's response to the motion.

Commission Determination

26. The Louisiana Commission's 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 for investigation and a trial-type evidentiary hearing under section 206 of the FPA.²⁰

27. While we are setting these matters 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, 18 C.F.R. § 385.603 (2009). 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.²¹ The settlement judge 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.

28. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as amended by section 1285 of the Energy Policy Act of 2005, requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,²² we will set the refund effective at the earliest date possible, i.e., the date of the filing of the complaint, which is June 29, 2009.

29. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section

²⁰ Contrary to the Arkansas Commission's arguments, the Louisiana Commission's complaint substantially complies with the requirements of Rule 206(b), 18 C.F.R. § 385.206(b) (2009), and we deny the Arkansas Commission's request to dismiss the complaint.

²¹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov -- click on Office of Administrative Law Judges).

²² See, e.g., *Seminole Elec. Coop., Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by August 3, 2010. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions, or by April 30, 2011.

The Commission orders:

(A) 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 (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), 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.

(C) 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.

(D) 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, N.E., 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.

(E) The refund effective date established pursuant to section 206(b) of the Federal Power Act is June 29, 2009.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.