

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Entergy Services, Inc.

Docket No. ER05-356-000

ORDER ACCEPTING AND SUSPENDING NETWORK INTEGRATION
TRANSMISSION SERVICE AGREEMENT AND ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued February 14, 2005)

1. In this order we accept for filing Entergy Services, Inc.'s (Entergy) unexecuted Fifth Revised Network Integration Transmission Service Agreement (Fifth Revised NITSA) between Entergy and the East Texas Cooperatives (Cooperatives), and suspend it for a nominal period to become effective January 1, 2005, subject to refund.¹ We also establish hearing and settlement judge procedures. This order benefits customers because it provides the parties with a forum in which to resolve their disputes.

I. Background

2. Entergy is the acting agent for the Entergy Operating Companies.² The Entergy Operating Companies are engaged in primarily electric power production and retail distribution operations. The Entergy Operating Companies own and operate power plants with approximately 30,000 MW of electric generating capacity.

¹ The Cooperatives consist of East Texas Electric Cooperative, Inc. (ETEC), Sam Rayburn G&T Electric Cooperative, Inc. (Sam Rayburn), and Tex-La Electric Cooperative of Texas, Inc. (Tex-La).

² The Entergy Operating Companies include Entergy Arkansas, Inc., Entergy Gulf States, Inc. (Entergy Gulf States), Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. Entergy is a service company affiliate of the Entergy Operating Companies and acts as their agent with respect to the execution and administration of certain contracts and in proceedings at the Commission.

3. ETEC is a non-profit generation and transmission rural electric cooperative corporation organized under the laws of the State of Texas. Both Tex-La and Sam Rayburn buy power from ETEC to supply their member cooperatives serving retail customers located in Entergy Gulf State's service area in Texas. The Cooperatives are transmission dependent on the Entergy Transmission system and do not operate their own control areas. The Cooperatives are currently party to and buy network transmission service under their Fourth Revised NITSA with Entergy. The Cooperatives are also party to the April 1, 2004 Partial Requirements Agreement with Entergy Gulf States.

4. On January 1, 1997, Entergy and the Cooperatives entered into a NITSA based on the provisions of a 1997 Special Requirements Wholesale Electric Service Agreement (Special Requirements Agreement). The NITSA included, among other things, an exemption from Reactive Power Charges under Schedule 2 of Entergy's Open Access Transmission Tariff (OATT). The NITSA was to expire in 2016. This filing involves the fifth revision to the NITSA.

5. The Special Requirements Agreement expired on December 31, 2004 and was replaced by a new Agreement for Partial Requirements Wholesale Electric Service (Partial Requirements Agreement) effective January 1, 2005, which does not include the exemption for reactive power charges. The Fifth Revised NITSA is now based on the Partial Requirements Agreement and, consequently, eliminates the reactive charge exemption (it also includes, among other things, the Cooperatives' newly designated network resources, and new delivery points). Entergy also reduced the term of the NITSA from May 31, 2016 to January 1, 2009 to coincide with the termination of the Cooperatives' Network Service Reservations.

6. On December 17, 2004, Entergy filed the unexecuted Fifth Revised NITSA between Entergy and the Cooperatives with the Commission. The Fifth Revised NITSA amends its predecessor to reflect: (1) the effectiveness of the April 1, 2004 Partial Requirements Agreement executed between the Cooperatives and Entergy Gulf States; (2) recent changes to the Cooperatives' designated Network Resources;³ (3) the extension of the Cooperatives' existing monthly \$43,000 Network Integration Transmission Service credit from January 1, 2005 until January 1, 2006; (4) the extension of Network Service to Tex-La points of delivery; and (5) several "ministerial" revisions to the Fourth Revised NITSA.

³ As of January 2005, the Cooperatives' Network Resource portfolio will include; (1) newly-acquired additional 50 MW interest in the Nelson 6 Generating Unit; (2) newly-acquired additional 50 MW interest in the Harrison County Power Project; (3) newly-acquired additional 75 MW interest in the Warren Power Project; and (4) reduced energy purchase from Entergy Gulf States.

II. Notice of Filing, Intervention, Protest, and Answer to Protest

7. Notice of Entergy's filing was published in the *Federal Register*, 70 Fed. Reg. 804 (2005), with comments, interventions, and protests due on or before January 7, 2005. The Cooperatives filed an intervention and protest on January 7, 2005. Entergy filed an answer to the Cooperative's protest on January 24, 2005.

III. The Cooperative's Protest

8. The Cooperatives argue that in the Fifth Revised NITSA Entergy unjustly, unilaterally, and without compensation to the Cooperatives eliminated the long-standing reactive power charge exemption. The Cooperatives state that the waiver was based on the Cooperative's self-supply of reactive power. The Cooperatives claim that they have been self-supplying reactive power starting in 1997 with the First NITSA and have added even more network resources in the Fifth Revised NITSA to continue their self-supply of reactive power.

9. The Cooperatives argue that they never agreed to the elimination of the exemption in the 2004 Partial Requirements Agreement. According to the Cooperatives, Entergy is arguing that the NITSA's waiver of Schedule 2 charges was to avoid a double charge by Entergy for reactive power costs bundled into Entergy's power charges. The Cooperatives argue that the First NITSA specifically stated that the purpose of the Schedule 2 waiver was to reflect their self-supply of reactive power.

10. The Cooperatives claim that the Fourth Revised NITSA explicitly requires a waiver of Schedule 2 reactive power charges due to customer self-supply of reactive power until May 31, 2016 for the Sam Rayburn points of delivery and to Tex-La points of delivery until December 31, 2004. The Cooperatives state that any attempt to change the waiver must comply with the *Mobile-Sierra* "public interest" standard of review. The Cooperatives argue that the Schedule 2 waiver is a fixed rate because it is a specified rate of zero and there is no provision in the NITSA for changing that rate. Entergy could not change a fixed rate contract unless it meets the "public interest" standard and Entergy could not meet that standard. The Cooperatives argue further that the waiver of charges amounts to a savings of an estimated \$392,684 in 2005, and an estimated savings of \$408,776 starting in 2007, and they claim they would not have agreed to a waiver of this term without compensation.

11. The Cooperatives note that the Commission has approved the waiver of reactive power charges in the First through Fourth NITSA's. The Cooperatives state that no facts have changed with respect to the waiver other than the addition of more generation by the Cooperatives. The Cooperatives argue that the waiver continues to be justified.

12. The Cooperatives also claim that a unilateral reduction in the term of the NITSA from May 31, 2016 to January 1, 2009 for the Sam Rayburn points of delivery is in violation of the NITSA. The Cooperatives state that Entergy's sole justification for the abbreviated termination date is that the NITSA's term would then coincide with the Cooperatives' network service reservation. The Cooperatives argue that the term of their current network service reservation is irrelevant to the term of the contracted-for network service. In addition, the Cooperatives argue that for both the Sam Rayburn and Tex-La points of delivery, the new term is inconsistent with the December 31, 2009 termination date for the 2004 Partial Requirements Agreement. The Cooperatives argue that Sam Rayburn had contracted in the Fourth NITSA for a term to end in 2016 in order to coincide with its Rural Utilities Service loan financing of the Nelson 6 generator. They argue that Entergy agreed to that date and has no justifiable basis to change it unilaterally. For Tex-La, uncertainty over power supply arrangements had led to a December 31, 2004 termination in the original NITSA. However, the Cooperatives state that the date should now coincide with the December 31, 2009 termination of the 2004 Partial Requirements Agreement.⁴

IV. Entergy's Answer

13. Entergy argues that Entergy's OATT Schedule 2 requires all of Entergy's OATT customers to purchase Schedule 2 service and pay the charges for reactive power. Entergy states that while the Special Requirements Agreement and NITSA had previously exempted the Cooperatives from the Schedule 2 charges, this exemption was never meant to be permanent. Entergy notes that the Special Requirements Agreement was superceded by the 2004 Partial Requirements Agreement and that the 2004 Agreement unambiguously requires the payment of reactive power charges. Thus, Entergy claims that the Cooperatives agreed to the elimination of the exemption when they signed the new Partial Requirements Agreement. Entergy states that it then revised the NITSA accordingly.

14. Entergy claims that the reason for the exemption from the reactive power charges was because the bundled rate included a charge for reactive power. Entergy states that Rate Schedule WP-EETEC of the Special Requirements Agreement included bundled ancillary services charges, including reactive power. Entergy argues that while reactive power was not separately billed under that rate schedule, it was still physically necessary and was provided by Entergy. The exemption in the NITSA thus, according to Entergy,

⁴ The Cooperatives also note that Exhibit B of Entergy's filing included a 60 MW network resource but that the purchased power resource had expired on December 31, 2004.

prevented an over recovery of the reactive power charges. Entergy argues that any argument involving the now-expired Special Requirements Agreement is moot since the new Partial Requirements Agreement is in effect.

15. Entergy argues that the Cooperatives have not satisfied the factual burden needed to establish a waiver of Schedule 2 charges based on the addition of new network resources. Entergy states that the Cooperatives have not demonstrated exactly how much useful reactive power that they supply to Entergy from their newly-acquired interests in three generators. Entergy argues that factors, such as the units' distance from the nearest point of delivery and Entergy's lack of control over the Var production of one of the units, undermine the Cooperatives' argument that their interests in the three units qualify for a waiver or credit under Schedule 2.

16. Entergy argues that the Cooperatives' assertion that it must satisfy the *Mobile-Sierra* "public interest" standard before rescinding the Schedule 2 waiver should be dismissed. Entergy states that the Fourth Revised NITSA is a rate schedule under the OATT and incorporates, by reference, the OATT's terms and conditions. Entergy notes that section 9 of the OATT allows it to make unilateral Federal Power Act section 205 rate filings and Entergy's section 205 filing in this proceeding would be subject to the just and reasonable standard of review.

17. Entergy argues that the Fifth Revised NITSA's proposed termination date of January 1, 2009 is just and reasonable. Entergy states that according to its OATT, entitlement to network service is based on the actual deliverability of the Cooperatives' network resources to their network load. Entergy states that since the Cooperatives have not requested service past January 1, 2009, it has only studied deliverability of network resources to network load up to that date. Entergy states that it cannot contract to provide network service past that date until it studies whether the Cooperatives' network resources will be deliverable to their network load. Entergy states that it is unable to extend the Fifth Revised NITSA's term without the Cooperatives submitting a request for service beyond January 1, 2009. Entergy states that it would be willing to extend the Fifth Revised NITSA's term if the Cooperatives submit a request for service and, based on the necessary studies, Entergy concludes that service will be available.

18. Entergy requests that the Commission dismiss the Cooperatives' protest and accept the Fifth Revised NITSA for filing with an effective date of January 1, 2005.

Discussion

Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the Cooperatives' timely, unopposed notice to intervene serves to make it a party to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Entergy's answer because it has provided information that assisted us in our decision-making process.

Hearing Procedures

21. Entergy's filing raises issues of material fact that cannot be resolved based on the record before us, and is more appropriately addressed in the hearing and settlement judge procedures ordered below.

22. Our preliminary analysis indicates that the Fifth Revised NITSA has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Therefore, we will accept the Fifth Revised NITSA for filing, suspend it for a nominal period, make it effective January 1, 2005,⁵ subject to refund, and set it for hearing and settlement judge procedures.

23. 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.⁶ 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.⁷ The settlement judge

⁵ See *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106 at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

⁶ 18 C.F.R. § 385.603 (2004).

⁷ 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).

shall report to the Chief Judge and the Commission within 60 days of the date of this order 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.

The Commission orders:

(A) The Fifth Revised NITSA is hereby accepted for filing, and suspended for a nominal period, to become effective January 1, 2005, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the Fifth Revised NITSA. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in 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 (2004) 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 in writing or by telephone within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, 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 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

this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 20426. Such 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)

Linda Mitry,
Deputy Secretary.