

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Entergy Services, Inc

Docket Nos. ER99-2854-003  
EL99-87-003  
ER95-112-014  
ER96-586-009

ORDER DENYING REHEARING

(Issued September 10, 2003)

1. In this order the Commission denies the request for rehearing of Ralph R. Mabey, the court-appointed trustee in bankruptcy (Trustee) for Cajun Electric Power Cooperative, Inc. (Cajun), of an order accepting a compliance refund/surcharge report filed by Entergy Services, Inc. (Entergy). Entergy Services, Inc., 99 FERC ¶ 61,329 (2002) (June 17 Order).

**Background**

2. On December 21, 1994, Cajun filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, before the United States Bankruptcy Court for the Middle District of Louisiana. Cajun was a Louisiana electric cooperative corporation engaged in the generation, transmission, purchase and sale of electricity to, among others, twelve electric distribution cooperatives, which were its members.

3. On or about January 1, 1998, as part of the so-called Riverbend Settlement, Entergy and the Trustee, on behalf of Cajun, entered into a Network Integration Transmission and Service Agreement. Pursuant to the terms of the Service Agreement, Entergy agreed to provide network integration transmission service, and Cajun agreed to take and pay for such service under Entergy's Open Access Transmission Tariff on file with the Commission.

4. Pursuant to the terms of the Service Agreement, the obligations under the Service Agreement were binding upon Cajun and any successor, assignee, and, "insofar as is permitted by law, on any receiver or trustee in bankruptcy, reorganization or receivership." On August 25, 1999, the parties to the bankruptcy proceeding reached a global settlement under which Cajun sold all of its non-nuclear generating facilities and related assets to Louisiana Generating, L.L.C. (Louisiana Generating).

5. Cajun took network integration transmission service under the Service Agreement from January 1, 1998 until March 31, 2000, the last day before the assets were assigned to Louisiana Generating.

6. At the time the Service Agreement was executed by the Trustee, and at the time of the assignment to Louisiana Generating, the rate charged under the filed Open Access Transmission Tariff was a bifurcated rate under which a customer with only higher voltage points of delivery paid only higher voltage charges, while a customer with points of delivery on lower voltage transmission facilities paid for both higher voltage and lower voltage service. However, at the time of the execution of the Service Agreement, it was probable that the rate would be changed to a single rather than a bifurcated rate, because, in consolidated Docket Nos. ER95-112-000 and ER96-586-000, an administrative law judge had ruled that the bifurcated rate for network integration transmission service was not just and reasonable. Entergy Services, Inc., 75 FERC ¶ 63,015 (1996).

7. On October 30, 1998, the Commission summarily affirmed the findings of the administrative law judge that the bifurcated rate was not just and reasonable. Entergy Service, Inc., 85 FERC ¶ 61,163 (1998), reh'g denied 91 FERC ¶ 61,153 (2000). On June 19, 2000, Entergy made a compliance filing in Docket Nos. ER95-112-010 and ER96-586-005, that included a single rate. Nine days later, on June 28, 2000, Entergy submitted to Cajun an invoice for \$5,574,413.20 in surcharges due for the two and one-quarter years of transmission service provided to Cajun from January 1, 1998 to March 31, 2000.

8. After Entergy had sent the invoice identifying the applicable surcharges to Cajun, the Trustee filed a motion to intervene in the compliance filing dockets. The Trustee raised no substantive issue regarding the surcharges or the effective date of the rates. The Trustee's motion merely stated that "Entergy's modification of the network integration transmission service rate could result in the Cajun bankruptcy estate being assessed surcharges for past periods."<sup>1</sup> On July 19, 2000, the Commission accepted Entergy's compliance filing. On August 22, 2000, Entergy filed a compliance refund/surcharge report. In that report, Entergy set forth a surcharge for Cajun in the amount of 5,574,413.20, the same amount of the invoice that Entergy had previously presented to the Cajun bankruptcy estate.<sup>2</sup>

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<sup>1</sup> Motion at 3.

<sup>2</sup> The refund/surcharge report also showed that Louisiana Generating owed a surcharge in the amount of \$345,309.15, and the East Texas Electric Cooperative, Inc. (ETEC) was due a refund of \$4,808,208.70. Entergy states that it has refunded the amount due ETEC, and that Louisiana Generating has paid the surcharge.

9. The Trustee filed a protest to the refund/surcharge report and asserted that the claim to the surcharge against Cajun was time-barred by bankruptcy law. In support of his position, the Trustee asserted that he had served upon Entergy two separate notices of the bar date for filing claims for Non-Ordinary Course Administrative Expenses, and that Entergy had not filed any request for allowance of administrative expenses by either bar date. Accordingly, the Trustee argues, Entergy's claim for the surcharge amount, even if it otherwise had merit, is time-barred under bankruptcy law. In addition, the Trustee argued that the Commission should not approve Entergy's refund report as it applies to Cajun because Entergy's right to collect that amount from Cajun is an issue in the bankruptcy proceeding. Finally, the Trustee also argued that the surcharge was inconsistent with settlements in this case.

10. Entergy, Louisiana Generating, and Sam Rayburn G&T Electric Cooperative filed answers to the Trustee's protest.

### **July 17 Order Accepting Refund/Surcharge Report**

11. In its June 17 Order at issue here, the Commission accepted Entergy's compliance refund/surcharge report, saying:

Under these circumstances the Commission will accept the refund report as filed because it follows the Commission's orders on the merits. Determining the amount of the surcharge is clearly within the Commission's jurisdiction, and we find that Entergy properly calculated the surcharge. The charges were incurred by Cajun, and in the first instance are Cajun's obligation. However, because Cajun is now a bankruptcy estate, the issue of who must pay the amount is for the Bankruptcy Court to determine.[<sup>3</sup>]

12. Subsequently, the Bankruptcy Court resolved the issue of who shall pay the charges. Cajun Electric Power Coop., Inc., Civil Action No. 94-2763 B-2 (Bank. M.D. La.) With regards to Cajun's argument that Entergy's claim is time-barred, the Bankruptcy Court ruled that, although Entergy did not timely file an administrative expense by the relevant bar date, sufficient cause existed to allow Entergy's tardy request. The Bankruptcy Court also ruled on the Trustee's cross claim that any surcharge amounts owed to Entergy should be passed on to its member cooperatives. The Bankruptcy Court disagreed, and held that the members are not liable for any amounts owed by Cajun to Entergy.

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<sup>3</sup> 99 FERC ¶ 61,329 at P 14.

### **Request for Rehearing**

13. On rehearing of the June 17 Order, the Trustee argues that the Commission erred when the Commission concluded that the refund/surcharge report follows the Commission's orders on the merits. In this regard, the Trustee argues that the Commission authorized a surcharge on current rates and thus to be paid by the current holder of the generation, Louisiana Generating, and that Cajun never entered into any settlement or agreement authorizing direct billing of Cajun.

### **Discussion**

14. The Trustee's argument that, essentially, Cajun did not participate in any agreement or settlement that allows Entergy to impose additional charges upon Cajun is unpersuasive. Cajun had an opportunity to participate earlier and did not do so, and so failed to participate in and object to the settlements.<sup>4</sup> Only after Entergy had sent the invoice identifying the additional charges to Cajun, did the Trustee file a motion to intervene in the compliance filing dockets. Even then, the Trustee raised no substantive issue regarding the surcharges or the effective date of the rates. The Trustee's motion merely stated that:

Entergy's modification of the network integration transmission service rate could result in the Cajun bankruptcy estate being assessed surcharges for past periods.

15. The Trustee was aware that Entergy was seeking to recover over \$5 million from Cajun. With this knowledge, the Trustee nevertheless did not object to the additional charges reflected in the compliance filing. His failure to object was a critical failure.<sup>5</sup> The Trustee's current objection thus constitutes an impermissible collateral attack on the Commission's approval of the compliance filings.

16. The June 17 Order addressed the refund/surcharge report. What was at issue was whether Entergy correctly calculated the amount Cajun must pay Entergy. In the June 17 Order, we found that Entergy had correctly calculated the amount, and the Trustee still does not challenge the accuracy of the calculation.

17. The Trustee argues that the Commission is prevented by precedent from approving Entergy's use of what the Trustee now calls a direct bill to the Cajun bankruptcy estate.

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<sup>4</sup>Cajun was originally a party to Docket Nos. ER95-112 and ER96-586, but withdrew. See 85 FERC ¶ 61,163 at 61,638 & n.15.

<sup>5</sup> See, e.g., Baltimore Gas & Electric Co., 92 FERC ¶ 61,043 at 61,114 & n. 8 (2000).

The Trustee argues that a surcharge and a direct bill are two distinct collection mechanisms and that one can not be substituted for the other, and that Entergy's efforts to recover approximately \$5.6 million from Cajun through a direct bill (as opposed to a surcharge on current rates) must fail. While the Trustee is correct that there are differences between the two mechanisms, they are, for present purposes, effectively the same; that is, no matter how described, Entergy is seeking an additional \$5.6 million from Cajun. In this regard, as we explained in the June 17 Order:

“The charges were incurred by Cajun, and in the first instance are Cajun's obligation.”<sup>6</sup>

18. The Commission orders that the Trustee cites in support of its argument are either distinguishable or contrary to the Trustee's position. For example, the Trustee cites Williams Gas Pipelines Central, Inc., 88 FERC ¶ 61,198 at 61,678 (1999) (Williams), for the proposition that a direct bill requires the customers who are on the system at the time of filing (here, the Trustee argues, that would not be Cajun) to pay the entire amount of a specified cost by lump sum payments. However, in the Williams case, the Commission was addressing a settlement that expressly provides for such a billing arrangement. Id. at 61,676, 61,678-79.

19. The Trustee's citation of ANR Pipeline Company, 92 FERC ¶ 61,284 (2000) (ANR Pipeline), to support its argument that direct billing is not permitted is, in fact, contrary to its position. ANR Pipeline, which accepted a direct billing arrangement proposed by the company, stands for the principle that cost responsibility should follow cost causation. Id. at 61,970. Here, the Commission's approval of the surcharge to Cajun applied this same principle.<sup>7</sup>

20. In conclusion, the Trustee has raised nothing on rehearing that warrants changing our decision to accept the refund/surcharge report. We will accordingly deny rehearing.

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<sup>6</sup> 99 FERC ¶ 61,329 at P 14.

<sup>7</sup> Id.

The Commission orders:

The Trustee's request for rehearing is hereby denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.