

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Arkansas, Inc.

Docket No. EL05-135-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 19, 2005)

1. In this order, we deny a Petition for Declaratory Order (Petition) because this case involves an issue of contract interpretation that does not meet the Commission's criteria for asserting primary jurisdiction; the applicant may take the issue to court instead. In addition, we find that, if the courts determine that the contract does not allow for Entergy's interpretation of the contract, then, if Entergy wishes to change the contract, it must file its revised interpretation of the contract with the Commission under section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d (2005).

I. Background

A. The Agreement

2. The Power Coordination, Interchange, and Transmission Service Agreement (Agreement) between Entergy and Arkansas Electric Cooperative Corporation (Arkansas Coop) governs the integration of all of Arkansas Coop's Resources¹ with those of

¹ Arkansas Coop Resources are *both* the Arkansas Coop-owned Resources and Arkansas Coop Other Resources. *Arkansas Coop-owned Resources* are defined in the Agreement as generating facilities owned by Arkansas Coop (including Arkansas Coop's share of power and energy in any jointly owned facilities) that are in Entergy's load control area and that Entergy can dispatch. *Arkansas Coop's Other Resources* are generating facilities owned by Arkansas Coop outside the Entergy control area, or capability that Arkansas Coop purchases from Entergy or others and that Entergy can schedule. Agreement, First Revised Rate Schedule FERC No. 82, Original Sheet No. 7.

Entergy. This Agreement makes Entergy responsible for dispatching and scheduling Arkansas Coop's Resources and establishes a settlement mechanism under which Arkansas Coop receives credit for the output of its Resources. The Agreement sets up a settlement and billing mechanism based on a theoretical "after-the-fact redispatch" of Arkansas Coop's Resources. Under the Agreement, Entergy is entitled to dispatch Arkansas Coop's dispatchable generating capacity to serve the combined load obligations of Entergy and Arkansas Coop. In return, Arkansas Coop is entitled to an hourly, theoretical, after-the-fact economic redispatch of its Resources against its hourly power requirements. The redispatch process simulates an Arkansas Coop-only economic dispatch.²

B. Entergy's Petition for Declaratory Order

3. Entergy's Petition first asks the Commission to find that Entergy is not obliged to issue corrected bills to correct billing errors that Entergy claims it made when billing the Arkansas Coop³ in past periods.⁴ Second, it also asks that we approve its new method of billing from August 1, 2005 forward.⁵

4. Entergy claims that it has discovered two billing errors in the administration of the Agreement. The first is that Entergy included other resources in the billing process instead of including only Arkansas Coop's Resources. The second is that Entergy did not include in the billing calculations the minimum operating level for each of Arkansas Coop's six generating units.

² Arkansas Coop and Entergy entered into the Agreement on June 27, 1977. On October 1, 2001, Arkansas Coop and Entergy restated and amended the Agreement. On January 25, 2002, Entergy filed the restated Agreement with the Commission in Docket No. ER02-839-000. The Commission accepted Entergy's filing by a letter order dated March 11, 2002. (Designated Rate Schedule FERC No. 82).

³ Arkansas Coop is an electric generation and transmission cooperative that provides wholesale electric energy to its 16 electric distribution cooperative members. Arkansas Coop relies on Entergy's transmission system (among others) to serve its members' loads.

⁴ Petition at 1, 7.

⁵ Entergy filed its Petition on July 20, 2005.

1. **Third Party Resources Used in After-the-Fact Redispatch Calculations**

5. Entergy states that the only Arkansas Coop Resources that qualify under the Agreement for inclusion in after-the-fact redispatch calculations are those that Entergy can schedule or dispatch.⁶ Entergy states that it now realizes that it has included in its after-the-fact redispatch calculations electric energy that Arkansas Coop purchased but that Entergy could neither dispatch nor schedule. Entergy states that this error resulted in incorrect billings to Arkansas Coop “dating back several years or more[.]”⁷

6. Entergy says that it does not want to correct this error for past periods because corrected bills would require Arkansas Coop to retroactively use other resources or purchase electric energy from Entergy. Entergy states that this would cause Arkansas Coop to pay twice for the same energy: once (originally) to third parties for energy that it purchased and scheduled, and a second time to Entergy for replacement energy.⁸ However, Entergy also says it intends to calculate the bills to correct the error starting August 1, 2005.

2. **Minimum Operating Level**

7. Entergy states that it has also failed to include in the after-the-fact redispatch calculations the minimum operating level for each of Arkansas Coop’s six generating units.⁹ Entergy seeks to apply the costs associated with minimum operating levels not just to each generating unit that is actually needed in a particular hour’s redispatch to meet Arkansas Coop’s load, but also to each generating unit that is available for redispatch.

8. Again, Entergy does not propose to correct past bills because this would create inequities, since Arkansas Coop would have to purchase electric energy from Entergy after the fact, without the possibility of modifying its off-system purchases to take the unit minimums into account. Entergy submits that this would be unfair to Arkansas

⁶ *Id.* 9-11.

⁷ *Id.* at 11.

⁸ *Id.* at 5-6, 17-18.

⁹ *Id.* at 1, 13-16.

Coop.¹⁰ Entergy also states that it may not be able to re-calculate past bills because it does not have all of the necessary data.¹¹

9. However, from August 1, 2005 forward, Entergy proposes to include the cost of operating each of the Arkansas Coop Owned Resources at their minimum operating levels when such units are available to Entergy's dispatcher. This will increase Arkansas Coop's rates by including in the theoretical dispatch process certain higher-cost electric energy that Arkansas Coop would not otherwise have dispatched.

II. Notice of Filing and Further Pleadings

10. Notice of Entergy's filing was published in the *Federal Register*, 70 Fed. Reg. 43,854 (2005), with interventions and protests due on or before August 17, 2005. On August 17, 2005, Arkansas Coop filed a motion to intervene and an answer, and Calpine Corporation (Calpine) and Occidental Chemical Corporation (Occidental) jointly filed a motion to intervene and comments. On August 22, 2005, the Arkansas Public Service Commission filed a late motion to intervene. On September 1, 2005, Entergy filed an answer to Arkansas Coop's answer and on September 9, 2005, Arkansas Coop filed an answer to Entergy's answer.

A. Arkansas Coop's Answer

11. Arkansas Coop says that the Commission should not allow Entergy to apply its re-interpretation of the Agreement from August 1, 2005, forward.¹² It argues that what Entergy is really asking is that the Commission sanction Entergy's re-interpretation of the Agreement.¹³ Arkansas Coop asks the Commission to summarily dismiss Entergy's Petition. It says that Entergy is seeking to advance a re-interpretation of the Agreement that is inconsistent with the language of the Agreement, would render provisions of the Agreement meaningless, would deviate from the parties' consistent course of conduct over the last 25 years, would interfere with Arkansas Coop's ability to purchase excess electric energy from third parties, would irreparably injure Arkansas Coop's competitive

¹⁰ *Id.*

¹¹ *Id.* at 18.

¹² Petition at 1.

¹³ Answer at 4.

position, and would cost Arkansas Coop over \$69 million in additional cost to purchase excess electric energy from third parties.¹⁴

12. Arkansas Coop states that there was nothing wrong with the past bills.¹⁵ Rather, Entergy is simply re-interpreting the Agreement, and, beginning with the billing cycle that starts on August 1, 2005, will be issuing bills that violate the Filed Rate Doctrine. Arkansas Coop contends that Entergy should have brought its reinterpretations of the Agreement to the Commission under section 205 of the FPA and explained to the Commission why it is now changing contract interpretations that the parties have followed for decades.¹⁶

1. Arkansas Coop's Purchase of Electric Energy from Third Parties

13. Arkansas Coop states that the Agreement recognizes the right of both Arkansas Coop and Entergy to purchase excess electric energy (or economy energy) from third parties.¹⁷ It points to the provision in the Agreement that states:

It is also recognized that either party may purchase excess energy from others. [Entergy's] dispatcher will coordinate and assist [Arkansas Coop] with respect to all transactions of [Arkansas Coop] for the sale or purchase of excess energy for delivery to or from the Transmission System of [Entergy].¹⁸

Arkansas Coop states that Entergy wants to replace this provision with a Communications Protocol¹⁹ under which Arkansas Coop cannot purchase excess energy

¹⁴ Answer at 4-6.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ This is electric energy that third parties produce and that exceeds their needs. *Id.* at 19 n.6.

¹⁸ *Id.* at 6.

¹⁹ This Communications Protocol was attached to a letter dated July 15, 2005 from Entergy to Arkansas Coop. Arkansas Coop included this letter and protocol in its Answer as Attachment RB-4. Among other things, this Protocol states that Arkansas Coop must allow Entergy to view the associated North American Electric Reliability Council Tags for any energy that Arkansas Coop purchases from third parties. The

(continued)

from a third party unless it first obtains Entergy's permission. Arkansas Coop argues that this is a blatant misreading of the Agreement.²⁰

14. Arkansas Coop contends that, were Entergy's reinterpretation of the Agreement to stand, Arkansas Coop would no longer have the right to purchase excess electric energy from others. It would merely have the right to apply to Entergy for permission to make such a purchase. Alternatively, it could make the purchase without Entergy's approval and then pay double the price: once to the entity that supplies the electric energy and a second time to Entergy in the form of a bill on redispatch that fails to give Arkansas Coop any credit for the electric energy that it purchased from a third party and effectively requires Arkansas Coop to make up the deficiency at Entergy's incremental energy cost.

15. Arkansas Coop argues that neither of these results is consistent with the section of the Agreement quoted above that allows Arkansas Coop to purchase electric energy from third parties. It contends that Entergy's reading of the Agreement deprives Arkansas Electric of a valuable right that it bargained for and obtained in the Agreement.²¹

16. Arkansas Coop recognizes that its purchases of electric energy from third parties are not available for dispatch by Entergy. That energy is scheduled using the North American Electric Reliability Council tagging process and becomes a fixed resource, which the Entergy dispatcher cannot control. Arkansas Coop notes that the terms of the purchase specify the delivery schedule; once Arkansas Coop makes the purchase, there is nothing for the Entergy dispatcher to control. But Entergy's granting permission for the purchase does not change a fixed resource into one that is scheduleable or dispatchable. Arkansas Coop argues that, in terms of the after-the-fact redispatch calculation, Entergy's granting permission for a third-party purchase is meaningless.²²

17. Arkansas Coop says that Entergy's position that Entergy may not consider Arkansas Coop's purchases of electric energy from third parties in the after-the-fact redispatch calculation is inconsistent with the structure and terms of the Agreement.²³

Protocol also requires Arkansas Coop to give Entergy volume and price information regarding third party purchases.

²⁰ Answer at 6-7.

²¹ *Id.* at 6-7, 21-22.

²² *Id.* at 7-8, 22-25, 28-29.

²³ *Id.* at 25.

The Agreement provides that Arkansas Coop will provide all of the electric energy necessary to fulfill all of the present and future requirements of Arkansas Coop's member cooperatives from sources available to it, and will deliver that electric energy to Entergy at points of receipt and interconnection.²⁴ Arkansas Coop argues that there is nothing in the Agreement to keep Arkansas Coop from using electric energy purchased from third parties to meet its needs.²⁵

18. Arkansas Coop submits that for at least 19 years, Entergy has included Arkansas Coop's purchases of excess electric energy in the after-the-fact redispatch calculation.²⁶ A party's own interpretation of a contract by its long-standing performance of that contract is telling evidence of what the parties intended as long as that interpretation is not contrary to the contract.²⁷

19. Arkansas Coop also maintains that Entergy's reinterpretation of the Agreement will injure Arkansas Coop competitively either by undermining its right to buy electric energy from third parties or by forcing it to provide commercially sensitive information, including the price, the volume, and the time frame of the purchase.²⁸ This information would give Entergy a competitive edge in making off-system purchases and would discourage other suppliers from presenting their best proposals to Arkansas Coop, since they would not wish to divulge this information to a third party.²⁹ Also, the protocols that Entergy would impose to govern the purchase of excess electric energy from third parties

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 26.

²⁷ *Id.* at 26-27, citing *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 53 FERC ¶ 61,026 (1990); *Consolidated Edison Company of N.Y., Inc. v. Pub. Serv. Electric and Gas Company*, 105 FERC ¶ 61,343 at P 21 (2002); *Village of Jackson Center, Ohio v. Dayton Power & Light Company*, Opinion No. 461, 101 FERC ¶ 61,155 at P 24 (2002); *Cities of Bethany, et al. v. FERC*, 727 F. 2d 1131, 1144 (D.C. Cir. 1984); *Restatement (Second) Contracts* § 2-204(4).

²⁸ *Id.* at 7, 22, 34-38.

²⁹ *Id.*

would not require Entergy to reveal the basis for its decision and would leave Entergy free to destroy Arkansas Coop as a competitor for purchases and sales in the wholesale market.³⁰

2. Minimum Operating Level

20. In its Petition, Entergy states that it should have been applying the costs associated with minimum operating levels not only to each generating plant that Arkansas Coop needs in a particular hour's redispatch to meet Arkansas Coop's load, but also to each generating unit that is available for redispatch.³¹ Arkansas Coop states that this is not a reasonable interpretation of the Agreement and would contradict the course of conduct that the parties have followed under the Agreement since 1980.³²

21. Arkansas Coop states that the purpose of the redispatch section of the Agreement is to simulate how it would have selected from its stack of available energy sources if Entergy were not dispatching them. It would never operate all of its generating units, especially its high-marginal-cost gas-fired units, at minimum operating levels for months on end and thereby displace equivalent amounts of electric energy available from much cheaper base-load coal-fired plants. Arkansas Coop states that, since 1980, the parties have included in the after-the-fact redispatch calculation the minimum operating cost of only those units that Arkansas Coop would have actually used to generate electric energy on an hour-by-hour basis if Arkansas Coop were dispatching its own resources.³³ Arkansas Coop states that Entergy's interpretation of the Agreement would increase its costs and diminish its ability to compete with Entergy for sales at wholesale.³⁴

22. Arkansas Coop states that under the Agreement, Entergy undertook the obligation of providing substitute electric energy at the running cost of Arkansas Coop's Resources in exchange for the right to dispatch those Resources. The after-the-fact redispatch calculation is at the heart of the bargain that the parties made in the Agreement and is

³⁰ *Id.* at 35-36.

³¹ Petition at 9.

³² Answer at 9-10, 38-40.

³³ *Id.* at 10-11.

³⁴ *Id.* at 45.

critical to Arkansas Coop's ability to realize the value of its Resources. Entergy's reinterpretation of the after-the-fact redispatch calculation undermines the purpose of that portion of the Agreement.³⁵

B. Other Comments

23. Calpine and Occidental are concerned that the effect of Entergy's filing may be to make it more difficult for Arkansas Coop to buy power from non-affiliated suppliers. They ask the Commission to ensure that Entergy does not restrict Arkansas Coop's ability to purchase power from non-affiliated suppliers.³⁶

III. Commission Determination

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), Arkansas Coop's, Calpine's and Occidental's timely, unopposed motions to intervene serve to make them parties to this proceeding. We will grant the Arkansas Public Service Commission's motion to intervene out of time, given its interest, the early stage of this proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept either Entergy's answer or Arkansas Coop's answer to Entergy's answer and will, therefore, reject them.

B. Decision

25. Entergy's Petition presents a question of contract interpretation. In deciding whether to entertain such a case, instead of telling the parties to take their dispute to court, the Commission usually considers the following three factors: (a) whether the Commission possesses some special expertise that makes the case peculiarly appropriate for Commission decision; (b) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (c) whether the case is important in relation to the regulatory responsibilities of the Commission.³⁷ As discussed below,

³⁵ *Id.* at 13-15.

³⁶ Calpine and Occidental intervention at 3.

³⁷ *Arkansas Louisiana Gas Company v. Hall*, 7 FERC ¶ 61,175 at 61,322 (1979), *reh'g denied*, 8 FERC ¶ 61,031 (1979).

based on these three factors, we will not assert primary jurisdiction; the parties may take their contract dispute to court.

26. This contract is unique to the parties. The Commission has no special expertise in interpreting the Agreement or in divining how the parties intended to conduct the after-the-fact redispatch calculation. The ascertainment of parties' intent when they execute a contract is a matter of case-by-case adjudication that does not involve the considerations of uniformity or technical expertise that, in other circumstances, might call for the assertion of this Commission's jurisdiction. A court can determine the parties' intentions on entering into their contract as well as can this Commission. The type of question that arises here is unique to these parties and there is no need for industry-wide interpretation of the questions that the dispute raises. Nor is the resolution of this dispute important to the regulatory responsibilities of this Commission, since the dispute is unlikely to arise in other contexts or to affect other parties, much less the industry as a whole.

27. Entergy asks us to approve its new method of billing from August 1, 2005 forward.³⁸ We cannot grant this request at this time because the new method of billing is central to the question of contract interpretation that we are referring to the court.

28. Further, Entergy has modified the Agreement by including a "Communications Protocol" detailing procedures that Arkansas Coop must now follow when purchasing electric energy from third parties.³⁹ The Communications Protocol is not part of the Agreement on file with the Commission and has not been filed with the Commission. Arkansas Coop claims that this Communications Protocol is anticompetitive and would increase its rates. If the courts determine that the contract does not allow for Entergy's interpretation of the contract, then, if Entergy wishes to change the contract, it must file its revised interpretation of the contract with the Commission under section 205 of the FPA.

29. For all of these reasons we will deny the Petition for Declaratory Order.

³⁸ Petition at 1, 19.

³⁹ Answer, Attachment RB-4.

The Commission orders:

The Petition for Declaratory Order is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.