

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

East Texas Electric Cooperative

Docket No. EL04-134-000

v.

Entergy Arkansas, Inc.

ORDER ON COMPLAINT ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued November 23, 2004)

1. In this order we establish hearing and settlement judge procedures to address East Texas Electric Cooperative's (East Texas) request for summary disposition and complaint against Entergy Arkansas, Inc. (Entergy Arkansas). East Texas complains that Entergy Arkansas's announcement that it will charge co-owners of the Independence Steam Electric Station (ISES) the Entergy System's (Entergy) incremental cost plus 10 percent for substitute energy violates the express terms of the operating agreement between Entergy Arkansas and the co-owners of ISES and the filed rate doctrine. East Texas contends that Entergy Arkansas should provide substitute energy at the ISES coal stockpile price. Entergy Arkansas responds that it has honored the terms of its agreements with East Texas and that Entergy Arkansas may charge the incremental cost plus 10 percent for substitute energy when there are constraint factors beyond Entergy Arkansas's control on the system. This order benefits customers because it provides the parties with a forum in which to resolve their dispute over Entergy Arkansas's charges for substitute energy.

I. Background

2. East Texas is a non-profit generation and transmission rural electric cooperative corporation organized under the laws of the State of Texas. Entergy Arkansas is an

investor-owned utility organized under the laws of the State of Arkansas. East Texas is a co-owner with Entergy Arkansas and others of ISES located in Newark, Arkansas. ISES consists of two coal-fired electric generating plants, ISES I and ISES 2. On February 26, 1998, East Texas purchased a 7.13 percent share of ISES 2 plant. ISES is connected to Entergy Arkansas's transmission system and operated within the control area. The ISES Operating Agreement designates Entergy Arkansas as the operator of the plant with responsibility for management, control, operation, and maintenance of ISES.

3. On June 23, 2004, Entergy Arkansas informed East Texas that, effective July 1, 2004, Entergy Arkansas would no longer supply East Texas substitute energy at the ISES coal stockpile equivalency price whenever Entergy Arkansas reduced the output of ISES 2 due to Entergy system constraints. In other communications and at a July 9, 2004 co-owner meeting, Entergy Arkansas explained it would now charge East Texas for replacement energy priced at the Entergy system's incremental cost plus 10 percent, except when Entergy Arkansas reduced ISES 2 generation to import economy energy. East Texas protested Entergy Arkansas's decision. On August 10, 2004, Entergy Arkansas held a meeting of the executive officers of the co-owners. On August 19, 2004, East Texas withheld payment of the amount it considered over-billing of substitute energy. On August 27, 2004, there was another meeting of the ISES co-owners. Finally, on September 2, 2004, East Texas and Entergy Arkansas met via a conference call. The parties did not reach an agreement.

II. Complaint

4. On September 14, 2004, East Texas filed a complaint against Entergy Arkansas, stating that it has suffered an immediate, substantial and unauthorized rate increase with respect to ISES 2, a coal fired plant. East Texas states that Entergy Arkansas provides East Texas and other co-owners substitute energy when the station provides the co-owners less than their contracted share of ISES-generated power due to Entergy's system dispatch. It further states that the agreement between Entergy Arkansas and the co-owners specifies that the rate charged for the substitute energy will be based upon the cost of fuel used to power ISES. East Texas requests that the Commission: (1) find that Entergy Arkansas's re-pricing of substitute energy violates the express terms of the agreement and the filed rate doctrine; and (2) order Entergy Arkansas to charge East Texas only the rate as set out in the agreement and filed at the Commission. In addition, because one purported basis for Entergy Arkansas increasing rates for substitute energy is an Entergy Arkansas response to the mis-allocation of Public Utility Regulatory Policies Act of 1978 (PURPA) Qualifying Facilities (QF) power purchases among Entergy Arkansas and other Entergy affiliates under the terms of the Entergy System Agreement. Accordingly, East Texas asserts that the Commission should institute an investigation of the Entergy companies' apparent violation of the Entergy System Agreement.

5. East Texas explains that there are three contracts that govern East Texas's share of ISES: (1) Independent Steam Electric Station Ownership Agreement (ISES Ownership Agreement); (2) Independence Steam Electric Station Operating Agreement (November 1, 2000) (ISES Operating Agreement); and (3) Power Coordination and Interchange Agreement (October 22, 1998) (East Texas Interchange Agreement).

6. East Texas states that Entergy Arkansas's unilateral decision to re-price substitute energy breaches the ISES Operating Agreement section 8.4. According to East Texas, section 8.4 of the Operating Agreement unambiguously sets the rate for Entergy Arkansas's supply of substitute energy at a coal equivalency price, not the system incremental cost plus 10 percent. Section 8.4 states that:

EAI shall schedule and make available to the Participants who have Ownership Shares in any Unit not so scheduled an amount of energy from other of its resources in accordance with the requirements of such participants equal to each Participant's Ownership Share of the net capability of the Unit not so scheduled at the time of the election of EAI not to schedule generation from such Unit. In such event, energy shall be paid for on the basis of the average cost per ton of the coal stockpile for the Independence SES and the heat rate of the relevant Unit assuming operation at 60% loading during summer test conditions.

7. East Texas claims that when Entergy Services, Inc. (Entergy Services) chooses to reduce the dispatch of ISES so that Independent Power Producers (IPP) can ramp up their generation, or Entergy Louisiana, Inc. (ELI), Entergy Gulf States, Inc. (EGI) and Entergy Arkansas can buy QF power, Entergy Services is satisfying the overall system requirements. According to East Texas, the ISES Operating Agreement section 8.4 provides that, if Entergy Arkansas does not fully dispatch an *otherwise capable* ISES plant, then the amount of energy scheduled by a co-owner, up to that co-owner's Ownership Share, will still be provided by Entergy Arkansas to co-owners from other Entergy resources. East Texas states that beginning July 1, 2004, Entergy Arkansas commenced treating ISES, when it is dispatched at less than its capability, as if it were incapable of generation, and, contrary to the provision of the Interchange Agreement, Entergy Arkansas demands a non-existent contractual right to charge East Texas at a rate that is not provided for in the Entergy Arkansas/East Texas contracts.

8. East Texas argues that Entergy Arkansas's claim that it does not "elect" to reduce the dispatch of ISES for Entergy system requirements except when Entergy Arkansas imports economy energy has no basis. According to Wayne Miller (East Texas's consultant), Entergy Arkansas is attempting to eliminate substitute energy and its coal equivalency price for all instances of reduced ISES dispatch for Entergy system

requirements except for imports of economy energy. East Texas states that up until now Entergy Arkansas had provided "surplus energy" sold at the ISES coal equivalency rate when ISES was backed down for Entergy system constraints. East Texas argues that a party's own interpretation of a provision by its longstanding performance of that provision is telling evidence of what the parties intended so long as that interpretation is not contrary to the words of the contract. East Texas asserts Entergy Arkansas is obligated to supply surplus energy to the ISES co-owners so long as ISES was capable of generating at levels higher than Entergy Arkansas's choice of dispatch level.

9. According to East Texas, Entergy Arkansas is attempting a unilateral amendment of section 8.4 of the Operating Agreement. East Texas states that this section does not distinguish economy energy imports from other situations where Entergy Arkansas elects to reduce the dispatch of ISES for Entergy system requirements. East Texas states the ISES Operating Agreement section 8.4 unambiguously sets the rate for Entergy Arkansas's supply of substitute energy at the coal equivalency price when it chooses to dispatch ISES at less than its capability for Entergy system requirements. East Texas asserts that the co-owners have contracted for a right to receive ISES-priced power up to their Ownership Share regardless of Entergy's overall system requirements and the resultant dispatch of ISES. According to East Texas, section 8.4 of the Operating Agreement makes no distinction between economy and non-economy reasons for reduced dispatch for overall Entergy system requirements.

10. East Texas asserts that Entergy Arkansas has decided that its ISES co-owners no longer have a right to receive ISES-priced power up to their Ownership Shares. East Texas believes that whenever Entergy Arkansas chooses to dispatch ISES below its capability for reasons other than economy energy imports, it will charge a price higher than the ISES price.

11. According to East Texas, Entergy Arkansas has decided to charge a rate for substitute energy (Entergy's system incremental cost plus 10 percent) that is not found in its contract with East Texas and is not filed at the Commission in violation of the filed rate doctrine. East Texas adds that the higher rate that Entergy Arkansas now demands is not found in any of Entergy Arkansas's contracts with East Texas nor is any such rate applicable to East Texas on file at this Commission. East Texas argues that under the filed rate doctrine, Entergy Arkansas has no legal right to charge East Texas a rate based on Entergy system incremental cost. East Texas further argues that Entergy Arkansas's new rate seriously disrupts the ability of the ISES co-owners to plan their activities, since, on seven days notice, Entergy Arkansas informed its ISES co-owners that they would now pay an estimated 51 mills/kwh for energy that was previously costing them 14 mills/kwh. East Texas states the ISES co-owners had every right to believe that they would be paying the relatively stable and predictable coal equivalency price.

12. East Texas asserts that Entergy Arkansas and its affiliates are violating the Entergy System Agreement with respect to Entergy Arkansas's allocation of purchases of QF power. East Texas claims that the Entergy Operating Committee appears to be over-allocating QF power purchases to EGI and ELI, while under allocating QF power purchases to Entergy Arkansas. East Texas argues that Entergy Arkansas is cross subsidizing EGI and ELI and now seeks to make up part of that cost by overcharging its coal plant co-owners.

13. East Texas cites section 30.07 of the Entergy System Agreement, which states that “[t]he Operating Committee shall have the authority to allocate such energy to one or more Companies or to determine that the energy is for the use, and at the expense of, the Company making the purchase from Such Source in accordance with FERC Opinion Nos. 246 and 246-A.” East Texas also states that Opinion Nos. 246 and 246-A held that the Entergy Operating Committee has discretion to allocate QF capacity among the Entergy operating companies, but recognizes that the discretion is not absolute.

14. East Texas expresses concern that the Operating Committee’s allocation of QF purchases may result in unjust and unreasonable rates. East Texas maintains that under allocation of QF power purchases to Entergy Arkansas may be the principle reason for Entergy Arkansas's attempt to re-price ISES under dispatch energy and therefore requests that the Commission resolve East Texas's complaint as to the unauthorized rate increase for substitute power and by revisiting the QF power allocation issue.

15. East Texas also asserts that Entergy Arkansas is violating its fiduciary duty to East Texas by re-pricing substitute energy at the Entergy system incremental cost plus 10 percent.

III. Notice of Filing, Answer to Complaint, and Pleadings

16. Notice of East Texas’s complaint was published in the *Federal Register*, 69 Fed. Reg. 57,274 with comments, interventions, and protests due on September 24, 2004. The Arkansas Public Service Commission, the Arkansas Cities, and Arkansas Electric Cooperative Corporation (Arkansas Electric) filed motions to intervene. The City Water & Light Plant of the City of Jonesboro, Arkansas (Jonesboro Plant) filed a motion to intervene and comments. Entergy Arkansas filed an answer to East Texas’s complaint on October 7, 2004 with an errata filed on October 12, 2004.¹ Entergy Arkansas filed an

¹ On September 24, 2004 the Commission issued a notice granting Entergy’s request for an extension of time to file an answer to East Texas’ complaint up to and including October 7, 2004.

answer to the comments of the Jonesboro Plant and Arkansas Electric's answer in support of the complaint on October 15, 2004. The Arkansas Cities filed a response to Entergy Arkansas's answer to the complaint on October 22, 2004. East Texas filed an answer to Entergy Arkansas's answer to the complaint on October 22, 2004. The Jonesboro Plant filed an answer to Entergy Arkansas's answer to the complaint and Entergy Arkansas's answer to the comments of the Jonesboro Plant and answer of Arkansas Electric on October 22, 2004. Arkansas Electric filed an answer to Entergy Arkansas's answer to the comments of the Jonesboro Plant and answer of Arkansas Electric on November 1, 2004. Entergy Arkansas filed a motion to reject, or in the alternative a reply, to the answers of East Texas, Jonesboro Plant, and Arkansas Cities on November 8, 2004.

IV. Entergy Arkansas's Answer to Complaint

17. Entergy Arkansas argues that East Texas's assertion that the ISES Operating Agreement section 8.4 applies to the under dispatch of ISES due to Entergy system requirements is wrong. Entergy Arkansas claims that section 8.4 does not apply in situations where operational constraints require a reduction in output. Entergy Arkansas states that East Texas fails to recognize the scope of the Entergy System and the benefits of its integration into the Entergy System, and the numerous provisions of both the ISES Operating Agreement and East Texas Interchange Agreement that recognize the limitations on the operation of the co-owned units due to operating constraints on the Entergy System, thereby reducing the co-owners' entitlement.

18. Entergy Arkansas asserts that the Entergy System Agreement establishes the contractual basis for the operation of the bulk transmission and generation facilities of the parties to the Entergy System Agreement, including those owned and operated by Entergy Arkansas. Entergy Arkansas claims that section 3.01 and 3.07 of the Entergy System Agreement recognize that the facilities within the Entergy System, or control area, must be coordinated as they are part of an integrated system. Entergy Arkansas maintains that the only way for the Energy Management Organization (EMO, a department of Entergy Services, Inc.) to manage the integrated system effectively and ensure that the system is balanced is for the Entergy Control Area Operator to control the energy supply of the entire system. Entergy Arkansas states that the Entergy System Agreement, Operating Agreement, and Interchange Agreement provide for that control. Entergy Arkansas claims that under Article II, section 2 of the East Texas Interchange Agreement the ISES 2 plant, both the portion owned by Entergy Arkansas and the portion owned by the co-owners, is a part of the Entergy System's fully integrated control area.

19. Entergy Arkansas contends that when the Entergy Control Area Operator operates and manages the Entergy System, a number of operational factors that are outside of its control can cause imbalances between generation and load. Entergy Arkansas states that it must reduce the output of the ISES unit for operation constraints that are beyond its

control, and that Entergy Arkansas is not liable to East Texas for the effects of such reduction. Entergy Arkansas mentions a number of operational constraints. Entergy Arkansas states that the EMO must have sufficient unloaded generation that can be turned up or down in response to instantaneous load fluctuations and there is no basis for excluding co-owned resources from being used for this purpose. Entergy Arkansas further states that EMO has the obligation to balance but it cannot control the output of IPP generation on the Entergy system, and, to the extent that IPPs do not match the output of their units to their schedules, EMO must balance the unpredictable output by varying the output of the units under its control. Entergy Arkansas asserts that it must contend with the unpredictable nature of schedules for delivery of energy by third-parties into the Entergy System when third-parties, such as East Texas, schedule for delivery a resource that may be less expensive than, say, a co-owned resource. Entergy Arkansas explains that this requires Entergy Arkansas to reduce the output of generation within the control area to accommodate delivery of the off-system resource. Entergy Arkansas submits that East Texas seeks to have unfettered access to energy from its ownership interest in ISES 2 even though Entergy Arkansas may have to turn down ISES 2 to accommodate delivery of East Texas energy from other, off-system resources. Entergy Arkansas states that it is obligated to purchase energy provided by QFs interconnected to the Entergy system and the Entergy dispatcher must deal with the deliveries from the QFs to the Entergy system. Entergy Arkansas argues that for the Entergy Control Area Operator to accommodate these QF energy deliveries it must keep generation that is on-line and operating at a level below its maximum output yet above its minimum output. Finally, Entergy Arkansas states that the inherent internal transmission limits must be recognized when balancing generation and load.

20. Entergy Arkansas states that dispatch is a matter of both economics and reliability; dispatch decisions cannot be based solely on economics and certainly not on the economics of a single unit and whether that unit might be able to produce more. Entergy Arkansas states that reliability is maintained chiefly by balancing generation and load, while recognizing certain security constraints. It states that to achieve this balance on an economic basis, energy from the generating units and purchases of all the Operating Companies is scheduled to minimize operating costs while meeting reliability requirements and operating constraints which is consistent with section 3.01 of the Entergy System Agreement.

21. Entergy Arkansas states that the Operating Agreement assigns Entergy Arkansas the responsibility and authority for operation of the ISES units as if they were Entergy Arkansas units and a part of the Entergy System.² Entergy Arkansas states that the co-

² See section 3.1.

owners explicitly appoint Entergy Arkansas their agent to exercise full discretion to effect the operation and maintenance of ISES.³ According to Entergy Arkansas, absent willful misconduct or the failure to use reasonable best efforts, Entergy Arkansas as operator is not responsible for any consequential damages, which includes the cost of purchased or replacement power under section 3.5. Entergy Arkansas submits that section 8.4 clearly contemplates that the co-owners may not receive their full entitlement share of the output of ISES, as the provision states that Entergy Arkansas must use its best efforts to meet the requirements of the co-owners. Entergy Arkansas contends that section 11.2 makes it clear that Entergy Arkansas is to treat ISES as part of the Entergy System and on the same basis as any other generator in the system.

22. With regard to the interchange agreement, Entergy Arkansas claims that under Article I, Appendix A, Entergy Arkansas is given full control over the scheduling of power and energy available at ISES and the definitions in Article II clearly contemplate that ISES 2 will be treated as an Entergy Arkansas resource and Entergy Arkansas, or its agent, has full discretion to perform the function of scheduling and dispatch for this resource. Entergy Arkansas submits that Article III, section 1, Appendix A unambiguously integrates ISES 2 into the Entergy System.

23. Entergy Arkansas states that numerous provisions in the Operating Agreement recognize that, in addition to receiving the benefits of co-ownership, the co-owners also bear a proportionate share of the costs and obligations associated with ISES. Entergy Arkansas states that section 4.1 provides that if an ambiguity exists as to whether a cost or obligation be shared, it must be shared. Entergy Arkansas further interprets section 8.1 to mean that co-owners are entitled to their share of what ISES can produce as part of the Entergy System and no more. Entergy Arkansas states that the constraint factors which are beyond Entergy Arkansas's control discussed above can require adjustments in the level of output of system resources, including the co-owned resources.

24. Entergy Arkansas states that economic purchases by the Entergy Operating Companies that displace operation of the co-owned units are not considered operational constraints within the meaning of the ISES Operating Agreement and East Texas Interchange Agreement. Entergy Arkansas explains that this type of purchase constitutes an election pursuant to section 8.4 of the ISES Operating Agreement. Entergy Arkansas states that when it elects to make an economic purchase, East Texas and the other co-owners are entitled to substitute energy at the ISES coal stockpile price. Entergy Arkansas insists that East Texas's argument that section 8.4 of the ISES Operating Agreement exclusively governs any reduced dispatch of ISES would require Entergy

³ See section 3.2.

Arkansas to dispatch ISES in a way isolated from the rest of the Entergy System, irrespective of system reliability and sound economics, in direct contravention of the contracts. Entergy Arkansas claims that the requirement that Entergy Arkansas must choose not to dispatch ISES before providing substitute energy is plain in the language of section 8.4 of the ISES Operating Agreement. Entergy Arkansas claims that East Texas is asking the Commission to construe section 8.4 of the ISES Operating Agreement in a way that would nullify other provisions of the contract. Entergy Arkansas also states that the East Texas Interchange Agreement recognizes that operational constraints may limit East Texas's energy entitlement.

25. Entergy Arkansas further asserts that East Texas's claim that Entergy Arkansas has violated the filed rate doctrine is unfounded. Entergy Arkansas states that East Texas fails to acknowledge that the rate currently being charged is an application of the rate for plant energy under the East Texas Interchange Agreement, and that the parties agreed that Entergy Arkansas would continue to provide replacement energy at Entergy's incremental cost plus 10 percent. Entergy Arkansas states that East Texas has been receiving power in the past, when the ISES unit trips, at the Entergy System Incremental Cost plus 10 percent.

26. Entergy Arkansas argues that East Texas's claim that Entergy Arkansas and its affiliates are violating the Entergy System Agreement is baseless. Entergy Arkansas argues that East Texas provides no evidence to back up its claim that the Entergy System Agreement "appears to be over allocating QF power purchases to EGI and ELI, while under allocating QF power purchases to EAI." Entergy Arkansas states that the Commission explicitly granted the Entergy Operating Committee full discretion to set the allocation of QF power purchases in Opinion No. 246.⁴ Entergy Arkansas asserts that Opinion Nos. 246 and 246-A both recognize the "highly coordinated, fully integrated electric system in which planning, construction, and operations are conducted primarily for the benefit of the system as a whole."⁵ Entergy Arkansas submits that ISES 2 is treated just like all other facilities within the system, and East Texas agreed to that treatment when it acknowledged Entergy Arkansas's operation and dispatch control over ISES in the Operating Agreement.

⁴ *Middle South Services, Inc.*, 33 FERC ¶ 61,408 at 61,792 (1985).

⁵ *Citing Middle South Services, Inc.*, 33 FERC ¶ 61,408 at 61,783 (1985).

27. Entergy Arkansas also claims that it is meeting its contractual duties to East Texas, and consequently it is satisfying any fiduciary duty it might have to East Texas. Entergy Arkansas states that section 8.4 of the Operating agreement recognizes that East Texas and other co-owners will not always be entitled to the full output of ISES.

28. Finally, Entergy Arkansas states that it does not believe that litigation is necessary to resolve this dispute and requests that the Commission set this proceeding for settlement, in the event that it does not rule in Entergy Arkansas's favor based on the language in the contracts.

V. Comments

29. Jonesboro Plant requests that the Commission order Entergy Arkansas to charge all parties to the ISES Operating Agreement only the rate set forth for substitute energy in section 8.4 of the agreement on file with the Commission. The Jonesboro Plant shares East Texas's view that Entergy Arkansas's unilateral re-pricing of substitute energy violates the express terms of the ISES Operating Agreement and the filed rate doctrine. The Jonesboro Plant agrees with the following arguments set forth in East Texas's complaint: (1) section 8.4 of the ISES Operating Agreement unambiguously requires that when the ISES units are capable of generation, but Entergy Arkansas chooses not to schedule that capacity, Entergy Arkansas must provide substitute energy; (2) section 8.4 of the ISES Operating Agreement unambiguously sets the rate for Entergy Arkansas's supply of substitute energy at a coal equivalency price; (3) Entergy Arkansas's unilateral decision to re-price substitute energy breaches section 8.4 of the ISES Operating Agreement on file with the Commission; (4) the Commission should enforce the plain language of section 8.4 of the ISES Operating Agreement on file with Commission; (5) there is no basis regarding Entergy Arkansas's claim that it never "elects" to reduce the dispatch of ISES for Entergy system requirements except when Entergy Arkansas imports energy; and (6) by charging a rate for substitute energy that is not found in the ISES Operating Agreement on file with the Commission, Entergy Arkansas is in violation of the filed rate doctrine.

30. The Jonesboro Plant adds two arguments with respect to the word "elect": (1) Entergy Arkansas cannot justify its argument that it is unable to "elect" to schedule energy from ISES when Entergy Arkansas is purchasing energy from QFs at prices higher than that available from ISES; and (2) Entergy Arkansas cannot justify its argument that it is unable to "elect" to schedule energy from ISES when it has failed to demonstrate that it could not have equipped and operated its other generation resources in a manner that would permit Entergy Arkansas to choose between operating its other generating resources or operating ISES.

31. Arkansas Electric states that it fully supports the requests contained in East Texas's complaint. Arkansas Electric states that it has suffered an immediate, substantial, and unauthorized rate increase in the same manner as East Texas by Entergy Arkansas's decision to no longer supply substitute power when Entergy Arkansas chooses to redispatch ISES and charge the co-owners for replacement energy at a much higher price. Arkansas Electric claims that it is further harmed by Entergy Arkansas's new billing methodology pertaining to Arkansas Electric's ownership shares of White Bluff Electric Steam Station.⁶

VI. Discussion

A. Procedural Matters

32. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

33. Rule 213(a)(2) (2204), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy Arkansas's answer to the comments of the Jonesboro Plant and Arkansas Electric's answer in support of the complaint; the Arkansas Cities' response to Entergy Arkansas's answer to the complaint; East Texas's answer to Entergy Arkansas's answer to the complaint; the Jonesboro Plant's answer to Entergy Arkansas's answer to the complaint and Entergy Arkansas's answer to the comments of the Jonesboro Plant and answer of Arkansas Electric; Arkansas Electric's answer to Entergy Arkansas's answer to the comments of the Jonesboro Plant and answer of Arkansas Electric; and Entergy Arkansas's motion to reject, or in the alternative reply to, the answers of East Texas, the Jonesboro Plant, and the Arkansas Cities. Therefore, we reject them.

B. Analysis

34. We are unable to resolve the complaint summarily at this time, because it raises issues of material fact that must be determined in the context of a trial-type evidentiary hearing. More specifically, the parties dispute the contract interpretation involving what rate should be charged when Entergy Arkansas reduces the output of the ISES generation

⁶ We note that on October 25, 2004, Arkansas Electric Cooperative Corporation (Arkansas Electric) filed a similar complaint against Entergy Arkansas in Docket No. EL05-15-000.

unit due to alleged constraints on its operating system. Accordingly, pursuant to section 206 of the Federal Power Act (FPA),⁷ we will set East Texas's complaint for a trial-type evidentiary hearing.

35. The Commission believes, however, that it would be in the best interest of the parties to resolve this dispute expeditiously and consensually, rather than through litigation. Accordingly we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁸ 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.⁹ The settlement judge 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.

36. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy,¹⁰ we will set the refund effective date 60 days after the date of the filing of this complaint, *i.e.*, November 13, 2004.

37. Section 206 (b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the

⁷ 16 U.S.C. § 824e (2000).

⁸ 18 C.F.R. § 385.603 (2004).

⁹ 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).

¹⁰ *See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993) and *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date has passed, the Commission cannot follow its normal procedure.

38. Although we do not have the benefit of the presiding judge's report, based on our review of the record we expect that the presiding judge would be able to issue an initial decision within approximately eight months of the commencement of hearing procedures, or, if hearing procedures were to commence immediately, by July 15, 2005. If the presiding judge is able to render a decision within that time, and assuming the case does not settle, we estimate that we will be able to issue our decision with approximately three months of the filing of briefs on and opposing exceptions, or, assuming the case goes to hearing immediately, by December 15, 2005.

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 I), a public hearing shall be held concerning the complaint, as discussed in the body of this order. As discussed in the body of this order, we will hold the hearing in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(B) 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. To the extent consistent with this order, the designated 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.

(C) 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 every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If the settlement discussions fail, and the proceeding goes to hearing, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the presiding judge's designation, convene a pre-hearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE., 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)

Magalie R. Salas,
Secretary.