

122 FERC ¶ 61,259
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc. and EWO Marketing, L.P.	Docket No. ER03-583-007
Entergy Services, Inc. and Entergy Power, Inc.	Docket No. ER03-681-005
Entergy Services, Inc. and Entergy Power, Inc.	Docket No. ER03-682-006
Entergy Services, Inc. and Entergy Louisiana, Inc.	Docket No. ER03-744-005

ORDER ACCEPTING COMPLIANCE FILING

(Issued March 21, 2008)

1. In this order, the Commission accepts a compliance filing submitted by Entergy Services, Inc. (Entergy), over the protests of the Louisiana Public Service Commission (Louisiana Commission) and the Council of the City of New Orleans (Council), because the compliance filing is consistent with the Commission's directives in Opinion Nos. 485 and 485-A.¹

I. Background

2. This matter began when, on March 31, 2003 and April 14, 2003, Entergy filed, in four separate dockets, eight power purchase agreements (PPAs or contracts) with the Commission for approval. Four of the PPAs consist of market-based sales of electric power and associated capacity from four Entergy affiliates² to two other Entergy

¹ *Entergy Services, Inc. and EWO Marketing, L.P.*, Opinion No. 485, 116 FERC ¶ 61,296 (2006), *order on reh'g and clarification*, Opinion No. 485-A, 119 FERC ¶ 61,019 (2007).

² EWO Marketing LP (EWO Marketing), Entergy Power, Inc. (Entergy Power), Entergy Gulf States, Inc. (Entergy Gulf States) and Entergy Arkansas, Inc. (Entergy Arkansas).

affiliates³ resulting from a request for proposals auction process conducted in the fall of 2002 (2002 RFP). The other four PPAs were negotiated and executed outside of the 2002 RFP process.⁴

3. In Opinion No. 485, the Commission affirmed the presiding judge's finding in his initial decision (ID)⁵ that the four Entergy affiliate PPAs obtained through the 2002 RFP are just and reasonable and not unduly discriminatory; however, the Commission limited the term of the Entergy Power ISES 2 PPAs to ten years to coincide with the ten-year analysis used to justify these contracts.

4. The Commission also found that Entergy improperly used information obtained through the 2002 RFP process to price the two Entergy Arkansas Base Load PPAs. Accordingly, in Opinion No. 485, the Commission affirmed the presiding judge's finding that the two Entergy Arkansas Base Load PPAs are unjust, unreasonable, and unduly discriminatory. The Commission affirmed the presiding judge's remedy to remove the retained share of the Grand Gulf nuclear generator (Grand Gulf Retained Share) from the resource mix of the Entergy Arkansas Base Load PPA with Entergy Louisiana.⁶ As a

³ Entergy Louisiana, Inc. (Entergy Louisiana) and Entergy New Orleans, Inc. (Entergy New Orleans).

⁴ The RFP agreements include two three-year term (term ending June 2006) contracts from EWO Marketing's RS Cogen facility sold to Entergy Louisiana and Entergy New Orleans and two life-of-unit (LOU) contracts from Entergy Power's Independent System Electric Union Station Unit 2 facility also sold to Entergy Louisiana and Entergy New Orleans (Entergy Power ISES 2 PPAs). The four non-RFP agreements include two life-of-unit sales from Entergy Gulf States to Entergy Louisiana and to Entergy New Orleans from Entergy Gulf States' share of the River Bend Nuclear Station. The remaining two non-RFP agreements are life-of-unit sales from six of Entergy Arkansas' coal and nuclear units to Entergy Louisiana and Entergy New Orleans (the Entergy Arkansas Base Load PPAs).

⁵ *Louisiana Public Service Commission v. Entergy Services, Inc.*, 111 FERC ¶ 63,077 (2005).

⁶ As we explained in Opinion No. 485, the most expensive base load resources available to Entergy Arkansas to meet its resource requirements were those obtained from Grand Gulf. The presiding judge found, and we affirmed in Opinion No. 485, that Entergy used inside information it obtained from competitors' bids to determine the maximum share of resources it could retain from Grand Gulf resources and still present a winning bid.

further remedy, the Commission ordered the removal of the Grand Gulf Retained Share from the resource mix of the Entergy Arkansas Base Load PPA with Entergy New Orleans.

5. In Opinion No. 485-A, the Commission denied requests for rehearing of Opinion No. 485, including requests for rehearing of the decision to limit the Entergy Power ISES 2 PPAs to ten years. The Commission also granted Entergy's request for clarification that Entergy did not violate its code of conduct in the process of developing the Entergy Arkansas Base Load PPAs.

6. On November 6, 2007, Entergy submitted its compliance filing (Compliance Filing) in response to Opinion Nos. 485 and 485-A. The Compliance Filing contains two alternative versions of revised Entergy Power ISES 2 PPAs with the term reduced to ten years (as directed in Opinion Nos. 485 and 485-A). Entergy states that it is unclear whether the Commission intended in Opinion Nos. 485 and 485-A to eliminate the purchase options in the Entergy Power ISES 2 PPAs.⁷ Consequently, it has submitted alternative revised versions of the Entergy Power ISES 2 PPAs, one retaining the purchase options, and another eliminating them. Entergy requests that the Commission accept for filing whichever version of the revised Entergy Power ISES 2 PPAs complies with Opinion Nos. 485 and 485-A.

7. Entergy has also included in the Compliance Filing revised River Bend 30 PPAs that implement its proposal, made in the course of these proceedings, to reprice these agreements as Service Schedule MSS-4 agreements (River Bend 30 MSS-4 PPAs).⁸ In

⁷ There are two Entergy Power ISES 2 PPAs, one between Entergy Power and Entergy Louisiana and one between Entergy Power and Entergy New Orleans. The option to purchase facilities would allow the buyer, Entergy Louisiana or Entergy New Orleans, to purchase the "Buyer's Share" of the generating facilities (50.5 percent in the case of Entergy Louisiana and 49.5 percent in the case of Entergy New Orleans) for the Buyer's Share of the purchase price by providing written notice to Entergy Power prior to the fifth anniversary of the transaction date (March 29, 2008). Failure to give notice by the fifth anniversary of the transaction date will be considered a decision by the Buyer not to purchase the Buyer's Share of the facilities. If the Buyer (Entergy Louisiana or Entergy New Orleans) decides to purchase the Buyer's Share of the facilities and if Entergy New Orleans does not exercise its option to purchase the remaining share of the facilities by the fifth anniversary of the transaction date, the Buyer (Entergy Louisiana or Entergy New Orleans) would then have the option to purchase the remaining share of the facilities.

⁸ Service Schedule MSS-4 of the Entergy System Agreement includes formulas for calculating the payment by one operating company to another for the sale of capacity and energy from designated system generation resources. Service Schedule MSS-4 also contains provisions for pricing power purchased by one operating company and sold to another operating company.

addition, Entergy has submitted revised River Bend 30 MSS-4 PPAs to reflect the restructuring of Entergy Gulf States into two separate utilities, Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana) and Entergy Texas, Inc. (Entergy Texas), both of which will be Entergy operating companies. The new agreements are between Entergy Gulf States Louisiana and Entergy Louisiana and between Entergy Gulf States Louisiana and Entergy New Orleans. The revised River Bend 30 MSS-4 PPAs are drafted to take effect on January 1, 2008, based on the effective date of the Commission-approved jurisdictional separation plan, and are intended to replace the River Bend 30 MSS-4 PPAs involving Entergy Gulf States.⁹ Entergy also states that these revised PPAs include certain revised account references and values to reflect the fact that a portion of River Bend is a non-utility investment.

8. Entergy has also submitted the two Entergy Arkansas Base Load PPAs (i.e., the one with Entergy Louisiana and the one with Entergy New Orleans) as MSS-4 agreements. Entergy has removed the Grand Gulf Retained Share from both of these agreements.

9. Entergy has submitted a separate MSS-4 agreement between Entergy Arkansas and Entergy Louisiana for a percentage share of the Grand Gulf Retained Share. Likewise, it has submitted a separate MSS-4 agreement between Entergy Arkansas and Entergy New Orleans for a percentage share of the Grand Gulf Retained Share. Entergy has also provided documentation comparing rates under the various MSS-4 agreements to the rates that would have applied under the originally filed market-based rate agreements.

10. Entergy requests an effective date of January 1, 2008 for the two River Bend 30 MSS-4 PPAs that will take effect upon the restructuring of Entergy Gulf States into Entergy Gulf States Louisiana and Entergy Texas, and an effective date of June 1, 2003 for the other PPAs submitted in the Compliance Filing.

II. Notice of Filing and Responsive Pleadings

11. Notice of Entergy's Compliance Filing was published in the *Federal Register* with comments, interventions, and protests due on or before November 27, 2007.¹⁰ In response to the Compliance Filing, the Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention and timely protests were filed by Louisiana Commission and Council. On December 12, 2007, Entergy filed an answer to the protests. On December 27, 2007, Council filed an answer to Entergy's answer. On January 11, 2008, Entergy filed an answer to Council's answer.

12. Louisiana Commission's protest argues that the Entergy Power ISES 2 PPAs should retain the purchase option because this option was not affected by the requirement to reduce the term of the contracts to ten years. In addition, Louisiana Commission states

⁹ *Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007).

¹⁰ 72 *Fed. Reg.* 65,322 (2007).

that, while it recognizes that the MSS-4 pricing for a percentage share of the Grand Gulf Retained Share for the agreement between Entergy Arkansas and Entergy New Orleans is consistent with the findings in Opinion Nos. 485 and 485-A, it retains its view that these sales should be made at the \$46 per MWh price. The Louisiana Commission also gives notice that it may pursue this issue on appeal and thus argues that the Compliance Filing should be rejected insofar as it substitutes MSS-4 pricing in lieu of the \$46 price, pending review of Opinion Nos. 485 and 485-A on appeal.

13. Council argues that Entergy New Orleans should not be permitted to charge New Orleans ratepayers a surcharge arising from repricing the Entergy Arkansas Base Load PPA with Entergy New Orleans under Service Schedule MSS-4. Council, citing testimony by Entergy witness Harlan, states that Entergy has committed to absorbing any cost increase resulting from the change to MSS-4 cost-based rates from the previously submitted market-based rates.¹¹ Thus, Council argues that no retroactive true-up to recover any differential between market-based rates and cost based rates should be allowed. Moreover, Council argues that Entergy has failed to provide sufficient supporting data to show that the new PPA MSS-4 charges are just and reasonable. Council argues that the Commission should reject the filing as insufficient, and that Entergy should be required to produce the workpapers showing the MSS-4 calculations. Council also states that the Commission should set the filing for hearing so that interested parties could conduct discovery.

14. In its answer, Entergy states that Council and the Louisiana Commission do not dispute that Entergy has complied with Opinion Nos. 485 and 485-A. Entergy states that the Louisiana Commission recognizes that the separate MSS-4 agreement between Entergy Arkansas and Entergy Louisiana for the Grand Gulf Retained Share complies with the Commission's decisions in Opinion Nos. 485 and 485-A and its arguments on the proper pricing of the Grand Gulf Retained Share were already decided in Opinion Nos. 485 and 485-A. Entergy states that, as the Louisiana Commission has already made its argument that the Grand Gulf Retained Share should be priced at \$46 per MWh and lost, it should not be allowed to renew this issue here in the guise of a protest to a compliance filing. Entergy argues, further, that the Louisiana Commission misunderstands the Commission's procedural rules as the Louisiana Commission has not requested and this Commission has not ordered a stay of its decision to price the Grand Gulf Retained Share at the MSS-4 cost-based rate.

¹¹ Citing rebuttal testimony of David C. Harlan, Ex. ETR-60, filed May 1, 2004 at 101. In addition, Council argues that it entered into a global settlement with Entergy New Orleans in 2003, predicated in part on Entergy New Orleans being able to charge ratepayers the market-based rates resulting from the PPAs at issue in this proceeding. Council further argues that, in light of its commitment to Council in the settlement, Entergy New Orleans should be precluded from imposing a surcharge as a result of the repricing of the PPAs under MSS-4.

15. Entergy states that contrary to Council's protest, Entergy New Orleans is not imposing a retroactive surcharge on New Orleans ratepayers. Entergy states that Entergy New Orleans did not propose or request the ability to impose a surcharge in the Compliance Filing. Entergy states that, even though the recalculation under Service Schedule MSS-4 results in higher charges than under the original Entergy Arkansas Base Load PPA with Entergy New Orleans, the higher charges will not be passed through to New Orleans ratepayers for the period June 1, 2003 through September 27, 2006 (i.e., the date the contract took effect under Opinion No. 485).

16. Entergy requests that the Commission deny Council's request for Entergy to produce workpapers or for the Commission to set the Compliance Filing for hearing. Entergy argues that these requests are moot given that Entergy New Orleans does not intend to pass through the higher charges resulting from the MSS-4 pricing for the period prior to September 27, 2006. Entergy states that it was not required to submit a formal refund report as there are no refunds or higher charges to New Orleans ratepayers for the period June 1, 2003 through September 27, 2006. Entergy states that it submitted spreadsheets in the Compliance Filing for informational purposes only, and not as a formal refund report.

17. In its answer, Council states that, while the areas of dispute between itself and Entergy have narrowed, it still disputes Entergy's assertion that the refund period ended on the date of the issuance of Opinion No. 485. Council argues that Entergy must refund all excess charges until such time as Entergy changed its rates to reflect the Commission's orders. Council states that Entergy repriced the contracts at issue in July of 2007 and that the period subject to refund ended in July of 2007 and not upon the issuance of Opinion No. 485. Council also argues that Entergy's argument that it should not be required to provide workpapers only holds to the extent that Entergy would not be charging New Orleans ratepayers any surcharges at all with respect to the Compliance Filing. Council states that Entergy does not appear to make such a commitment and Entergy contemplates applying some level of surcharge to New Orleans ratepayers. Thus, Council argues that Entergy should be required to provide sufficient workpapers for the Council to verify that Entergy's calculations are correct and result in just and reasonable charges.

18. In its reply, Entergy argues that the Commission approved the MSS-4 charges for the PPAs as of September 27, 2006 when it found in Opinion No. 485 that the agreements are just and reasonable as repriced under Service Schedule MSS-4. Entergy states that as of September 27, 2006, the MSS-4 charges were applied prospectively and that no basis existed for New Orleans ratepayers to pay a rate different from the Commission-approved rate. Any commitments made by Entergy to not charge the higher MSS-4 rate cannot be interpreted to extend beyond the date of Opinion No. 485.

III. Discussion

A. Procedural Matters

19. Arkansas Commission, Louisiana Commission and Council are all already parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(a)(2) (2007), prohibits answers to protests and answers to answers unless otherwise ordered by the decisional authority. We will accept the parties' various answers because they provided information that assisted us in our decision-making process.

B. Commission Determination

20. We will accept Entergy's Compliance Filing as being in compliance with Opinion Nos. 485 and 485-A. We will also grant the requested effective dates of January 1, 2008 for the two River Bend 30 PPAs that will take effect upon the restructuring of Entergy Gulf States into Entergy Gulf States Louisiana and Entergy Texas, and June 1, 2003 for the other PPAs submitted in the Compliance Filing.

21. As noted above, Entergy has revised the Entergy Power ISES 2 PPAs, limiting those agreements to terms of 10 years, and the Entergy Arkansas Base Load PPAs, removing the Grand Gulf Retained Share, as directed by the Commission. The Commission previously approved Entergy's decision to reprice the River Bend 30 and Entergy Arkansas Base Load PPAs as Service Schedule MSS-4 agreements, as Entergy has done here. In addition, we will accept the ISES PPAs that include the purchase options. Opinion Nos. 485 and 485-A did not require Entergy to delete the purchase options and we see no need for Entergy to do so here. We will accept the Grand Gulf Retained Share PPAs, with an effective date of June 1, 2003, as being in compliance with our directive to remove the Grand Gulf Retained Share from the Entergy Arkansas Base Load PPA resource mix.

22. Many of the issues raised by intervenors are moot or have been already dealt with by the Commission. Louisiana Commission again raises the issue of the pricing of the Grand Gulf Retained Share at \$46 per MWh. However, Louisiana Commission states that it is doing so in order to preserve the issue on appeal. We have addressed the issue previously¹² and, thus, there is no need for further comment by the Commission.

23. Council raises the issue of when the MSS-4 charges should be passed through to New Orleans ratepayers. Council states that Entergy repriced the contracts at issue in

¹² See Opinion No. 485, 116 FERC ¶ 61,296 (2006) at P 102 and Opinion No. 485-A, 119 FERC ¶ 61,019 (2007) at P 33-34.

July of 2007 and that the period subject to refund thus ended in July of 2007 and not when Opinion No. 485 was issued on September 27, 2006. Council is mistaken on this point. In Opinion No. 485, the Commission approved Entergy's plan to use MSS-4 pricing for the Entergy Arkansas Base Load PPAs. Thus, Entergy is correct that, as of September 27, 2006, the date of the issuance of Opinion No. 485, the MSS-4 charges were to be applied prospectively and that no basis existed for New Orleans ratepayers to pay a rate different from the Commission-approved rate.

24. As to Council's request for workpapers, we will direct Entergy to provide Council with all workpapers relating to the calculations of the MSS-4 charges billed to New Orleans ratepayers since September 27, 2006, so that Council can review these charges for accuracy.¹³ At this time, we do not see a need for a hearing and deny Council's request for a hearing without prejudice regarding any issues it may raise concerning Entergy's MSS-4 billing for the period since September 27, 2006.

The Commission orders:

(A) Entergy Services' compliance filing, including the version of the Entergy Power ISES 2 PPAs that retains a five year purchase option, is hereby accepted for filing, as discussed in the body of this order.

(B) Entergy's request for an effective date of January 1, 2008 for the two River Bend 30 PPAs, and its request for an effective date of June 1, 2003 for the other PPAs submitted in the Compliance Filing, is hereby granted, as discussed in the body of this order.

(C) Entergy is hereby directed, within thirty days of the date of issuance of this order, to provide Council with a copy of its workpapers relating to the Service Schedule MSS-4 charges it is billing to New Orleans ratepayers since September 27, 2006.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³ We are not requiring Entergy to provide Council with workpapers for the period prior to September 27, 2006 because Entergy has pledged that it will not be seeking any surcharge for this period. The Commission will verify this in subsequent audits.