

132 FERC ¶ 61,223
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Louisiana Public Service Commission and the Council Docket No. EL00-66-012
of the City of New Orleans

v.

Entergy Corporation

ORDER ON REFUND REPORT AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued September 16, 2010)

1. In this order, we accept in part a refund report submitted by Entergy Services, Inc., on behalf of its public utility operating companies (collectively, Entergy)¹ as it pertains to the period from April 1, 2004 through March 31, 2005. We establish hearing and settlement judge procedures regarding Entergy's refund report as it pertains to the period from May 14, 1995 through August 13, 1996 because it raises issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in hearing and settlement judge procedures.

¹ The Entergy system comprises Entergy Services, Inc. and its various public utility operating companies, i.e., Entergy Arkansas, Inc. (Entergy Arkansas); Entergy Louisiana, LLC (Entergy Louisiana); Entergy Mississippi, Inc. (Entergy Mississippi); Entergy New Orleans, Inc. (Entergy New Orleans); Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana) and Entergy Texas, Inc. (Entergy Texas) (Operating Companies). At the time the refund report was made Entergy Gulf States Louisiana and Entergy Texas were one Operating Company and functioned as Entergy Gulf States, Inc. (Entergy Gulf States).

I. Background

2. In response to a petition for review of Opinion Nos. 468 and 468-A filed by the Louisiana Public Service Commission (Louisiana Commission), the United States Court of Appeals for the District of Columbia Circuit issued an order on April 3, 2007 that remanded the matter back to the Commission for further proceedings.² The court's order addressed whether, in calculating charges for the Entergy system, the exclusion of interruptible load from the computation of peak load responsibility should be accomplished immediately or phased-in over twelve months. The court found that this should be accomplished immediately. Also at issue was whether the Commission was empowered to order refunds under the specific circumstances presented in this proceeding. The court found that the Commission had not justified its finding that it was unable to order refunds in these circumstances.

3. In an order issued on September 20, 2007,³ the Commission directed Entergy to make a compliance filing to remove all interruptible load from the computation of peak load responsibility since April 1, 2004 and include all workpapers explaining its calculations. Entergy was also directed to make refunds reflecting the differences between what Entergy charged (based on the Commission's findings in Opinion Nos. 468 and 468-A, which had allowed a phase-out of interruptible load over a 12-month period starting April 1, 2004)⁴ and what it would have charged had Entergy at that time removed all interruptible load as of April 1, 2004 from the computation of Load Responsibility⁵ and the Responsibility Ratio. The 2007 Remand Order also ordered refunds for the 15-month refund period established by section 206(c) of the FPA.⁶ In addition, the

² *Louisiana Public Service Commission v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (Court Remand Order).

³ *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 120 FERC ¶ 61,241 (2007) (2007 Remand Order), *reh'g denied*, 124 FERC ¶ 61,275 (2008) (Rehearing Order).

⁴ *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, Opinion No. 468, 106 FERC ¶ 61,228, at P 82-84 (2004), *reh'g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080, at P 16 (2005).

⁵ Each Operating Company's Responsibility Ratio is calculated by determining the Operating Company's load responsibility as a proportion of the load responsibility for all Operating Companies. The Responsibility Ratio of each Operating Company is determined using a historical rolling average of an Operating Company's contribution to the system's monthly peak over the preceding twelve months.

⁶ 2007 Remand Order, 120 FERC ¶ 61,241 at P 8.

Commission directed Entergy to file a refund report describing its computations and the refunds it makes. On rehearing, the Commission affirmed the holding in the 2007 Remand Order that the refunds need not include interest payments.

4. The 2007 Remand Order and Rehearing Order were appealed to the D.C. Circuit by the Arkansas Public Service Commission and Entergy.⁷ On June 24, 2009, in response to a motion by the Commission, the court remanded the refund issue so that the agency could address it more fully. The Commission conducted a paper hearing on the issues raised by the court's order of (1) the applicability of section 206(c), (i.e., when and how it would apply) and (2) if refunds are legally permissible, are they equitable in the circumstances presented.⁸ After reviewing the briefs and reply briefs submitted by the parties, the Commission issued an order on August 13, 2010 finding both that the Commission was empowered to order refunds under section 206(c) and that refunds were appropriate.⁹ The order directed that refunds be paid, if not paid already.

A. Entergy's Refund Report

1. Refunds for Elimination of Phase-In of Interruptible Load for the Period from April 1, 2004 through March 31, 2005¹⁰

5. The Commission's Amended Order on Remand directed Entergy, to the extent it had not already done so, to make a compliance filing to remove interruptible load from the computation of peak load responsibility since April 1, 2004. Entergy had previously made this filing on November 19, 2007. Entergy's November 19, 2007 filing included a refund report that, among other matters, calculated the amount of refunds due as a result of eliminating the phase-in of the interruptible load for the period April 1, 2004 through March 31, 2005. This period represents the refunds that are summarized in Attachment A of the refund report. Entergy calculates that, as a result of removing the phase-in of interruptible load for the period April 1, 2004 through March 31, 2005, Entergy

⁷ *Arkansas Public Service Commission, et al. v. FERC*, Nos. 08-1330, *et al.* (D.C. Cir. October 14, 2008).

⁸ *Louisiana Public Service Commission and the City Council of New Orleans v. Entergy Corporation*, 129 FERC ¶ 61,237, at P 5 (2009).

⁹ *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 132 FERC ¶ 61,133 (2010) (Amended Order on Remand).

¹⁰ April 1, 2004 was the prospective date set for refunds in Docket No. EL00-66-000.

Louisiana is owed a refund of \$1,670,489. Of this amount, Entergy calculates that Entergy Arkansas owes \$604,738, Entergy Mississippi owes \$198,004, Entergy Gulf States owes \$736,945, and Entergy New Orleans owes \$130,802. Entergy states that these amounts have already been included on the Intra-System Bill, and therefore, the refunds have been paid.

2. Refunds during the 15-Month Refund Period from May 14, 1995 through August 13, 1996¹¹

6. Entergy's November 19, 2007 refund report also addresses refunds due for the 15-month refund period from May 14, 1995 through August 13, 1996 (15-Month Refund Period). In explaining its refund calculation for this period, Entergy notes that, during the hearing phase in Docket No. EL00-66-000, an Entergy witness submitted testimony calculating and quantifying the cost effect of removing interruptible load from the loads used to calculate the load Responsibility Ratio (Exhibit KMT-10). In this testimony, Entergy explains that, for each hour, the amount of the entire interruptible load was removed from the system load, and a new system peak hour was determined. Entergy explains that, by removing the entire interruptible load, it was assumed that during the refund period, all customers who could be interrupted were interrupted. Entergy then used the loads of each individual Operating Company coincident with that new peak hour to calculate the new Responsibility Ratios. As a result of the new Responsibility Ratios, payments and receipts under a number of the System Agreement Service Schedules changed. In further testimony submitted in the hearing, Entergy corrected some errors and its witness submitted a revised summary of the refund amounts in Exhibit KMT-10. A copy of Exhibit KMT-10 was included in this refund report as Attachment B.

7. Entergy states that its calculation of refunds for the 15-Month Refund Period is based on the numbers and methodology shown in Exhibit KMT-10. However, Exhibit KMT-10 includes a phase-in of interruptible load. Entergy explains that because the 15-Month Refund Period occurred over twelve years ago, Entergy has been unable to duplicate the Intra-System Bill created by Entergy's witness for his calculation of Exhibit KMT-10 or to obtain the exact amount of interruptible load each month during May 1995 through April 1996 in order to eliminate the phase-in. Entergy states that, for this reason, it developed an alternative mechanism to estimate the elimination of the phase-in for the first twelve months of the 15-Month Refund Period.

8. The Intra-System bill uses a rolling 12-month average so each month of billing data includes data from the previous 12-months. Entergy explains that to develop its

¹¹ May 14, 1995 through August 13, 1996 was the 15-month refund period established in Docket No. EL95-33-000, the complaint that preceded the complaint filed in EL00-66-000.

alternative mechanism in Exhibit KMT-10 it annualized the first twelve months of the original refund calculation. Therefore, for each month during the months of May 1995 through April 1996, Entergy's alternative mechanism had to manipulate each month of data in order to estimate an annual amount to reflect the effect of removing all the interruptible load. Entergy explains that its first month of the original refund calculation excluded one month of interruptible load. Therefore, Entergy multiplied the May 1995 data by 12 to obtain the full annual effect of the removal of the interruptible load. In June 1995, Entergy's data had two months of interruptible load excluded so Entergy multiplied this amount by six. The third month excluded three months of interruptible load, and therefore, Entergy multiplied the refund amount calculated for July 1995 by four. Entergy repeated this process for all months through April 1996 in order to estimate the full annual effect of the removal of the interruptible load. Entergy states that the use of this annualized, estimated approach is reasonable and consistent with Opinion No. 468-A.

9. Entergy summarized the refunds for the full 15-Month Refund Period on Attachment C. Entergy states that, as a result of the calculations for the 15-month Refund Period, Entergy Louisiana is owed a refund of \$4,073,025, Entergy Gulf States is owed a refund of \$298,316, Entergy Arkansas owes \$2,729,886, Entergy Mississippi owes \$1,209,421, and Entergy New Orleans owes \$432,034.¹²

B. Notice of Filing and Responsive Pleading

10. Notice of Entergy's filing was published in the *Federal Register*,¹³ with protests and interventions due on or before December 20, 2007. The Arkansas Public Service Commission and the Mississippi Public Service Commission filed notices of intervention. Louisiana Commission filed a protest. On January 4, 2008, Entergy filed an answer. On January 15, 2008, Louisiana Commission filed an answer to Entergy's answer.

C. Louisiana Commission's Protest

11. Louisiana Commission argues that Entergy's calculation of refunds for the refund period from April 1, 2004 through March 31, 2005 is deficient because it does not include interest payments. Louisiana Commission argues that the Commission should

¹² By notice issued on October 18, 2007, the Commission extended the date for the payment of refunds associated with the 15-Month Period until 30 days from the date of issuance of an order on rehearing of the 2007 Remand Order. The order on rehearing was issued on September 19, 2008 and, thus, refunds were due by October 19, 2008.

¹³ 72 Fed. Reg. 68,873 (2007).

require Entergy to include interest on the refund amounts and should require Entergy to disclose the amount of interest refunded.

12. Louisiana Commission also asserts that Entergy's calculation of refunds for the 15-Month Period is patently deficient and substantially understates the refunds due for that period. Louisiana Commission states that the report reflects a drastic decline in monthly refund amounts for Reserve Equalization under Service Schedule MSS-1. Additionally it states that Entergy's adoption of an estimating methodology is unacceptable and the utility was required to maintain records adequate to permit the accurate calculation of refunds. It states that the report covers 14 months rather than the 15-month statutory period. Further, Louisiana Commission argues that the refund report, for the 15-Month Refund Period does not include interest, which it states is required under section 206(b) of the Federal Power Act. Therefore, it claims the refund report is deficient.

II. Discussion

A. Procedural Matters

13. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2010), prohibits an answer to a protest or an answer, unless otherwise permitted by the decisional authority. We are not persuaded to accept Entergy's or the Louisiana Commission's answers and will, therefore, reject them.¹⁴

B. Entergy's Refund Calculations for the Period from April 1, 2004 through March 31, 2005

14. We find that Entergy has complied with the directive to calculate refunds for the refund period from April 1, 2004 through March 31, 2005 and that Entergy's calculations for this refund period are in accordance with the Rehearing Order. Louisiana Commission's protest argues that Entergy's refund calculation is deficient because it fails to provide for the payment of interest on the refund amounts. We find Louisiana Commission's objections without merit because the Commission previously determined in the Rehearing Order that the Commission had approved refunds without interest and that Louisiana Commission's objection to this finding was untimely.¹⁵ Thus, we will accept Entergy's refund report (as it pertains to the refund period from April 1, 2004

¹⁴ The notices of intervention of the Arkansas and Mississippi Public Service Commissions are unnecessary as they are already parties to this proceeding.

¹⁵ See Rehearing Order, 124 FERC ¶ 61,275 at P 39-40.

through March 31, 2005) and reject Louisiana Commission's argument that these refunds should be accompanied by the payment of interest.

C. Entergy's Refund Calculations for the Period from May 14, 2005 through August 13, 2006

15. Entergy's proposed refund report for the refunds due for the 15-month period from May 14, 1995 through August 13, 1996 raises issues of material fact that cannot be resolved based on the record before us. For example, Entergy has not demonstrated that its estimating methodology based on Exhibit KMT-10 is appropriate and consistent with the Remand Order, nor has it established why the Intra-System Bill used to create Exhibit KMT-10 in 2001 could not be duplicated by Entergy to calculate the refund report numbers or why the report reflects a substantial decline in monthly refund amounts over the course of the 15-month refund period. Also, the Refund Report depicts a 15-month period of May 1, 1995 through July 31, 1996 and does not reflect the actual refund period of May 14, 2005 through August 13, 1996. The Commission is unable to resolve these issues based on a review of Entergy's November 19, 2007 refund report or other available information and we find that these issues of material fact would be more appropriately addressed in the hearing and settlement judge procedures ordered below.

16. Our preliminary analysis indicates that Entergy's proposed refund report for the 15-month period from May 14, 1995 through August 13, 1996 has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will set this portion of Entergy's refund report (as it pertains to the 15-month refund period) for hearing and settlement judge procedures.

17. While we are setting these matters for a trial-type evidentiary hearing, we nonetheless encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will temporarily 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.¹⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁷

¹⁶ 18 C.F.R. § 385.603 (2010).

¹⁷ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge in writing or by telephone at (202) 502-8500 within five days of the date of this order. FERC's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, 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 move forward to the commencement of a hearing by assigning the case to a presiding judge.

18. Further, Louisiana Commission's protest argues that Entergy's refund calculation, for the 15-Month Refund Period fails to provide for the payment of interest on the refund amounts. The 2007 Remand Order did not order interest to be paid for the 15-Month Refund Period. However, as noted in footnote 12, refunds were due to be paid for the 15-Month Refund Period 30 days from the date of issuance of an order on rehearing of the 2007 Remand Order (i.e. October 19, 2008). Entergy has not paid these refunds yet. Therefore, interest will accrue for the 15-Month Refund Period starting on October 19, 2008 until refunds are paid by Entergy.

The Commission orders:

(A) Entergy's proposed refund report, as it relates to the period from April 1, 2004 through March 31, 2005 is hereby accepted for filing, as discussed in the body of this order. The portion of Entergy's refund report that deals with the 15-Month Refund Period from May 14, 1995 through August 13, 1996 is set for hearing and settlement judge procedures as discussed in the body of this order and the ordering paragraphs below.

(B) 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 sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Entergy's refund report. However, the hearing will be held in abeyance to give the parties time for settlement judge procedures, as discussed in Ordering 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 (2010), 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 within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, 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 towards 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 Washington, DC 20426. Such a 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)

Kimberly D. Bose,
Secretary.