

153 FERC ¶ 61,032  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
and Tony Clark.

Louisiana Public Service Commission

Docket No. EL01-88-013

v.

Entergy Services, Inc.

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued October 15, 2015)

1. On April 29, 2014, as amended on May 7, 2014 and May 23, 2014, Entergy Services, Inc. (Entergy), on behalf of the Entergy Operating Companies (Operating Companies),<sup>1</sup> submitted a compliance filing pursuant to a Commission order<sup>2</sup> issued in this proceeding. The compliance filing calculates bandwidth payments and receipts for the seven-month period of June 1, 2005 through December 31, 2005. In this order we establish hearing and settlement judge procedures.

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<sup>1</sup> The five Operating Companies involved in this proceeding are, at the relevant times for filing pursuant to the first bandwidth calculation: Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States, Inc. (Entergy Gulf States), Entergy Louisiana LLC, Entergy Mississippi, Inc., and Entergy New Orleans, Inc. On December 31, 2007, Entergy Gulf States was split into Entergy Texas, Inc. (Entergy Texas) and Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana), which subsequently serve load in their respective states.

<sup>2</sup> *Louisiana. Pub. Serv. Comm'n v. Entergy Serv., Inc.*, 146 FERC ¶ 61,153 (2014).

## I. Background

2. The Commission has held that the System Agreement requires that production costs be “roughly equal” among the Operating Companies.<sup>3</sup> In Opinion Nos. 480 and 480-A, the Commission held that the Entergy System was no longer in rough production cost equalization and adopted a numerical bandwidth remedy. This bandwidth remedy achieves rough production cost equalization on Entergy’s System by not allowing any Operating Company to have production costs that are more than 11 percent above or below the system average production costs. Under the bandwidth remedy, each calendar year, the production costs of each Operating Company are calculated, with payments made by the low cost Operating Company(ies) to the high cost Operating Company(ies) such that, after reflecting the payments and receipts, no Operating Company would have production costs more than 11 percent above the Entergy System average or more than 11 percent below the Entergy System average. The Commission determined that a +/- 11 percent bandwidth would apply if the Entergy System exceeded historical cost disparities, but would otherwise allow the Entergy System to maintain the flexibility that it had traditionally enjoyed.<sup>4</sup>

3. In Opinion No. 480, issued June 1, 2005, the Commission found that the bandwidth remedy should apply prospectively in calendar year 2006, with the first payments, based on calendar-year 2006 production costs, occurring in 2007.

4. In its remand<sup>5</sup> of Opinion Nos. 480 and 480-A the United States Court of Appeals for the District of Columbia Circuit held that the Commission had not provided a reasonable explanation for the Commission’s decision to delay implementation of the bandwidth remedy until a full year of data had become available for the 2006 test year. The court held that the Commission’s argument that use of the first calendar year of data

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<sup>3</sup> *Louisiana Pub. Serv. Comm’n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 at P 136, *order on reh’g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006) (November 2006 Compliance Order), *order on reh’g and compliance*, 119 FERC ¶ 61,095 (2007), *aff’d in part and remanded in part*, *Louisiana Pub. Serv. Comm’n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (*Louisiana Remand*), *order on remand*, 137 FERC ¶ 61,047 (2011) (Order on Remand), *order dismissing reh’g*, 137 FERC ¶ 61,048 (2011), *order on reh’g*, 146 FERC ¶ 61,152, (2014), *order rejecting compliance filing*, 146 FERC ¶ 61,153 (2014) (Order Rejecting Compliance Filing).

<sup>4</sup> Opinion No. 480, 111 FERC ¶ 61,311 at P 144.

<sup>5</sup> *Louisiana Remand*, 522 F.3d 378.

is “the most appropriate and equitable way” to implement the bandwidth remedy was a conclusion rather than a reason, and that the Commission had failed to explain why it believes that the first calendar year is the most equitable time.<sup>6</sup>

5. In the Order on Remand, the Commission held that it would implement the bandwidth remedy on June 1, 2005, the date the Commission issued Opinion No. 480 determining that the rates were unjust and unreasonable. The Commission stated that allowing the bandwidth remedy to be implemented on June 1, 2005 is consistent with the court’s direction that, absent a reasonable explanation for a delay to implement the bandwidth remedy, it would be arbitrary and capricious for the Commission to delay implementation of a just and reasonable rate.<sup>7</sup> The Commission directed Entergy to file a compliance filing calculating the bandwidth payments and receipts for the period June 1, 2005 through December 31, 2005.<sup>8</sup>

6. On February 28, 2014, the Commission issued an order<sup>9</sup> rejecting a compliance filing submitted by Entergy on December 19, 2011 in response to the Order on Remand. The Commission rejected Entergy’s use of six months of data as a basis for calculating the seven-month period at issue, rather than actual data for all seven months, and required Entergy to submit a subsequent compliance filing. The Commission stated that in its subsequent compliance filing, Entergy must perform bandwidth calculations for the seven-month period of June 1, 2005 through December 31, 2005 using monthly data for the seven individual months wherever possible. The Commission ruled that for components of the bandwidth formula where month-to-month variations in costs are not meant to be captured, end-of-year amounts should be used.<sup>10</sup> The Commission also ruled that payments associated with the seven-month period must include interest.<sup>11</sup>

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<sup>6</sup> *Id.* at 400.

<sup>7</sup> Order on Remand, 137 FERC ¶ 61,047 at P 34.

<sup>8</sup> *Id.*

<sup>9</sup> Order Rejecting Compliance Filing, 146 FERC ¶ 61,153.

<sup>10</sup> *Id.* PP 26-27.

<sup>11</sup> *Id.* P 30.

## II. Entergy's Compliance Filing

7. As part of its current compliance filing, as amended, Entergy filed a comprehensive recalculation report showing the payment/receipt amounts on the 2005 monthly data. Entergy states that the sources of these monthly data are the actual books and records of each Operating Company that existed at that time. Entergy contends that monthly data were used as the source for those variables that are not based on data as of December 31, 2005, e.g., rate base components use year-end balances. Entergy states that with respect to the Demand Ratio and Energy Ratio, Entergy has applied a seven-month average balance.<sup>12</sup> The resulting payments and receipts for each Operating Company, along with those originally proposed in the initial compliance filing, are as follows:

|   | (Payment)Receipt<br>\$ Millions<br>(Subsequent<br>Compliance Filing<br>May 23, 2014) | (Payment)Receipt<br>\$ Millions<br>(Initial<br>Compliance Filing<br>Dec. 19, 2011) |
|---|--|--|
| Entergy Arkansas, Inc.                  | (\$167.3)  | (\$156.0)  |
| Entergy Gulf States Louisiana, L. L. C. | \$64.5   | \$74.9   |
| Entergy Louisiana, LLC                  | \$0.0  | \$0.0  |
| Entergy Mississippi, Inc.               | \$33.2   | \$33.0   |
| Entergy New Orleans, Inc.               | \$2.1  | \$4.8  |
| Entergy Texas, Inc.                     | \$67.5   | \$43.3   |

8. Entergy has also included compound interest with the bandwidth payments/receipts, as required by the February 28 Order:<sup>13</sup>

|                                       | (Payments)/Receipts<br>Millions<br>May 23, 2014 Filing |
|---------------------------------------|--|
| Entergy Arkansas, Inc.                | (\$56.5)   |
| Entergy Gulf States Louisiana, L.L.C. | \$20.5   |
| Entergy Louisiana, LLC                | \$0.0  |
| Entergy Mississippi, Inc.             | \$11.0   |
| Entergy New Orleans, Inc.             | \$0.5  |
| Entergy Texas, Inc.                   | \$24.5   |

<sup>12</sup> Entergy Compliance Filing at 2.

<sup>13</sup> *Id.* at 3.

9. Entergy notes that the jurisdictional separation of Entergy Gulf States, Inc. into two jurisdictional public utilities under the System Agreement, Entergy Gulf States Louisiana and Entergy Texas, occurred in 2007, thereby replacing Entergy Gulf States, Inc. in the Entergy System Agreement. Entergy states that it will provide updated bandwidth payment/receipt amounts to the current wholesale customers on their next monthly bill. Entergy states that, regarding the wholesale jurisdictions, Entergy and/or the Operating Companies will have a contractual basis to make additional payments to, or require payments from, only the current wholesale customers. Entergy contends that this prospective treatment of the updated bandwidth payment/receipt amounts is consistent with administrative and implementation efficiency and with the manner in which payments and receipts are administered to the Operating Companies' retail jurisdictions.<sup>14</sup>

### **III. Notice of Filing and Responsive Pleadings**

10. Notice of Entergy's compliance filing was published in the *Federal Register*, 79 Fed. Reg. 26,244 (2014), with interventions and protests due on or before May 20, 2014. Notice of Entergy's first amended filing was published in the *Federal Register*, 79 Fed. Reg. 29,182 (2014), with interventions due on or before May 28, 2014. Notice of Entergy's second amended filing was published in the *Federal Register*, 79 Fed. Reg. 32,273 (2014), with interventions due on or before June 13, 2014. The Louisiana Public Service Commission (Louisiana Commission), the Council of the City of New Orleans, and the Arkansas Public Service Commission (Arkansas Commission) filed protests. The Mississippi Public Service Commission, the Louisiana Commission and the Arkansas Commission filed answers.

11. The Louisiana Commission argues that the Commission should commence a proceeding in which full discovery and, if necessary, a hearing, is permitted. The Louisiana Commission contends that Entergy's compliance filing conflicts with the methodology that has been approved by the Commission, and that the opportunity for discovery is necessary to determine the extent to which Entergy deviated from the tariff in determining what costs should be included in the bandwidth calculation. As an example, the Louisiana Commission contends that Entergy included short-term debt for Entergy Louisiana in the bandwidth calculation, even though that debt is excluded from the bandwidth calculation by agreement of the parties.<sup>15</sup>

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<sup>14</sup> *Id.* at 5.

<sup>15</sup> Louisiana Commission Protest at 2 (citing *Entergy Servs., Inc.*, 128 FERC ¶ 61,181(2009)).

12. The Louisiana Commission also contends that discovery in previous bandwidth proceedings has uncovered violations of the Commission's accounting regulations by Entergy. It argues that, because the Commission has made it clear that bandwidth proceedings are the proper proceedings in which to determine the correctness of Entergy's accounting, the absence of a hearing process could preclude parties from ensuring compliance with the tariff requirements.<sup>16</sup> The Louisiana Commission also argues that a hearing is necessary to determine if any cost inputs are unjust, unreasonable, or imprudent.<sup>17</sup>

13. The Council of the City of New Orleans also urges the Commission to set this case for hearing to permit parties to conduct sufficient discovery to ascertain whether Entergy's calculations and the accounting practices reflected in the calculations comport with the bandwidth formula. It explains that, although Entergy's filing is relatively lengthy, it does not contain enough information to assess whether it complies with the filed rate and the Commission's orders.<sup>18</sup>

14. The Arkansas Commission argues that Entergy's compliance filing should be rejected because it contemplates Entergy Arkansas making further bandwidth payments, even though Entergy Arkansas has withdrawn from the Entergy System Agreement. Entergy Arkansas argues that it has no continuing obligation under the System Agreement after December 19, 2013.<sup>19</sup> It contends that the issue is appropriately raised here because no prior order addressed the issue of whether, post-withdrawal from the Entergy System, Entergy Arkansas would be held liable for past bandwidth payments.

15. The Arkansas Commission argues that the Commission cannot require post-withdrawal payments from Entergy Arkansas. It notes that the Commission has previously held that withdrawal "required no further conditions ... other than the already proffered eight-year notice to the other Operating Companies."<sup>20</sup> The Arkansas Commission adds that the System Agreement does not compel withdrawing companies to

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<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> Council of the City of New Orleans Protest at 2.

<sup>19</sup> Arkansas Commission Protest at 3.

<sup>20</sup> *Id.* (citing *Council of the City of New Orleans v. FERC*, 692 F.3d 172, 175 (D.C. Cir. 2012) (*New Orleans*)).

pay exit fees.<sup>21</sup> The Arkansas Commission further argues that, because the System Agreement does not provide for payments or refunds after withdrawal, and no condition was later added despite expressed concern about the effect of withdrawal on refunds, Entergy Arkansas cannot be required to pay the refunds identified in the compliance filing.

16. The Arkansas Commission also argues that the time for amending the System Agreement to allow recovery was prior to Entergy Arkansas' withdrawal, because the filed rate doctrine prohibits assessing charges against former customers. It also argues that it was unclear whether the Commission would necessarily order refunds related to bandwidth implementation or interest in this case until after Entergy Arkansas withdrew from the System Agreement.<sup>22</sup> The Arkansas Commission concludes that this uncertainty distinguishes this case from a situation in which parties should have realized that additional payments would be due.

17. The Arkansas Commission contends that, in previous rulings, the Commission has drawn an analogy between Entergy Arkansas' withdrawal from the System Agreement and a transmission owner withdrawing from a Regional Transmission Organization (RTO) to join another.<sup>23</sup> It explains that, in determining the costs for which a transmission owner is responsible after it provides notice of its departure to the RTO, the Commission looks to the relevant contractual language, such as the wording of the tariff or the Operating Agreement. It contends that, accordingly, Entergy Arkansas should not be responsible for any further bandwidth payments under the System Agreement.<sup>24</sup>

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<sup>21</sup> *Id.* (citing Louisiana Commission, Motion to Permit Interlocutory Appeal of Order Staying Proceeding, Docket No. ER10-1350-001 at 8-9).

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 7 (citing, e.g., *Entergy Servs., Inc.*, 129 FERC ¶ 61,143, at P 60 (2009) (comparing the System Agreement with RTO operating agreements and noting that, unlike the exit provisions of some RTO operating agreements which explicitly condition withdrawal upon an exit fee, the System Agreement contains no such provisions)).

<sup>24</sup> *Id.*

#### IV. Discussion

##### A. Procedural Matters

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed in this proceeding and will, therefore, reject them.

##### B. Commission Determination

###### 1. Arkansas Commission Protest

19. We deny the Arkansas Commission's request to exclude Entergy Arkansas from making bandwidth payments due to its withdrawal from the System Agreement on December 18, 2013. As an initial matter, we note that, on February 28, 2014, the Commission issued the Order Rejecting Compliance Filing.<sup>25</sup> In that order, the Commission, inter alia, directed Entergy to perform a bandwidth calculation for the seven-month period at issue.<sup>26</sup> Nothing in that order indicated that Entergy Arkansas was to be omitted from the bandwidth calculation in Entergy's subsequent compliance filing; to the contrary, Entergy was directed to submit a new compliance filing and the Commission did not exclude Entergy Arkansas from any further stages of this proceeding. There was no uncertainty.<sup>27</sup> The Arkansas Commission could have requested rehearing of that order but failed to do so.

20. Even if we were to accept, arguendo, that this is the appropriate time for the Arkansas Commission to raise this issue, we would still reject the Arkansas Commission's request. The Arkansas Commission argues that such payments would be exit fees that the Commission and the United States Court of Appeals for the District of Columbia have determined cannot be assessed. We find this argument to be without merit. Any bandwidth payments assessed to Entergy Arkansas as a result of this proceeding are not "exit fees" as discussed in *Council of the City of New Orleans v. FERC*,<sup>28</sup> but instead are payments required under the System Agreement for services exchanged among the Operating Companies during seven months in 2005 that fall

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<sup>25</sup> See *supra* note 3.

<sup>26</sup> Order Rejecting Compliance Filing, 146 FERC ¶ 61,153 at PP 26-27.

<sup>27</sup> *Id.* PP 26-30.

<sup>28</sup> *New Orleans*, 692 F.3d at 176.

entirely within the period of Entergy Arkansas' participation. The court's ruling does not address or excuse Entergy Arkansas from paying its System Agreement obligations that existed prior to its exit. In addition, we disagree that the RTO analogy supports the Arkansas Commission's position. The Arkansas Commission argues that exit fees are allowed in the RTO context because the RTO agreements explicitly provide for those fees.<sup>29</sup> However, in the instant case, the required bandwidth payments – as stated above – are not exit fees, but instead are obligations specifically required by the System Agreement and are for a period when Entergy Arkansas was subject to the System Agreement.

## 2. Hearing and Settlement Judge Procedures

21. Entergy's compliance filing raises issues of material fact that cannot be resolved based on the record before us. These issues of material fact are more appropriately addressed in the hearing procedures and settlement judge procedures ordered below.

22. Our preliminary analysis indicates that Entergy's proposed rate schedule 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 Entergy's compliance filing for hearing and settlement judge procedures.<sup>30</sup>

23. While we are setting these matters for a trial-type evidentiary hearing, we 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 hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>31</sup> 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.<sup>32</sup> The settlement judge

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<sup>29</sup> Arkansas Commission Protest at 7.

<sup>30</sup> In the Order on Remand, the Commission established June 1, 2005 as the effective date for the rates in this proceeding. Order on Remand, 137 FERC ¶ 61,047 at P 34.

<sup>31</sup> 18 C.F.R. § 385.603 (2015).

<sup>32</sup> 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 this order. FERC's website contains a listing of the Commission's judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) –click on Office of Administrative Law Judges).

shall report to the Chief Judge and the Commission within 30 days of the date of 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 provide for commencement of a hearing by assigning the case to a presiding judge.

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 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 compliance filing. 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.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2015), 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.

(C) 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 toward settlement.

(D) If the 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 these proceedings in a hearing room of the Commission, 888 First Street, NE, 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. Commissioner Honorable is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.