111 FERC ¶ 61,198
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc. Docket No. ER05-696-000

ORDER ACCEPTING AND SUSPENDING AMENDMENTS TO SYSTEM AGREEMENT AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued May 9, 2005)

1. In this order, we accept for filing three amendments to Entergy Operating Companies' System Agreement (Entergy System Agreement) filed by Entergy Services, Inc. and suspend them for a nominal period to become effective May 11, 2005, subject to refund. We also establish hearing and settlement judge procedures. This order benefits customers because it provides the parties with a forum in which to resolve their disputes.

I. Background

2. On March 11, 2005, Entergy Services, Inc., as agent for the Entergy Operating Companies (Operating Companies) (collectively, Entergy),[1] filed three amendments to

[1] Entergy Corporation is a registered public utility holding company that owns all of the common stock of public utility companies collectively known as its Operating Companies. Entergy Services, Inc. is a subsidiary of Entergy Corporation that acts as agent for the corporation and for the Operating Companies in matters related to the Entergy System Agreement. The Operating Companies are: Entergy Arkansas, Inc., Entergy Louisiana Inc., Entergy Gulf States, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. The Operating Companies provide wholesale and retail electric service in the states of Arkansas, Louisiana, Texas, and Mississippi.

the Entergy System Agreement.[2] Entergy requests that the Commission "accept these amendments for filing effective sixty (60) days after filing or May 10, 2005."

3. Entergy's first proposed amendment is to modify the definition of "capability," in section 2.14 of the Entergy System Agreement, to clarify that an Operating Company's capability will not include the portion of a unit owned by an Operating Company, the output of which has been sold to another Company. This would occur when an Operating Company sells a portion of the output of a unit it owns to another Operating Company or to an unaffiliated entity. This amendment would clarify that an Operating Company's capability can only be that capability that it can rely on to meet the loads of its retail and wholesale customers.

4. The second and third proposed amendments affect Service Schedule MSS-1 of the Entergy System Agreement. The purpose of Service Schedule MSS-1 is to govern the sharing of reserves costs among the Operating Companies so that each Operating Company's share of reserves costs matches its capability responsibility.[3] Under Service Schedule MSS-1, "short" Operating Companies (those with capacity less than their capability responsibility) pay "long" Operating Companies (those with capacity in excess of their capability responsibility). These payments are currently calculated according to a formula that adjusts monthly to reflect changes in the capital and operating costs of *all* of the "long" Operating Companies' gas and oil-fired generating units.

5. Entergy's second proposed amendment is to modify the definition of "Company Capability" in section 10.02 of Service Schedule MSS-1. This amendment would exclude the portion of a unit whose output has been sold or leased to another Operating

[2] The current Entergy System Agreement is an interconnection and pooling agreement among the Operating Companies and Entergy Services, Inc. Entergy explains that the Entergy System Agreement requires the central economic dispatch of the Operating Companies' generating units and provides for the exchange of energy among the Operating Companies. The Entergy System Agreement consists of seven Service Schedules: MSS-1 (Reserve Equalization), MSS-2 (Transmission Equalization), MSS-3 (Exchange of Electric Energy Among the Companies), MSS-4 (Unit Power Purchase), MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies, MSS-6 (Distribution of Operating Expenses of System Operation Center), and MSS-7 (Merger Fuel Protection Procedure).

[3] The sum of all Operating Companies' generating capability is equal to the System Capability. An Operating Company's capability responsibility is the amount of System Capability allocated to each Operating Company, based on its load responsibility. The capability responsibility is then compared to the Operating Company's actual capability to determine whether it is "long" or "short."

Company or unaffiliated entity from the definition of "company capability." This change is similar to the proposed revision of section 2.14, as described above.

6. Entergy's third proposed amendment is to modify section 10.05 "Investment in Reserve Generating Units" of Service Schedule MSS-1. This section defines those generation units used to determine price under Service Schedule MSS-1 as all gas and oil-fired units of a "long" Operating Company. Entergy proposes to limit these gas and oil-fired units to those having an average annual heat rate of at least 10,000 Btus per kWh. It asserts that this amendment will allow MSS-1 transactions to be priced based on those gas and oil-fired generating units that generally provide reserve capability. Otherwise, Entergy states, a "short" Company could be providing significant cost support for a very efficient, gas-fired generating resource that is not actually serving a reserve or peaking function.

II. Notice of Filing, Intervention, and Protest

7. Notice of Entergy's filing was published in the *Federal Register*, 70 Fed. Reg. 15,078 (2005), with comments, interventions, and protests due on or before April 1, 2005. The Mississippi Public Service Commission (Mississippi Commission), Arkansas Public Service Commission (Arkansas Commission), and the Council of the City of New Orleans (New Orleans) filed notices of intervention. The Louisiana Energy Users Group (Louisiana Energy), Occidental Chemical Corporation (Occidental), Arkansas Electric Cooperative Corporation (Arkansas Electric), and Arkansas Electric Energy Consumers, Inc. (Arkansas Energy) filed motions to intervene. The Louisiana Public Service Commission (Louisiana Commission) filed a notice of intervention, protested Entergy's filing, and later amended its protest. Entergy filed an answer to the Louisiana Commission's original protest, later corrected this answer, and later filed an answer to the Louisiana Commission's amended protest. The Arkansas Commission filed an answer to the Louisiana Commission's protest.

8. In its protest, the Louisiana Commission requests that the Commission reject Entergy's proposed change to section 10.05 of Service Schedule MSS-1 of the Entergy Service Agreement. It contends that this change will significantly impact the Operating Companies by lowering the MSS-1 rate paid to the "long" Operating Companies. It claims that the Louisiana retail customers of two Operating Companies: Entergy Louisiana, Inc. and Entergy Gulf States, Inc., regulated by the Louisiana Commission, will be affected by the proposed amendment.

9. The Louisiana Commission states that since the inception of the current Entergy System Agreement in 1982, *all* gas and oil-fired units have been used to determine the Service Schedule MSS-1 prices, regardless of their heat rate or whether they served a peaking function. It argues that Entergy has not provided an adequate justification or sufficient information to support its proposed change.

10. The Louisiana Commission further contends that Entergy has provided no evidence as to the reasonableness of using a 10,000 Btu threshold, nor has it provided evidence as to the actual or expected operating characteristics of gas or oil-fired units on the Entergy System with heat rates below 10,000 Btus per kWh. It states that much of Entergy's oil and gas capacity with heat rates above 10,000 Btus per kWh operate as load following units. Under Entergy's proposed amendment, these units will continue to be included in MSS-1 pricing, even though they are not serving a peaking function.

11. The Louisiana Commission argues that the purpose of the proposed change to the definition of "capability" in section 2.14 and "company capability" in section 10.02 of the Entergy System Agreement is not clear and that Entergy has not provided an adequate reason for the amendments. It contends that it is unclear why the amendments are necessary, given that the changes are self-evident interpretations under the current agreement.

12. Finally, in its protest, the Louisiana Commission expresses concern that the proposed changes to sections 2.14 and 10.02 will affect the applicability of section 3.05 of the Entergy System Agreement. Section 3.05 provides each Operating Company with a right of first refusal on generating capacity in excess of an Operating Company's needs that it desires to sell. In other words, an Operating Company must first offer its excess capacity to each of the other Operating Companies before it can sell or lease the capacity to another entity. The Louisiana Commission argues that it is unclear whether Entergy's proposed amendments will affect this right of first refusal and asserts that they should not be accepted, unless clarified or conditioned to make certain that there is no impact on section 3.05.

13. In its amended protest, the Louisiana Commission withdraws its objection to Entergy's proposed amendment to section 10.05 of Service Schedule MSS-1 but requests that the Commission investigate whether this proposed amendment to section 10.05, to exclude gas and oil-fired units with a heat rate below 10,000 Btus per kWh, is just and reasonable or whether a more appropriate method for distinguishing reserve capacity should be adopted. The Louisiana Commission also still objects to amending the definition of "capability" in section 2.14 and the definition of "company capability" in section 10.02 of the System Agreement. It requests that the Commission limit these amendments so that they apply only to sales "among and between operating companies," in order to ensure compliance with section 3.05 of the Entergy System Agreement.[4]

[4] According to the Louisiana Commission, unless the definitions are limited to sales between and among the Operating Companies, the amendments would allow sales of excess system capacity to third parties, without offering the Operating Companies a right of first refusal.

14. On April 28, 2005, the Louisiana Commission filed what is characterized as a notice of renewal of issue (*i.e.*, a protest), regarding whether replacement costs for sulfur dioxide emission allowances may be billed through Service Schedule MSS-3 of the Entergy System Agreement. The Louisiana Commission asserts that it filed this notice pursuant to Commission Opinion 468-A, which issued on April 18, 2005, in which the Commission held that the "Louisiana Commission may renew this issue in the next case Entergy files regarding the [Entergy] System Agreement, or it may file a complaint raising the issue."[5] The Louisiana Commission argues that it is appropriate to resolve this issue in the present case, since it is the "next case Entergy filed regarding the [Entergy] System Agreement."[6]

15. On April 29, 2005, Entergy filed an answer in opposition to the Louisiana Commission's notice, arguing that it is untimely and denies Entergy due process to respond to the substantive allegations. Entergy contends that this proceeding is not the "next [Entergy] System Agreement case" because Entergy filed the present amendments on March 11, 2005, more than one month before the Commission issued Opinion 468-A on April 18, 2005. It states that the "next [Entergy] System Agreement case" must be a case that commences after April 18, 2005. Further, Entergy argues that this notice of renewal of issue was filed 27 days after the intervention deadline and 6 days before the Commission intends to act in its May 4, 2005 meeting, thereby depriving Entergy of an opportunity to respond fully prior to the Commission meeting.

III. Discussion

A. Procedural Matters

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

17. Rule 213(a)(2) of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy's answers or Arkansas' Commission's answer and will, therefore, reject them.

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[5] *Louisiana Public Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp.; Entergy Servs., Inc., Louisiana Public Serv. Comm'n v. Entergy Servs., Inc.*, 111 FERC ¶ 61,080 at P 26 (2005). The Commission found that the sulfur dioxide issue was not properly included in Docket No. EL01-88-000 nor was the Commission prepared to decide the issue in Docket No. EL95-33-005. *Id.*

[6] Notice of Renewal of Issue at 1.

B. Hearing Procedures

18. We will not allow the issue of whether replacement costs for sulfur dioxide emission allowances may be billed through Service Schedule MSS-3 of the Entergy System Agreement to be considered in this proceeding. Although in Opinion 468-A we stated that the "Louisiana Commission may renew this issue in the next case Entergy files regarding the [Entergy] System Agreement,"[7] we did not intend for this statement to be interpreted so broadly as to permit the Louisiana Commission to include an issue related to Service Schedule MSS-3 in any filing made by Entergy related to the Entergy System Agreement. Rather, we intended that if Entergy filed to revise Service Schedule MSS-3 or filed other revisions to the System Agreement that relate to Service Schedule MSS-3, the Louisiana Commission would be able to raise the issue in its protest. However, in the present situation, Entergy's proposed amendments affect Service Schedule MSS-1 and one definition in the Entergy System Agreement, none of which relate to Service Schedule MSS-3. Thus, we conclude that this proceeding is not the proper forum for the Louisiana Commission to resolve the sulfur dioxide issue. To the extent that the Louisiana Commission desires, at this time, consideration of this issue, it may file a complaint, as provided in Opinion 468-A.

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

20. Our preliminary analysis indicates that the amendments to Entergy's System Agreement have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the proposed amendments for filing, suspend them for a nominal period, make them effective May 11, 2005,[8] subject to refund, and set them for hearing and settlement judge procedures.

21. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will 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.[9] If the parties desire they may, by

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[7] 111 FERC at 61,080.

[8] Absent waiver, this is the earliest date that Entergy's proposed amendments can be made effective (after 60-days notice).

[9] 18 C.F.R. § 385.603 (2004).

mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.[10] 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.

The Commission orders:

(A) The proposed amendments to the Entergy System Agreement are hereby accepted for filing, and suspended for a nominal period, to become effective May 11, 2005, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 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 justness and reasonableness of the proposed amendments to the Entergy System Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in 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 (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. 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 in writing or by telephone within five (5) days of the date of this order.

(D) 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

[10] 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).

discussions continue, the settlement judge shall file a report at least sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward 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 this proceeding in a hearing room of the Commission, 888 First Street, N.E., 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)

Linda Mitry,
Deputy Secretary.