

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.

Docket No. ER01-2214-007

ORDER ACCEPTING REFUND REPORT
AND DIRECTING FURTHER COMPLIANCE FILINGS

(Issued September 25, 2006)

1. In this order we accept for filing a refund report filed by Entergy Services, Inc. (ESI), on behalf of the Entergy Operating Companies, submitted in compliance with the Commission's earlier order in this proceeding¹ and describing ESI's calculation of refunds. We also require further compliance filings with regard to further payment of refunds.

Background

2. The Entergy Operating Companies include Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, LLC, Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (ENOI). On June 1, 2001, ESI, on behalf of all of the Entergy Operating Companies, filed revisions to the ancillary services provisions of Schedules 3 through 6 of its Open Access Transmission Tariff (OATT). The Commission accepted the proposed revisions, suspended them for a nominal period, allowed them to become effective August 1, 2001 subject to refund, and set them for hearing.²

3. The presiding administrative law judge (presiding judge) issued an Initial Decision that found some aspects of the filing to be unjust and unreasonable.³ On July 25, 2001,

¹ *Entergy Services, Inc.*, 114 FERC ¶ 61,286 (2006) (March 17 Order).

² *Entergy Services, Inc.*, 96 FERC ¶ 61,113 (2001) (July 25 Order).

³ *Entergy Services, Inc.*, 102 FERC ¶ 63,016 (2003) (Initial Decision).

the Commission affirmed and adopted the presiding judge's findings on the majority of the issues.⁴

4. On rehearing, the Commission clarified certain issues and directed ESI to submit a compliance filing.⁵ In an effort to comply with the October 28 Order, on November 29, 2004, ESI submitted proposed revised tariff sheets for the ancillary services contained in Schedules 3 through 6 of the Entergy OATT. In the March 17 Order, the Commission accepted ESI's November 29 compliance filing and directed Entergy to calculate refunds of the penalty revenues under Schedule 4 (involving Energy Imbalance Service) and to file a refund report within 30 days thereafter.⁶ In response, ESI filed the refund report at issue here.

Notice of Compliance Filing and Pleadings

5. Notice of ESI's refund report was published in the *Federal Register*, 71 Fed. Reg. 30,909 (2006), with interventions and protests due on or before June 1, 2006. On June 1, 2006, MDEA Cities⁷ filed a protest. ESI filed an answer to MDEA Cities' protest.

Discussion

A. Procedural Matters

6. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept ESI's answer, notwithstanding the general prohibition on the filing of an answer to a protest, as the answer has provided information that assisted us in our understanding and resolution of the issues raised.

⁴ *Entergy Services, Inc.*, 105 FERC ¶ 61,319 (2003) (December 22 Order), *errata*, 106 FERC ¶ 61,108 (2004).

⁵ *Entergy Services, Inc.*, 109 FERC ¶ 61,095 (2004) (October 28 Order).

⁶ March 17 Order at P 10-23, Ordering Paragraph B.

⁷ The MDEA Cities include Mississippi Delta Energy Agency, the Clarksdale Public Utilities Commission of the City of Clarksdale, Mississippi, and the Public Service Commission of Yazoo City, Mississippi.

B. Refund Report**ESI's Refund Report**

7. On May 11, 2006, ESI filed a refund report describing refunds to the applicable customers for revenues collected pursuant to Schedule 4 (involving Energy Imbalance Service) for the period August 1, 2001 through December 31, 2005. In particular, the report identifies total refunds of \$727,304.11 to MDEA Cities and \$64,784.97 to EWO Marketing, LP (EWOM), including interest calculated in accordance with section 35.19a of the Commission's regulations.⁸

8. ESI indicates, however, that the amounts refunded to MDEA Cities and EWOM do not include that portion of the load ratio share attributable to ENOI. ESI states that on September 23, 2005 ENOI filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. ESI states that as a result of the bankruptcy filing, and because ESI acts not on its own behalf but as agent for ENOI and the other Entergy Operating Companies, refund amounts attributable to ENOI for the period prior to September 23, 2005, as well as interest on such refund amounts, have not been paid to MDEA Cities and EWOM. ESI maintains that, in total, it withheld \$38,138.50 from MDEA Cities and \$3,188.98 from EWOM. ESI adds that it has notified MDEA Cities and EWOM of their additional refund entitlement and reports that it has provided these entities with information to allow them to file proofs of claim with the bankruptcy court.

MDEA Cities' Protest

9. MDEA Cities argue that ESI's refund report fails to cite any authority for compartmentalizing the refund obligations under ESI's single OATT. MDEA Cities state that ESI provides service under a single, system-wide OATT, and that its refund report does not identify any authority for ESI's claim that amounts collected subject to refund, under proposed revisions to ESI's OATT that the Commission subsequently rejects, are considered obligations of individual Entergy Operating Companies as opposed to obligations of ESI. MDEA Cities, therefore, protest the withholding of any refunds based upon ENOI's bankruptcy filing. MDEA Cities further argue that ESI's refund report fails to explain or justify the calculation of the amounts attributed to ENOI.

ESI's Answer

10. ESI contends that the Commission should dismiss MDEA Cities' protest. ESI states that it owns no transmission assets and does not provide transmission service, and that its role is solely to act as the agent of the Entergy Operating Companies in the

⁸ See 18 C.F.R. § 35.19a (2006).

administration of certain contracts and in Commission proceedings, and that transmission service is actually provided by the individual Entergy Operating Companies under the OATT. Thus, ESI states, any obligations to make refunds are the obligations of the Entergy Operating Companies, and are not obligations of ESI.

11. ESI states that it withheld the approximately \$38,000 attributable to service from ENOI from MDEA Cities because, on September 23, 2005, ENOI filed for bankruptcy. Therefore, ESI argues, ENOI's property and assets are now subject to the jurisdiction of the bankruptcy court. ESI states that MDEA Cities press a claim for monetary relief that is no different from any other pre-petition claim for payment against ENOI's bankruptcy estate. ESI asserts that the bankruptcy court has jurisdiction over the assets of ENOI,⁹ and that, under section 362(a) of the Bankruptcy Code, the filing of a petition for reorganization:

operates as a stay, applicable to all entities, of ... the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.¹⁰

Thus, ESI states, section 362(a) prevents MDEA Cities from continuing its collection action in this forum.

12. Additionally, ESI suggests that MDEA Cities should not be permitted to disrupt the effective administration of pre-petition claims against ENOI's assets by seeking relief in this forum. ESI argues that MDEA Cities' protest, if not dismissed, would allow MDEA Cities an avenue of relief not available to ENOI's other creditors, contrary to the clear intent and plain meaning of the Bankruptcy Code that all matters related to pre-petition claims against ENOI's assets be consolidated in a single forum. Finally, ESI states it notified MDEA Cities of their additional refund entitlement and provided MDEA Cities with information to allow them to file a proof of claim with the bankruptcy court, and that MDEA Cities have filed such a proof of claim.

Commission Determination

13. ESI asserts that, because ENOI has filed for bankruptcy protection, the Commission may not order refunds to be made from funds that, since August 1, 2001, have been collected subject to refund.¹¹ ESI's argument assumes that refunds due to

⁹ In support of this view, ESI cites 28 U.S.C. § 1334(e) (2000).

¹⁰ 11 U.S.C. § 362(a) (2000).

¹¹ See 16 U.S.C. § 824d(e) (2000).

customers of amounts that were charged to them, subject to refund, before the Commission determined those rates to be just and reasonable form part of the bankruptcy estate and are under the jurisdiction of the bankruptcy court. However, the bankruptcy court has not yet made this determination.

14. In order to comply with its obligation to this Commission to make appropriate refunds, we recognize that ESI will need to seek an opinion from the bankruptcy court as to whether the refund amounts form part of the bankruptcy estate. We will therefore require ESI to make a compliance filing with us within 90 days of the date of this order as to the status of the proceedings in bankruptcy court on this specific question.

15. Once a determination is made by the bankruptcy court, if the bankruptcy court finds that those refund amounts form part of the bankruptcy estate of ENOI, in that case, as ESI suggests, the disposal of those amounts will take place under the jurisdiction of the bankruptcy court. In the event, however, that the bankruptcy court determines that those refund amounts do not fall within the bankruptcy estate,¹² we will require ESI to distribute those amounts to MDEA Cities and EWOM, pursuant to the Commission's March 17 Order. As ESI states, it is not subject to our jurisdiction as a public utility under sections 205 and 206 of the Federal Power Act (FPA).¹³ However, that is beside the point. ESI is a service company subsidiary of Entergy Corporation and, as particularly relevant here, agent for ENOI with respect to the administration of the Entergy OATT. If the bankruptcy court rules that the refund amounts do not fall within the bankruptcy estate, ESI must, as ENOI's agent, proceed to distribute those refund amounts attributable to ENOI. We will require ESI, within 30 days of receiving the bankruptcy court's determination on the question of whether the refund amounts are within the bankruptcy estate, to make a filing with this Commission lodging that determination with us, and, if the bankruptcy court determines that the refund amounts at issue do not form part of ENOI's bankruptcy estate, providing a further refund report with regard to ESI's distribution of refunds to MDEA Cities and EWOM.

¹² See *In re Columbia Gas Systems, Inc.* 997 F.2d 1039, 1059, 1062 (3rd Cir. 1993) (*Columbia Gas*), cert. denied, 510 U.S. 1110 (1994) (court holds that customer refunds held by a bankrupt pipeline were held in trust for the customer and thus were not part of the bankruptcy estate). We believe that the principles articulated in *Columbia Gas* are equally applicable to the facts here. When ENOI began charging its new rates on August 1, 2001, which were subject to refund, it did so as, in essence, a trustee for that portion of the rates that ultimately might be required to be refunded to customers. For this reason, we do not believe that these refunds are part of the bankruptcy estate.

¹³ See 16 U.S.C. §§ 824, 824d, 824e (2000).

16. We disagree with MDEA Cities' assertion that the refund report fails to justify the calculation of the \$38,138.50 attributable to ENOI. In its answer to the protest, ESI explains that revenues under the OATT are allocated to the Entergy Operating Companies based on each operating company's responsibility ratio,¹⁴ and, once ESI has calculated the total refund due to MDEA Cities and EWOM under Schedule 4, a further calculation is performed to discern the amount attributable to ENOI for the pre-petition period, and including post-petition interest. ESI has sufficiently explained its calculation of the amounts attributable to ENOI.

The Commission orders:

(A) ESI's refund report is in compliance with the March 17 Order, and is hereby accepted for filing.

(B) ESI is hereby required to file a report, within 90 days of the date of this order, as to the status of the proceedings in bankruptcy court on the question of whether the refund amounts at issue here form part of the bankruptcy estate.

(C) ESI is hereby required to make a filing, within 30 days of receiving the bankruptcy court's determination on the question of whether the refund amounts form part of the bankruptcy estate, lodging that determination with this Commission, and, if the bankruptcy court determines that the refund amounts at issue do not form part of ENOI's bankruptcy estate, providing a further refund report with regard to ESI's distribution of refunds to MDEA Cities and EWOM.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁴ ESI states that the responsibility ratio of each operating company is the ratio obtained by dividing the load responsibility of that company by the load responsibility of the Entergy system.