129 FERC ¶ 61,143
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Entergy Services, Inc. Docket No. ER09-636-000

ORDER ACCEPTING NOTICES OF CANCELLATION

(Issued November 19, 2009)

1. On February 2, 2009, Entergy Services, Inc. (Entergy), as agent and on behalf of two of the Entergy Operating Companies (Operating Companies),[1] Entergy Arkansas and Entergy Mississippi, submitted for filing, pursuant to sections 35.15 and 131.53 of the Commission's regulations,[2] Notices of Cancellation of Entergy Arkansas and Entergy Mississippi to terminate their participation in the Entergy System Agreement (System Agreement). In this order, we accept the Notices of Cancellation.

I. Entergy's Filing

2. Entergy submitted the Notices of Cancellation pursuant to section 1.01 of the System Agreement, a Commission-accepted rate schedule that governs, among other things, the allocation of certain costs associated with the currently integrated operations of the Entergy System. Entergy states that on December 19, 2005, Entergy Arkansas notified the other Operating Companies of its intent to withdraw from the System Agreement effective 96 months after that date, or December 18, 2013. Entergy also states that on November 8, 2007, Entergy Mississippi gave the same notice, with its withdrawal effective 96 months after that date, or November 7, 2015.

[1] The Operating Companies are Entergy Arkansas, Inc. (Entergy Arkansas); Entergy Mississippi, Inc. (Entergy Mississippi); Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana); Entergy Louisiana, LLC (Entergy Louisiana); Entergy Texas, Inc., (Entergy Texas) and Entergy New Orleans, Inc. (Entergy New Orleans). The generation and bulk transmission systems of all the Operating Companies are collectively referred to as the Entergy System.

[2] 18 C.F.R. §§ 35.15 & 131.53 (2009).

3. Entergy argues that in prior proceedings, such as the complaint in Docket No. EL07-25-000, the Louisiana Public Service Commission (Louisiana Commission) and the Council of the City of New Orleans (New Orleans) have acknowledged that the System Agreement explicitly gives any Operating Company the right to withdraw, and is completely silent as to what rights and obligations pertain to the Operating Companies upon such withdrawal. Entergy contends that this withdrawal right is unilateral given the plain language of section 1.01 of the System Agreement, which was accepted by the Commission in 1982.[3] Entergy argues that, consistent with Commission precedent on termination clauses,[4] the withdrawing Operating Companies will have no remaining obligations under the System Agreement.

4. Entergy states that it anticipates a post-withdrawal "4-1-1 scenario," whereby each of the withdrawing companies operates as an individual Balancing Authority alongside the four remaining Operating Companies, and argues that this scenario is viable given the withdrawing companies' large sizes. Entergy further contends that the Independent Coordinator of Transmission (ICT) would continue to serve as Reliability Coordinator for these three Balancing Authorities.[5] Entergy proposes that each of the withdrawing companies and the remaining aggregate four companies would become a network customer under the Operating Companies' open access transmission tariff (OATT), and that the transmission system would continue to be planned and operated as a single system. Entergy anticipates that each of the remaining Operating Companies would continue to transact capacity and energy sales with each other pursuant to the service schedules of the System Agreement, but that Entergy Arkansas and Entergy Mississippi

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[3] Section 1.01 of the System Agreement states:

> This Agreement shall become effective on August 1, 1982, or such later date as may be fixed by any requisite regulatory approval or acceptance for filing and shall continue in full force and effect until terminated by mutual agreement of the Companies. Notwithstanding this, any Company may terminate its participation in this Agreement by ninety six (96) months written notice to the other Companies hereto.

[4] Entergy's Notice of Cancellation at 6 (*citing Kansas Power & Light Co.*, 56 FERC ¶ 61,466 (1991), *Boston Edison Co.*, 56 FPC 3414 (1976)).

[5] *Entergy Services, Inc.*, 115 FERC ¶ 61,095 (ICT Approval Order), *order on reh'g*, 116 FERC ¶ 61,275 (2006). In the ICT Approval Order, the Commission approved the Southwest Power Pool as the ICT. Some of the duties of the ICT include processing transmission service requests, calculating available flowgate capability, and overseeing the Weekly Procurement Process.

would only transact with the remaining Operating Companies through Commission-accepted affiliate transactions.

5. Entergy asserts that the 96 month notice period provides ample time for generation resource planning, and that Entergy Louisiana and Entergy New Orleans have each in fact been pursuing additional base load capacity since the cancellation notices.

6. Entergy contends that, with this filing, it has filled the information "vacuum" that the Commission found in its order denying the Louisiana Commission's complaint in Docket No. EL07-25-000 on the same issue of withdrawal from the Entergy System, [6] and urges the Commission to accept the proposed Notices of Cancellation without suspension or further proceedings. However, should the Commission determine that a trial-type hearing is necessary, Entergy requests that the parties advocating continuing obligations among all Operating Companies have the burden of proof at hearing.

7. Entergy requests a waiver of the 120-day advance notice requirement, and contends that expeditious resolution of this advanced filing will benefit all parties, because it will provide the certainty needed in order to make timely future planning decisions for reliable and efficient operation of all of its Operating Companies.

II. Notice of Filing and Responsive Pleadings

8. Notice of Entergy's filing was published in the *Federal Register*,[7] with protests and interventions due on or before March 19, 2009. Notices of intervention including comments and/or protests were filed by the Arkansas Public Service Commission (Arkansas Commission), New Orleans, and the Louisiana Commission. A notice of intervention raising no issues was filed by the Mississippi Public Service Commission (Mississippi Commission). Timely motions to intervene raising no issues were filed by the Arkansas Electric Cooperative Corporation and NRG Companies. Timely motions to intervene including comments and/or protests were filed by the Louisiana Energy Users Group (LEUG); Union Power Partners, L.P. (Union Power); Arkansas Electric Energy Consumers, Inc. (AEEC); and East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc. (East Texas Cooperatives). Motions to intervene out-of time were filed by Cottonwood Energy Company, LP; Lafayette Utilities System, Mississippi Delta Energy Agency, Municipal

[6] *Louisiana Public Service Comm'n*, 119 FERC ¶ 61,224, at P 10 (2007) (June 2007 Order).

[7] 74 *Fed. Reg.* 7416 (2009).

Energy Agency of Mississippi, and Louisiana Energy and Power Authority; Texas Industrial Energy Consumers; and the Public Utility Commission of Texas.

9. Answers were filed by the Arkansas Commission and New Orleans. Entergy filed an answer, and in the alternative, a motion for paper hearing. The Arkansas and Mississippi Commissions filed a joint answer to Entergy's motion for paper hearing. New Orleans filed an answer to the answers filed by Entergy and the Arkansas Commission, and the Louisiana Commission filed an answer to Entergy's answer and motion for paper hearing.

III. Comments and Protests

10. New Orleans argues that the Commission should reject outright the Notices of Cancellation filed by Entergy on behalf of Entergy Arkansas and Entergy Mississippi, or in the alternative, should set the issues for hearing.

11. New Orleans contends that Entergy's cancellation filing violates and collaterally attacks the June 2007 Order, which dismissed a complaint by the Louisiana Commission seeking a determination of whether, and on what terms, Entergy Arkansas may withdraw from the System Agreement. New Orleans argues that because the Commission's June 2007 Order directed Entergy to submit a section 205 filing "as early as 18 months prior to the date that Entergy Arkansas' withdrawal becomes effective,"[8] Entergy Arkansas and Entergy are required to make the present filing no earlier than June 2012.[9] New Orleans asserts that the Commission has already found that Entergy can submit its section 205 filing 14 months earlier than allowed under the 120-day advance notice requirement, but that there is no basis to increase that waiver by another three years. New Orleans suggests that such a waiver would inhibit the ability of the Commission to access current information to adequately assess whether the post-withdrawal Entergy System will be just and reasonable for the remaining Operating Companies, because such information would be speculative at best.

12. New Orleans argues that Entergy's filing raises the same issue resolved in the June 2007 Order – the need for and timing of a section 205 filing addressing Entergy Arkansas' withdrawal from the System Agreement, and thus is precluded by the doctrines of *res judicata* and collateral estoppel. New Orleans characterizes the current filing as requiring the Commission to "expend significant resources" to render a decision that

[8] June 2007 Order, 119 FERC ¶ 61,224 at P 50.

[9] The proposed Entergy Arkansas withdrawal becomes effective December 18, 2013.

"could lead to an inaccurate result," [10] citing these as reasons that prevented the Commission from making a decision in the June 2007 Order.

13. New Orleans argues that Entergy has not met its burden of demonstrating that the proposed cost-free withdrawals of Entergy Arkansas and Entergy Mississippi from the Entergy System are just and reasonable. New Orleans contends that the proposed withdrawals will return the Entergy System at least to its 2005 production cost imbalances, which the Commission has characterized as unjust, unreasonable, and unduly discriminatory.[11] New Orleans asserts that by leaving the Entergy System, Entergy Arkansas would have lower production costs and enjoy "near sole use of and benefits from the low-cost generating units which were planned and constructed for the benefit of all system members."[12] New Orleans asserts that the Commission has the authority to order transition measures in the form of continued bandwidth payments or other payments for loss of access to the Arkansas based generating units. Further, New Orleans argues that, if the Commission accepts Entergy Arkansas' exit from the Entergy System, the Commission should impose certain continuing obligations for bandwidth payments, or design some other remedy to compensate the Entergy System for the loss of low-cost generation.

14. New Orleans asserts that none of the information necessary to meaningfully assess the justness and reasonableness of the cancellation filing is current or available yet, because Entergy Arkansas will not be withdrawing for another four years and Entergy Mississippi will not be withdrawing for another six years, during which time fuel costs, availability of resources and access to resources can change. As an alternative to outright rejection of the cancellation filing, New Orleans asks the Commission to suspend Entergy's filing and set the issues raised in it for hearing. New Orleans argues that a hearing would give the customers and retail regulators of the remaining Operating Companies the opportunity to present evidence establishing: (1) that new operational structures proposed by Entergy are not just and reasonable; (2) the amount and type of

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[10] New Orleans Protest at 15 (*citing* June 2007 Order, 119 FERC ¶ 61,224 at P 49).

[11] *Id.* at 18 (*citing Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 136 (2005) (Opinion No. 480), *aff'd, Louisiana Public Service Comm'n v. Entergy Services. Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005) (Opinion No. 480-A) (providing for cost allocation that requires certain bandwidth payments between the Operating Companies in order to maintain rough production cost equalization between the Operating Companies).

[12] *Id.*

generation resources needed to provide these services and make the Entergy System just and reasonable; and (3) the amount and type of resources needed to satisfy North American Electric Reliability Corporation (NERC) rules and Reliability Standards.

15. New Orleans asserts that withdrawal without continuing obligations would fundamentally alter the Entergy System and its generation portfolio and undermine the assumptions forming the basis of the bandwidth remedy, by taking assets off the Entergy System that Entergy and its Operating Committee have repeatedly represented were planned, built and operated for the "benefit" of all members of the Entergy System, and by extension, their ratepayers. New Orleans asserts that had it known that Entergy Arkansas or Entergy might suddenly remove all of the coal-fired units from the Entergy System without recompense, it very well may have required a more diversified portfolio of generation in New Orleans to protect its ratepayers from the possible combined effect of: (1) an increase in gas prices; and (2) the unavailability of lower-cost generation resources.

16. New Orleans argues that Entergy Arkansas' proposed cost-free withdrawal of generation assets from the Entergy System will restore the Entergy System inequities that the Commission has already found to be unjust and unreasonable, having only recently completed the exercise of analyzing cost allocations under the System Agreement and developing an appropriate remedy. New Orleans argues that Entergy Arkansas is equitably estopped from acting inconsistently with earlier representations, which New Orleans claims were made with the purpose of inducing reliance by New Orleans that generating units were being planned, built, and operated for the express benefit of all Entergy System members. New Orleans asserts that, in *Duquesne Light Company*,[13] the Commission refused to allow a withdrawing utility to escape from obligations of a Regional Transmission Organization (RTO) interconnectivity agreement, holding that other parties had detrimentally relied on the utility in acquiring generation capacity on its behalf.

17. New Orleans argues that Entergy should be required to demonstrate that each of the remaining Operating Companies would have the capability to independently function as a Balancing Authority, including meeting NERC Reliability Standards. New Orleans asserts that Entergy does not indicate which functional requirements are to be carried out directly by Entergy or by another party, nor does it provide transition or readiness plans. New Orleans characterizes Entergy's filing statements as "generalized statements [that] do not address the resource-specific criteria needed to determine whether each Operating

[13] *Duquesne Light Company*, 122 FERC ¶ 61,039 (2008) (order concerning Duquesne's withdrawal from PJM Interconnection, LLC (PJM)).

Company can qualify as its own Balancing Authority"[14] and criticizes the Operating Committee for having taken no steps to conduct studies or make investment decisions as required by the System Agreement since Entergy Arkansas noticed its withdrawal over three years ago.

18. New Orleans argues that Entergy has attempted to improperly shift its burden of proving justness and reasonableness to the Commission by asking the Commission to determine which additional information is necessary to rule on the cancellation filing. New Orleans asserts that Entergy's filing is inadequate, in part, because it fails to address the likelihood that withdrawal by Entergy Arkansas and Entergy Mississippi (the "4-1-1 scenario") will prompt one or more of the remaining Operating Companies to withdraw, ultimately leaving a "1-1-1-1-1-1 scenario" of companies without the necessary resources and capability to be NERC-compliant.

19. New Orleans characterizes the cancellation filing as an attempt by Entergy Arkansas, Entergy and the Arkansas Commission to evade the remedies ordered in the Commission's bandwidth decisions. New Orleans asserts that Commission approval of a cost-free exit would create a blueprint for evasion of unfavorable Commission orders by affiliates of multi-state holding companies and their retail regulators, and will encourage corporate manipulation within holding companies. New Orleans asserts that Entergy Arkansas, Entergy, and the Arkansas Commission have failed in opposing the revised cost allocation formula in Opinion Nos. 480 and 480-A through active litigation, and thus have negotiated around the Commission-ordered remedies.

20. New Orleans cites precedent for a Commission policy of closely monitoring affiliate transactions to prevent abuse to the detriment of captive ratepayers or of wholesale competition,[15] and argues that Entergy Arkansas' withdrawal would subsidize parent company shareholders at the expense of the remaining utilities' captive customers, including ratepayers in the City of New Orleans. New Orleans contends that Entergy Arkansas would be free to sell lower cost surplus energy from its Arkansas-based generation in wholesale markets, increasing profitability and therefore increasing dividend payments to Entergy, at the expense of affiliates' customers. New Orleans notes that the Mississippi Attorney General has filed suit against Entergy Mississippi alleging the same affiliate abuse.

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[14] New Orleans Protest at 31.

[15] *Id.* at 43 (*citing, inter alia, Southern Co. Serv., Inc.*, 111 FERC ¶ 61,146, at 61,771-72 (2005)).

21. New Orleans argues that Entergy Arkansas' withdrawal will also require the Commission to revisit approvals of numerous transactions involving Entergy and the Operating Companies under Federal Power Act (FPA) sections 203 and 205[16] that were based on representations that the Entergy System operates as a single entity. New Orleans argues that numerous past orders require Entergy to notify the Commission of any change of circumstance that affects the facts on which the Commission relied in granting the authorization, and that Entergy Arkansas' withdrawal would be a material change relevant to various Commission-approved transactions. For example, New Orleans argues that the Commission's approval of the merger between Entergy and Gulf States Utilities Company was based on the benefits of lower rates, greater fuel savings, improved generation and more diverse fuel mix accruing to the Operating Companies when analyzed collectively.

22. The Louisiana Commission asks that the Commission treat Entergy's cancellation filing as a filing pursuant to section 205 of the FPA, and asserts that this proceeding is an appropriate forum for resolution of the issues related to the rights and obligations of the withdrawing and remaining Operating Companies. The Louisiana Commission argues that the cancellation should not be granted because Entergy has failed to demonstrate that the proposed withdrawal is just and reasonable and not unduly discriminatory.

23. The Louisiana Commission argues that the Commission has repeatedly recognized that all major decisions regarding the planning, construction, and operation of generation units on the Entergy System have been made to serve the needs of the Entergy System as a whole. The Louisiana Commission asserts that language in section 3.02 of the System Agreement provides for central coordination of generation, transmission, and dispatch to achieve economies of scale and integrated operations for the mutual benefit of all the Operating Companies. The Louisiana Commission also contends that in Opinion No. 485,[17] the Commission construed language in section 3.05 of the System Agreement, which gives Operating Companies a right of first refusal for excess generating capacity of another Operating Company, as ensuring that system capacity remains available to all Operating Companies. The Louisiana Commission emphasizes that the Entergy System has been centrally planned and operated for over 50 years.

24. The Louisiana Commission asserts that Entergy Louisiana and Entergy Gulf States and their ratepayers have paid for much of the costs associated with generation capacity in Arkansas, with payments made under the MSS-1 and MSS-3 Service Schedules. The Louisiana Commission also asserts that Entergy Louisiana and Entergy New Orleans paid

[16] 16 U.S.C. §824b (2006) and 16 U.S.C. § 824d (2006), respectively.

[17] *Entergy Services, Inc.*, Opinion No. 485, 116 FERC ¶ 61,296 (2006).

large sums of money to Entergy Arkansas pursuant to agreements in the early 1980's for the full capacity costs associated with Arkansas coal units and under the "participation unit" approach of the System Agreement. The Louisiana Commission contends that these generating units have remaining useful lives well in excess of the 2013 Entergy Arkansas termination date. The Louisiana Commission refutes Entergy's argument that the Operating Companies have sufficient time to acquire new base load generating capacity, arguing that there is a huge cost disparity between the low cost Entergy Arkansas base load generation being removed from the Entergy System and the high cost of replacement power.

25. The Louisiana Commission contends that transition conditions or other measures should be instituted to ensure that the remaining Operating Companies retain the benefits to which they are entitled under prior Commission decisions interpreting the System Agreement, including rough production cost equalization and costs associated with a final remedy for the cost discrimination found in Opinion Nos. 480 and 480-A. The Louisiana Commission urges a thorough review of the impact of termination on the Operating Companies, including: the allocation of remedy benefits provided to Entergy Arkansas from its settlement with Union Pacific;[18] allocation of transmission upgrades paid for by Entergy Louisiana for the Ouachita generating plant in Entergy Arkansas' service territory; and impacts on the availability of the Entergy Arkansas portion of the Entergy bulk transmission system. The Louisiana Commission urges the Commission to set hearings to resolve these issues as soon as possible to reduce the financial implications of uncertainty and to facilitate new generation planning.

26. LEUG argues that Entergy's filing does not adequately address concerns that withdrawal by Entergy Arkansas and Entergy Mississippi of generation and bulk transmission resources will substantially harm the Louisiana Operating Companies. LEUG urges the Commission to engage in comprehensive and thorough discovery, review and consideration by hearing before rendering a decision on potential transition measures or other conditions to ensure just and reasonable wholesale rates. LEUG argues that Entergy should have the burden of proof pursuant to section 205 to show that the System Agreement, as well as any new jurisdictional wholesale arrangements for withdrawing members, will remain just and reasonable.

27. The East Texas Cooperatives, wholesale customers of Entergy Texas and network integration transmission customers of Entergy, assert that it is unclear whether Entergy

[18] The Louisiana Commission is referring to the settlement of Entergy Arkansas' litigation with Union Pacific associated with coal deliveries to the Entergy Arkansas Independence Steam Electric Station and the White Bluff Steam Electric Station generating units located in Arkansas. (Louisiana Commission Protest at 24).

Arkansas and Entergy Mississippi resources would continue to be available to provide ancillary services currently purchased from Entergy. The East Texas Cooperatives contend that more expensive resources from the remaining Operating Companies could substantially increase ancillary service costs. The East Texas Cooperatives also contend that rate pancaking could exist for delivery of power from designated network resources located in Entergy Arkansas to the East Texas Cooperatives' load in Entergy Texas, jeopardizing the firm nature of the current transmission arrangements if additional point-to-point reservation is required. Finally, the East Texas Cooperatives assert that their energy costs under a new Entergy Texas agreement could be affected since they purchase some portion of their total requirements at Entergy's System Incremental Cost.

28. Union Power contends that the assertions in the cancellation filing are speculative because it is approximately forty months early pursuant to the June 2007 Order. Union Power asserts that one of the assumptions Entergy makes is that the ICT would continue to serve as the Reliability Coordinator for these three Balancing Authorities and perform all of the other functions approved by the Commission.

29. It maintains that Entergy's statement regarding the ICT may not prove true because the Commission has not conducted its re-evaluation of the ICT and therefore the Commission does not have current information to weigh the likelihood that the ICT will continue performing functions that it does today.[19] Given this, Union Power argues that the Commission should reject the filing and require it to be re-filed within the 18 month period prior to the effective date of withdrawal provided for in the June 2007 Order, by which time questions about the ICT will have been addressed. In the alternative, Union Power argues that any acceptance should be conditioned on there being no changes in the structure proposed by Entergy here, and if there are, then the acceptance should be rescinded and a new filing required identifying the changes.

30. Union Power argues that Entergy's generalized statements in the filing lack the level of detail that would enable the Commission to make the determination that the 4-1-1 arrangement is just and reasonable under section 205. Union Power asserts that questions include, but are not limited to: (1) how will the pre- 4-1-1 set of resources be allocated among the Operating Companies for designation as network resources; (2) what process will be followed by the three network customers (i.e., Entergy Arkansas, Entergy Mississippi and the four remaining Operating Companies) for the designation of the network resources; (3) to the extent the designations involve grandfathered transmission service, what are those rights and how are they to be allocated among the three network customers; (4) if the designations involve grandfathered transmission service, do those rights vary based on the duration of time for which the resource is designated (e.g., long-

[19] *Entergy Services, Inc.*, 126 FERC ¶ 61,227, at P 83 (2009).

term, short-term); (5) how does the allocation for transmission purposes impact the contemplated sales of energy and/or capacity that appear to accompany the pre-4-1-1 set of resources; and (6) what are the commercial terms that are expected to be in place for sales of energy and/or capacity that will be made by the six Operating Companies to accompany the pre-4-1-1 set of resources (including whether the sales will be at cost-based rates or market-based rates).

31. Lastly, Union Power states that while the cancellation filing provides for the designation of network resources based on the pre-4-1-1 set of resources and discusses longer term planning, Entergy does not address whether contracts will be executed for sales among the six Operating Companies based on the pre-4-1-1 set of resources. Union Power argues that if not, Entergy should have so stated, and if so, then it should have provided the details of the transactions.

32. The Arkansas Commission urges that the Commission accept the Notices of Cancellation of Entergy Arkansas and Entergy Mississippi pursuant to the terms of the System Agreement. The Arkansas Commission asserts that section 1.01 of the System Agreement has remained in effect unchanged for the last twenty-seven years, and that, until the Louisiana Commission filed its complaint, no party has ever argued that it is not just and reasonable or that it is unduly discriminatory. The Arkansas Commission argues that section 1.01, which was fairly bargained, gives an unfettered and absolute right to any Operating Company to exit the System Agreement upon giving its ninety-six month notice. The Arkansas Commission asserts that the System Agreement gives sufficient time to make reasonable alternative resource arrangements, and that Entergy Louisiana and Entergy New Orleans have in fact been pursuing and acquiring additional base load capacity and have further indicated their intent to exercise purchase options for an ownership share of a coal-fired generation resource.

33. The Arkansas Commission argues that Commission precedent is generally contrary to imposition of an exit fee upon exercise of contractual termination rights without recourse.[20] The Arkansas Commission also argues that the issuance of Opinion Nos. 480 and 480-A indicates that transition measures or conditions are unnecessary, and that significant mitigations of cost imbalances are already underway.

34. AEEC, whose members purchase electricity from Entergy Arkansas, argues that the Commission should allow Entergy Arkansas's exit from the System Agreement

[20] Arkansas Commission Protest at 3 (*citing Kansas Power & Light Co*, 56 FERC ¶ 61,446 (1991) and *Boston Edison Co.*, 56 FPC 3414 (1976); *see also Kentucky Utilities Company*, 23 FERC ¶ 61,317 (1983) and *Arizona Public Service Company*, 18 FERC ¶ 61,197 (1982)).

without conditions or further subsidization of the Entergy System by Entergy Arkansas or its customers. AEEC contends that 96 month advance notice of termination provides participants with plenty of time to acquire additional resources they might need after withdrawal. AEEC asserts that it is concerned that, at the time of filing, Entergy Arkansas has not provided "any document of the sort necessary to implement the so-called 4-1-1 plan," and therefore, AEEC reserves its right to oppose any claim by any party of a continuing right to any portion of Entergy Arkansas' generating capacity after withdrawal.

IV. Answers

35. The Arkansas Commission argues that several of the protests, particularly those filed by the Louisiana Commission and New Orleans, mischaracterize and incorrectly cite provisions of the System Agreement regarding the ability of Entergy Arkansas and Entergy Mississippi to withdraw from it.

36. The Arkansas Commission contends that the Louisiana Commission and New Orleans incorrectly believe that the System Agreement conveys to the other Operating Companies some level of ownership or entitlement in perpetuity to the Entergy Arkansas resources, and also completely mischaracterize the nature of the bandwidth remedy adopted by the Commission in its Opinion Nos. 480 and 480-A, in an attempt to create a future obligation for Entergy Arkansas and Entergy Mississippi to continue to participate in the rough production cost equalization remedy after cancellation of the System Agreement.

37. The Arkansas Commission contends that New Orleans's assertion that Entergy's filing is premature and a collateral attack on the June 2007 Order is a complete mischaracterization of the earlier order, wherein the Commission only determined that review at that time, nearly two years ago, was premature but did not, as New Orleans contends, determine that any filing made subsequent to the order, but earlier than 18 months, would be premature. The Arkansas Commission argues that the Commission's advice to Entergy on timing must not serve as a bar to Entergy filing in sufficient time to address the long-term operations and planning issues that will need to be addressed. The Arkansas Commission asserts that New Orleans, having consistently raised the need to address these withdrawals in order to move forward in numerous Entergy proceedings, cannot credibly argue now that the filing is premature.

38. The Arkansas Commission asserts that the only condition on withdrawal, specified in the unambiguous contract terms of section 1.01 of the System Agreement, is the obligation to provide a lengthy 96 month advance notice. The Arkansas Commission argues that although the Commission suggested that it would consider transition measures upon Entergy Arkansas' withdrawal from the System Agreement, the notice period is a sufficient contractual transition mechanism. The Arkansas Commission

contends that the Commission has recognized that the notice requirement was designed to provide sufficient lead time for the remaining Operating Companies to establish "reasonable alternative supply arrangements" for the period following another Operating Company's withdrawal, and contends that Entergy explained in response to the Louisiana Commission's complaint (the subject of the June 2007 Order) that the 96 month notice period was established based on the planning horizon for a new coal-fired power plant. The Arkansas Commission reiterates Entergy's argument that the notice and termination provision necessarily assumes that the remaining Operating Companies will not have any entitlement to the departing Operating Company's generation resources, and provides time for the remaining companies to make resource adjustments, which is appropriate given the rights of parties under the FPA to establish their relationship by contract, including contract termination rights.[21]

39. The Arkansas Commission asserts that the order in *Duquesne Light Company*, cited by New Orleans as support for extra-contractual conditions on withdrawal, is readily distinguishable from the current matter, because Duquesne's duties upon withdrawal from PJM were governed by contract provisions addressing withdrawal.

40. The Arkansas Commission asserts that section 3.05 of the System Agreement plainly states that each Operating Company is responsible for having base load generation to serve its customers, and that furthermore, the section 3.05 provisions regarding the sale of excess capacity simply do not apply to Entergy Arkansas' and Entergy Mississippi's withdrawals because both Operating Companies are projected to face capacity deficits after withdrawal.

41. The Arkansas Commission also asserts that the Louisiana Commission mischaracterizes the Commission's prior ruling in Opinion No. 485, and argues that the actual issue before the Commission there was the treatment of short-term sales under section 3.05, and that the court ultimately ruled that the Commission had made no final ruling regarding section 3.05. The Arkansas Commission argues that the Louisiana Commission's attempts to bootstrap the right of first refusal in section 3.05 of the System Agreement into a full joint ownership right of Entergy Arkansas-owned generation should be rejected outright. The Arkansas Commission asserts that the right of first refusal is not a blanket entitlement right to the operating capacity owned by each Operating Company, but is a limited right of a non-owner Operating Company to purchase generating capacity which may be excess to the Operating Company owner's

[21] Arkansas Commission Answer at 12 (*citing Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733, 2738-39 (2008), *Edison Sault Elec. Co.*, 85 FERC ¶ 61,249, at 62,033 (1998)).

own requirements and needs, as the text of section 3.05 clearly establishes.[22] Furthermore, the Arkansas Commission notes that the right of first refusal applies to an entirely elective purchase and sale of unit power under Service Schedule MSS-4, not to all of the excess generating capacity of an owning Operating Company.

42. The Arkansas Commission asserts that section 4.01 of the System Agreement expressly provides that each Operating Company is obligated to supply its own generation resources to meet its own needs, and that the notion of a so-called "joint right" of each Operating Company to the operating capacity of another Operating Company is contrary to prior Commission rulings in Opinion Nos. 234, 234-A, 292 and 292-A,[23] and has never been acknowledged.

43. The Arkansas Commission argues that Entergy Arkansas' withdrawal will not unfairly shift profits to the parent holding company, because the Entergy System is a "zero sum game," i.e., the Operating Companies' System Agreement payments and receipts shift costs among those Operating Companies, with no effect on shareholders' revenues. The Arkansas Commission further argues that New Orleans is wrong in contending that by exiting the System Agreement, Entergy Arkansas will sell its excess energy at market-based rates, thereby increasing its profits, because sales of excess energy and capacity by Entergy Arkansas do not inure to the benefit of shareholders, and New Orleans makes unsupported assertions over Entergy Arkansas' profitability. The Arkansas Commission urges the Commission not to give merit to New Orleans' distracting suggestion to look into the motives behind, and profitability of, an Operating Company that exercises its contractual right to exit the System Agreement.

44. The Arkansas Commission asserts that, in its June 2007 Order, the Commission merely suggested that some transitional measures may be appropriate, but also found no basis to support the Louisiana Commission's request for what in effect would be involuntary continuation of the existing integrated system arrangements, or the virtual equivalent, in perpetuity. The Arkansas Commission argues that the imposition of such

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[22] *Id.* (*citing Mississippi Industries v. FERC*, 808 F.2d 1525, 1566 (D.C. Cir. 1987)).

[23] *Id.* at 21 (*citing Middle South Energy, Inc and Middle South Services, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305, *reh'g denied*, Opinion No. 234-A, 32 FERC ¶ 61,425 (1985), *aff'd, Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987), *vacated and rev'd in part and remanded*, 822 F.2d 1104 (D.C. Cir. 1987 (per curium), *cert .denied*, 484 U.S. 985 (1987), *order on remand, System Energy Resources, Inc.*, Opinion No. 292, 41 FERC ¶ 61,238 (1987), r*eh'g denied*, Opinion No. 292-A, 42 FERC ¶ 61,091 (1988), *aff'd sub nom. City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990)).

conditions on Entergy Arkansas would be unjust, unreasonable, and unduly discriminatory. The Arkansas Commission contends that Entergy Arkansas and its ratepayers have provided more than their proportionate share of base load capacity and have paid the high front-end costs for generation resources, while Entergy Louisiana, Entergy Gulf States Louisiana, Entergy Texas, and Entergy New Orleans have enjoyed the full benefits of that generation by purchasing it from the Entergy pool at fuel cost only.

45. The Arkansas Commission asserts that New Orleans' estoppel argument is without merit, because there has been no actual detrimental reliance by the party claiming estoppel, only mere speculation as to what New Orleans "might" have done to diversify Entergy New Orleans' generation portfolio. The Arkansas Commission contends that ongoing litigation should have in fact given New Orleans grounds to suspect that an Operating Company might unilaterally exit the System Agreement while continuing to own its generating facilities.

46. In arguing that Entergy Arkansas and Entergy Mississippi should be allowed to exit the System Agreement without continuing obligations, the Arkansas Commission asserts that Entergy Gulf States Louisiana and Entergy Texas did not participate in the historical planning and construction of the Entergy System, because the last base load units constructed on the Entergy System, Grand Gulf and Waterford 3, were completed in 1985 and Entergy Gulf States Louisiana and Entergy Texas did not merge with Entergy until 1994. The Arkansas Commission asks that if the Commission does determine that some transitional measures are necessary upon Entergy Arkansas's exit, Entergy Gulf States Louisiana and Entergy Texas not be entitled to any of those benefits.

47. The Arkansas Commission urges the Commission to clarify that the burden of proof under section 206 of the FPA is on parties that seek to impose withdrawal conditions beyond the terms of the contract, and contends that the Commission historically will not lightly set aside contracts. The Arkansas Commission argues that if the Commission establishes hearing procedures, it should limit the scope of such inquiry to whether or not transition or other conditions are necessary in order to ensure just and reasonable rates for the Operating Companies, post-withdrawal. The Arkansas Commission asserts that the Commission should find that Entergy Arkansas and Entergy Mississippi have complied with their contractual obligations in exercising their right to withdraw from the System Agreement, so that issues regarding whether Entergy Arkansas and Entergy Mississippi have met such obligations are outside the scope of the hearing, as are arguments raised in the protests that are without merit or irrelevant to the issue of whether transition measures or other conditions are necessary to ensure just and reasonable rates.

48. New Orleans asserts that the Commission simply is not in a position to render a meaningful decision at this time, nor in the reasonably foreseeable future, due to the lack of enough information about Entergy's post-withdrawal intentions, as well as uncertainty as to the justness and reasonableness of conditions that will exist in five years when the withdrawals become effective.

49. New Orleans argues that the Commission's bandwidth remedy seeks to partially remedy an unjust and unreasonable imbalance in the costs and benefits of participation in the Entergy System. New Orleans contends that the decision to pursue coal-fired generation in Arkansas was made not to benefit Arkansas customers alone, but was done because the decision benefited the Entergy System as a whole.

50. New Orleans criticizes Entergy for assuming that the ICT will continue to serve as the Reliability Coordinator for the three proposed Balancing Authorities, asserting that it is far from clear that the ICT arrangement will even be in place when Entergy Arkansas and Entergy Mississippi withdraw from the System Agreement. New Orleans contends that potentially all of the assumptions on which the Commission relied to approve Entergy's participation in the ICT in lieu of an RTO may no longer be true once Entergy Arkansas and Entergy Mississippi withdraw from the Entergy System, and therefore argues that the Commission should wait until 2012 or later to rule on the appropriateness and conditions of Entergy Arkansas' and Entergy Mississippi's withdrawals.

51. Entergy argues that the positions articulated by the intervenors in their protests and comments were previously heard by the Commission in the proceeding leading up to the June 2007 Order, and alleges that some of the intervenors seemingly prefer endless litigation and uncertainty. Entergy contends that section 1.01 of the System Agreement does not contain any specific provisions providing for the Operating Companies that remain in the System Agreement to have any continuing rights to the generating assets of a departing company or the continuation of any payments or obligations beyond the 96 month notice period.

52. Entergy argues that the information provided in its filing provides the Commission an adequate record upon which to make a decision, without suspension or further proceedings, but urges that if the Commission nevertheless believes that it cannot accept the filing, the Commission should adopt a process for resolving this conflict in a manner that is fair to all jurisdictions by balancing the need for timely action with the parties' respective due process rights. Entergy suggests that one option for achieving such a balance is for the Commission to institute a paper hearing schedule to resolve the major policy and legal issues and then, if necessary, set any remaining factual questions for an expedited hearing.

53. Entergy argues that the issue of whether there are continuing obligations upon withdrawal from the System Agreement is ripe now for consideration by the Commission, and obtaining certainty on the issue will allow the Operating Companies to engage in long-term generation planning and procurement decisions that reflect the Commission's determination. Entergy asserts that the schedule proposed by New Orleans creates an impossible situation because if Entergy's February 2, 2009 filing is rejected and the Commission sets Entergy's re-filing in June 2012 for an evidentiary hearing, the parties will not have a final Commission decision until after Entergy Arkansas' termination date of December 18, 2013.

54. Entergy argues that most of the issues raised by the protests are beyond the scope of this proceeding and address subjects that are unrelated to the specific question of whether Entergy Arkansas' and Entergy Mississippi's proposed Notices of Cancellation are just and reasonable. Entergy states that these inappropriate issues and subjects include: the satisfaction of NERC Reliability Standards; certification of Balancing Authorities; transmission and generation planning and dispatch; mutations of the 4-1-1 configuration such as a potential 1-1-1-1-1-1 structure; and compliance with future OATT requirements. Entergy characterizes these inquiries as premature and unproductive, and contends that post-2013 arrangements for the Operating Companies will be subject to Commission review and prior approval under section 205 before they become effective.

V. Discussion

A. Procedural Matters

55. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

56. We will grant the late interventions of Cottonwood Energy Company, LP; Lafayette Utilities System, Mississippi Delta Energy Agency, Municipal Energy Agency of Mississippi, and Louisiana Energy and Power Authority; Texas Industrial Energy Consumers; and the Public Utility Commission of Texas, given their interest in this proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

57. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers to answers and answers to protests because they have assisted us in our decision-making process.

B. Commission Determination

58. We find that Entergy Arkansas' and Entergy Mississippi's proposed Notices of Cancellation are just and reasonable and we will accept them. We address three main issues in this order. First, whether Entergy Arkansas and Entergy Mississippi are permitted to leave the Entergy System under the System Agreement; second, whether they are required to compensate the remaining Operating Companies before they are allowed to withdraw; and third, whether the withdrawing companies have any continuing obligations to the remaining companies under the System Agreement.

59. As to the first issue, we find that the System Agreement allows Operating Companies to exit the System Agreement pursuant to section 1.01. Section 1.01 provides that "any Company may terminate its participation in this Agreement by ninety six (96) months written notice to the other Companies hereto." The System Agreement contains no restrictions on Operating Companies' ability to withdraw, nor does it place any further conditions on withdrawal beyond the 96 month notice requirement. Both Entergy Arkansas and Entergy Mississippi have given proper notice of withdrawal under the System Agreement, and no party has argued otherwise. Thus, we find that Entergy Arkansas and Entergy Mississippi are permitted to leave the Entergy System following the 96 month notice period.

60. As to the second issue, we note that the System Agreement contains no provisions requiring withdrawing Operating Companies to pay a fee or otherwise compensate other remaining Operating Companies prior to withdrawing from the System Agreement. We contrast the terms in the System Agreement with the exit provisions in other operating agreements, such as those governing RTO membership, which explicitly condition withdrawal upon the meeting of certain requirements, including exit fees.[24] The drafters of the Entergy System Agreement chose to condition withdrawal only upon 96 months notice; had they wished to provide for additional exit requirements, they could have done so. Additionally, any interested party could have filed under sections 205 or 206 to amend the System Agreement exit provisions at any time. Indeed, the 96 month notice provision has been in place since 1982 and no party has before now raised a concern with that aspect of the System Agreement.

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[24] *See, e.g.*, *Duquesne Light Company*, 122 FERC ¶ 61,039 at P 31 (discussing the provisions in PJM's Transmission Owner Agreement requiring certain obligations prior to, and after, any withdrawal from PJM, including continued liability for any obligations incurred under the Agreement); *Louisville Gas and Electric Co.*, 114 FERC ¶ 61,282, at P 52-60, *order on reh'g*, 116 FERC ¶ 61,020 (2006) (explaining the exit fee required for parties withdrawing from the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) as discussed in the Midwest ISO's tariff).

61. As such, we will not impose an exit fee or other payment upon the withdrawing companies. To the extent the remaining Operating Companies are concerned with their own mix of capacity, we note that the 96 month notice period should provide all of the Operating Companies time to adjust their long-term plans and to acquire any needed capacity. The Louisiana Commission's argument that it will be more expensive to acquire new base load capacity once Entergy Arkansas leaves the system, and that the 96 month exit provision is thus not just and reasonable, is not persuasive. The parties to the System Agreement were aware of the possibility of withdrawal at the time they signed the agreement, and should have planned accordingly. As we note above, parties could have sought to amend the exit provisions at any time to lengthen the notice provision or add additional requirements. No such filings were made.

62. Finally, we find that the System Agreement requires no continuing obligation on the part of the withdrawing Operating Companies. The Louisiana Commission cites to several provisions of the System Agreement, including sections 3.02 and 3.05, to support its argument that system capacity remains available to all Operating Companies beyond the cancellation dates. We disagree. The System Agreement provisions apply only when an Operating Company is a party to the System Agreement. The provisions that the Louisiana Commission cite to, individually and collectively, fail to convey any rights to the generation capacity of withdrawing Operating Companies.[25] Similarly, the Louisiana Commission's assertion that the withdrawing Operating Companies should continue to bear the cost responsibility assigned to them by Opinion Nos. 480 and 480-A is without merit. The rough production cost equalization remedy only applies when an Operating Company is part of the System Agreement. Once Entergy Arkansas and Entergy Mississippi exit the System Agreement, any obligations that they have with respect to Opinion Nos. 480 and 480-A would end.

63. However, we note that Entergy has an obligation to ensure that any future operating arrangement is just and reasonable.[26] With our acceptance of these Notices of Cancellation regarding the System Agreement, we expect Entergy and all interested parties to move forward and develop the details of all needed successor arrangements. We encourage Entergy to make its section 205 filing for the post-2013 arrangements as soon as possible in order for the Commission to review the replacement arrangement prior to the withdrawals.

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[25] Sections 3.05 and 4.01 of the System Agreement provide support for the proposition that each Operating Company should have enough generating capacity to serve its own customers, contrary to the Louisiana Commission's assertions.

[26] *See* 16 U.S.C. § 824d (2006).

64. Protestors raise several additional arguments in opposition to the Notices of Cancellation, which we find are without merit. New Orleans' assertion that the cancellation filing is an attempt by Entergy Arkansas, Entergy and the Arkansas Commission to evade the remedies ordered in the Commission's bandwidth decisions is irrelevant to whether Entergy Arkansas and Entergy Mississippi should be allowed to withdraw. We note that Entergy Arkansas and Entergy Mississippi will be obligated to abide by the bandwidth remedy until the effective date of their withdrawal from the System Agreement. New Orleans opines that had it known that Entergy Arkansas might suddenly remove all of its coal-fired units from the Entergy System without compensation, it may have required a more diversified portfolio of generation in New Orleans to protect its ratepayers. Again, this is irrelevant to whether Entergy Arkansas and Entergy Mississippi should be allowed to withdraw. In any event, New Orleans has been aware that it was a future possibility that an Operating Company might withdraw from the System Agreement and it could have made plans accordingly.

65. New Orleans' argument that Commission approval of a cost-free exit would somehow encourage the evasion of the Commission-ordered remedies in Opinion Nos. 480 and 480 as well as allow alleged corporate manipulation[27] within holding companies, is not only speculative, but also irrelevant to the issue before us – does the System Agreement allow Entergy Arkansas and Entergy Mississippi to withdraw.[28]

66. Arguments that Entergy should be required to demonstrate that each of the remaining Operating Companies would have the capability to independently function as a Balancing Authority, including meeting NERC Reliability Standards are irrelevant and premature. In this docket, Entergy is not requesting the Commission to issue any ruling on the 4-1-1 structure or on how the Operating Companies will satisfy the NERC requirements post December 2013. Any future arrangements will have to comply with NERC Reliability Standards, but the current proceeding need not, and does not, address

[27] The Louisiana Commission asserts that Entergy Arkansas' withdrawal could shift costs to captured rate payers while shifting profits to the parent holding company. (Louisiana Commission Protest at 45).

[28] New Orleans' reliance on *Duquesne Light Company*, 122 FERC ¶ 61,039 (2008), to support its argument for continuing obligations is also unpersuasive. In *Duquesne Light Company*, unlike in this case, Duquesne failed to provide a timely withdrawal notice and the Commission granted a conditional withdrawal from PJM by Duquesne. Also, Duquesne's responsibilities after termination were outlined in the contract. Thus, the two cases are different. Here, Entergy Arkansas and Entergy Mississippi filed timely notices of cancellation that will not be effective until the full 96 month notice period has elapsed.

that issue. Also, New Orleans' assertion that Entergy's filing is inadequate, in part, because it fails to address the likelihood that withdrawal by Entergy Arkansas and Entergy Mississippi will prompt one or more of the remaining Operating Companies to withdraw is speculative and irrelevant to whether Entergy Arkansas and Entergy Mississippi can withdraw from the System Agreement.

67. We reject Union Power's and New Orleans' arguments that there is too much uncertainty regarding the terminations and therefore this issue is ripe for consideration only 18 months before the termination. While the June 2007 Order advised Entergy to make a section 205 filing no earlier than 18 months prior to the withdrawal date, providing certainty to the parties with respect to the obligations of Entergy Arkansas and Entergy Mississippi and the other Operating Companies upon withdrawal now will allow them time to engage in meaningful negotiations going forward. Waiting until 18 months before the withdrawals would serve no useful purpose. Further, as stated above, Entergy will have to file under section 205 of the FPA to reflect the arrangements to be in place after the withdrawal of Entergy Arkansas and Entergy Mississippi from the System Agreement. While we determine that Entergy Arkansas and Entergy Mississippi are permitted to leave the Entergy System under the System Agreement without remaining obligations, any interested party will be able to comment on the successor arrangements at the time they are filed with the Commission.

The Commission orders:

The Notices of Cancellation of Entergy Arkansas and Entergy Mississippi are hereby accepted for filing, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.