

98 FERC ¶ 61, 135
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Louisiana Public Service Commission
and the Council of the City of New Orleans

v.

Docket No. EL01-88-000

Entergy Corporation,
Entergy Services, Inc.,
Entergy Arkansas, Inc.,
Entergy Louisiana, Inc.,
Entergy Mississippi, Inc.,
Entergy New Orleans, Inc.,
Entergy Gulf States, Inc.,
and System Energy Resources, Inc.

ORDER ON COMPLAINT AND ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued February 13, 2002)

On June 14, 2001, the Louisiana Public Service Commission (Louisiana Commission) and the Council of the City of New Orleans (New Orleans) filed a complaint against Entergy Arkansas, Inc. (EAI), Entergy Gulf States, Inc. (EGS),¹ Entergy Louisiana, Inc. (ELI), Entergy Mississippi, Inc. (EMI), Entergy New Orleans, Inc. (ENOI) (collectively, Operating Companies), Entergy Corporation,² Entergy

¹EGS operates in both Texas and Louisiana.

²Entergy Corporation is a public utility holding company; its wholly-owned, public utility subsidiaries are EAI, EGS, ELI, EMI and ENOI.

Services, Inc., (Entergy)³ and System Energy Resources, Inc. (SERI).⁴ In their complaint the Louisiana Commission and New Orleans allege that the cost allocations embodied in the wholesale rates of the Entergy System Agreement (System Agreement)⁵ and the Unit Power Sales Agreement (Power Sales Agreement) applicable to the Grand Gulf nuclear unit (Grand Gulf) have become unjust, unreasonable and unduly discriminatory in violation of Sections 205 and 206 of the Federal Power Act (FPA).

This order sets the complaint for investigation and hearing. This order will benefit customers by providing a forum for the parties to address whether, over time, these agreements have become unjust, unreasonable or unduly discriminatory.

³Entergy, the subsidiary service company of Entergy Corporation, acts as an agent for Entergy Corporation and for the parties to the Entergy System Agreement (System Agreement), which include ELI, EGS, ENOI, EMI and EAI, in matters related to the System Agreement, including the dispatch, operation and planning associated with the generating units on the Entergy System.

⁴SERI is a generating subsidiary of Entergy that owns a 90 percent interest in the Grand Gulf I Nuclear Generating Facility (Grand Gulf) located in Port Gibson, Mississippi. SERI sells all available capacity from its 90 percent interest in Grand Gulf in fixed percentages to the four Operating Companies under the Unit Power Sales Agreement.

⁵The System Agreement provides for coordinated operation on a single system basis of the generation and bulk transmission facilities of the Operating Companies and the allocation of benefits and costs among them. The System Agreement takes advantage of system-wide economies of scale to roughly equalize the costs of excess electric energy (energy not needed by a particular Operating Company to meet its base load) by allowing another Operating Company to purchase that energy.

The System Agreement consists of seven Service Schedules: MMS-1 (Reserve Equalization); MMS-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 Operations Center); and MSS-7 (Merger Fuel Protection Procedure).

The Complaint

Complainants state that the "rough equalization" that the Commission requires among the Operating Companies no longer exists.⁶ Complainants request that the Commission either: (a) impose full cost equalization among the Operating Companies; or (b) restore rough equalization among the Operating Companies. Complainants maintain that the standard for rough equalization of cost of production should be that the Operating Companies' costs of production do not deviate by more than five percentage points from the system average.⁷

Complainants also request the Commission to direct Entergy to make certain changes to the System Agreement. Complainants further request that the Commission "investigate the consistency of the MSS-1 allocation method and Entergy's current planning criteria and other deficiencies in the tariff identified in the proceeding."⁸

Notice, Answers and Interventions

Notice of the Louisiana Commission's and New Orleans' complaint was published in the Federal Register, 66 Fed. Reg. 33,242 (2001), with answers, protests or interventions due on or before July 5, 2001. By order dated June 29, 2001, the Commission extended the time for the filing of an answer to and including July 19, 2001.

The Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention in this proceeding.

The following entities filed timely motions to intervene in this proceeding, raising no substantive issues: Cleco Power LLC, (Cleco); Arkansas Electric Cooperative Corporation (Arkansas Electric); East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative, Inc., (East Texas Cooperatives); Conoco Gas and Power Marketing (Conoco); Arkansas Cities and Cooperative (ACC); the Colonial Pipeline Company (Colonial Pipeline); Louisiana Energy Users Group (Louisiana Group); Occidental Chemical Corporation (Occidental);

⁶Complaint at 2-3; Verified Statements of Stephen J. Baron and Philip M. Hayet (Complaint, Exhibits A and B, respectively).

⁷Complaint at 26, 32, 36.

⁸Complaint at 39.

Louisiana Generating LLC (Louisiana Generating); and South Mississippi Electric Power Association (South Mississippi).

On July 13, 2001, Arkansas Electric Energy Consumers (Arkansas Consumers) filed a motion to intervene in this proceeding, raising no substantive issues.

On July 23, 2001, the Mississippi Manufacturers Association (Mississippi Manufacturers) filed a motion to intervene in this proceeding, raising no substantive issues.

On July 19, 2001: (a) Entergy filed an answer to the complaint; (b) the Mississippi Public Service Commission (Mississippi Commission) filed a notice of intervention, answer and protest to the complaint; (c) the Arkansas Commission filed an answer and protest to the complaint; and (d) Arkansas Consumers filed a protest to the complaint.

Entergy, the Mississippi and Arkansas Commissions (collectively, State Commissions)⁹ and Arkansas Consumers argue that complainants have not provided sufficient evidence to show that there is no longer a rough equalization of the cost of production or that any current disparity is likely to continue for a long enough period to warrant modification of the System Agreement.¹⁰ They state that the Commission has always taken a long-term view of the phrase "rough equalization," and that, viewed over the long term, rough equalization of production costs exists on the Entergy System.¹¹ They maintain that were the Commission to require full production cost equalization we would shift costs of about \$220 to \$481 million per year among the Operating Companies and their ratepayers, which, in their view would be neither just nor reasonable.¹² They suggest that, should the Commission find that any remedy is necessary, the Commission should: (a) narrowly tailor the remedy to the specific

⁹We will describe Entergy's, the State Commissions' and Arkansas Consumers' answers together because they each raise virtually identical issues.

¹⁰Entergy Answer at 3, 7, 9, 10, 16, 17, 21-23; Arkansas Commission Answer at 1-5; Arkansas Consumers Protest at 1-2, 7, 10-12.

¹¹Arkansas Consumers protest at 1, 10-12.

¹²Arkansas Commission Answer at 2, 12-15; Arkansas Consumers Protest at 2-3, 9-15.

problems that it discovers; (b) restore only rough equalization; and (c) terminate the remedy when the problem ceases to exist.¹³

Entergy, the State Commissions and Arkansas Consumers also oppose complainants' proposed definition of the phrase "rough equalization of cost of production." They argue that complainants have not shown that a standard requiring no more than a deviation of five percent from system average cost of production is appropriate or consistent with Commission precedent, or compatible with the practices of the Entergy System.¹⁴ They also argue that the authorities that Complainants put forth to support the proposed standard are not relevant guides for determining the parameters of the phrase "rough equalization of costs of production."¹⁵

The Mississippi Commission states that it and the Arkansas Commission made certain decisions, such as supporting the prepayment of certain obligations, that served to lower the cost of production in their jurisdictions.¹⁶ The Mississippi Commission argues that a decision to order full production cost equalization would shift to other jurisdictions, such as Louisiana, the benefits of the accelerated payments made on behalf of Arkansas and Mississippi ratepayers.¹⁷

On August 3, 2001, Complainants filed an answer to the State Commissions' answers. In their answer Complainants defend the validity of the production cost analyses upon which they rely to support their complaint.¹⁸ They also object to the Mississippi Commissions' argument that full production cost equalization would "punish ratepayers in the States of Mississippi and Arkansas for decisions made by those State

¹³Arkansas Answer at 19-20.

¹⁴Entergy Answer at 19, 21,22; Arkansas Commission Answer at 6-7; Arkansas Consumers Protest at 2, 13-16.

¹⁵Arkansas Commission Answer at 7-11; Arkansas Consumers Protest at 12-13.

¹⁶Mississippi Commission Answer and Protest at 6-7. One such decision was the decision to support the accelerated payment of Entergy's Mississippi's purchase obligation to SERI under the Unit Power Sales Agreement. Id. at 6.

¹⁷Id. at 6-7.

¹⁸Complainants Answer at 2-4.

Commissions."¹⁹ They refer to this argument as a "single state view" of the System Agreement and argue that the Commission should view the System Agreement from the point of view of the system as a whole and not with regard to the consequences of Complainants' proposed remedy upon an individual state.²⁰

Discussion

A. Preliminary Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²¹ the notice of intervention of the Arkansas and Mississippi Commissions and the timely, unopposed motions to intervene of Cleco, Arkansas Electric, East Texas Cooperatives, Conoco, ACC, Colonial Pipeline, Louisiana Group, Occidental, Arkansas Consumers Louisiana Generating and South Mississippi, serve to make them parties to this proceeding. We will grant the untimely, unopposed motions to intervene of Arkansas Consumers and Mississippi Manufacturers, given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213 (2001) forbids the filing of an answer to an answer unless otherwise ordered by the decisional authority. We find good cause to accept Complainants' answer, as it aids us in the decision-making process.

B. Hearing and Settlement Judge Procedures

1. Hearing Procedures

Based on a review of the parties' pleadings, it appears that the System Agreement and the rates under that Agreement may be unjust and unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, the Commission will institute an investigation of the System Agreement and the rates under that Agreement, as well as the rates under the Power Sales Agreement, under section 206 of the Federal Power Act.

¹⁹Complainants Answer at 4-6.

²⁰Complainants Answer at 4-6.

²¹18 C.F.R. § 385.214 (2001).

In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the Federal Power Act, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy of providing maximum protection to customers,²² we will set the refund effective date as of the date 60 days after the date of the filing of the complaint, or September 13, 2001.

Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission 15 days in advance of the refund effective date in the event the presiding judge has not by that date: (1) certified to the Commission a settlement which, if accepted, would dispose of the proceeding; or (2) issued an Initial Decision. The presiding judge's report would advise the Commission of the status of the investigation and provide his or her best estimate of the expected date of the certification of a settlement or the Initial Decision. This, in turn, would allow the Commission on or before the refund effective date to estimate the date when it expects to render its decision.

However, since we have established a refund effective date of 60 days after the filing of the complaint, *i.e.*, September 13, 2001, we obviously cannot follow our usual procedure. Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that, assuming the case does not settle, the presiding judge should be able to render a decision within thirteen months or by March 31, 2003. If the presiding judge is able to render an initial decision by that date, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately seven months of the filing of briefs on and opposing exceptions or by December 31, 2003.

²²See, *e.g.*, *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989)

2. Settlement Judge Procedures

While we are setting this proceeding for a trial-type, evidentiary hearing, we encourage the parties, before hearing procedures are commenced, to first make every effort to settle their dispute. To aid the parties in their settlement efforts, the hearing we have ordered shall be held in abeyance and a settlement judge shall be appointed to assist the parties in reaching a settlement.²³ 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.²⁴

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 the Federal Power Act, particularly Section 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 1), a public hearing shall be held in Docket Nos. EL01-88-001 into the reasonableness of the System Agreement and of the rates under the System Agreement, as well as the rates under the Power Sales Agreement, as discussed in the body of this order.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and procedure, 18 C.F.R. § 385.603 (2001), 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. To the extent consistent with this order, the designated settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable.

(C) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and with the Commission 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

²³18 C.F.R. § 385.603 (2000).

²⁴If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 219-2500 within five days of this order. FERC's website contains a listing of Commission judges and a summary of their background and experience (www.ferc.fed.us - click on the Office of Administrative Law Judges).

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 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(D) If settlement discussions fail, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within approximately fifteen days of the settlement judge's report to the Commission, in a hearing room of the Federal Energy Regulatory 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 administrative law 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.

(E) The refund effective date in Docket No. EL01-88-000 established pursuant to Section 206(b) of the Federal Power Act is September 13, 2001.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.