

120 FERC ¶ 61,051

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.

ExxonMobil Corporation

v.

Docket No. EL03-230-002

Entergy Services, Inc.

ORDER REJECTING COMPLIANCE FILING

(Issued July 18, 2007)

1. On February 20, 2007, Entergy Services, Inc. (Entergy) filed a revised Service Agreement purportedly complying with the Commission's directions in *ExxonMobil I*.¹ This order rejects that compliance filing because it fails to comply with the Commission's directions in *ExxonMobil I* and fails to comply with Order No. 614.²

I. Background

2. ExxonMobil owns and operates an oil refinery in Beaumont, Texas. On September 28, 2001, Entergy filed an interconnection, operation and generator imbalance agreement (Original IA) to accommodate ExxonMobil's 165 MW generator unit. On December 7, 2001, the Commission accepted the Original IA for filing pursuant to delegated authority.³ The Original IA identified certain facilities in that agreement as

¹ 118 FERC ¶ 61,032 (*ExxonMobil I*); order on reh'g, 119 FERC ¶ 61,261 (2007) (*ExxonMobil II*).

² *Designation of Electric Rate Schedule Sheets*, Order No. 614, 65 *Fed. Reg.* 18,221 (April 7, 2000), FERC Stats. & Regs., Regulations Preambles July 1996 – December 2000 ¶ 31,096 (2000) (Order No. 614).

³ See *Entergy Services, Inc.*, Docket No. ER02-144-000 (December 7, 2001) (unpublished letter order) (December 7 Order).

interconnection facilities (Original Transmission Facilities) and directly assigned the cost of these facilities to ExxonMobil, without requiring Entergy to provide transmission credits.

3. ExxonMobil then installed two additional generators. When Entergy filed an unexecuted, revised IA to accommodate the expanded facilities (New Transmission Facilities), ExxonMobil filed a protest, stating that *all* of the facilities (both Original and New Transmission Facilities) are located at or beyond the point of interconnection on the Entergy network and are, therefore, network upgrades entitled to transmission credits.

4. The Commission granted ExxonMobil's protest with respect to the New Transmission Facilities. With respect to the Original Transmission Facilities, the Commission found that ExxonMobil's request that the Commission direct Entergy to reclassify the Original Transmission Facilities was, in effect, a complaint. The Commission rejected this portion of ExxonMobil's protest, without prejudice to ExxonMobil's filing a separate complaint on that issue.⁴

5. On September 16, 2003, ExxonMobil filed a complaint requesting that the Commission direct Entergy to reclassify the Original Transmission Facilities as network upgrades rather than as direct assignment facilities, and provide ExxonMobil with transmission credits. On January 19, 2007, in *ExxonMobil I*, the Commission granted that complaint and directed Entergy to provide ExxonMobil with transmission credits for the cost of those facilities.⁵ It also directed Entergy to file revisions to the Original IA reflecting the Commission's decision and to file a compliance report within 15 days after providing the required credits.⁶

6. The Commission noted that section 206(b) of the Federal Power Act (FPA),⁷ as it was in effect at the time that ExxonMobil filed its complaint, requires that the Commission must, when it institutes an investigation on a complaint, establish a refund effective date that is no earlier than 60 days after the date on which the complainant filed the complaint, and not later than five months after the expiration of the 60-day period.⁸

⁴ See *Entergy Services, Inc.*, 104 FERC ¶ 61,084 at P 13 (2003).

⁵ *ExxonMobil I*, 118 FERC ¶ 61,032 at P 1, 14.

⁶ *Id.* P 14-16.

⁷ 16 U.S.C. § 824e(b) (2000).

⁸ *ExxonMobil I*, 118 FERC ¶ 61,032 at P 15. The Commission also noted that the Energy Policy Act of 2005, Pub. L. No. 109-58, Sec. 1285, 119 Stat. 594, 980-81 (2005), amended section 206(b) of the FPA to require that, in the case of a proceeding instituted on a complaint, the refund effective date shall not be earlier than the date of the filing of such complaint or later than five months after the filing of such complaint. *Id.* n.10.

Unlike other cases dealing with credits for network upgrades, transmission had not commenced when ExxonMobil filed its complaint.⁹ Therefore, to afford ExxonMobil maximum protection, the Commission set the refund effective date at the latest possible date, *i.e.*, five months after the 60 days after ExxonMobil filed its complaint, which is April 15, 2004.¹⁰

7. The Commission noted that transmission credits accrue over a maximum 20-year period beginning with the commercial operation of the generator.¹¹ The Commission directed Entergy to provide ExxonMobil with transmission credits as follows: (a) before April 15, 2004 (the start of the refund effective period), Entergy provides no transmission credits; (b) from April 15, 2004 through July 15, 2005 (the refund effective period), Entergy provides transmission credits, with interest calculated in accordance with 18 C.F.R. § 35.19a(a)(2)(iii);¹² (c) from the end of the 15-month refund effective period until the date of the Commission order (January 19, 2007), Entergy may not provide any transmission credits or interest on those credits; and (d) to the extent that ExxonMobil has not previously taken service for which credits either did accrue or would have accrued, Entergy must provide ExxonMobil transmission credits, with interest, on a prospective basis from the date of the Commission's order.¹³

II. Compliance Filing and Responsive Pleadings

A. Compliance Filing

8. As noted above, on February 20, 2007, Entergy filed a revised Service Agreement purporting to comply with *ExxonMobil I* (compliance filing). The compliance filing consists of a revised Interconnection and Operating Agreement and a revised Generator Imbalance Agreement (together, the Revised IA) between Entergy and ExxonMobil.¹⁴

⁹ ExxonMobil filed its complaint on September 16, 2003; however, the generating facilities that are the subject of the complaint did not begin commercial operation until December, 2004.

¹⁰ *ExxonMobil I*, 118 FERC ¶ 61,032 at P 15 (citations omitted). The Commission noted that transmission credits accrue from the date of commercial operation of the generator. *Id.*

¹¹ The Commission noted that Article 11.4.1 of the Large Generator Interconnection Agreement provides for a maximum 20-year refund period. *Id.* P 17.

¹² *Id.* at P 16. We note that in *ExxonMobil I* the Commission inadvertently referenced 18 C.F.R. § 35.19a(2)(ii) (2000).

¹³ *Id.*

¹⁴ Entergy also submitted what it refers to as “blackline pages,” which reflect the revisions made in the Revised IA.

The Revised IA reclassifies the Original Transmission Facilities as required system upgrades.¹⁵

9. Entergy states that it will provide ExxonMobil with transmission credits against transmission charges for the full amount of the upfront payments that ExxonMobil made for the Original Transmission Facilities once it (Entergy) has fully reimbursed the upfront payment (total cost plus interest) that ExxonMobil paid to Entergy for the New Transmission Facilities.¹⁶ Entergy states that ExxonMobil will continue to receive transmission credits against transmission charges until Entergy has reimbursed ExxonMobil for the total cost of the construction of both the Original and New Transmission Facilities, with interest.¹⁷

10. Entergy states that the total cost of the Original Facilities is \$5,141,347.88.¹⁸ Entergy further states that the interest due to ExxonMobil on the cost of the Original Transmission Facilities from April 15, 2004 to January 31, 2007 is \$311,132.00.¹⁹ Entergy calculates the interest due for that period as follows: Entergy first computed the interest due from the refund effective date, April 15, 2004, through July 15, 2005 (the refund effective period). Entergy claims that the interest due for that period is \$296,383. Entergy states that, consistent with the Commission's decision in *ExxonMobil I*, it did not calculate any interest from the end of the 15-month refund effective period until the date of the Commission order (*i.e.*, July 16, 2005 through January 19, 2007).²⁰ Finally, Entergy states that it resumed the interest calculation on January 20, 2007. According to Entergy, the interest amount from January 20, 2007 through January 31, 2007 is \$14,749, bringing the total interest calculation to \$311,132.²¹

11. Entergy states that, for the period February 1, 2007 forward, Entergy will pay to ExxonMobil interest on all transmission credits until it has completely reimbursed ExxonMobil for the total construction cost of the Original and New Transmission Facilities, with interest, excluding metering.²²

¹⁵ Entergy March 28, 2007 Answer to ExxonMobil Protest at 2.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 5-6.

¹⁸ *Id.* at 6.

¹⁹ *Id.*

²⁰ Entergy April 27, 2007 Answer to ExxonMobil's Answer at 3, *citing ExxonMobil*, 118 FERC ¶ 61,032 at P 17.

²¹ Entergy April 27, 2007 Answer to ExxonMobil's Answer at 3 and Appendix A.

²² *Id.* at 3.

12. Notice of Entergy's compliance filing was published in the *Federal Register*, 72 Fed. Reg. 10,195 (2007), with comments, protests or interventions due on or before March 13, 2007. On March 13, 2007, ExxonMobil filed a protest to Entergy's compliance filing. On March 28, 2007, Entergy filed an answer to ExxonMobil's protest. On April 12, 2007, ExxonMobil filed an answer to Entergy's answer. On April 27, 2007, Entergy filed an answer to ExxonMobil's answer. On May 14, 2007, ExxonMobil filed an answer to Entergy's answer.

B. Protest

13. ExxonMobil initially disagreed with Entergy's calculation of the cost of the Original Transmission Facilities,²³ but then realized that it had failed to take into account the tax gross-up that it is and will be receiving from Entergy.²⁴ ExxonMobil now agrees with Entergy on the cost of the Original Transmission Facilities and the tax gross-up amounts.²⁵

14. However, ExxonMobil disagrees that the amount of interest on the upfront costs of the Original Transmission Facilities due to ExxonMobil for the period from April 15, 2004 until January 31, 2007 is \$311,132; instead, it calculates that interest as \$941,437.²⁶ ExxonMobil states that the difference in the calculation of interest is that, while it and Entergy use the same period for their interest calculations (April 15, 2004 to January 31, 2007), Entergy does not include interest from July 16, 2005 through January 18, 2007 (from the end of the refund effective period to the date of the Commission's order), while ExxonMobil includes interest for the entire period between April 15, 2004 and January 31, 2007. ExxonMobil argues that, since Entergy has held ExxonMobil's money continuously since April 15, 2004, Entergy should not omit interest associated with transmission credits for the period July 16, 2005 to January 18, 2007.²⁷

²³ ExxonMobil originally claimed a New Transmission Facilities cost of \$6.8 million. See ExxonMobil Protest at 2, 4-5, 8-9, 15, 18-19. Appendix B to ExxonMobil's Protest calculated a total cost of the Original Transmission Facilities, including tax gross-up of \$6,766,206.87. ExxonMobil Protest at 16 and Appendix B.

²⁴ ExxonMobil April 12, 2007 Answer to Entergy Answer at 3. Entergy has refunded, or shortly will refund to ExxonMobil \$1,697,887 in tax gross-up. Entergy answer to ExxonMobil protest at 6. Entergy states that it has already refunded to ExxonMobil \$1,435,750.13, and will refund the remainder, including interest (\$346,334.01), to ExxonMobil when Entergy completes its amended tax return process for the year 2003. *Id.* at 6-7.

²⁵ ExxonMobil April 12, 2007 Answer to Entergy Answer at 3.

²⁶ ExxonMobil May 14, 2007 Answer to Entergy Answer at 3.

²⁷ *Id.* at 3-4.

15. ExxonMobil asks the Commission to reject the compliance filing and to direct Entergy to reimburse ExxonMobil for the entire cost of the upfront payments for the Original Transmission Facilities, with interest. ExxonMobil further requests that the Commission direct Entergy to:

- a. reflect the actual costs of the Original Transmission Facilities, rather than provide estimates of these costs;
- b. provide separate identification of the credits/refunds potentially subject to transmission credits;
- c. clearly identify the dollar amounts of the upfront payments that ExxonMobil made for both the Original Transmission Facilities and the New Transmission Facilities; and
- d. delete language stating that the classification of the interconnection is “subject to the final disposition of Docket Nos. EL03-230-000 and ER03-851-000.”²⁸

16. ExxonMobil also asks the Commission to recognize the unique circumstances of this case, in which there are two different sets of facilities located at one cogeneration plant, with only one set of transmission lines that connect both sets of facilities to Entergy’s transmission system.²⁹ ExxonMobil notes that the Commission has directed Entergy to pay ExxonMobil transmission credits for each set of facilities (New Transmission Facilities, Docket No. ER03-851-000, and Original Transmission Facilities, Docket No. EL03-230-000).³⁰ ExxonMobil argues that the Commission’s application of

²⁸ Protest at 4, 15-16, 19-20. ExxonMobil attempts to incorporate its request for rehearing by reference in its protest. *Id.* at 8. We will not allow this for several reasons: First, we have already addressed ExxonMobil’s request for rehearing in *ExxonMobil II*, 119 FERC ¶ 61,261 at P 15-26. Second, a protest to a compliance filing is the wrong forum in which to address the merits of the underlying order. In a compliance filing, what is before the Commission is whether the public utility has complied with the Commission’s order, not the merits of that order. *Southwest Power Pool, Inc.*, 117 FERC ¶ 61,110 at P 19 & n.31 (2006); *Northwestern Corp.*, 113 FERC ¶ 61,215 at P 9 (2005). Finally, introducing extraneous issues into the Commission’s review of a compliance filing disrupts the administrative process. The Commission must focus on what is before it in the compliance filing, not in some other aspect of the proceeding. *Cf. American Electric Power Service Corporation*, 90 FERC ¶ 61,040 at 61,193 (2000); *First Energy Trading & Power Marketing, Inc.*, 85 FERC ¶ 61,311 at 62,226 (1998).

²⁹ *Id.* at 3, 18.

³⁰ Protest at 3. *See Entergy Services, Inc.*, 104 FERC ¶ 61,084 (2003), *order on reh’g*, 111 FERC ¶ 61,181 (2005) (Docket No. ER03-851-000); *Exxon Mobil I*; *ExxonMobil II*.

four distinct periods in crediting upfront payments is inapplicable to these circumstances.³¹

17. ExxonMobil also asks that the payment of transmission credits for the Original Transmission Facilities should commence on the month following the month in which Entergy completes providing transmission credits for the New Interconnection Facilities.³² Alternatively, ExxonMobil asks that the Commission direct Entergy to pay ExxonMobil directly the entire cost of the Original Transmission Facilities with interest from January 19, 2007.³³

III. Discussion

A. Procedural Matter

18. 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 or to an answer unless otherwise ordered by the decisional authority. We will accept Entergy's answers to ExxonMobil's protest and answer and ExxonMobil's answers to Entergy's answers because they have provided information that assisted us in our decision-making process.

B. Compliance Filing

1. Transmission Credits

19. We will reject the compliance filing because Entergy has not complied with our instructions in *ExxonMobil I*. The interconnection cost that ExxonMobil must pay and the rate Entergy must charge for its interconnection service for the periods addressed in this proceeding is the rate set by the Commission pursuant to the requirements of section 206 of the FPA, including the refund limitations required by section 206. In *ExxonMobil I*, we expressly provided that Entergy may not pay ExxonMobil any transmission credits for the Original Transmission Facilities that ExxonMobil would have earned from the end of the 15-month refund effective period until the date of the Commission order, or any interest on those credits.³⁴ That is, the rate we set in the prior order for ExxonMobil to

³¹ *Id.* at 18 & n.20. ExxonMobil cites *Entergy Mississippi*, 117 FERC ¶ 61,200 (2006), and *Southern California Edison Company*, 117 FERC ¶ 61,103 P 39 (2006). We rejected this argument in *ExxonMobil II*, 119 FERC ¶ 61,261 at P 21-22. We reject that argument here for the same reasons that we rejected it there.

³² *Id.* at 18-19.

³³ According to ExxonMobil, this remedy would comport with paragraph 8.3.1 of the Revised IA, because, in January 2007, the total amount of the transmission credits exceeded the charges due to Entergy from ExxonMobil. *Id.* at 19.

³⁴ *ExxonMobil I*, 118 FERC ¶ 61,032 at P 17.

pay for the interconnection service is equal to the total of ExxonMobil's upfront payments for those network upgrades, *less* the credits that we directed in the prior order, and *less* the sum of the transmission service payments associated with the transmission service that ExxonMobil took from the end of the 15-month refund effective period (July 15, 2005) until the date of the Commission order (January 19, 2007).³⁵ A utility must charge the rate determined or accepted by the Commission pursuant to the ratemaking procedures of section 205 or 206. The rate we established in *ExxonMobil I* did not provide for Entergy to pay transmission credits on the Original Transmission Facilities *following* its payment of transmission credits on the New Transmission Facilities.

20. Entergy did not comply with this direction in its compliance filing. Instead, Entergy states that it intends to pay to ExxonMobil *all* of ExxonMobil's upfront payments for the Original Transmission Facilities *without deducting* the sum of the transmission service payments associated with the transmission service that ExxonMobil took from the end of the 15-month refund effective period (July 15, 2005) until the date of the Commission order (January 19, 2007).³⁶ That is not the rate we established in the prior order and, absent Commission approval, Entergy cannot charge a rate other than the rate fixed by the Commission in compliance with section 206. Therefore, we will direct Entergy to re-file its compliance filing in accordance with the rate we established in *ExxonMobil I* (and *ExxonMobil II*). That is, to determine the total amount of credits to which ExxonMobil is now entitled, Entergy must deduct from the total of ExxonMobil's upfront payments for the Original Transmission Facilities the sum of the transmission service payments associated with the transmission service that ExxonMobil took from July 16, 2005 through January 19, 2007.³⁷ For the reasons we explained in *ExxonMobil I* and *ExxonMobil II*, we reject ExxonMobil's argument that it is entitled to transmission credits for the entire cost of the upfront payments for the Original Transmission Facilities. In addition, to permit ExxonMobil to receive transmission credits in excess of what we established would be unduly discriminatory and unfair to other similarly situated generators who did not receive such treatment.

2. Interest

21. Similarly, we reject ExxonMobil's arguments regarding the interest due on ExxonMobil's upfront payments for the Original Transmission Facilities for the period from April 15, 2005 to January 31, 2007. We find that Entergy has complied with our instructions by deducting the amount of interest due on the transmission credits for the

³⁵ See also *ExxonMobil II*, 119 FERC ¶ 61,261 at P 20-22 & n.39.

³⁶ Entergy March 28, 2007 Answer to ExxonMobil Protest at 5; Entergy April 24, 2007 Answer to ExxonMobil Answer at 3.

³⁷ *ExxonMobil II*, 119 FERC ¶ 61,261 n. 39.

period from July 16, 2005 through January 19, 2007 (the period from the end of the refund effective period to the date of the Commission's order).

3. Other Matters

22. As noted above, in their answers, Entergy and ExxonMobil resolved ExxonMobil's concern with the cost of the Original Transmission Facilities.³⁸ Additionally, there is no longer any question of Entergy's applying the payment of transmission credits associated with the New Transmission Facilities as an offset against the transmission credits associated with the Original Transmission Facilities.³⁹ We will, therefore, deny ExxonMobil's request that we direct Entergy to modify its compliance filing to reflect these matters. However, while Entergy's answers reflect the agreed-upon cost of ExxonMobil's upfront payments for the Original Transmission Facilities (\$5,141,347.88), its compliance filing does not. We will, therefore, direct Entergy to use the cost of the upfront payments for the Original Transmission Facilities, upon which the parties agree, in its compliance filing.

23. Entergy states in its compliance filing that the classification of the interconnection is subject to the final disposition of Docket Nos. EL03-230-000 and ER03-851-000. ExxonMobil asks us to direct Entergy to delete this language from its compliance filing.⁴⁰ We have already accepted this language in Docket Nos. ER03-851-001 and ER03-851-002⁴¹ and ExxonMobil has presented no reason to reject it here.

24. Finally, we find that the Second Revised Service Agreement No. 277 submitted with the Compliance filing does not comply with Order No. 614. Accordingly, we will require Entergy to file a revised Service Agreement in conformance with Order No. 614 within 30 days of the date of this order.

The Commission orders:

(A) Entergy's compliance filing is hereby rejected for the reasons discussed in the body of this order.

³⁸ See ExxonMobil Protest at 4, 15-16, 19-20.

³⁹ See Entergy March 28, 2007 Answer to ExxonMobil Protest at 4-5; Entergy April 24, 2007 Answer to ExxonMobil Answer at 3; ExxonMobil April 12, 2007 Answer to Entergy Answer at 3.

⁴⁰ See Protest at 4.

⁴¹ *Entergy Services, Inc.*, 111 FERC ¶ 61,181 at P2 (2005).

Docket No. EL03-230-002

- 10 -

(B) Entergy is hereby directed to file, within 30 days of the date of this order, a compliance filing in conformity with the directions in this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ExxonMobil Corporation v. Entergy Services, Inc. Docket No. EL03-230-002

(Issued July 18, 2007)

KELLY, Commissioner, *dissenting in part*:

This case presents a very unique situation that we are not likely to see often. Entergy is voluntarily proposing to fully refund to ExxonMobil the cost of certain network transmission facilities that ExxonMobil paid for up front, even though the Commission is not able to order full refunds under the strictures of section 206 of the Federal Power Act in this situation. It is important to note that this refund would not have been more than we would have ordered if we were not restricted in this instance. Further, no party has objected to this aspect of Entergy's proposal. Nevertheless, the Commission here rejects the proposal. The majority views Entergy's proposal as violating the compliance directive. I disagree.

The main factor that leads to this unique situation is the fact that ExxonMobil's creditable facilities were separated by circumstance into two separate groups for crediting purposes. Because the crediting situation for the first group was resolved prior to the crediting situation for the second group, Entergy began providing credits for the first group before it did for the second group. This seems to have caused Entergy to account for the credits for these two groups sequentially and this sequential accounting resulted in Entergy delaying the start of crediting for the second group, the subject of this order, until after the underlying order issued. As a result, Entergy committed to provide credits even for the period prior to the date of the order, but after the end of the 15-month refund window, when the Commission could not have ordered such refunds.

I see no problems with Entergy's proposal and no violation of our compliance directive. I think Entergy should not be prohibited from voluntarily paying off the full amount of its valid debt to a customer, and I would have accepted the compliance filing conditioned upon Entergy correcting the separate Order No. 614 compliance issues.

I recognize that it may be possible to argue that the filed rate is violated if Entergy voluntarily grants credits for a period when we were prohibited from directing credits (that we would otherwise have directed). However, Entergy's "violation" in this instance merely results in the same just and reasonable rate that we have approved for other periods (and would have approved for this period if we were not prevented) being applied during a period when we were prohibited from directing its application. If anyone actually complained about this, the remedy would seem to be to impose refunds back to a

just and reasonable rate, but since Entergy has already voluntarily applied the just and reasonable rate, no refunds would seem to be due even assuming someone took the rather extraordinary step of complaining in this circumstance.

While I understand and in general agree with my colleagues' concerns with the strict enforcement of our compliance filing process, I believe rejection of this particular compliance filing elevates form over substance. However, I agree that Entergy must comply with Order No. 614. Accordingly, I respectfully dissent in part.

Sudeen G. Kelly