119 FERC ¶ 61,341
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc. Docket Nos. ER07-525-000
ER07-525-001

ORDER ACCEPTING AND SUSPENDING PROPOSED RATE SCHEDULE AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued June 29, 2007)

1. In this order, we accept for filing Entergy Services, Inc.'s (Entergy)[1] proposed mutually-executed long-term firm point-to-point transmission service agreement (TSA) between Entergy and American Electric Power Service Corporation (AEP),[2] and suspend it for a nominal period, to become effective April 9, 2007, subject to refund, and establish hearing and settlement judge procedures.

I. Background

2. Entergy states that, on June 6, 2006, AEP submitted a request for long-term firm point-to-point transmission service sourcing from generation resources located in the Union Power Partners Balancing Authority Area and sinking at the AEP Central and Southwest Balancing Authority Area. Entergy states that AEP's initial request was for service commencing on January 1, 2007 and terminating on January 1, 2010.

3. Entergy determined that insufficient transmission capacity was available to grant service to AEP beyond January 1, 2008 without the construction of certain transmission upgrades or the implementation of redispatch procedures. Entergy states that AEP agreed

[1] Entergy is acting as agent for Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, LLC, Entergy Mississippi, Inc., and Entergy New Orleans, Inc.

[2] AEP is acting as agent for Public Service Company of Oklahoma and Southwestern Electric Power Company.

to take partial interim transmission service under section 19.7 of Entergy's OATT until January 1, 2008. Entergy states that for service beyond that time, the parties agreed that service would be contingent upon the results of an additional facilities study to determine the scope of the required transmission system upgrades or the implementation of redispatch options.

4. Commission staff issued a deficiency letter directing Entergy to state for each year beginning in 2007 the amount of transmission capacity assigned to pre-existing contract obligations that commence in the future that will constrain Entergy's system such that it cannot provide transmission beyond January 1, 2008.[3]

5. On May 2, 2007, Entergy filed a response to the deficiency letter stressing that service under the TSA is not standard long-term firm point-to-point transmission service, but is partial interim service provided under section 19.7 of Entergy's OATT. Entergy further states that transmission service was not available for the last two years of AEP's transmission reservation because of, among other issues, loop flow that Entergy is experiencing at the interface of the Entergy, AEP, and OGE transmission systems.

6. Entergy states, in light of these circumstances, and consistent with section 19.7 of its OATT and *Morgan Stanley Capital Group v. Illinois Power Company*,[4] Entergy and AEP entered into a TSA for a limited time period. Entergy further states that the provision for rollover in the initial TSA did not seem appropriate and seemed to contravene the reason that Entergy was providing AEP partial interim service in the first place. Furthermore, Entergy notes that even though it is acting consistent with Commission policy, the appropriate time to evaluate the availability for rollover will be upon the completion of its pending facilities study.

7. Entergy also seeks waiver of the Commission's 60-day prior notice requirement and requests an effective date of January 1, 2007. Entergy argues that the revisions included in the TSA reflect the parties' good faith negotiations and are mutually agreed-upon. Entergy further argues that, while the TSA indicates that service commenced on January 1, 2007, the parties did not finalize the TSA until late January 2007 and only executed that agreement on February 5, 2007. Accordingly, Entergy states that the TSA is being filed within two days of being executed. Furthermore, Entergy states that it has not billed and AEP has not paid for any service under the TSA.

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[3] *Entergy Services, Inc.*, Docket Nos. ER07-525-000 and ER07-541-000 (April 2, 2007) (deficiency letter).

[4] 83 FERC ¶ 61,204 (1998).

II. Notice of Filing and Responsive Pleadings

8. Notice of Entergy's filing was published in the *Federal Register*, 72 Fed. Reg. 8373 (2007), with interventions and protests due on or before February 28, 2007. None was filed. Notice of Entergy's supplemental filing was published in the *Federal Register*, 72 Fed. Reg. 28,485 (2007), with interventions and protests due on or before February 28, 2007. AEP filed a timely motion to intervene and protest.

9. AEP states that the sequence of events leading up to AEP's decision to move forward with the TSA differs from the description of events outlined in Entergy's filing. AEP states that Entergy did produce a System Impact Study in September 2006 which indicated no available transfer capability (ATC) was available for any period of the request. Realizing that a more detailed study was required to identify upgrades and any possibility of redispatch, AEP requested and executed the necessary study agreements to have Entergy perform a Facility Study. AEP states that, after delays resulting from the implementation of the Southwest Power Pool as Entergy's Independent Coordinator of Transmission, a preliminary facility study report was produced which indicated that ATC was available for the first year of the request, but there was insufficient ATC to provide such service beyond one year. AEP contends that, in order to move forward with the service for calendar year 2007 and avoid an unnecessary delay in the start of service while the Facility Study is completed, AEP agreed to the TSA's terms and conditions, including the limitation on rollover rights.

10. AEP argues that it has since received new information regarding the service it originally requested. First, AEP notes that Entergy is currently preparing its proposed revisions to the TSA based on the results of the recently completed Facility Study. AEP contends that it is unable to determine if it will have any dispute with Entergy since the exact terms of service and cost allocation responsibilities cannot be determined from the Facility Study. Second, AEP states that it has learned of short-term (monthly) firm service of the exact same volume and point of receipt/point of delivery combination that was not made available to AEP through the Facility Study. Again, AEP is unsure how the availability of this short-term service for the entire calendar year 2008 will be reflected in future terms or cost allocation responsibilities.

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene serves to make AEP a party to this proceeding.

B. Commission Determination

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

13. Our preliminary analysis indicates that Entergy's proposed TSA has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Entergy's TSA for filing, and suspend it for a nominal period, make it effective April 9, 2007, subject to refund, after 60 days from the date of filing as described below, and set it for hearing and settlement judge procedures.

14. We will deny Entergy's request for waiver of the Commission's 60-day prior notice requirement,[5] And make the TSA effective 60 days from the date of filing, April 9, 2007. Entergy's justification for failing to timely file the TSA, i.e., to file within 30 days after service commences,[6] does not constitute extraordinary circumstances that would justify waiver. Contract negotiations and delayed execution have no bearing on the statutory requirement that utilities provide prior notice of proposed rates, terms, and conditions of jurisdictional service.[7] Because Entergy has not billed and AEP has not paid for any services under the TSA, however, a refund of the time value of revenues collected without Commission authorization is not appropriate in this case.[8]

15. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[9] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding;

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[5] 16 U.S.C. § 824d(d) (2000); 18 C.F.R. §§ 35.3, 35.11 (2006).

[6] *See Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,983-94, *order on reh'g*, 65 FERC ¶ 61,081 (1993); *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at P 9-52 (2003).

[7] *E.g., Pacific Gas and Elec. Co.*, 107 FERC ¶ 61,224, at P 21 (2004).

[8] *E.g., id*. at P 22.

[9] 18 C.F.R. § 385.603 (2006).

otherwise, the Chief Judge will select a judge for this purpose.[10] The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

16. We will deny Entergy's request for waiver of the Commission's 60-day prior notice requirement,[11] and make the TSA effective after 60 days from the date of filing, April 9, 2007. Entergy's justification for failing to timely file the TSA, i.e., to file within 30 days after service commences,[12] does not constitute extraordinary circumstances that would justify waiver. Contract negotiations and delayed execution have no bearing on the statutory requirement that utilities provide prior notice of proposed rates, terms, and conditions of jurisdictional service.[13] Because Entergy has not billed and AEP has not paid for any services under the TSA, however, a refund of the time value of revenues collected without Commission authorization is not appropriate in this case.[14]

The Commission orders:

(A) Entergy's proposed TSA is hereby accepted for filing and suspended for a nominal period, to become effective April 9, 2007, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly

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[10] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

[11] 16 U.S.C. § 824d(d) (2000); 18 C.F.R. §§ 35.3, 35.11 (2006).

[12] *See Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,983-94, *order on reh'g*, 65 FERC ¶ 61,081 (1993); *El Paso Elec. Co.*, 105 FERC ¶ 61,131 (2003).

[13] *E.g.*, *Pacific Gas and Elec. Co.*, 107 FERC ¶ 61,224, at P 21 (2004).

[14] *E.g.*, *id*. at P 22.

sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Entergy's proposed TSA. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.