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.

Louisiana Public Service Commission Docket No. EL07-25-000
v.
Entergy Corporation,
Entergy Services, Inc.
Entergy Louisiana, L.L.C.,
Entergy Arkansas, Inc.,
Entergy Mississippi, Inc.,
Entergy New Orleans, Inc. and
Entergy Gulf States, Inc.

ORDER DENYING COMPLAINT

(Issued June 1, 2007)

1. On December 18, 2006, pursuant to sections 205 and 206 of the Federal Power Act (FPA),[1] the Louisiana Public Service Commission (Louisiana Commission) filed a complaint against Entergy Corporation, Entergy Services, Inc., Entergy Louisiana, L.L.C., Entergy Arkansas, Inc, (Entergy Arkansas), Entergy Mississippi, Inc., Entergy New Orleans, Inc. and Entergy Gulf States, Inc. (collectively, Entergy). The Louisiana Commission's complaint seeks a remedy for the attempted withdrawal from the Entergy System Agreement (System Agreement) of Entergy Arkansas. In this order, we deny the complaint, as discussed below.

[1] 16 U.S.C. §§ 824d and 824e (2000).

I. Background

2. The System Agreement is a Commission-approved rate schedule that allocates costs among the Entergy Operating Companies in several jurisdictions. In Opinion Nos. 480 and 480-A, the Commission approved a numerical bandwidth to maintain the rough equalization of production costs among the Entergy Operating Companies. This bandwidth remedy is designed to assure that each Entergy Operating Company's customers pay no more than +/- 11 percent of Entergy's system average production cost on an annual basis. Opinion Nos. 480 and 480-A required annual filings beginning in June 2007.[2] On December 19, 2005, the same day the Commission issued Opinion No. 480-A, Entergy Arkansas notified the four other Entergy Operating Companies that it would terminate its participation in the current System Agreement in ninety-six months or such earlier date as authorized by the Commission.[3]

II. Notice of Filing and Responsive Pleadings

3. Notice of the Louisiana Commission's complaint was published in the Federal Register,[4] with comments, interventions and protests due on or before December 29, 2006. The Commission granted a motion to extend the due date for interventions and protests to January 31, 2007.

4. Notices of intervention were filed by: the Arkansas Public Service Commission (Arkansas Commission); the Mississippi Public Service Commission; and the Council of the City of New Orleans, Louisiana (New Orleans City Council). Timely motions to intervene, raising no substantive issues, were filed by: Union Power Partners, L.P. (Union Power); Louisiana Energy Users Group; Occidental Chemical Corporation; Arkansas Electric Cooperative Corporation (Arkansas Electric Cooperative); and Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, and the Public Service Commission of Yazoo City (collectively the "MDEA Cities").

---

[2] *Louisiana Public Service Commission v. Entergy Services, Inc., et al.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance filing*, 117 FERC ¶ 61,203 (2006).

[3] Section 1.01 of the System Agreement provides that "any Company may terminate its participation in this Agreement by ninety-six months written notice to the other Companies hereto." *See* Complaint, Exh. B (the Entergy System Agreement).

[4] 71 Fed. Reg. 78,421 (2006).

5. On January 31, 2007, Entergy filed an answer; the Arkansas Commission filed an answer and protest; the New Orleans City Council filed comments; Arkansas Electric Energy Consumers, Inc. (AEEC) filed a motion to intervene and protest; and the Louisiana Energy and Power Authority, the Lafayette Utilities System, and the Municipal Energy Agency of Mississippi (L-M Municipals) filed a motion to intervene and motion for technical conference.

6. On February 2, 2007, Cleco Power LLC (Cleco) filed a motion to intervene out of time, raising no substantive issues. On February 5, 2007, East Texas Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas (East Texas Cooperatives) filed a motion to intervene out of time, raising no substantive issues.

7. On February 15, 2007, the Louisiana Commission filed an answer to Entergy's answer, the Arkansas Commission's answer and protest, and AEEC's protest. On February 15, 2007, Entergy filed an answer to L-M Municipals' motion for technical conference and the New Orleans City Council's comments. On February 15, 2007, the Arkansas Commission filed an answer to L-M Municipals' motion for technical conference. The Arkansas Commission also opposes the motions to intervene of Union Power, L-M Municipals, MDEA Cities and Arkansas Electric Cooperative.

8. On February 20, 2007, the Arkansas Commission filed an answer to Cleco's and East Texas Cooperatives' motions to intervene out of time. On March 1, 2007, East Texas Cooperatives filed a response to the Arkansas Commission's February 20 answer.

9. On March 2, 2007, Entergy and AEEC filed answers to the Louisiana Commission's February 15 answer, and the New Orleans City Council filed an answer to Entergy's February 15 answer.

III. The Louisiana Commission's Complaint

10. The Louisiana Commission states that Entergy Arkansas may not terminate its participation in the System Agreement without ensuring the continued rough equalization of production costs considering all Entergy System resources, including those owned by Entergy Arkansas. Further, it requests that the remedy preserve the benefits of the System Agreement to the remaining Entergy Operating Companies while allocating to Entergy Arkansas its just and reasonable share of the existing costs and liabilities. The Louisiana Commission states that the Commission should immediately institute a proceeding to determine whether, and on what terms, Entergy Arkansas may withdraw.

11. The Louisiana Commission contends that the exit of Entergy Arkansas from the System Agreement will cause a disruption of the rough equalization of costs achieved on

the Entergy System under the System Agreement, and will violate sections 205 and 206 of the FPA. It argues that, while the System Agreement allows withdrawal with 96 months' written notice, "the provision must be just and reasonable as applied, in accordance with the [FPA]."[5] It argues that any increase in System Agreement or other charges or costs, or capacity and production costs to the remaining Entergy Operating Companies as a result of the withdrawal will violate sections 205 and 206 of the FPA.

12. The Louisiana Commission further contends that while a proper 96 months' notice was given, the provision allowing a company to terminate its participation in the System Agreement is not enforceable if it is unjust, unreasonable, and unduly discriminatory. The Louisiana Commission states that because the facilities of the System were planned and constructed for all the System's customers, removing Entergy Arkansas' facilities after 96 months is in fact unjust, unreasonable, and unduly discriminatory. It adds that the failure of Entergy Arkansas to share access to low-cost generating capacity and associated energy pursuant to the System Agreement would be unjust, unreasonable, and unduly discriminatory.

13. The Louisiana Commission requests that the Commission: (1) set this complaint for hearing and investigation; (2) investigate the impact that Entergy Arkansas' notice of termination will have on the rates, charges, and billings under the various Service Schedules, and adopt remedies that are just and reasonable; and (3) determine that Entergy Arkansas cannot escape its obligation to make payments to the other Entergy Operating Companies pursuant to the remedy adopted in Opinion Nos. 480 and 480-A. Alternatively, the Louisiana Commission requests that the Commission require Entergy Arkansas to provide generating capacity or wholesale power contracts to Entergy Louisiana, L.L.C. (Entergy Louisiana) and Entergy Gulf States, Inc. (Entergy Gulf States) sufficient to satisfy the rough production cost equalization requirement and the reliability and energy requirements of these companies at costs no higher than would have been incurred if Entergy Arkansas had not terminated its participation. As another alternative, the Louisiana Commission requests that the Commission order that a hold harmless protection be put in place to prevent any harm to Entergy Louisiana and Entergy Gulf States as a result of the impact of Entergy Arkansas' termination of participation in the System Agreement. In addition to the remedies requested above, the Louisiana Commission requests that the Commission recognize that Entergy controls the actions of Entergy Arkansas and is responsible and liable for any damages caused and remedies required due to Entergy Arkansas' termination. The Louisiana Commission also requests that the Commission provide any other relief required under the FPA so that the rates

[5] Complaint at 4.

paid by the customers of Entergy Louisiana and Entergy Gulf States will remain just and reasonable and non-discriminatory into the future.

IV. Entergy's Answer

14. Entergy responds that the termination provision in the System Agreement has been in place since it was first approved by the Commission and that the Commission approved the System Agreement as just and reasonable in Opinion No. 234.[6] Further, Entergy states that the purpose of the 96-month notice provision was to allow a new coal generator to be developed in the event that additional resources would be needed by the remaining Operating Companies to serve load.

15. Entergy asserts that the Louisiana Commission did not challenge the termination provision at the time it was approved by the Commission. It asserts that the Louisiana Commission has consistently acknowledged the clear meaning of the termination provision and even argued that the 96-month notice limited the rights of an Operating Company to the resources to its sister Companies to eight years. Entergy points out that now that the Louisiana Commission is faced with a contractually permitted notice of termination, the Louisiana Commission is reversing its course and adopting an opposite view that the resources of the exiting Operating Company should be provided to the remaining members in perpetuity.

16. Further, Entergy asserts that withdrawal from the System Agreement is subject to a single clear and unambiguous condition that an Operating Company provide 96 months notice for unilateral withdrawal. Entergy contends that this language is clear and unambiguous, which should be given full effect.[7] It explains that a contract is not considered ambiguous merely because the parties disagree on its interpretation.[8] Entergy

---

[6] *Middle South Energy, 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) (System Energy Resources), *reh'g denied*, Opinion 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).

[7] *Public Service Co. of N.H. v. New Hampshire Electric Coop., Inc.*, 85 FERC ¶ 63,001, at 65,012 (1998) (*citing Thiem v. Thomas*, 406 A.2d 115, 118 (N.H. 1979)).

[8] *See, e.g., Pacific Gas & Electric Co. v. FERC*, 746 F.2d 1383, 1384, 1387 (9th

(continued)

uses recently authorized withdrawals to support its argument, such as Louisville Gas and Electric Company's withdrawal from the Midwest Independent System Operator,[9] and asserts that the Commission has precedent for upholding the conditions under specific agreements.

17. Entergy also claims that if the Commission were to accept the Louisiana Commission's request to alter the System Agreement, it would violate the Commission's policy regarding the sanctity of contracts.[10] It states that the System Agreement is a voluntary pooling agreement.[11] Entergy contends that parties would likely not enter into resource sharing agreements if their exit from such agreements could be subject to unspecified, future-imposed conditions and if the obligations of sharing continued in perpetuity. Moreover, Entergy declares that parties are not bound in perpetuity under Commission-jurisdictional agreements, especially under voluntary sharing agreements. Entergy also argues that the Louisiana Commission has offered no evidence that the Operating Companies intended to or would have entered into the System Agreement under the terms now suggested by the Louisiana Commission.

18. Entergy argues that the Louisiana Commission failed to meet its section 206 burden to show that the termination provision is no longer just and reasonable and that its proposed alternative is just and reasonable. Specifically, Entergy argues that the Louisiana Commission incorrectly asserts that the termination provision must be deemed to be just and reasonable as applied, in accordance with the FPA. Furthermore, Entergy states that the Louisiana Commission failed to provide relevant precedent on the matter and that the Louisiana Commission must show how the termination provision is unjust and unreasonable, specifically after the System Agreement as a whole was accepted by the Commission as being just and reasonable.

19. Entergy argues that the Louisiana Commission is relying on cost sharing arrangements under the System Agreement, and it disputes the Louisiana Commission's assertion that the cost responsibility for the System's generation was equalized among the Operating Companies through the System Agreement. It counters that the "intent of the

---

Cir. 1984).

[9] *Louisville Gas & Electric Co.*, 114 FERC ¶ 61,282 (2006), *reh'g pending*.

[10] *Citing PacifiCorp v. Reliant Energy Services, Inc.*, 99 FERC ¶ 61,381, at P 25 (2002).

[11] Entergy's January 31 Answer at 13, *citing*, *e.g.*, Opinion No. 234-A at 61,950.

System Agreements has not been to specifically equalize costs, but rather to equalize any imbalance of costs associated with the facilities used for the mutual benefit of all of the companies."[12]

20. Entergy also argues that the Commission has made it clear that perpetual entitlement to resources is not assured.[13] It also notes that the Commission has described "current contractual commitments" as "expir[ing]" once the contract reaches the end of its initial term and a party "has given the contractually required notice to terminate the contract."[14]

21. Further, Entergy disputes the Louisiana Commission's assertion that the remaining Operating Companies and ratepayers have an entitlement to Entergy Arkansas' generation facilities. Entergy states that "[i]t is well-settled that customers pay only for service; they do not obtain, by their payments, an entitlement in a utility's assets."[15]

22. Entergy states that the Louisiana Commission's proposed departure conditions would render the eight-year notice period meaningless. It contends that as a matter of policy and of contract interpretation, any reading or application of a section that renders the eight-year notice period meaningless should be rejected.

V. Other Pleadings

A. January 31 Pleadings

23. The Arkansas Commission argues that section 1.01 of the System Agreement:

---

[12] Entergy's January 31 Answer at 18, quoting Opinion 234-A, 32 FERC ¶ 61,425 at 61,959. Entergy also cites *Mississippi Industries v. FERC*, 808 F.2d at 1566 (holding that the Entergy "System agreements have sought simply to equalize the System's *excess* energy and capacity among the companies") (emphasis in original).

[13] *Citing Entergy Services, Inc. and Gulf States Utilities Co*., Opinion No. 385, 65 FERC ¶ 61,332, at 62,506 (1993).

[14] *Citing Transcontinental Gas Pipe Line Corp.*, 115 FERC ¶ 61,268, at P 11 (2006).

[15] Entergy's January 31 Answer at 21, *citing Southern Co. Services., Inc.*, 69 FERC ¶ 61,437, at 62,560 (1994) (*citing Board of Pub. Util. Comm'rs v. New York Tel. Co*., 271 U.S. 23, 32 (1926)).

> specifically addresses the term of the agreement and makes no provision for a redistribution of assets of the Operating Companies, no provision for hold harmless responsibilities among the Operating Companies, and no provision for continued entanglement with the System when an Operating Company chooses to terminate its participation. The provision is clear and unambiguous and requires no reference to any other section of the System Agreement to obtain an understanding of its meaning. It is a clear and precise statement of the rights of the respective parties, and the Commission should enforce it.[16]

24. The Arkansas Commission contends that the complaint has not shown that the System Agreement is unjust, unreasonable and unduly discriminatory. Further, it argues that the complaint offers no statutory or case law support for its claim that the termination provision, which was found to be just and reasonable when the Commission accepted it for filing, may be found unjust and unreasonable when an Operating Company actually seeks to exercise the provision, even though it is exercised in exact compliance with the terms of the contract. The Arkansas Commission and AEEC argue that an Operating Company has a clear right under the System Agreement to unilaterally withdraw upon eight years' notice.

25. According to the Arkansas Commission and AEEC, the complaint seeks to require that Entergy Arkansas guarantee that the other Operating Companies continue to receive the benefits of Entergy Arkansas' coal generating capacity indefinitely. They argue that the other Entergy Operating Companies do not have a right to any particular share of Entergy Arkansas' low cost coal capacity. They cite Opinion No. 385 in the Entergy/Gulf States merger case,[17] cited by Entergy, as holding just the opposite. The Arkansas Commission also states that in Opinion No. 234-A (concerning the System Agreement and the allocation of Grand Gulf costs) the Commission recognized that each Operating Company has first claim to the benefits of the facilities it has constructed.

26. Regarding the Louisiana Commission's concern that, if Entergy Arkansas is allowed to withdraw, the other Operating Companies may be forced to provide new additional capacity to serve their remaining load, resulting in added costs to the remaining Operating Companies, the Arkansas Commission responds that it is not unjust and unreasonable that an Operating Company may be required to construct or acquire capacity to serve its load. Rather, it contends that such a result is explicitly contemplated

---

[16] Arkansas Commission's January 31 Answer and Protest at 3.

[17] *See supra* note 13.

under the System Agreement. It cites section 3.05 of the System Agreement which provides:

> *It is the long term goal of the Companies that each Company have its proportionate share of Base Generating Units available to serve its customers either by ownership or purchase.* Any Company which has generating capacity above its requirements, which desires to sell all or any portion of such excess generating capacity and associated energy, shall offer the right of first refusal for this capacity and associated energy to the other Companies under Service Schedule MSS-4 Unit Power Purchases. (Emphasis added by the Arkansas Commission.)

In addition, it cites section 4.01 which provides that "[e]ach Company shall normally own, or have available to it under contract, such generating capability and other facilities as are necessary to supply all of the requirements of its own customers." Thus, the Arkansas Commission contends that the injury claimed by the Louisiana Commission is nothing more than compliance with a long-standing and unchallenged System Agreement requirement.

27. The Arkansas Commission contends that in numerous cases concerning the System Agreement since it was filed in 1982, the Louisiana Commission has never previously complained that the exit provision was unjust and unreasonable. It further argues that the Louisiana Commission's argument here is inconsistent with its interpretation of the System Agreement in prior proceedings, e.g., the retail access proceeding in Docket No. EL00-66,[18] in which the Louisiana Commission acknowledged that the 96-month notice provision was based on the planning horizon for a coal generator, which was about eight years. It also states that the Louisiana Commission's witness in that case testified that he did not object to an Operating Company exiting the System Agreement before the 96-month period had run, but that it should be subject to section 3.05 of the System Agreement until the 96 months had elapsed. AEEC argues that this inconsistency violates the doctrine of judicial estoppel.[19]

---

[18] The retail access proceeding in Docket No. EL00-66 concerned a complaint by the Louisiana Commission regarding Entergy Arkansas' and Entergy Gulf States-Texas' anticipated withdrawal from or altered participation in the System Agreement due to the then-anticipated implementation of retail access in Arkansas and Texas. That proceeding was settled and Arkansas subsequently repealed its retail access legislation.

[19] AEEC's January 31 Intervention and Protest at 5.

28. Regarding the Louisiana Commission's argument that the remaining Operating Companies may be deprived of the benefits of fuel diversity, economies of scale and efficiencies that the departing company's facilities may produce, the Arkansas Commission responds that it is a natural effect that the drafters of the System Agreement must have contemplated in drafting the termination provisions. Moreover, it argues that the remaining companies will lose the benefits of fuel diversity only if those companies, and their regulators, neglect to use the 96-month period to improve their own fuel diversities and efficiencies. It states that in Docket No. EL00-66, the Louisiana Commission acknowledged that the 96-month notice provision was based on the planning horizon for a coal generator.

29. The New Orleans City Council argues that, while the System Agreement provides the right to withdraw upon 96-months notice, the agreement is silent as to what rights and obligations pertain to the Operating Companies upon such withdrawal. It contends that all of the generating plants on the Entergy system were planned, constructed and operated for the benefit of the Entergy system as a whole, not that of any individual Operating Company and that Entergy Arkansas cannot depart the Entergy system and take with it generating plants that were built for the benefit of and paid for, in part, by the other Operating Companies. It claims that Entergy's withdrawal from the System Agreement would remove a disproportionate amount of low-cost generation from the Entergy System and necessarily raise system-average production costs for the remaining Operating Companies and their ratepayers.[20] It contends that the Commission has held that when a party seeks to withdraw from a Regional Transmission Organization (RTO), it will consider whether the effects on other participants are just and reasonable, including consideration of any replacement arrangements.[21]

30. New Orleans City Council also suggests that Entergy Arkansas' withdrawal is an attempt to avoid the Commission's determination concerning rough cost equalization in Opinion No. 480 and that Entergy Arkansas' desire to do so does not warrant a condition-free withdrawal. It notes that Entergy has raised the possibility that the Operating Companies could mutually agree to permit Entergy Arkansas' withdrawal in less than the 96-month notice period. It asserts that any decision by the Entergy system to allow

[20] New Orleans City Council contends that Entergy Arkansas has for several years been the lowest production cost company on the Entergy system due to the system's decision to locate its coal-fired plants in Arkansas and subsequent increases in the price of natural gas.

[21] New Orleans City Council's Comments at 11, n.20, *citing Louisville Gas and Electric Co.*, 114 FERC ¶ 61,282, at P 27-29 (2006) (*Louisville Gas and Electric*).

Entergy Arkansas' withdrawal before 96 months would exacerbate the economic hardships suffered by New Orleans and the other Gulf regions which were devastated by Hurricanes Katrina and Rita.

31. L-M Municipals describe Entergy Arkansas' withdrawal from the System Agreement as "a watershed event . . . [that] has presented this Commission with a unique opportunity to shape the electricity markets in the Gulf Coast region."[22] They support the Louisiana Commission's analysis and argue that Entergy Arkansas may not simply withdraw without protective measures to ensure that the legitimate expectations of historical users of the Entergy transmission system are protected. While the complaint focuses on issues of generation cost equalization, L-M Municipals argue that many transmission issues will arise if Entergy Arkansas withdraws without condition and that each of those issues raises the possibility of significant additional costs to consumers.[23]

32. L-M Municipals argue that the Commission should preclude Entergy Arkansas' withdrawal from the System Agreement if that also would result in the withdrawal of Entergy Arkansas from the Entergy Open Access Transmission Tariff (OATT). In the alternative, they request that the Commission establish conditions on Entergy Arkansas' withdrawal from the System Agreement that preserve the Entergy transmission system as a single entity; one such condition could be a requirement that Entergy join Southwest Power Pool (SPP) and place the Entergy Operating Companies' transmission facilities under a single, seamless SPP-Entergy RTO. Alternatively, L-M Municipals suggest that the Commission, in exchange for permitting Entergy Arkansas to withdraw its transmission assets from the System Agreement, require Entergy Arkansas to turn over operational control of those assets to the service company (Entergy Services, Inc.) and agree that Entergy Services, Inc. shall be Entergy Arkansas' agent. They request that the Commission establish a technical conference to address the Entergy Arkansas' withdrawal.

B. February 15 Answers to the January 31 Pleadings

33. The Louisiana Commission states that it does not challenge the 96-month period for the notice of termination. But, it contends that the System Agreement does not set forth the consequences and what occurs when a party attempts to withdraw from the System Agreement. It further states that the Chief Executive Officer (CEO) of Entergy has acknowledged that an Operating Company cannot simply withdraw from the System

[22] L-M Municipals' Motion at 9.

[23] *Id*. at 7-8.

Agreement without consequences and that Entergy has acknowledged that it must pursue a replacement agreement that balances the need to achieve economies and efficiencies for utility customers while eliminating disputes.[24]

34. The Louisiana Commission also asserts that its position in the instant complaint is consistent with its position in past proceedings. It contends that parties mischaracterize its position in the retail access proceeding, Docket No. EL00-66. It asserts that in that proceeding, its position was that "[a]llowing the withdrawal of companies from the System Agreement, without enforcing section 3.05 or complete hold harmless measures, would be patently unreasonable."[25] It states that, as it did in Docket No. EL00-66, it seeks to retain the benefits of system membership to which it is entitled. It also argues that the doctrine of judicial estoppel is not applicable to administrative proceedings before the Commission.[26]

35. Entergy and the Arkansas Commission oppose the L-M Municipals' motion for a technical conference as misplaced, premature and beyond the scope of the complaint. According to Entergy, the Entergy OATT governs the issues raised by L-M Municipals, the withdrawal of a party from the System Agreement does not alter the transmission rates, terms and conditions of the OATT, and no filing has been made to alter the OATT to reflect Entergy Arkansas' withdrawal.

36. Entergy asserts that the New Orleans City Council mischaracterizes the *Louisville Gas and Electric* order,[27] and that the Commission did not state in that order that it would consider whether the effects of Louisville Gas and Electric's withdrawal were just and reasonable. Rather, the Commission simply stated that it would consider the effect of the requesting party's withdrawal on the RTO and its remaining members, and, in so doing, be guided by Order No. 2000 principles. However, Entergy argues that the *Louisville Gas and Electric* holding has no application to withdrawal from the System Agreement, which is not an RTO. Rather, the Commission should be guided by Commission orders and federal court cases addressing the System Agreement. It asserts that no System

---

[24] Louisiana Commission's February 15 Answer at 2, *citing* Entergy's January 30, 2007 earnings conference call and a statement by Entergy's CEO in *Electric Utility Week.*

[25] *Id*. at 3, quoting the Louisiana Commission's initial brief in Docket No. EL00-66.

[26] *Citing Kentucky Utilities Co.*, 62 FERC ¶ 61,097 (1993) (*Kentucky Utilities*).

[27] *See supra* note 21.

Agreement-related Commission order or federal court case places conditions on withdrawals from the System Agreement under section 1.01.

C. March 2 Answers to the February 15 Answers

37. Entergy states that the Louisiana Commission seeks the imposition of standards for evaluating Entergy Arkansas' withdrawal that are similar to those standards argued for in the retail access proceeding. But, it contends that a fundamental difference between Entergy Arkansas' withdrawal and the retail access proceeding is that Entergy Arkansas is withdrawing according to the explicit terms of the System Agreement and, thus, no amendment to the System Agreement is necessary. In contrast, in the retail access proceeding, Entergy was requesting approval of amendments that would allow Operating Companies to depart without giving 96 months' notice to accommodate then-impending retail access in Arkansas and Texas. It also reiterates its position that the Louisiana Commission's interpretation of the termination provision here is vastly different from its position in the retail access proceeding.

38. Regarding statements made by Entergy's senior management, Entergy argues that the Louisiana Commission has taken them out of context. According to Entergy, Entergy's CEO commented on the inevitable litigation that would result from Entergy Arkansas' withdrawal, but he never addressed the legal departure rights of a company under the System Agreement. Entergy further explains that the statement of Entergy's CEO cited by the Louisiana Commission suggesting that the System Agreement would be rendered inequitable and unworkable was related to the bandwidth remedy adopted by the administrative law judge in Docket No. EL01-88 (the same proceeding that resulted in Opinion No. 480), not Entergy Arkansas' withdrawal from the System Agreement. Entergy further asserts that it has never taken the position that it must pursue a replacement agreement for the System Agreement upon Entergy Arkansas' withdrawal. The System Agreement is voluntary and no replacement is required. Citing the repeal of the Public Utility Holding Company Act of 1935, which required coordinated operations, Entergy states that there is no law or regulation that requires it to have coordinated operations, such as those provided for under the System Agreement. It acknowledges that it did state that it will continue to see if a replacement agreement can be attained, but it contends that there is no legal requirement that it do so.

39. Entergy also states that no filing has been made to allocate transmission costs among the Operating Companies following Entergy Arkansas' withdrawal, or to alter the OATT to reflect such withdrawal. Until such a filing is made, Entergy contends that any concerns regarding the allocation of transmission costs among the Operating Companies or the effects of Entergy Arkansas' withdrawal on the OATT and Entergy's transmission system are speculative and premature.

40. The New Orleans City Council disputes Entergy's interpretation of *Louisville Gas and Electric*, arguing that the Commission did apply the just and reasonable standard to Louisville Gas and Electric's proposal to withdraw from the Midwest Independent System Operator. It also challenges Entergy's assertion that orders concerning withdrawals from an RTO are inapplicable to Entergy Arkansas' withdrawal. It argues that the System Agreement is not a simple power sales contract between two parties negotiating at arm's length. Rather, it is much closer to an RTO or power pooling arrangement than a standard power sales contract, and the withdrawal of an Operating Company from the System Agreement can be expected to have a large impact on the remaining Operating Companies, their customers and energy markets in the Southeast. It notes that in *Louisville Gas and Electric*, the Commission noted that it is required to consider the effects of the requesting party's withdrawal from the RTO on its remaining members because a transmission owner's withdrawal can have a substantial effect on other market participants and the markets themselves. It argues that the same logic should apply to Entergy Arkansas' withdrawal from the System Agreement. It also notes that the System Agreement does not contain consumer protection provisions applicable to withdrawals.

41. AEEC reiterates its argument that the Louisiana Commission's position is inconsistent with its position in the retail access proceeding in which the Louisiana Commission argued, among other things, that no one expected a company to withdraw from the System Agreement, yet the agreement addresses that circumstance by providing a right of first refusal and a 96-month withdrawal period.[28] According to AEEC, the Louisiana Commission understood that the System Agreement would terminate upon 96 months notice and that the termination provision would limit any other party's right to relief under the System Agreement after the 96-month period. Regarding the Louisiana Commission's reliance upon Entergy's reference to a desire to establish a new system agreement, AEEC also argues that Entergy Arkansas cannot enter into any System Agreement replacement contract without the approval of the Arkansas Commission. Finally, AEEC disputes the Louisiana Commission's contention that the Commission, in *Kentucky Utilities*, determined that judicial estoppel is inapplicable to administrative proceedings before the Commission. AEEC argues that the Commission has on numerous occasions considered and discussed judicial estoppel claims even though it has never formally adopted the principle.[29]

---

[28] AEEC's March 2 Answer at 3.

[29] *Id*. at 6-8.

VI. Discussion

A. Procedural Matters

42. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[30] the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

43. Notwithstanding the Arkansas Commission's opposition to the timely motions to intervene of Union Power, L-M Municipals, MDEA Cities and Arkansas Electric Cooperative, we find that good cause exists to grant their motions to intervene. We are satisfied that they have adequately demonstrated their interests in the outcome of this proceeding, that no other party represents their interests and that their participation may be in the public interest. Further, notwithstanding the Arkansas Commission's opposition to their motions to intervene out of time, we will also grant Cleco's and East Texas Cooperatives' late interventions, given their interest in this proceeding, the early stage of this proceeding, and the absence of any undue prejudice or delay.

44. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[31] prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers to answers and the answers to protests because they have assisted us in our decision-making process.

B. Commission Determination

45. Initially, we deny AEEC's argument that we should apply the doctrine of judicial estoppel to prevent the Louisiana Commission from taking the position it takes in its complaint which, AEEC alleges, is contrary to the Louisiana Commission's position in past proceedings such as the retail access proceeding in Docket No. EL00-66. In a 2006 order, the Commission explained that "[t]he doctrine of judicial estoppel applies only where, as a result of prior testimony, parties have relied upon that testimony and changed positions by reason of that testimony."[32] In this case, AEEC does not allege that it relied

[30] 18 C.F.R. § 385.214 (2006).

[31] 18 C.F.R. § 385.213(a)(2) (2006).

[32] *San Diego Gas & Electric Co. v. Sellers of Ancillary Services, et al.*, 115 FERC ¶ 61,230, at P 33 & n.59 (2006) (citations omitted). In that case, the Commission found the doctrine did not apply because there was no inconsistency and no party would be induced to change its litigation position. *See also Kentucky Utilities Co.*, 62 FERC

(continued)

upon prior testimony by the Louisiana Commission and changed positions by reason of that testimony. Thus, AEEC has failed to make the required allegations under the doctrine of judicial estoppel.

46. No parties to this proceeding dispute the fact that Entergy Arkansas properly gave notification of its withdrawal in accordance with the termination provision of the System Agreement.[33] However, the parties do dispute whether Entergy Arkansas has any obligations under the System Agreement upon its withdrawal and, if so, what those obligations may be. We will deny the complaint in part based on the merits and in part because it is premature, as discussed below.

47. While the System Agreement is silent as to the rights and obligations of a departing member, and thus arguably could be interpreted as imposing no obligations on a departing member and providing no rights to remaining members, the Commission concludes that such a major change to this type of highly integrated system arrangement, which has existed for over 50 years,[34] cannot be viewed in a vacuum if we are to fulfill our obligations under the FPA. The Commission must determine that the System Agreement will remain just and reasonable for remaining members (Entergy Louisiana, Entergy New Orleans, Entergy Mississippi and Entergy Gulf States), and likewise that any new Entergy Arkansas jurisdictional wholesale arrangements will be just and reasonable, as a result of Entergy Arkansas withdrawing from the arrangement. We find 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. However, in light of the history and nature of the existing members' planning and operation of their facilities under the System Agreement, it is possible that it may ultimately be appropriate to require transition measures or other conditions to ensure just and reasonable wholesale rates and services for affected

---

¶ 61,097, at 61,705 (1993) ("The doctrine of judicial estoppel has been rejected in many jurisdictions and has never been applied by the Commission. We agree with the presiding judge on this issue that the interest of fundamental fairness and sound public administration outweigh Municipals' technical objection to full consideration of KU's evidence. We thus have no need to decide whether KU has made any inconsistent statements or whether any such statements have had a material impact on the Municipals' prosecution of their complaint.").

[33] System Agreement, § 1.01.

[34] There has been some form of an Entergy system agreement in place for 50 years, and the current System Agreement has been in place since 1982.

Operating Company members going forward from the effective date of Entergy Arkansas' withdrawal.

48. Presumably, the 96-month notice period provides Operating Companies affected by Entergy Arkansas' departure the opportunity to make reasonable alternative resource arrangements if they believe it appropriate to do so, and for all members to try to address disputes, before the departure of Entergy Arkansas actually occurs. The fact is that we do not at this time know what arrangements may replace the existing ones and there could be other factors present, such as shifts in the cost of one fuel versus another during this period, affecting parties' positions. Thus, it would be premature for us to attempt to address these issues at this time.[35] Entergy Arkansas' withdrawal will not take place for almost six and a half years, and, as discussed below, Entergy will need to modify the System Agreement pursuant to section 205 of the FPA to reflect a change in members of the agreement. Much can happen during a six and a half year period, as evidenced by the history of the System Agreement. For the Commission to expend significant resources at this juncture would be administratively inefficient and more importantly could lead to an inaccurate result, to the extent it may be determined that Entergy Arkansas has obligations upon its withdrawal from the System Agreement.

49. We disagree with Entergy's assertion that it will not need to make a filing under section 205 of the FPA revise the System Agreement to reflect the withdrawal of Entergy Arkansas. We note that, unlike a situation in which an agreement expires by its own terms, this is a change in the composition of parties subject to a multi-party coordination arrangement and agreement approved by the Commission under section 205. Entergy Arkansas is referenced throughout the System Agreement and, although the rate formula itself will not be changed, the removal of Entergy Arkansas from the coordination arrangement will affect the rates to remaining Entergy Operating Companies since the formula will no longer reflect the costs of one of the current Entergy Operating Companies. This is not akin to a typical power sales contract that is terminating by its own terms or a one-to-one contract where one party terminates and there is no direct effect on others. That Entergy Arkansas is leaving the arrangement consistent with the notice terms of the System Agreement does not change the fact that, in the context of this multi-party arrangement and the operation of the formula, this is a change that clearly

[35] We also agree with Entergy that L-M Municipals' concerns regarding the effects of Entergy Arkansas' withdrawal on the OATT and Entergy's transmission system are speculative and premature because no filing has been made to alter the OATT to reflect such withdrawal.

"affects or relates to" payments among the remaining Entergy Operating Companies and thus the rates charged by those members.[36]

50. Based on the above, we deny the Louisiana Commission's complaint. A more sound approach to addressing these issues would be to address them at the time that Entergy makes a section 205 filing to reflect Entergy Arkansas' withdrawal from the System Agreement. At that time, the parties will have the opportunity to address the issues discussed above and the Commission will have the current information necessary to make appropriate findings. Because of the circumstances concerning Entergy Arkansas' withdrawal from the System Agreement, and given that resolution of these issues may take considerable time, we advise Entergy that it should submit its section 205 filing as early as 18 months prior to the date that Entergy Arkansas' withdrawal becomes effective. This would allow the Commission and all parties the opportunity to try to address issues without the potential for suspension, refunds and trial-type hearing.

The Commission orders:

The Louisiana Commission's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose
Secretary

[36] See section 205(c) of the FPA which requires, among other things, that "all contracts which in any manner affect or relate to" Commission-jurisdictional rates, charges, classifications, and services must be filed with the Commission. 16 U.S.C. § 824d(c) (2000).