

122 FERC ¶ 61,059
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.

Entergy Services, Inc.

Docket No. ER07-985-001

ORDER DISMISSING REHEARING REQUEST AS DEFICIENT AND GRANTING
REHEARING REQUEST

(Issued January 25, 2008)

1. On August 24, 2007, the Louisiana Public Service Commission (Louisiana Commission) filed a request for rehearing of the Commission's July 26 Order¹ addressing a request to amend the Entergy System Agreement (System Agreement) submitted by Entergy Services, Inc. (Entergy), on behalf of the Entergy Operating Companies.² Entergy also filed a request for rehearing of the July 26 Order. In this order, as discussed below, the Commission finds the Louisiana Commission's request for rehearing to be deficient, and therefore, dismisses the rehearing request. In addition, the Commission grants Entergy's rehearing request, as discussed below.

I. Background

2. On June 14, 2001, the Louisiana Commission filed a complaint pursuant to section 206 of the Federal Power Act (FPA).³ The Louisiana Commission alleged that the System Agreement, a rate schedule that includes various service schedules governing, among other things, the allocation of certain costs associated with the integrated operations of the Entergy system, no longer operated to produce rough production cost equalization.

¹ *Entergy Services, Inc.*, 120 FERC ¶ 61,089 (2007) (July 26 Order).

² The Entergy Operating Companies are: Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana LLC, Entergy Mississippi, Inc. and Entergy New Orleans, Inc.

³ 16 U.S.C. § 824e (2000).

3. In Opinion No. 480,⁴ the Commission found that rough production cost equalization had been disrupted on the Entergy system. Opinion Nos. 480 and 480-A approved a numerical bandwidth of +/- 11 percent of the Entergy system average production cost to maintain the rough equalization of production costs among the Entergy Operating Companies and required annual filings beginning in June 2007. The Commission stated that the bandwidth would be implemented prospectively and would be effective for calendar year 2006, and that any equalization payments would be made in 2007 after a full calendar year of data became available.

4. On April 10, 2006, Entergy submitted a compliance filing to implement the directives of Opinion Nos. 480 and 480-A. The compliance filing included proposed revisions to Service Schedule MSS-3⁵ that had not been ordered by the Commission in Opinion Nos. 480 and 480-A. In its order on the compliance filing,⁶ the Commission rejected these non-compliant amendments and denied, as beyond the scope of the compliance filing, Entergy's request to make adjustments to the methodology reflected in Exhibits ETR-26 and ETR-28. The Commission explained that Entergy must comply with the requirements of Opinion Nos. 480 and 480-A, including the requirement to follow the methodology set forth in Exhibits ETR-26 and ETR-28. The Commission also stated that Entergy should make a section 205 filing if it desired to make any changes to the methodology in Exhibits ETR-26 and ETR-28.⁷

5. On May 30, 2007, in the instant docket, Entergy filed to amend section 30.12 of Service Schedule MSS-3 to exclude the amount of storm cost accruals recorded in FERC Account No. 924 from the calculation of each Operating Company's actual production

⁴ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005) (Opinion No. 480), *aff'd*, *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005) (Opinion No. 480-A).

⁵ Service Schedule MSS-3 includes a methodology for pricing energy exchanged among the Operating Companies and provides for an after-the-fact, hour-by-hour allocation of the cost of energy from an Operating Company whose generation provided energy in excess of that company's load to an Operating Company whose generation produced less than its load. Entergy also included the formulas for implementing the rough production cost equalization bandwidth remedy required by Opinion No. 480 in Service Schedule MSS-3.

⁶ *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006) (Compliance Order).

⁷ *Id.* P 69.

costs. In the July 26 Order, the Commission found that Entergy's proposed amendment raised issues of material fact that are more appropriately addressed in hearing and settlement judge procedures.⁸ Therefore, the Commission accepted it for filing, and suspended it for a nominal period, to become effective July 30, 2007, subject to refund and established hearing and settlement judge procedures.⁹

6. Further, the Commission explained that it disagreed with the Louisiana Commission's argument that, to be consistent with the remedy adopted in Opinion No. 480, the proposed revisions should not be permitted to take effect until a future calendar year.¹⁰ The Commission cited another recent Entergy order¹¹ in which the Louisiana Commission raised similar arguments in explaining that the Commission's holding in Opinion Nos. 480 and 480-A did not change the fundamental tenets of section 205 of the FPA.¹² Public utilities have a statutory right to amend their rates and charges and to propose that, absent waiver, the amendments be made effective after 60 days' notice.¹³ Accordingly, the Commission established an effective date of July 30, 2007 (i.e., the date following 60 days' notice).

II. Requests for Rehearing

7. The Louisiana Commission and Entergy filed requests for rehearing of the July 26 Order. Subsequently, the Louisiana Commission filed an answer to Entergy's rehearing request, Entergy filed an answer to the Louisiana Commission's answer, and the Arkansas Public Service Commission filed an answer to the Louisiana Commission's answer.

A. Louisiana Commission's Rehearing Request

8. The Louisiana Commission seeks rehearing of the Commission's determination in the July 26 Order that Entergy may file a change to its System Agreement, to be effective after 60 days' notice, allowing the change to affect calculations for a prior cost

⁸ July 26 Order, 120 FERC ¶ 61,089 at P 12.

⁹ *Id.* P 13.

¹⁰ *Id.* P 11.

¹¹ *Citing Entergy Services, Inc.*, 119 FERC ¶ 61,190, at P 19 (2007).

¹² 16 U.S.C. § 824d.

¹³ July 26 Order, 120 FERC ¶ 61,089 at P 11.

measurement period. The Louisiana Commission states that the Commission previously ruled that the Louisiana Commission's own ordered revisions in a section 206 case could only affect a future cost measurement period.¹⁴ It alleges that the Commission's ruling creates a double standard for the time in which a tariff change may be made effective; arguing that tariff changes proposed by the utility are effective almost immediately, while tariff changes ordered by the Commission on behalf of customers are delayed for up to two years.¹⁵

9. The Louisiana Commission claims that the Commission's ruling that public utilities have a statutory right to amend their rates under section 205 of the FPA fails to reconcile with the Commission's rulings in Opinion Nos. 480 and 480-A, which determined that making a remedy effective immediately would be retroactive and illegal.¹⁶ It argues that the reasoning in Opinion Nos. 480 and 480-A and the *Compliance Order*, issued November 17, 2006 in Docket No. EL01-88-004, would require a proposed change in methodology to take effect only for a future calendar year test period because in those orders the Commission applied the remedy adopted in 2005 for the first time in the 2006 calendar year test period, with payment and receipts commencing thereafter.¹⁷

10. The Louisiana Commission maintains that if the Commission is to be consistent with its prior rulings it may implement the modified version of the remedy only to the first calendar year of data following the filing, after which the first modified remedy payments would occur.¹⁸ According to the Louisiana Commission, the first calendar year following this filing is 2008 and any payments should not occur until 2009, if the modification to the remedy is approved.¹⁹

B. Entergy's Rehearing Request

11. Entergy seeks clarification as to the implementation of the amendment accepted for filing in the July 26 Order. Entergy states that the Commission made its amendment effective July 30, 2007, however, Entergy states that the amended formula will not be

¹⁴ Louisiana Commission Rehearing Request at 1.

¹⁵ *Id.*

¹⁶ *Id.* at 1-2.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 4.

¹⁹ *Id.*

utilized until the second annual bandwidth payments/receipts are calculated, which payments/receipts will be effective June 1, 2008.²⁰ Entergy explains that the bandwidth formula is an annual calculation that is performed in May of each year to calculate bandwidth payments and receipts, which payments/receipts become effective June 1 of such year. Therefore, Entergy asks that the Commission clarify that the amendment to section 30.12 of its System Agreement Service Schedule MSS-3 will apply for the first time to the computation of bandwidth payments based on calendar year 2007 production cost data, which computation will be performed and filed with the Commission in May 2008, to be effective June 1, 2008.²¹

12. The Louisiana Commission supports Entergy's request to make the amendment effective June 1, 2008, for the purposes of this filing, but cautions that the Commission should not adopt Entergy's position as a general interpretation of section 30.12 of its System Agreement Service Schedule.²² It suggests that the Commission treat Entergy's filing as a request to make the effective date of its tariff change June 1, 2008. It further comments that no harm will result in this case by allowing Entergy to change the effective date to 2008 since Entergy could have sought a June 1, 2008 effective date in its May 30, 2007 application in this case.²³ In addition, the Louisiana Commission reiterates its argument that section 205 and 206 changes should be treated the same to the extent practicable under the law.²⁴

III. Discussion

A. Procedural Matters

13. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 713(d) (2007), prohibits answers to requests for rehearing. Accordingly, we will reject the answers filed by the parties in this proceeding.

²⁰ Entergy Rehearing Request at 2.

²¹ *Id.*

²² Louisiana Commission's Response to Rehearing Request at 1.

²³ *Id.* at 3.

²⁴ *Id.* at 4.

B. Rehearing Requests

1. Louisiana Commission's Rehearing Request

14. We find that the Louisiana Commission's rehearing request is deficient because it fails to include a Statement of Issues section separate from its arguments, as required by Rule 713 of the Commission's Rules of Practice and Procedure.²⁵ Rule 713(c)(2) requires that a rehearing request include a separate section entitled "Statement of Issues" listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.²⁶ Under Rule 713, any issue not so listed will be deemed waived. Accordingly, we will dismiss the Louisiana Commission's rehearing request.²⁷

15. However, if the Commission were to consider the Louisiana Commission's rehearing request, we would deny it. As discussed below, we find that its arguments on rehearing are without merit.

16. We disagree with the Louisiana Commission that Entergy's proposed amendments retroactively recalculate bandwidth remedy payments. Rather, Entergy filed the proposed amendments pursuant to section 205, and the Commission, in accordance with section 205, made them effective, after 60 days' notice. As the Commission explained in the July 26 Order, the holding in Opinion Nos. 480 and 480-A did not change the fundamental doctrine of section 205 of the FPA, which provides public utilities a statutory right to amend their rates and charges and to propose that, absent waiver, the amendments be made effective after 60 days' notice. In adhering to section 205 of the

²⁵ 18 C.F.R. § 385.713(c)(2) (2007). *See Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, FERC Stats. & Regs. ¶ 31,193 (2005), *order on reh'g*, Order No. 663-A, FERC Stats. & Regs. ¶ 31,211 (2006) (amending Order No. 663 to limit its applicability to rehearing requests).

²⁶ As explained in Order No. 663, the purpose of this requirement is to benefit all participants in a proceeding by ensuring that the filer, the Commission, and all other participants understand the issues raised by the filer, and to enable the Commission to respond to these issues. Having a clearly articulated Statement of Issues ensures that issues are properly raised before the Commission and avoids the waste of time and resources involved in litigating appeals regarding which the courts of appeals lack jurisdiction because the issues on appeal were not clearly identified before the Commission. *See* Order No. 663, FERC Stats. & Regs. ¶ 31,193 at P 3-4.

²⁷ *See, e.g., Duke Power Co., LLC*, 116 FERC ¶ 61,171 (2006); *South Carolina Electric & Gas Co.*, 116 FERC ¶ 61,218 (2006).

FPA, the Commission simply cannot and did not change that basic right accorded by the FPA. Accordingly, in the July 26 Order, the Commission held that the appropriate effective date for the proposed amendment was July 30, 2007, after 60 days' notice. Therefore, we find that the July 26 Order is consistent with the FPA, and does not constitute retroactive ratemaking.

17. Moreover, contrary to the Louisiana Commission's assertions, the Commission's obligation in addressing Entergy's filing is not to be consistent with Opinion Nos. 480 and 480-A, which involved a complaint under section 206 of the FPA, but is to be consistent with section 205 of the FPA, which the Commission has done in this proceeding. Simply put, the statutory requirements of sections 205 and 206 are different, a fact that the Louisiana Commission is unwilling to accept.

18. Furthermore, we disagree with the Louisiana Commission's argument that the Commission acted inconsistently. In the July 26 Order, the Commission, acting pursuant to section 205 of the FPA, accepted Entergy's proposed amendment, suspended it for a nominal period, made it effective subject to refund and established hearing and settlement judge procedures. Any proposed changes found to be just and reasonable could only be made effective prospectively, after 60 days' notice, consistent with section 205 of the FPA.²⁸ In contrast, in Opinion Nos. 480 and 480-A, the Commission, acting on a complaint filed by the Louisiana Commission pursuant to section 206 of the FPA, found that section 206(c) of the FPA prohibited the Commission from ordering refunds. Thus, the Commission concluded that any remedy could be imposed only on a prospective basis.²⁹ Therefore, regardless of the different outcome in the two proceedings, the

²⁸ The most the Commission could have done, had it been warranted, would have been a five-month suspension. Under section 205 of the FPA, the Commission certainly could not have delayed the effectiveness until 2009.

²⁹ Opinion No. 480, 111 FERC ¶ 61,311 at P 145. Section 206(c) of the FPA provides:

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other

(continued)

Commission treated the Louisiana Commission and Entergy consistently with the requirements of the FPA.³⁰

2. Entergy's Rehearing Request

19. We will grant Entergy's request for rehearing. In the Compliance Order issued in the proceeding under Docket No. EL01-88-004, the Commission stated that rough production cost equalization is to be undertaken in the year following the year in which the costs are incurred. The Commission stated that the correct implementation of the bandwidth remedy is as follows:

Entergy calculates production costs for 2006, payments and receipts for 2006 occur in 2007. In calendar year 2007, production costs are again measured and bandwidth payments

electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order.

We note that the Louisiana Commission has appealed this matter to the United States Court of Appeals for the District of Columbia Circuit, *Louisiana Pub. Serv. Comm'n. v. FERC*, No. 05-1462 (D.C. Cir.).

³⁰ Moreover, we note that the Commission recently considered the merits of other Entergy proposals under section 205 of the FPA to amend the System Agreement in Docket Nos. ER07-683-000 and ER07-684-000 and rejected them. *Entergy Services, Inc.*, 119 FERC ¶ 61,191, at P 24 (2007) (holding that the Commission was "not persuaded by Entergy that the new section is needed because of disputes that have arisen in proceedings pending in Louisiana and Arkansas, concerning the appropriate allocation of these payments or receipts to retail and wholesale customers"); *Entergy Services, Inc.*, 119 FERC ¶ 61,192, at P 18 (2007) (rejecting the proposed amendment to the System Agreement because "the hedged item is natural gas which is reflected in Account 501, therefore the gains or losses on gas hedges are to be charged or credited to Account 501, as appropriate").

and receipts for 2007 would occur in 2008. The bandwidth payments/receipts from 2006 should not be reflected in the 2007 production costs.³¹

20. Thus, because Entergy's proposed amendment became effective July 30, 2007, it will apply for the first time to the computation of bandwidth payments based on calendar year 2007 production cost data and the computation will be effective June 1, 2008. Further, the bandwidth formula calculation filed by Entergy on May 29, 2007, in Docket No. ER07-956-000,³² need not be modified as of July 30, 2007, to incorporate the amendment.

The Commission orders:

(A) Louisiana Commission's rehearing request is hereby dismissed, as discussed in the body of this order.

(B) Entergy's rehearing request is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³¹ Compliance Order, 117 FERC ¶ 61,203 at P 41.

³² The Commission accepted and suspended Entergy's proposed rules in Docket No. ER07-956-000 and established hearing and settlement judge procedures. *Entergy Services, Inc.*, 120 FERC ¶ 61,094 (2007).