

124 FERC ¶ 61,203
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. ER07-985-002

ORDER REJECTING REQUEST FOR REHEARING

(Issued August 28, 2008)

1. On February 25, 2008, the Louisiana Public Service Commission (Louisiana Commission) filed a request for rehearing of the Commission's January 25, 2008 Order dismissing the Louisiana Commission's prior rehearing request.¹ In this order, we reject the Louisiana Commission's request for rehearing.

I. Background

Initial Order (July 26, 2007)

2. On July 26, 2007, the Commission issued an order accepting and suspending Entergy Services, Inc.'s (Entergy)² proposed amendment to 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 costs, and making the amendment effective July 30, 2007, subject to refund. The Commission also established hearing and settlement judge procedures.³ In addition to setting the matter for hearing, the Commission rejected an argument by the Louisiana Commission that the proposed

¹ *Entergy Services, Inc.*, 122 FERC ¶ 61,059 (2008) (January 25 Order).

² Acting as agent and on behalf of the Entergy Operating Companies, which are: Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana LLC, Entergy Mississippi, Inc. and Entergy New Orleans, Inc. (collectively, Entergy).

³ *Entergy Services, Inc.*, 120 FERC ¶ 61,089 (2007) (July 26 Order).

revisions should not be permitted to take effect until a future calendar year. The Commission, quoting from a prior order rejecting the same argument raised by the Louisiana Commission, explained:

[T]he Commission's holding in Opinion Nos. 480 and 480-A did not change the fundamental tenets of section 205 of the FPA.^[4] 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. We cannot and did not change that basic right accorded by the FPA.^[5]

3. The Commission added that, because Entergy had not demonstrated good cause to justify waiver of the 60-day prior notice requirement for its proposed amendment, it would establish an effective date of July 30, 2007.

Rehearing Order (January 25, 2008)

4. The Louisiana Commission and Entergy sought rehearing of the July 26 Order. In an order issued January 25, 2008, the Commission dismissed the Louisiana Commission's rehearing request (though, in addition, it also addressed the merits of its arguments) and granted Entergy's rehearing request.⁶ In the January 25 Order, the Commission found the Louisiana Commission's rehearing request deficient because it failed to comply with Rule 713 of the Commission's Rules of Practice and Procedure.⁷ While the Commission dismissed the Louisiana Commission's rehearing request as deficient, it also addressed the merits of the Louisiana Commission's arguments. The Commission rejected the Louisiana Commission's argument that Entergy's proposed amendment retroactively recalculated bandwidth remedy payments. The Commission explained, citing its previous explanation in its July 26 Order, that it had made the proposed amendment effective after 60 days' notice (July 30, 2007) consistent with section 205 of the FPA. The Commission added that its action in this section 205

⁴ 16 U.S.C. § 824d (2006).

⁵ *Entergy Services, Inc.*, 119 FERC ¶ 61,190, at P 19 (2007).

⁶ *Entergy Services, Inc.*, 122 FERC ¶ 61,059 (2008) (January 25 Order).

⁷ See 18 C.F.R. § 385.713(c)(2) (2008); *Revisions 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).

proceeding was different from its action in Opinion Nos. 480 and 480-A, because those orders involved a complaint filed under section 206 of the FPA.⁸ It explained that, simply put, the statutory requirements of sections 205 and 206 are different. The Commission explained that any proposed changes found to be just and reasonable with respect to Entergy's section 205 filing could only be made effective prospectively, after 60 days' notice. In contrast, the Commission explained, in Opinion Nos. 480 and 480-A, it acted pursuant to section 206 of the FPA and found that section 206(c) of the FPA prohibited the Commission from ordering refunds.⁹ Thus, the Commission explained, a remedy could be imposed only on a prospective basis, and regardless of the different outcome in the two proceedings, the Commission treated both the Louisiana Commission and Entergy consistently with the requirements of the FPA.

5. In the January 25 Order, the Commission granted Entergy's rehearing request and clarified when the proposed amendment (to be effective July 30, 2007, subject to refund) would be reflected in a bandwidth remedy. The Commission pointed to language from a prior order in Docket No. EL01-88-004 to explain again how the implementation of the bandwidth remedy works:

It is the Commission's intent that rough production cost equalization is to be undertaken in the year following the year in which the costs are incurred. Thus, as we said in Opinion No. 480-A, cost equalization for 2006 is to be undertaken in 2007. The correct implementation of the remedy is as follows: Entergy calculates production costs for 2006, payments and receipts for 2006 [would] occur in 2007. In calendar year 2007, production costs are again measured and bandwidth payments and receipts for 2007 would occur in 2008. The bandwidth payments/receipts from 2006 should not be reflected in the 2007 production costs.^[10]

⁸ 16 U.S.C. § 824e (2006).

⁹ As the Commission noted in the January 25 Order, the Louisiana Commission 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.). Since that time, the Court remanded this matter to the Commission for reconsideration of its decision to deny retroactive refunds and to delay implementation of bandwidth remedy. *Louisiana Pub. Serv. Comm'n. v. FERC*, 522 F.3d 378 (2008).

¹⁰ See *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203, at P 41 (2006) (Compliance Order).

6. Thus, the Commission explained that, because the amendment became effective July 30, 2007, which was the effective date established pursuant to section 205 of the FPA, the amendment would apply for the first time to the computation of bandwidth payments based on calendar year 2007 production cost data, which computation would be effective June 1, 2008.

II. Louisiana Commission's Rehearing Request of the Rehearing Order

7. The Louisiana Commission seeks rehearing of the January 25 Rehearing Order, arguing that: (1) its first rehearing request did not violate Rule 713 and did not merit a waiver of its issues; and (2) while it supports the approval of Entergy's request to make the amendment effective June 1, 2008,¹¹ for the purposes of the filing in this proceeding only, it opposes the Commission's decision to allow a section 205 filing by Entergy to affect 2007's remedy payment calculations to be paid in 2008.

8. The Louisiana Commission argues that its pleading met all requirements of Rule 713, except for the failure to include a heading entitled "Statement of Issues." It maintains that Rule 713 does not state that substantial compliance is not enough, and it does not warn that the failure to insert those words in the pleading by itself is enough for the Commission to ignore its rehearing request. It argues that the Commission's action was unfair to ratepayers, and that it violates the FPA, which does not have a requirement that separate headings be included. Thus, the Louisiana Commission asserts that it has not violated the FPA, but rather that the Commission has violated the FPA.

9. The Louisiana Commission argues that the Commission should remain consistent with its prior rulings in Opinion Nos. 480 and 480-A, in which the Commission found that pursuant to section 206(c) of the FPA, the Commission could only provide a prospective remedy, and, because of that, the Commission should not permit a change in payments and receipts under section 205 of the FPA until the remedy is applied to data for a prospective calendar year. It further argues that no basis exists for the Commission to apply its rehearing clarification as a general standard of how section 30.12 of MSS-3 should be interpreted and implemented. It adds that section 205 and 206 changes should be treated the same "to the extent practicable under the law."¹²

¹¹ In the original filing, Entergy requested an effective date of June 1, 2007, but the Commission denied the request and made it effective July 30, 2007, after 60 days notice.

¹² Louisiana Commission's Rehearing Request at 5.

III. Discussion

10. We reject the Louisiana Commission's second rehearing request. The Commission does not allow rehearing of an order denying rehearing.¹³ Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to what the Commission earlier said.¹⁴ Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end. So, the Commission does not allow parties to seek rehearing of an order denying rehearing. And, as the United States Court of Appeals for the District of Columbia Circuit has put it, even “an improved rationale” would not justify a further request for rehearing.¹⁵

11. Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.¹⁶ In fact, a second rehearing request is required in instances when the later order modifies the results of the earlier order in a significant way.¹⁷

12. Here, that is not the case. The Commission found the Louisiana Commission's first request for rehearing deficient, because it failed to comply with the Commission's regulations, which expressly provide that requests for rehearing contain a separate section

¹³ See, e.g., *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, 112 FERC ¶ 61,153 (2005); *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

¹⁴ Accord, e.g., *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of “infinite regress” that would “serve no useful end”).

¹⁵ See *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)); see also *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001) (*Londonderry*).

¹⁶ See *Londonderry*, 273 F.3d at 423.

¹⁷ See *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Massachusetts v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).

entitled “Statement of Issues” listing each issue in a separately enumerated paragraph.¹⁸ No more need be said. Further, with respect to the appropriate effective date, the Commission made no significant modification on rehearing that would warrant the possibility of a second rehearing.¹⁹ In these circumstances, the second rehearing request was neither required nor appropriate, and so it will be rejected. In any event, we add, in the January 25 Order we addressed the Louisiana Commission’s arguments and found them unpersuasive – explaining that even if we were to consider the Louisiana Commission’s arguments on their merits, we would deny rehearing.²⁰

The Commission orders:

The Louisiana Commission’s request for rehearing of the January 25 Order denying rehearing in this proceeding is hereby rejected.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁸ 18 C.F.R. § 385.713(c)(2) (2008); *see supra* note 6.

¹⁹ *See Duke Power*, 114 FERC ¶ 61,148 (2006); *Gustavus Electric Co.*, 111 FERC ¶ 61, 424 (2005); *Symbiotics, L.L.C.*, 99 FERC ¶ 61,064 (2002); and *PacifiCorp*, 99 FERC ¶ 61,015 (2002). *See also Southern*, 877 F.2d at 1073 (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d at 1109-10).

²⁰ January 25 Order, 122 FERC ¶ 61,059 at P 15-18.