145 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Entergy Services, Inc. Docket No. ER10-1350-004

ORDER GRANTING CLARIFICATION AND DENYING REQUEST FOR REHEARING

(Issued October 16, 2013)

1. On November 7, 2011, the Louisiana Public Service Commission (Louisiana Commission) filed a request for rehearing and clarification of the Commission's order issued in this proceeding on October 6, 2011.[1] In the Rehearing Order, the Commission granted, in part, and denied, in part, the Louisiana Commission's request for rehearing of the Commission's order issued in this proceeding on July 23, 2010.[2]

2. In the Initial Order, the Commission accepted and suspended the rates that Entergy Services, Inc. (Entergy) proposed as part of its fourth annual bandwidth filing, and established hearing and settlement judge procedures with regard to whether Entergy's actual calendar year 2009 formula inputs were correctly applied in the bandwidth calculation.[3] In its rehearing request, the Louisiana Commission asked whether the limited scope of the hearing was intended to prevent the Louisiana Commission and other parties from challenging the prudence and justness and reasonableness of cost inputs to the bandwidth formula. In the Rehearing Order, the Commission determined that parties can challenge in the bandwidth filings whether the required formula inputs were correctly applied and can challenge the justness and reasonableness of the formula itself by submitting either a complaint or filing pursuant to section 206 or section 205 of the

---

[1] *Entergy Servs., Inc.*, 137 FERC ¶ 61,019 (2011) (Rehearing Order).

[2] *Entergy Servs., Inc.*, 132 FERC ¶ 61,065 (2010) (Initial Order).

[3] *Id.* P 26.

Federal Power Act (FPA),[4] respectively.[5] As discussed below, this order denies the Louisiana Commission's request for rehearing and provides clarification of the Rehearing Order.

I. Background

3. In Opinion Nos. 480 and 480-A, 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 in order to maintain the rough equalization of production costs among the Entergy Operating Companies[6] and required annual bandwidth implementation filings beginning in June 2007. Entergy included the formulas for implementing the rough production cost equalization bandwidth remedy required by Opinion No. 480 in Service Schedule MSS-3 of the Entergy System Agreement.[7] The Commission stated in its order accepting Entergy's compliance filing to implement the directives of Opinion Nos. 480 and 480-A that Entergy must follow the methodology set forth in Exhibits ETR-26 and ETR-28.[8]

4. On May 27, 2010, Entergy filed its fourth annual bandwidth implementation filing (2010 Bandwidth Calculation) pursuant to section 205 of the FPA to implement the Commission's decisions in Opinion Nos. 480 and 480-A. In the Initial Order, the Commission accepted and suspended Entergy's proposed rates and established hearing

---

[4] 16 U.S.C. §§ 824d-e (2006).

[5] Rehearing Order, 137 FERC ¶ 61,019 at P 12.

[6] The Entergy Operating Companies are Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy Texas, Inc.; and Entergy New Orleans, Inc.

[7] Service Schedule MSS-3 has two separate and distinct functions. The first function includes a methodology for pricing energy 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 that produced less than its load. The second function contains the formula to calculate the annual bandwidth remedy payments and receipts.

[8] *La. Pub. Serv. Comm'n. v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203, at P 69 (2006).

and settlement judge procedures. In its determination, the Commission limited the scope of the hearing to whether Entergy's actual calendar year 2009 formula inputs were correctly applied in the bandwidth calculation.[9]

5. On August 23, 2010, the Louisiana Commission filed a request for clarification of the Initial Order. Specifically, the Louisiana Commission sought clarification as to whether the Commission intended the limited scope of the hearing established in the Initial Order to prevent the Louisiana Commission and other parties from challenging the prudence and justness and reasonableness of cost inputs to the bandwidth formula.[10] The Louisiana Commission argued that, consistent with Commission precedent, the Commission should clarify "that the issues of prudence and any issues relating to the reasonableness of cost inputs that are not actual data approved at the retail level are subject to challenge in this and future bandwidth dockets."[11]

6. In the Rehearing Order, the Commission reiterated that the purpose of the annual bandwidth filings is to apply the specified bandwidth formula using the required data to determine whether or not there was rough production cost equalization. In other words, the focus of litigation in the annual bandwidth filings is whether Entergy properly implemented the bandwidth formula, not whether the bandwidth formula is just and reasonable.[12] The Commission clarified, however, that parties are not deprived of the opportunity to raise any issues before the Commission. Rather, the Commission stated that "[parties] just have to raise them in the proper forum – bandwidth filings to raise whether the required formula inputs were correctly applied in the bandwidth calculation and section 206 complaints or section 205 filings to raise whether the formula is just and reasonable."[13] The Commission stated that, in determining whether Entergy has properly implemented the bandwidth formula using the required data inputs in a bandwidth filing, parties in a bandwidth implementation proceeding may challenge whether the inputs were calculated consistent with the formula and applicable accounting rules and conformance

---

[9] Initial Order, 132 FERC ¶ 61,065 at P 26.

[10] Louisiana Commission Original Rehearing Request at 1.

[11] *Id*. at 3 (citing *Order Denying Interlocutory Appeal*, 130 FERC ¶ 61,170 (2010); *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010), *aff'd in relevant part*, Opinion No. 505-A, 139 FERC ¶ 61,103 (2012)).

[12] Rehearing Order, 137 FERC ¶ 61,019 at P 10.

[13] *Id*. P 12.

with retail regulatory approvals to the extent the formula requires use of values approved by retail regulators.[14] The Commission further stated that, although the formula approved in Service Schedule MSS-3 takes precedence in any conflict with the methodology found in Exhibits ETR-26 and ETR-28, "in instances where there are details omitted from the accepted Service Schedule MSS-3 formula (such as the source of data to use to calculate formula inputs), the underlying details included in the methodology used in Exhibits ETR-26 and ETR-28 control."[15] The Commission further noted that, "with respect to whether or not particular costs were prudently incurred, consistent with Opinion No. 505, the Louisiana Commission and other parties may challenge the prudence of cost inputs to the bandwidth formula in this bandwidth proceeding."[16]

II. Request for Rehearing and Clarification

7. The Louisiana Commission asserts that the Rehearing Order does not provide a mechanism to effectively challenge unjust and unreasonable and unduly discriminatory cost inputs to the bandwidth remedy formula rates. While acknowledging that the Commission determined that parties may challenge the prudence of cost inputs to the bandwidth formula and whether such inputs were calculated consistent with applicable accounting rules, the Louisiana Commission asserts that the Commission failed to clearly define the limits of those inquiries. The Louisiana Commission argues that if challenges are not allowed in the bandwidth proceedings and an FPA section 206 complaint is required, the complainant has no remedy for unjust and unreasonable costs being passed through the formula. The Louisiana Commission argues that Commission precedent "is clear and longstanding that [the Commission] approves only the formula, not the inputs, in formula rate approvals" and therefore "parties have a right to challenge those inputs when improprieties are discovered."[17] The Louisiana Commission argues that this precedent establishes not only that unreasonable inputs may be corrected, but that they may be corrected back to the time that they were introduced into the formula.[18] The

---

[14] *Id*. P 13.

[15] *Id*. n.21 (citing Opinion No. 505, 130 FERC ¶ 61,023 at PP 133-134).

[16] *Id*. P 13.

[17] Louisiana Commission Rehearing Request at 6-9 (citing *Louisiana Pub. Serv. Comm'n v. FERC*, 688 F.2d 357 (5th Cir. 1982); *Pub. Utils. Comm'n of the State of California v. FERC*, 254 F.3d 250 (D.C. Cir. 2001)).

[18] *Id.* at 9 (citing *American Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306, at P 34

(continued…)

Louisiana Commission contends that a section 206 complaint that is only prospective in effect to future bandwidth filings provides no remedy and violates the FPA requirement that the Commission correct unjust, unreasonable, and unduly discriminatory rates.[19] The Louisiana Commission therefore seeks rehearing and clarification of the Rehearing Order.[20]

III. Discussion

8. The Louisiana Commission's assertion that the Rehearing Order does not provide a mechanism to effectively challenge unjust and unreasonable and unduly discriminatory cost inputs to the bandwidth remedy formula rates is in error. As the Commission explained in an order in Docket No. EL09-43-002 in response to similar arguments by the Louisiana Commission,[21] Commission precedent concerning the right to challenge the misapplication of a formula rate or the charging of rates other than a filed rate and the resulting receipt of refunds would apply where erroneous data, incorrect calculations or imprudent costs are used in the bandwidth formula.[22]

(2008) (*AEP*)).

[19] *Id*. at 6 (citing 16 U.S.C. § 824d-e (2006)).

[20] *Id.* at 1-2.

[21] In Docket No. EL09-43-002, the Commission noted that:

> [T]he Louisiana Commission raises concerns that the Commission's clarification [in that proceeding] does not provide a vehicle to effectively challenge potentially unjust and unreasonable bandwidth formula cost inputs. It argues that a section 206 complaint only applies prospectively to future bandwidth filings and does not provide a remedy, or at most, provides an inadequate remedy for unjust and unreasonable costs being passed through the formula. Principally, the Louisiana Commission seeks assurance from the Commission that it may correct cost inputs, and obtain refunds, in a section 206 complaint that will relate back to the date that the alleged improper inputs were first used. The Louisiana Commission contends that this treatment is consistent with Commission precedent.

Arkansas Pub. Serv. Comm'n v. Entergy Corp., 142 FERC ¶ 61,012, at P 26 (2013) (Docket No. EL09-43 Rehearing Order).

[22] *Id.* P 33.

9. The Commission has held that it may order refunds for past periods where a utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate.[23] In *AEP*, the Commission found that public utility protocols that imposed time limits for raising preliminary and formal challenges to the application of the formula rate improperly precluded challenges to inputs in the formula. The Commission explained that, "in approving any formula rate, the Commission approves the formula itself, the algebraic equation used to calculate the rates. It does not approve the inputs into the formula or the charges resulting from the application of the inputs to the algebraic equation."[24] The Commission added that, "[t]he Commission's long-standing precedent is that, under formula rates, parties have the right to challenge the inputs to or the implementation of the formula at whatever time they discover errors in the inputs to or implementation of the formula."[25]

10. The Commission has also previously noted its authority to order refunds for imprudent costs charged to customers through an existing formula rate.[26] As with challenges premised upon misapplication of formula rates, the Commission has rejected attempts to limit the timeframe for prudence inquiries.[27]

---

[23] *See AEP*, 124 FERC ¶ 61,306 at P 35 n.50. *See also Appalachian Power Co.*, 23 FERC ¶ 61,032, at 61,088 (1983); *DTE Energy Trading, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,062, at P 28 (2005).

[24] *AEP*, 124 FERC ¶ 61,306 at P 34.

[25] *Id*. P 35.

[26] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,127, at P 15 n.14 (2012) (citing *Yankee Atomic Elec. Co*., 60 FERC ¶ 61,316, at 62,096-97 (1992)).

[27] *See, e.g., North Carolina Electric Membership Corp. v. CPL*, 57 FERC ¶ 61,332, at 62,065 (1991) (rejecting a utility's request to limit the scope of a prudence inquiry in an automatic adjustment clause complaint proceeding to outages occurring in the preceding 12 months because such a policy would preclude the Commission from providing relief for excessive fuel adjustment clause billings).

11. The rationale for permitting such challenges, and related refunds, is clear. In *AEP*, for example, the Commission noted that "customers may not uncover errors in data or imprudent or otherwise inappropriate costs until well after the challenge period."[28]

12. In sum, parties can challenge in a bandwidth proceeding erroneous inputs, implementation errors, or prudence of cost inputs. However, challenges to the bandwidth formula itself must be raised in an FPA section 206 complaint or section 205 filing. The Commission already found the formula rate contained in Service Schedule MSS-3 to be just and reasonable when it approved that formula as being in compliance with Opinion No. 480.[29] Because the Commission has approved the formula, it is the filed rate and under the filed rate doctrine it may not be changed absent a section 205 or 206 proceeding.[30] As stated in the Rehearing Order, parties, including the Louisiana Commission, are not deprived of the opportunity to raise any issues before the Commission. Rather, parties "just have to raise them in the proper forum – bandwidth filings to raise whether the required formula inputs were correctly applied in the bandwidth calculation and section 206 complaints or section 205 filings to raise whether the formula is just and reasonable."[31]

13. The Louisiana Commission requests that the Commission clarify what it meant by limiting the bandwidth challenges to the prudence of cost inputs. It states that while the Rehearing Order allows challenges in the bandwidth dockets to the "prudence of cost inputs to the bandwidth formula," the Commission did not identify what is includable under challenges to "prudence" of inputs, i.e., whether it includes challenges to whether the inputs were unjust and unreasonable or unduly discriminatory. The Louisiana Commission asserts that cost inputs that are unjust, unreasonable, and unduly

---

[28] *AEP*, 124 FERC ¶ 61,306 at P 36 and n.51 (citing *Yankee Atomic Electric Co.*, 60 FERC ¶ 61,316, at 62,096-97 (1992) (allowing review of potentially imprudent costs charged to customers in the prior-year formula rates)).

[29] *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095 (2007).

[30] *See Entergy Servs., Inc.*, Opinion No. 514, 137 FERC ¶ 61,029, at P 49 (2011), *order denying reh'g*, Opinion No. 514-A, 142 FERC ¶ 61,013 (2013) and *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 519, 139 FERC ¶ 61,107, at P 111 (2012).

[31] Rehearing Order, 137 FERC ¶ 61,019 at P 12.

discriminatory are imprudent.[32] If the Commission intended a narrower interpretation, the Louisiana Commission states that rehearing should be granted to allow challenges in unjust and unreasonable and unduly discriminatory cost inputs in the bandwidth proceedings.[33]

14. As stated above, the Commission determined in the Rehearing Order that parties can appropriately challenge in bandwidth proceedings whether formula inputs were properly applied in the bandwidth calculation. The Rehearing Order provided that parties can challenge whether the inputs were calculated consistent with the formula and the applicable accounting rules. As part of its determination, the Commission also stated that "with respect to whether or not particular costs were prudently incurred," parties can challenge the prudence of those cost inputs.[34] We clarify that challenges that may be raised in a bandwidth implementation proceeding to the "inputs" used in the bandwidth formula include misapplication of the formula rate (such as use of erroneous data or incorrect calculations),[35] which includes the prudence of a cost input.[36] On this basis, the Rehearing Order did not limit challenges to "the prudence of cost inputs." Instead, challenges in a bandwidth proceeding can include whether the formula was misapplied or miscalculated because the inputs were unjust and unreasonable. However, challenges to

---

[32] Louisiana Commission Rehearing Request at 11-12 (referencing *Mississippi Power & Light Co. v. Mississippi Ex Rel. Moore*, 487 U.S. 354, 363-66 (1988)).

[33] Louisiana Commission Rehearing Request at 12.

[34] Rehearing Order, 137 FERC ¶ 61,019 at P 13.

[35] Docket No. EL09-43 Rehearing Order, 142 FERC ¶ 61,012 at P 33. As the Commission clarified in that proceeding, "if parties believe that Entergy inserted data from the wrong parts of FERC Form No. 1 in its bandwidth formula, or that the data used was incorrectly calculated, such objections are properly raised in the annual bandwidth proceedings." *Id.* P 31.

[36] *See Pub. Serv. Co. of New Hampshire*, 6 FERC at 61,710 (stating that the principle against retroactive rulemaking does not prohibit refunds of unjust and unreasonable expenditures booked to FERC accounts that are flowed through a formula and thereby constitute an improper application of the Commission's accounting rules and improper computation of the formula rate), *reh'g denied*, 9 FERC ¶ 61,202 (1979).

the formula itself, not the inputs, must be brought in an FPA section 205 or section 206 proceeding.[37]

15. The Louisiana Commission further requests that the Commission clarify what was intended by its ruling that the parties may challenge in a bandwidth proceeding whether the inputs were calculated consistent with applicable accounting rules. The Louisiana Commission states that, the Commission ruled in Opinion No. 514 that challenges to the depreciation rates included in the bandwidth formula are inappropriate in the bandwidth proceedings. According to the Louisiana Commission, the Commission recognized, but did not address in its rationale, that the Louisiana Commission's challenge included a claim that the depreciation rates violated the Commission's own depreciation accounting rules.[38]

16. The Louisiana Commission misstates the findings set forth in Opinion No. 514. In its determination in that order, the Commission explained that:

> The formula mandates the use of depreciation rates reported in the FERC Form 1, reflecting, in part, state regulator approved depreciation rates, which the Commission has adopted for use in the bandwidth formula. Thus, the issue for the Commission here (as was the issue in Opinion No. 505) is whether Entergy has correctly implemented the just and reasonable bandwidth formula and this involves ensuring that Entergy has used the correct FERC Form 1 data. Significantly, no party alleges that Entergy used incorrect depreciation expense numbers in submitting its bandwidth filing.[39]

---

[37] *Id.* (the principle against retroactive ratemaking only applies to *post hoc* modification of a formula, not refunds of incorrectly computed charges under the formula). *See also* Docket No. EL09-43 Rehearing Order, 142 FERC ¶ 61,012 at PP 37-40 (explaining that challenges to certain bandwidth formula inputs related to depreciation expenses and out-of-period revenues/expenses did not constitute challenges to the proper implementation of the formula, including the prudence or reasonableness of expenditures booked to the applicable FERC accounts, but rather constituted challenges to the bandwidth formula itself, which may only be changed prospectively through an FPA section 205 or 206 proceeding).

[38] Louisiana Commission Rehearing Request at 12-13.

[39] Opinion No. 514, 137 FERC ¶ 61,029 at PP 49-50.

The Commission determined that replacing state approved depreciation expense inputs required for use in the bandwidth formula with reconstructed inputs would explicitly alter the depreciation component of the bandwidth and therefore extended beyond a challenge to the input for that component.[40]

17. We therefore clarify that, consistent with Opinion No. 514, a party may appropriately challenge whether inputs are calculated consistent with applicable accounting rules in a bandwidth proceeding. Should the challenge involve a change to the bandwidth formula itself, however, the challenge must be brought through either an FPA section 205 or section 206 proceeding.

The Commission orders:

(A) The Louisiana Commission's request for clarification is granted, as discussed in the body of this order.

(B) The Louisiana Commission's request for rehearing is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[40] *Id*. P 51.