

156 FERC ¶ 61,112
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Tony Clark.

Entergy Services, Inc.

Docket No. ER13-432-003

Docket No. ER13-432-004

ORDER DENYING REHEARING IN PART, GRANTING REHEARING IN PART,
AND ACCEPTING COMPLIANCE FILING

(Issued August 16, 2016)

1. In a March 4, 2016 order, the Commission affirmed an Initial Decision which resolved the allocation of proceeds from a settlement agreement (Union Pacific Settlement) between Entergy Arkansas, Inc. (Entergy Arkansas) and Union Pacific Corp. (Union Pacific).¹ Specifically, the Commission determined that benefits related to the Union Pacific Settlement² were realized by Entergy Arkansas following its withdrawal from the Entergy System Agreement (System Agreement). The Commission directed Entergy Arkansas to share those benefits with the remaining Entergy Operating Companies, allocating the benefits pursuant to the methodology proposed by the Mississippi Public Service Commission (Mississippi Commission), trued up for the actual volumes of coal purchased.
2. The Louisiana Public Service Commission (Louisiana Commission)³ and the Arkansas Public Service Commission (Arkansas Commission)⁴ sought rehearing.

¹ *Entergy Servs., Inc.*, Opinion No. 547, 154 FERC ¶ 61,173 (2016).

² The terms of the Union Pacific Settlement are confidential and are described in the Highly Sensitive Protected Information Direct Testimony of Entergy witness Thomas D. Crowley.

³ Louisiana Commission Rehearing Request, Docket No. ER13-432-003 (filed Mar. 30, 2016) (Louisiana Commission Rehearing Request).

⁴ Arkansas Commission Rehearing Request, Docket No. ER13-432-003 (filed Apr. 4, 2016) (Arkansas Commission Rehearing Request).

Entergy Services, Inc. (Entergy), sought rehearing and clarification.⁵ We grant rehearing in part, deny rehearing in part, and accept Entergy's May 3, 2016 compliance filing as amended, as discussed below.

A. The Commission's Authority to Review Settlement Benefits

3. The Arkansas Commission asserts the Commission erred in determining that the Arkansas Commission is precluded from challenging the Commission's authority to direct the sharing of settlement benefits because the Arkansas Commission did not seek rehearing of the order setting the matter for hearing (Hearing Order).⁶ The Arkansas Commission contends it did not waive its right to raise this argument because the Hearing Order did not constitute a final order and was thus not subject to rehearing.⁷ The Arkansas Commission asserts that the Hearing Order did not mark the consummation of the agency decision making process or provide rights and obligations from which legal consequences would flow, which are typical hallmarks of final agency action.⁸

4. We grant rehearing on this issue and find that the Arkansas Commission's failure to seek rehearing of the Hearing Order did not waive its right to raise its claim regarding the Commission's remedial authority. Rule 713(b) of the Commission's Rules of Practice and Procedure permits requests for rehearing "of any final decision or other final

⁵ Entergy Motion for Clarification and Request for Rehearing, Docket No. ER13-432-003 (filed Apr. 4, 2016) (Entergy Rehearing Request). Entergy sought clarification that the true-up required to determine the Union Pacific Settlement benefit amounts, which include actual coal usage volumes, should also include actual contract rate adjustment mechanisms and the assumed market alternative. The Louisiana Commission filed an answer to Entergy's motion for clarification. Entergy subsequently withdrew its motion for clarification. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing. Accordingly, we will reject the Louisiana Commission's answer both because it is a prohibited answer and because the issue is moot.

⁶ Arkansas Commission Rehearing Request at 7 (referencing *Entergy Servs. Inc.*, 145 FERC ¶ 61,247 (2013) (Hearing Order)).

⁷ *Id.* at 7-8.

⁸ *Id.*

order in a proceeding.”⁹ A final decision or order is one that imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.¹⁰ In this case, the Hearing Order established procedures to consider the issue of the post-withdrawal settlement benefits. The Hearing Order did not rule upon the Commission’s authority to order the sharing of post-withdrawal settlement benefits. Because the Hearing Order did not reflect a final decision with respect to that issue, we find that the Arkansas Commission’s prior failure to seek rehearing on this issue does not bar it raising the argument on exceptions.¹¹

5. With respect to the merits, the Arkansas Commission asserts that the Commission lacks authority to oversee post-withdrawal settlement benefits.¹² The Arkansas Commission argues that there is no language in the System Agreement that suggests Entergy Arkansas must share benefits after its withdrawal from the System Agreement. The Arkansas Commission contends that neither Opinion No. 547 nor the Initial Decision cite any statutory basis for the power to fashion equitable relief that “overrides” the purported filed rate set forth in the System Agreement.¹³

⁹ 18 C.F.R. § 385.713(b) (2015). *See also* 16 U.S.C. § 825l(a) (2012) (providing that parties “aggrieved by an order issued by the Commission in a proceeding . . . may apply for a rehearing within thirty days after the issuance of such order.”).

¹⁰ *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm’n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (“Final agency action ‘mark[s] the consummation of the agency’s decisionmaking process’ and is ‘one by which rights or obligations have been determined, or from which legal consequences will flow.’”) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

¹¹ *See, e.g., Hunter v. FERC*, 403 F. App’x 525, 527 (D.C. Cir. 2010) (“The only consequence of the Commission’s order was to subject Petitioner to further proceedings before the Commission, but this does not qualify . . . as a final agency action.”); *City of Hamilton*, 82 FERC ¶ 61,349, at 62,359 (1998) (“Setting this matter for a trial-type hearing does not impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.”).

¹² Arkansas Commission Rehearing Request at 12. *See also* Opinion No. 547, 154 FERC ¶ 61,173 at P 16 (citing *Council of City of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (*City of New Orleans*)).

¹³ Arkansas Commission Rehearing Request at 14.

6. We reject the Arkansas Commission's arguments and affirm our findings in Opinion No. 547 that the Commission has the authority to oversee the distribution of post-withdrawal settlement benefits.¹⁴ The System Agreement, which governs the operation of the Entergy Operating Companies, was approved by the Commission in 1982.¹⁵ Entergy Arkansas, a signatory to the System Agreement, negotiated the Union Pacific Settlement on behalf of all the Operating Companies. All parties to the Union Pacific Settlement were aware that Entergy Arkansas would withdraw from the System Agreement in 2013, before the Union Pacific Settlement benefits would fully accrue.¹⁶ When Entergy Arkansas withdrew from the System Agreement, the Commission approved its withdrawal.¹⁷ In the Withdrawal Order, the Commission preserved its ability to review the replacement agreements that succeeded the System Agreement.¹⁸ As explained in Opinion No. 547, "withdrawal would result in a significant change to the System Agreement, such that the Commission would need to review successor agreements."¹⁹ In fact, in *City of New Orleans v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit found that the Commission "must still review the post-withdrawal arrangements to ensure that they are just, reasonable, and not unduly discriminatory."²⁰ As such, the Commission's scope of review encompasses the

¹⁴ Opinion No. 547, 154 FERC ¶ 61,173 at PP 16-17.

¹⁵ The System Agreement, which has been supplemented by seven service schedules, is on file with the Commission and serves as an effective tariff. The System Agreement terminates on August 31, 2016. *See Entergy Ark., Inc.*, 153 FERC ¶ 61,347 (2015).

¹⁶ *Entergy Servs., Inc.*, 149 FERC ¶ 63,022, at P 279 (2014) (Initial Decision).

¹⁷ *Entergy Servs., Inc.*, 129 FERC ¶ 61,143 (2009) (Withdrawal Order).

¹⁸ *Id.* P 63 ("We encourage Entergy to make its section 205 filing for the post-2013 arrangements as soon as possible in order for the Commission to review the replacement arrangement prior to the withdrawals.").

¹⁹ Opinion No. 547, 154 FERC ¶ 61,173 at P 16.

²⁰ 692 F.3d 172, 177 (2012). *See also Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir 1967) (finding that the Commission can ensure that remedies are just and reasonable).

successor agreements, and its “jurisdiction attaches to and relates back to”²¹ its approval of the System Agreement.

7. As explained in that order,²² Opinion No. 547 does not impose new obligations upon Entergy Arkansas to share costs, but instead requires Entergy Arkansas to share received benefits it negotiated as a member of the System Agreement.²³ This is consistent with the Commission’s broad authority to fashion remedies²⁴ and affirms Opinion No. 547’s finding that it is within the Commission’s purview to determine how Entergy Arkansas’s post-withdrawal settlement benefits should be allocated among the Operating Companies.

²¹ Initial Decision, 149 FERC ¶ 63,022 at P 53 n.4.

²² Opinion No. 547, 154 FERC ¶ 61,173 at PP 17, 48-51.

²³ Settlement proceeds distributed prior to Entergy Arkansas’ December 19, 2013 withdrawal from the System Agreement flowed to the Operating Companies under Service Schedule MSS-3 of the System Agreement, based on ownership shares of the White Bluff and Independence Stations. *See id.* P 48. The remedy established by the Initial Decision and affirmed in Opinion No. 547 is intended to ensure that the Entergy Operating Companies continue to receive the benefit of the bargain of the Union Pacific Settlement after Entergy Arkansas’ withdrawal. *E.g., id.* P 71; *see also* Initial Decision, 149 FERC ¶ 63,022 at PP 274, 277, 279-283.

²⁴ *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984) (“[T]he Commission has broad authority to fashion equitable remedies in a variety of settings.”); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (“[T]he breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions”); *FPC v. La. Power and Light Co.*, 406 U.S. 621,642 (1972) (finding that the Commission has broad authority to make “pragmatic adjustments” based on circumstances); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942) (same); *Pub. Serv. Comm’n of New York v. FPC*, 327 F.2d 893, 897 (D.C. Cir. 1964) (“While the action of the Commission must conform with the terms, policies and purposes of the [Natural Gas] Act, it may use means which are not in all respects spelled out in detail.”).

B. Interest Payments

8. On rehearing, the Louisiana Commission contends that by not requiring interest payments on the settlement benefits, the Commission has departed from established precedent without a reasoned explanation.²⁵

9. The Louisiana Commission takes issue with the Commission's denial of interest payments, based upon the finding that such payments are "more appropriate with overcharges or where substantial time has passed."²⁶ The Louisiana Commission contends that substantial time has indeed passed,²⁷ that the accrued settlement benefits are overcharges eligible for interest payments,²⁸ and that Commission precedent does not support the notion that interest is "more appropriate" in certain contexts.²⁹ The Louisiana Commission contends the Commission does not explain why an overcharge of a rate by a utility would receive interest whereas costs resulting from an alleged unlawful contract breach would not.³⁰

10. The Commission generally favors interest payments when there are overcharges or where substantial time has passed.³¹ This policy is intended to "(1) provide just compensation for the losses, or costs, imposed upon those who have paid excessive rates;

²⁵ Louisiana Commission Rehearing Request at 3-5 (citing *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264 (D.C. Cir. 1999); *FC Landfill Energy, LLC*, 133 FERC ¶ 61,041 (2010); *H.Q. Energy Servs. (U.S.), Inc. v. New York Indep. System Operator, Inc.*, 113 FERC ¶ 61,184 (2005)).

²⁶ Opinion No. 547, 154 FERC ¶ 61,173 at P 77.

²⁷ Louisiana Commission Rehearing Request at 17-22.

²⁸ *Id.* at 12-16.

²⁹ *Id.*

³⁰ *Id.* at 12.

³¹ *Rate of Interest on Amounts Held Subject to Refund*, Order No. 47, FERC Stats. & Regs. ¶ 30,083, at 30,548, *order on reh'g*, Order No. 47-A, FERC Stats. & Regs. ¶ 30,099 (1979), *clarified*, Order No. 47-B, FERC Stats. & Regs. ¶ 30,121 (1980), *aff'd sub nom. United Gas Pipeline Co. v. FERC*, 657 F.2d 790 (5th Cir. 1981).

(2) reflect the benefits which were available to companies which collected excessive rates; and (3) not provide incentives for any party to prolong litigation.”³²

11. On balance, the principles underlying our general policy do not counsel in favor of interest payments in the present circumstance. First, this case does not involve refunds for overcharges assessed by Entergy Arkansas and excessive rates paid by the Operating Companies. Instead, we are faced with the reallocation of conferred settlement benefits among the Operating Companies in the System Agreement following Entergy Arkansas’s withdrawal from the System Agreement; an event not expressly dealt with in the Union Pacific Settlement. Fundamentally, the Operating Companies’ losses are not a result of Entergy Arkansas’s actions, but rather stem from an alleged breach of contract by Union Pacific relating to coal under-deliveries between May 2005 and June 2006.³³ In addition, awarding interest would not incent the avoidance of prolonged litigation or expedite proceedings. In this case, the Commission itself directed the parties to separately determine how to handle the post-System Agreement withdrawal settlement benefits.³⁴ Opinion No. 547 is the culmination of that process and identifies and equitably divides those settlement benefits.

12. Finally, the Commission has previously declined to require interest payments when settlements are made within a reasonable time frame after calculations were complete.³⁵ Here, Opinion No. 547, issued in March 2016, determined the post-withdrawal settlements that had accrued to Entergy Arkansas and how those benefits should be shared among the Operating Companies. The Commission directed Entergy to file a compliance filing containing the calculations of the settlement benefits within 60 days of the order’s issuance.³⁶ We do not find that the length of time that has passed in the instant case warrants an interest assessment.

³² Order No. 47, FERC Stats. & Regs. ¶ 30,083 at 30,546. *See also Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1268 (D.C. Cir. 1999), *vacated in part*, 200 F.3d 867 (D.C. Cir. 2000).

³³ Opinion No. 547, 154 FERC ¶ 61,173 at PP 19, 48-51.

³⁴ *Id.* P 7.

³⁵ *See, e.g., La. Pub. Serv. Comm’n*, 119 FERC ¶ 61,095, at P 32 (2007) (“In our discretion, we are requiring settlements to be made in a reasonable time period once the calculations are completed and, accordingly, there is no need to require that interest be applied to the payments.”).

³⁶ Opinion No. 547, 154 FERC ¶ 61,173 at PP 18-35.

13. In summary, the Commission retains wide discretion to determine interest payments³⁷ and under the present circumstances, we find that an assessment of interest is not warranted.

14. All other matters raised in the rehearing requests were sufficiently addressed in Opinion No. 547 and do not warrant further comment.

C. Compliance Filing

15. On May 3, 2016, Entergy submitted a filing to comply with the requirements of Opinion No. 547, including two alternative calculations for determining the true-up for settlement benefits. Attachment 2 includes a calculation for actual coal volumes delivered. Attachment 3 includes both actual coal volumes delivered and actual contract prices updated for actual indices (as described in Entergy's motion for clarification). Entergy states that on May 5, 2016, it will make payments to the Operating Companies in accordance with the calculation in Attachment 2.³⁸ On May 6, 2016, Entergy submitted errata to the May 3, 2016 filing, stating that certain information contained in the May 3, 2016 filing was highly sensitive and should have been filed pursuant to the protective order adopted in this proceeding.³⁹

16. Notice of Entergy's May 3, 2016 compliance filing was issued in the *Federal Register*, 81 Fed. Reg. 29,260 (2016), with interventions and protests due no later than May 24, 2016. Protests to the May 3, 2016 compliance filing were filed by the Louisiana Commission on May 24, 2016, and the Mississippi Public Service Commission on May 25, 2016. Notice of Entergy's May 6, 2016 errata filing was issued in the *Federal Register*, 81 Fed. Reg. 30,294 (2016), with interventions and protests due no later than May 27, 2016. The Louisiana Commission filed a protest to the May 6, 2016 errata filing.

³⁷ See e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 149 FERC ¶ 61,116, at P 236 (2014) ("the Commission's discretion is at its zenith when fashioning a remedy").

³⁸ Entergy states that Attachment 1 of its filing contains a replication of the benefits calculation contained in Exs. S-12 and MC-4 for the period January 2015 through June 2015 and the summary calculation that includes the true-up for the purchased volumes of coal. Entergy Errata to May 3, 2016 Compliance Filing, Docket No. ER13-432-004 (filed May 6, 2016) at 3.

³⁹ Entergy Errata to May 3, 2016 Compliance Filing, Docket No. ER13-432-004 (filed May 6, 2016), Transmittal at 1.

17. The protesting parties oppose Attachment 3 of the compliance filing, arguing that Opinion No. 547 did not mandate Entergy's additional true-up for contract price and that the true-up for contract price would reduce the benefits paid by Entergy Arkansas to the other Entergy Operating Companies. On June 8, 2016, Entergy withdrew both its motion for clarification and Attachment 3 of the compliance filing.⁴⁰ Entergy also filed an answer to the protests. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy's answer and will, therefore, reject it.

18. We find that Entergy's withdrawal of the motion for clarification and withdrawal of Attachment 3 of the compliance filing render the protests moot. We also find that the calculations contained in Attachment 2 of the compliance filing are consistent with the methodology set forth in Opinion No. 547.⁴¹ Accordingly, we accept Entergy's May 3 filing, as amended by the withdrawal of Attachment 3, as in compliance with Opinion No. 547.

The Commission orders:

(A) The requests for rehearing are denied in part and granted in part, as discussed in the body of this order.

⁴⁰ Entergy Notice of Withdrawal of April 4, 2016 Motion for Clarification and Withdrawal of Attachment 3 of May 6, 2016 Compliance Filing, Docket Nos. ER13-432-003 and ER13-432-004 (filed June 8, 2016).

⁴¹ Opinion No. 547, 154 FERC ¶ 61,173 at PP 52, 71. The Mississippi Commission, while acknowledging that Entergy's Attachment 2 "reasonably implements" the true-up for actual volumes, notes that Entergy's use of a quarter-by-quarter basis rather than a rolling-year basis reduces the benefits paid by Entergy Arkansas to the other Operating Companies. Mississippi Commission Protest of Compliance Filing, Docket No. ER13-432-003 (filed May 25, 2016). As stated above, we are satisfied that Entergy's Attachment 2 calculations comply with Opinion No. 547.

(B) Entergy's May 3, 2016 compliance filing, as refiled pursuant a protective order on May 6, 2016, and as amended, is hereby accepted, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.