

156 FERC ¶ 61,184
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Osceola, Arkansas

Docket No. EL16-7-001

v.

Entergy Arkansas, Inc.
Entergy Services, Inc.

ORDER DENYING REHEARING

(Issued September 16, 2016)

1. On February 18, 2016, the Commission issued an order denying a complaint filed by the City of Osceola, Arkansas (Osceola) against Entergy Arkansas, Inc. (Entergy Arkansas) and Entergy Services, Inc. (Entergy Services) (collectively, Entergy) seeking a refund of rough production cost equalization bandwidth payments (bandwidth equalization payments) from 2007 through 2009.¹ On March 21, 2016, Osceola filed a timely request for rehearing. For the reasons discussed below, we deny Osceola's request for rehearing.

I. Background

2. On October 29, 2015, Osceola filed a complaint pursuant to sections 206 and 306 of the Federal Power Act² seeking a refund of bandwidth equalization payments³ that Entergy Arkansas recorded in Account 555, Purchased Power, and passed through in the purchased energy variable of the energy rate formula contained in the Power Coordination, Interchange and Transmission Agreement (Service Agreement) between

¹ *City of Osceola, Ark. v. Entergy Ark., Inc.*, 154 FERC ¶ 61,099 (2016) (February 18 Order).

² 16 U.S.C. §§ 824e, 825e (2012).

³ For a discussion of the bandwidth remedy, *see* footnote 2 of the February 18 Order.

Entergy Arkansas and Osceola, from 2007 through 2009. In the February 18 Order, the Commission found that the claim upon which Osceola based its complaint was resolved through settlements entered into with Entergy Arkansas in connection with the annual rate redetermination process under the Service Agreement for the years 2007, 2008, and 2009 (the Formula Rate Update proceedings).⁴

3. On rehearing, Osceola raises four arguments. First, Osceola contends that the bandwidth payments were not at issue in the Formula Rate Update proceedings and thus the settlement of those cases could not have resolved its claim here.⁵ Second, Osceola asserts that the Commission erred by failing to address its contention that energy costs were not included in the settlements of the Formula Rate Update proceedings.⁶ Third, Osceola contends that the Commission incorrectly referenced certain dockets that involve formula rate updates for other Entergy Arkansas customers, but not Osceola, thus indicating that the February 18 Order was not the product of reasoned decision-making.⁷ Finally, Osceola argues that the Commission's analysis in the February 18 Order did not require the special expertise of the Commission and thus violated the U.S. Court of Appeals for the Eighth Circuit's (Eighth Circuit) referral of the matter to the Commission⁸ and the doctrine of primary jurisdiction.⁹

II. Commission Determination

A. The Formula Rate Update Proceedings

4. We deny Osceola's request for rehearing. As to the 2007 Formula Rate Update proceeding, Osceola does not dispute that it received actual notice that Entergy Arkansas passed the bandwidth equalization payments through Osceola's energy formula rate in its July 2007 bill.¹⁰ Nor does Osceola dispute that it intervened in the first bandwidth implementation proceeding (Docket No. ER07-956-000) and thus knew that Union

⁴ See February 18 Order, 154 FERC ¶ 61,099 at PP 22-35.

⁵ Osceola March 21 2016 Request for Rehearing at 2-5 (Osceola Request for Rehearing).

⁶ *Id.* at 5-7.

⁷ *Id.* at 7-8.

⁸ *Id.* at 8 (citing *City of Osceola v. Entergy Ark., Inc.*, 791 F.3d 904, 910 (2015) (*Osceola*)).

⁹ *Id.* at 8-9.

¹⁰ February 18 Order, 154 FERC ¶ 61,009 at P 25.

Electric's August 2007 filing in that case had framed the bandwidth equalization payment issue as an unlawful energy rate pass-through.¹¹ Nonetheless, in November 2007, Osceola executed a settlement which "resolved all outstanding issues" in the 2007 Formula Update proceeding.¹²

5. Osceola nonetheless suggests that it would violate the filed-rate doctrine to find that, "by accepting the rate as filed, a party is also accepting the violation of that rate as long as there is evidence that the party had 'actual notice' of such violation prior to the time of settlement."¹³ Holding a party to the terms of its settlement does not violate the filed-rate doctrine. Here, the parties had a dispute as to the proper inputs into a formula rate and agreed to resolve "all outstanding issues" relating to that dispute through a black-box settlement. Longstanding Commission policy favors such settlements.¹⁴

6. With respect to the 2008 and 2009 Formula Rate Update cases, Osceola does not dispute that it expressly protested the inclusion of the bandwidth equalization payments in the energy rate collected under the Service Agreement.¹⁵ Nor does Osceola contest that the relevant hearing orders noted the bandwidth payment pass-through issue and set all issues raised by Entergy Arkansas' filings for hearing.¹⁶ Nor does Osceola contest that it entered into settlements that unreservedly resolved all outstanding issues in the Formula Rate Update proceedings.¹⁷

7. Osceola acknowledges that it had notice of Entergy's purported violation of the Service Agreement's formula rate, but contends that it "proceeded under the reasonable belief that the bandwidth remedy proceeding was the appropriate venue for resolving that violation."¹⁸ This assertion is belied by the fact that Osceola expressly raised the bandwidth equalization payment issue in Formula Rate Update proceedings. And if Osceola thought that such claims should be resolved in a different proceeding, it was

¹¹ *Id.*

¹² 2007 Settlement, Docket No. ER07-630-000, at 1 (filed Nov. 2, 2007).

¹³ Osceola Request for Rehearing at 3.

¹⁴ *See* February 18 Order, 154 FERC ¶ 61,009 at P 35.

¹⁵ *See id.* PP 28, 32 (discussing Osceola's protest in the 2008 and 2009 Formula Rate Update cases).

¹⁶ *Id.* PP 29, 33.

¹⁷ *Id.* PP 30, 34.

¹⁸ Osceola Request for Rehearing at 3.

incumbent upon Osceola to carve out those claims from any settlement in the Formula Rate Update proceedings. Instead, Osceola entered into black-box settlements that “resolved all outstanding issues” in those proceedings.¹⁹

8. Osceola also points to footnotes in the February 18 Order in which the Commission noted that Entergy Arkansas’ entire filings had been set for hearing in the relevant Formula Rate Update cases.²⁰ Thus, even if the bandwidth equalization payment issue had not been expressly raised, the unconditional settlements resolved all issues associated with those filings.²¹ Seizing upon the Commission’s reference to Entergy Arkansas’ filings, Osceola argues that, because those filings did not expressly reference bandwidth equalization payments, the pass through of such payments was not among the issues set for hearing and resolved in the settlements. But this argument ignores the fact that Osceola itself recognized that Entergy Arkansas’ filings did raise the question of the propriety of passing through the bandwidth equalization payments. Accordingly, Osceola filed protests flagging that very issue. The pertinent hearing orders noted the issues raised by Osceola and set all issues of material fact raised by Entergy Arkansas’ filings for hearing.²² As we have explained previously, “[w]hen the Commission sets for hearing the justness and reasonableness of rates, it sets for hearing all issues – other than those summarily disposed of by the Commission or which the Commission has explicitly refused to set for hearing – that are relevant to assessment of justness and reasonableness.”²³

B. The Inclusion Of Energy Rates In The Settlements

9. Osceola asserts that the Commission failed to address the argument raised by its expert witness, John Painter, that energy rates (and thus the bandwidth equalization payments passed through in those energy rates) were not included in the settlements of the Formula Rate Update proceedings.²⁴ In the February 18 Order, the Commission

¹⁹ See 2007 Settlement, Docket No. ER07-630-000, at 1 (filed Nov. 2, 2007); 2008 Settlement, Docket No. ER08-752-000, at 1 (filed Feb. 26, 2009); 2009 Settlement, Docket No. ER09-877-000, at 1 (filed Oct. 29, 2009).

²⁰ Osceola Request for Rehearing at 4.

²¹ See February 18 Order, 154 FERC ¶ 61,009 at nn.36, 43, 47.

²² See, e.g., *Entergy Ark., Inc.*, 119 FERC ¶ 61,336, at PP 7, 12 (2007); *Entergy Ark., Inc.*, 124 FERC ¶ 61,125, at PP 6, 8 (2008); *Entergy Ark., Inc.*, 128 FERC ¶ 61,133, at PP 5, 7 (2009).

²³ See, e.g., *Trans-Allegheny Interstate Line Co.*, 121 FERC ¶ 61,009, at P 9 and n.13 (2007).

²⁴ Osceola Request for Rehearing at 5-6.

summarized Mr. Painter's argument.²⁵ While Osceola asserts this argument was uncontested,²⁶ in fact, as noted in the February 18 Order, Entergy explained that the relevant rate formulas explicitly include the energy rate and that the Commission set energy rate input issues for hearing in the Formula Rate Update proceeding at Osceola's request.²⁷ Based on the various filings made in the Formula Rate Update proceedings and the first bandwidth implementation proceeding, the Commission found that the pass-through of the bandwidth equalization payments were within the scope of the energy rate formula in Entergy Arkansas' filings and squarely at issue in the Formula Rate Update proceedings.²⁸ Thus, Osceola's settlement of "all outstanding issues" in the Formula Rate Update proceedings barred its current claim.²⁹

C. 2008 Formula Rate Update Docket References

10. Osceola argues that the February 18 Order is not the product of reasoned decision-making because, when discussing the 2008 Formula Rate Update proceeding, the Commission references Docket No. ER08-752, which pertained to formula rate updates for other Entergy customers, while Osceola's formula rate update was docketed in Docket No. ER08-750.³⁰ In the July 31, 2008 hearing order, however, the Commission consolidated Osceola's rate update proceeding (Docket No. ER08-750) with similar proceedings in Docket Nos. ER08-751 and ER08-752.³¹ Indeed, Osceola's protest of Entergy's 2008 formula rate update – which expressly took issue with Entergy's collection "of MSS-3 costs in the energy rate" – was filed in all three dockets.³² All documents filed in each of the dockets were available to the Commission and thus we fail

²⁵ February 18 Order, 154 FERC ¶ 61,009 at PP 12-13.

²⁶ Osceola Request for Rehearing at 5.

²⁷ February 18 Order, 154 FERC ¶ 61,009 at P 18 (citing Entergy November 30, 2015 Answer at 2-5, 9-11, 13-27).

²⁸ *Id.* PP 26, 28-30, 32-34.

²⁹ *Id.* PP 26, 30, 35.

³⁰ Osceola Request for Rehearing at 7.

³¹ *Entergy Ark., Inc.*, 124 FERC ¶ 61,125 at P 1.

³² Protest and Comments of Arkansas Cities, at 4 (filed June 2, 2008) (Docket Nos. ER08-750, 751, 752). As explained in the February 18 Order, bandwidth equalization payments are made pursuant to Service Schedule MSS-3. February 18 Order, 154 FERC ¶ 61,009 at P 30.

to see how a reference to Docket No. ER08-752 “is confusing and problematic” as Osceola now contends.³³

D. Primary Jurisdiction

11. Finally, Osceola asserts that, because the Commission’s analysis in the February 18 Order turned on an interpretation of the settlements in the Formula Rate Update proceedings – which purportedly does not involve any special Commission expertise – the Commission ignored the Eight Circuit’s referral in *Osceola* and “intrude[d] on the jurisdiction of the court.”³⁴ Osceola misunderstands the primary jurisdiction doctrine.

12. “The doctrine of primary jurisdiction ... is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.”³⁵ The doctrine applies to claims properly cognizable in court that raise issues within the special competence of an administrative agency. When a court determines that a claim or issue is more appropriately addressed by an administrative agency, “it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.”³⁶

13. Here, the Eighth Circuit did not refer any particular questions to the Commission. Instead, it affirmed the dismissal of Osceola’s court complaint without prejudice.³⁷ Osceola subsequently filed the instant complaint before the Commission, which retained the absolute discretion to resolve the case in the manner it deemed appropriate. Here, after analyzing the relationship between Service Agreement’s formula rate, the inputs to

³³ Osceola Request for Rehearing at 7. Osceola also criticizes the Commission for citing to *Entergy Ark., Inc.*, 124 FERC ¶ 61,126 (2008) – which consolidated Arkansas Electric Cooperative Cooperation’s 2008 formula rate update (Docket No. ER08-751) with other Entergy Arkansas’ formula rate proceedings – rather than *Entergy Ark., Inc.*, 124 FERC ¶ 61,125 – which consolidated Osceola’s formula rate update (Docket No. ER08-750) with other Entergy Arkansas formula rate proceedings. But Osceola acknowledges that the pertinent language cited in the February 18 Order appears in both *Entergy Ark., Inc.* orders. See Osceola Request for Rehearing at 7. Osceola’s quibble does not warrant rehearing.

³⁴ Osceola Request for Rehearing at 2.

³⁵ *United States v. W. Pac. R. Co.*, 352 U.S. 59, 63, (1956).

³⁶ *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993).

³⁷ *Osceola*, 791 F.3d at 910 (“we affirm the dismissal of this case, but modify it to be without prejudice”).

such rate, and the bandwidth equalization payments, the Commission found that Osceola's claim was barred by its prior settlements. In doing so, the Commission did not "intrude on the jurisdiction of the court," which had previously dismissed Osceola's complaint.

The Commission orders:

Osceola's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.