

135 FERC ¶ 61,218
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation Docket No. EL00-66-014

Louisiana Public Service Commission v. Entergy Services, Inc. Docket No. EL95-33-010

ORDER GRANTING REHEARING IN PART AND
DENYING REHEARING IN PART

(Issued June 9, 2011)

1. On August 13, 2010, the Commission issued its amended order on remand in this proceeding, holding that section 206(c) of the Federal Power Act (FPA), 16 U.S.C. § 824e(c) (2006), did not preclude the granting of refunds in this case, and that, pursuant to our discretionary remedial authority, refunds would be appropriate.¹ Timely requests for rehearing were filed by the Arkansas Public Service Commission and the Mississippi Public Service Commission (jointly) (Arkansas/Mississippi) and Entergy Services, Inc. (Entergy), contesting both conclusions.

2. We deny rehearing with respect to our interpretation of section 206(c), but grant rehearing on the issue of whether refunds should be ordered. Thus, we conclude that,

¹ *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 132 FERC ¶ 61,133 (2010) (Amended Remand Order). This case is before us on voluntary remand from the United States Court of Appeals of the District of Columbia Circuit. *Arkansas Public Service Commission, et al. v. FERC*, No. 08-1330, *et al.* (D.C. Cir. June 24, 2009). The convoluted history of this case is described in greater detail in the Amended Remand Order, and will not be repeated here except as necessary to explain today's decision.

while we have authority to grant refunds in this case, the better course is to invoke our equitable discretion to deny them.²

DISCUSSION

1. Section 206(c) Authority

3. Because the Commission is invoking its discretion to deny refunds in this order, the parties' argument concerning our authority pursuant to FPA section 206(c) is, as a practical matter, moot. Nonetheless, we believe that, as a matter of policy, it is important to fully confront this question.

4. In the Amended Remand Order, the Commission's interpretation of section 206(c) was significantly informed by the court's decision in *Louisiana Public Service Commission v. FERC (Louisiana Public Service Commission)*,³ which held that the Commission had failed to sufficiently explain why that provision barred refunds in this case. Thus, we held that: (1) the filed rate doctrine did not prevent refunds from being awarded in this case; (2) the Supremacy Clause of the United States Constitution (as interpreted by the Supreme Court in *Miss. Power & Light Co. v. Mississippi ex rel. Moore*⁴ and *Nantahala Power & Light Co. v. Thornburg*⁵) prohibits state commissions from preventing Commission-ordered refunds from being flowed through at the retail level; (3) alleged practical problems at the retail level that would impede Entergy's full recovery of costs could not prevail over this constitutional doctrine; and (4) refunds were not barred by the court's decision in *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009).⁶

5. On rehearing, Entergy does not appear to contest the logic of the Commission's position that the Supremacy Clause prevents the trapping of the costs at the retail level of Commission-ordered refunds. Entergy nonetheless claims that the Commission must more fully "explain[] how the Entergy Operating Companies will be able to overcome

² A pending partial settlement that quantifies the amount of refunds to be paid, while leaving open the issues being decided in this order (i.e., whether the Commission has authority to order refunds and whether, if the Commission has such authority, refunds are appropriate under the circumstances of this case), will be addressed in a separate order.

³ 482 F.3d 510 (D.C. Cir. 2007).

⁴ 487 U.S. 354 (1988).

⁵ 476 U.S. 953 (1986).

⁶ Amended Remand Order, 132 FERC ¶ 61,133 at P 20-30.

potential obstacles to full retail rate recovery of the cost of refunds made to other operating companies;”⁷ Entergy maintains that state regulation poses practical difficulties that would prevent such recovery.

6. The Commission rejects Entergy’s argument. As the court stated in *Louisiana Public Service Commission*, the Commission had previously failed to “explain why, under the Supremacy Clause, a rate increase ordered by the Commission may be recovered through retail rates but a refund ordered by the Commission may not be,” citing *Mississippi Power*, 487 U.S. at 369-72.⁸ In the pages referenced, the Supreme Court held that “FERC allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates.”⁹ This means, the Court explained, that “States may not bar regulated entities from passing through to retail customers FERC-mandated wholesale rates.”¹⁰ We see no basis on which to distinguish this principle with regard to the ordering of refunds, which may, under particular circumstances, require the payment of a Commission-mandated rate to recover from other ratepayers the amounts being refunded.¹¹ Furthermore, we find that the Supremacy Clause provides a legal basis to overcome any state regulatory stumbling blocks to flowing through the cost effects of any such federally ordered rate refunds.

7. Entergy also asserts that our denial of its “practical difficulty” defense is inconsistent with *Entergy Services, Inc.*, 127 FERC ¶ 61,126 (2009), *reh’g denied*, 131 FERC ¶ 61,227 (2010), “where the Commission took a position” that “the Supremacy Clause did not protect Entergy” from a “loss of revenues that arose due to decisions by retail regulators.”¹² We disagree. In that case, the Commission rejected Entergy’s request that it review the decision of the Public Utilities Commission of Texas

⁷ Entergy Request for Rehearing at 5 (heading format and capitals omitted).

⁸ 482 F.3d at 520.

⁹ 487 U.S. at 371.

¹⁰ *Id.* at 372.

¹¹ As we explained in the Amended Rehearing Order, the recovery of amounts refunded to some ratepayers from other ratepayers may be warranted in some instances, but not others. *E.g.*, Amended Remand Order, 132 FERC ¶ 61,133 at P 21 n.43 (citing and discussing, *e.g.*, *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, Opinion No. 468, 106 FERC ¶ 61,228, at P 84 & n.156 (2004)).

¹² Entergy Rehearing at 10 (citing Amended Remand Order, 132 FERC ¶ 61,133 at P 25).

(Texas Commission) concerning the allocation of Entergy-system payments to retail customers as beyond the Commission's FPA jurisdiction.¹³ To the extent that the state regulator's decision allegedly trapped costs in violation of the Supremacy Clause, we concluded, the remedy was not a matter for the Commission to itself address,¹⁴ but rather was "a matter for the courts to review in the pending appeals of the Texas Commission's decision brought by Entergy in both state and federal court."¹⁵ That holding is fully consistent with our decision here that the Commission may order refunds under section 206(c), notwithstanding any alleged practical difficulties.¹⁶

8. Entergy objects to the Commission's assertion that Congress intended FPA section 206(c) solely to remedy an operating company's loss of revenues due to the operation of the filed rate doctrine. Entergy emphasizes that the statute "states that the Commission must find that the holding company will not experience 'any reduction' in revenues," not just "revenues lost due to the operation of the filed rate doctrine."¹⁷

9. Entergy is correct that the statutory text does not expressly reference the filed rate doctrine. But the language of section 206(c) is sufficiently ambiguous in this regard to warrant recourse to extrinsic interpretative aids, and the relevant legislative history focuses solely on potential revenue loss to an operating company because of the operation of the filed rate doctrine.¹⁸ Therefore, we believe our interpretation of

¹³ *Entergy Services, Inc.*, 127 FERC ¶ 61,126 at P 23.

¹⁴ For the Commission to have decided this issue, it would have had to decide for itself what percentage of the costs at issue should be borne by some retail customers and what percentage by other retail ratepayers. The Commission is not authorized by the FPA to do that. *Id.*; *cf. id.* P 24.

¹⁵ *Id.* P 23.

¹⁶ *Id.* P 24 (noting that the Texas Commission decision at issue accepted this Commission's allocation of bandwidth receipts to Entergy Gulf States, as did the Louisiana Commission; hence there was no conflict between what this Commission ordered and what the two state commissions did – the conflict was between those two commissions as to how the Commission-allocated costs should be shared between them); *see also id.* P 25 & n.21 (describing precedent on cost allocation when more than one jurisdiction is involved).

¹⁷ Entergy Rehearing at 11 (quoting 16 U.S.C. § 824e(c) (2006) (emphasis Entergy's)).

¹⁸ Amended Remand Order, 132 FERC ¶ 61,133 at P 26 & n.52.

section 206(c) to this effect is reasonable, especially in light of the court's decision in *Louisiana Public Service Commission*.¹⁹

10. Entergy also raises the interesting question that the Commission's reading of the statute "would mean that FPA section 206(c) would never bar refunds in holding company cost allocation cases."²⁰ In the Amended Remand Order, we responded to this point by stating that our decision was ruling on this particular case;²¹ we did not rule on other future cases not yet before us. We are still unwilling to be drawn into speculation about the potential application of section 206(c). We acknowledge that there is some logic to Entergy's assertion, but the Commission is constrained by the language of the statute and by its legislative history, as well as by the mandate of the D.C. Circuit to reach the legal result that it has reached. And, indeed, if we were to rule otherwise, the other side could equally argue that FPA section 206(c) would never allow refunds in holding company cost allocation cases, notwithstanding what the D.C. Circuit has said on this question in *Louisiana Public Service Commission*.²² However, we will return to the issue of refunds below, in the context of invoking our equitable discretion with respect to refunds.

11. Finally, Entergy asks that we clarify that our statement in footnote 42 of the Amended Remand Order was *dicta*, or, alternatively, concede it is incorrect.²³ That footnote pointed out that section 206(c) refers to electric utility companies of a "registered holding company," and with the repeal in 2005 of the Public Utility Holding Company Act of 1935 (PUHCA 1935) there are now no longer any registered holding companies; thus, the reach of section 206(c) will be increasingly limited as the Commission works its way through the pending cases that date from before 2005. We see no reason to disavow the footnote, as it is accurate, reflecting that Congress expressly limited section 206(c) to registered holding companies, and Congress' repeal of PUHCA 1935 means there are now no longer any such companies.

12. Entergy, in this regard, first argued that repeal of PUHCA 1935 did not change Congress' intent in enacting section 206(c). But this argument would have the Commission rewrite section 206(c) to delete the word "registered" any time it appears in that section, as well as delete the last phrase of section 206(c), i.e., that "registered

¹⁹ *Louisiana Public Service Commission*, 482 F.3d 519-20.

²⁰ *Id.*

²¹ Amended Remand Order, 132 FERC ¶ 61,133 at P 28.

²² *Louisiana Public Service Commission*, 482 F.3d at 519-20.

²³ Amended Remand Order, 132 FERC ¶ 61,133 at P 21 n.42.

holding company”; shall have the same meaning [] as provided in [PUHCA 1935], as amended.²⁴ Rewriting a statute is beyond our authority, however. And, if Congress had intended that section 206(c) would apply to non-registered holding companies, it could have revised section 206(c) when it repealed PUHCA, but it did not do so.

13. Entergy next argues that Congress never intended, in 2005, to limit the reach of section 206(c). But Entergy’s argument ignores that section 206(c), by its express terms, applies to registered holding companies and, with Congress’ repeal of PUHCA 1935 in 2005, there are no longer any such companies. Congress, in 2005, did not need to expressly limit the reach of section 206(c), because that limit was already written into section 206(c).

14. Entergy next argues that Congress did not intend, in 2005, to alter the Commission’s responsibilities under the FPA – pointing to “saving” provisions in section 1267 of the Energy Policy Act of 2005.²⁵ But those provisions speak of the Commission’s authority under the FPA to require that jurisdictional rates be just and reasonable, and the Commission’s exercising its jurisdiction to determine whether a public utility may recover in rates the costs of activities of associate companies or the costs of goods or services acquired from associate companies. They do not address whether section 206(c) would now reach beyond registered holding companies to all holding companies in light of the repeal of PUHCA 1935. Indeed, the saving provisions Entergy cites demonstrate that Congress knew how to create a savings provision when Congress felt it appropriate to do so, but Congress crafted no such provision stating that section 206(c) would continue to apply to holding companies even though PUHCA 1935 had been repealed and there were now no longer any registered holding companies.

15. Arkansas/Mississippi’s request for rehearing on the issue of the applicability of section 206(c) focuses on the manner in which refunds would be accomplished. Arkansas/Mississippi maintains that “the only refund proposal presented in this case” would “incorporate rate increase surcharges to past underpayments in the FERC-

²⁴ To be a registered holding company under PUHCA 1935 required that a holding company have a “registration” that was “in effect under section 5” of PUHCA 1935. 15 U.S.C. § 79b(a)(12) (2000). Section 5, in turn, required filings with the Securities and Exchange Commission (SEC), and PUHCA 1935 subjected a registered holding company to a range of regulatory and reporting requirements. 15 U.S.C. § 79e (2000); *see* 15 U.S.C. § 79f—79q (2000). We are hard-pressed to conclude, in light of the repeal of PUHCA 1935, that Congress *sub silentio* intended that holding companies could continue to claim the benefits of registered holding company status long after that status had been abolished, but not be subject to the corresponding regulatory oversight that was associated with that status.

²⁵ *See* 42 U.S.C. § 16455 (2006).

jurisdictional wholesale rate . . . to avoid the prohibition against retroactive ratemaking at the retail level.”²⁶ As we understand it, Arkansas/Mississippi appears to believe that this would possibly lead to impermissible trapped costs because of “federal and state law disallowing retroactive increases to be collected by surcharges.”²⁷

16. The Commission denies rehearing on this argument. First, the mechanics of any refund here (whether or not involving the refund proposal cited) would be matters for a compliance proceeding. In this order, we are dealing solely with the legality of such refunds.

17. Second, we reject Arkansas/Mississippi’s apparent understanding that any refund involving a surcharge would be illegal under state and federal law. With respect to state law, we have explained in our earlier order and above that the Supremacy Clause prevails, to ensure the retail pass through of federally-mandated costs. The use of a surcharge mechanism in this context would provide no basis for ignoring the constitutional rule. As to federal law, the Commission denies Arkansas/Mississippi’s claim that *City of Anaheim* prohibits any remedial action employing rate surcharges. *City of Anaheim* holds that FPA section 206(a) “prohibits FERC from setting rates retroactively.”²⁸ But, as we explained previously, where, as here, the Commission has properly set a refund effective date, section 206 specifically prescribes the Commission’s refund authority for a fifteen month period.²⁹ As *Louisiana Public Service Commission* recognized, refunds pursuant to this authority cannot be considered retroactive ratemaking.³⁰ We do not read *City of Anaheim* as restricting the Commission’s remedial discretion (including the use of surcharges as a remedial mechanism) for statutorily-authorized refunds.

18. Next, Arkansas/Mississippi maintains that the Commission’s Amended Remand Order failed to adequately deal with *Nantahala* and *Mississippi Power*, which they believe Congress must be presumed to have taken into account in enacting section 206(c).³¹ However, petitioners fail to confront the fundamental problem posed by those

²⁶ Arkansas/Mississippi Rehearing Request at 8 (citing *Louisiana Public Service Comm. v. Entergy Corp.*, 96 FERC ¶ 63,002, at 65,024 (2002) (the original Initial Decision in this proceeding)).

²⁷ *Id.* 10.

²⁸ 558 F.3d at 522 (emphasis in original).

²⁹ Amended Remand Order, 132 FERC ¶ 61,133 at P 29-30.

³⁰ 482 F.3d at 520.

³¹ Arkansas/Mississippi Rehearing Request at 14.

cases vis-à-vis their interpretation of section 206(c), namely, that Congress could not by statute overrule the Supreme Court's decision that, under the Supremacy Clause, state ratemaking must conform to the dictates of federal ratemaking.

19. Finally, Arkansas/Mississippi argues that the Louisiana Public Service Commission's original complaint in this proceeding "does not constitute the requisite 'notice'" to avoid application of the filed rate doctrine.³² But this argument runs directly afoul of the court's observation in *Louisiana Public Service Commission* that the opposite is true.³³

2. Equitable Discretion

20. Having established the Commission's authority to issue refunds under section 206(c) in this case, the Amended Remand Order went on to hold that Arkansas/Mississippi and Entergy had not "demonstrated any reason . . . for the Commission to deviate from its policy of granting full refunds."³⁴ In this regard, we held that neither the parties' good faith nor the passage of time militated against refunds here. More significantly, for present purposes, we held that "contrary to Arkansas/Mississippi's position, this is not a rate design case where customer usage patterns are relevant" and provide a reason to withhold refunds.³⁵ To the contrary, we maintained that this case "involves a misallocation of costs, so that one group of customers was paying too much, to the benefit of other customer groups."³⁶

21. In their requests for rehearing, both Arkansas/Mississippi and Entergy seek to provide further support for their contention that circumstances present in this case do not warrant the imposition of refunds. In this regard Arkansas/Mississippi asserts that the Commission erred by not applying "its long-standing policy disallowing refunds or surcharges in cases where costs are reallocated among different customer classes."³⁷

³² *Id.* at 16 (heading format and capitals omitted).

³³ *Louisiana Public Service Commission*, 482 F.3d at 520.

³⁴ Amended Remand Order, 132 FERC ¶ 61,133 at P 31 (footnote omitted).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Arkansas/Mississippi Rehearing Request at 7 (citing *Portland General Electric Co.*, 106 FERC ¶ 61,193 (2004); *Union Electric Co.*, 64 FERC ¶ 61,355 (1993); *Union Electric Co.*, 58 FERC ¶ 61,247 (1990); and *Commonwealth Edison Co.*, 25 FERC ¶ 61,323 (1983)).

22. Entergy likewise contends that the Commission's general policy in favor of refunds "does *not* apply in rate design cases like this one where the issue is not whether the utility has been unjustly enriched by overcollecting revenues, but rather whether the rate design employed to allocate revenues to different customers or customer classes results in some customers paying too much and others not paying enough."³⁸ Entergy particularly relies on our recent decision in *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,378 (2005) (*Oxy v. PJM*), where we described as a "long-standing policy" under section 206 of the FPA that when the agency "requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively" – i.e., without refunds.³⁹

23. On the question of refunds, the Commission has two lines of precedent, each dealing with a different situation. When a case involves a company over collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers.⁴⁰ By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.⁴¹ Reconsidering the matter, the Commission disavows the distinction we attempted to draw in the Amended Rehearing Order between the treatment of refunds in rate design and cost allocation cases.

24. Here, upon reflection, we agree with Entergy and Arkansas/Mississippi that, in this case, the Entergy system as a whole collected the proper level of revenue, but, as was later established, incorrectly allocated peak load responsibility among the various Entergy operating companies. Thus, whether classified as a rate design or cost allocation matter (albeit among operating companies, rather than among customer classes), it does not present a straightforward instance of a utility over-collecting revenue.

25. In view of the foregoing, the Commission will apply here our usual practice in such cases, invoking our equitable discretion to not order refunds, notwithstanding our authority to do so.

³⁸ Entergy Rehearing at 15 (emphasis in original).

³⁹ *Oxy v. PJM*, 110 FERC ¶ 61,378 at P 10.

⁴⁰ See, e.g., *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009); *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).

⁴¹ See, e.g., *Portland General Electric Co.*, 106 FERC ¶ 61,193; *Union Electric Co.*, 58 FERC ¶ 61,247; *Commonwealth Edison Co.*, 25 FERC ¶ 61,335.

The Commission orders:

The requests for rehearing of the Amended Remand Order filed by Arkansas/Mississippi and by Entergy are hereby granted, in part, and denied, in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.