

The Bandwidth Remedy And Refund Issues

This case has its origins in a complaint filed by Louisiana that contended that cost allocations among the affiliated Entergy companies operating in several states had become unjust, unreasonable, and unduly discriminatory. The Commission, after a hearing before an administrative law judge, agreed that the production costs of the Entergy companies were no longer in rough equalization, and adopted a “bandwidth” formula as a remedial device to limit cost disparities to +/- 11 percent from the average for the Entergy system. *La. Pub. Serv. Comm’n v. Entergy Corp.*, Opinion No. 480, 111 FERC ¶ 61,311 at PP 136, 144, *on reh’g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *on appeal*, *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

On appeal, this Court held that the Commission had jurisdiction to impose the bandwidth formula and that the remedy was reasonable, supported by substantial evidence, and well within the Commission’s broad remedial discretion. 522 F.3d at 383, 391-94. The court, however, rejected the Commission’s rationale for declining to order retroactive refunds and found that the Commission had not provided a reasonable explanation for its decision to delay implementation of the bandwidth remedy until 2007 (based on cost disparity data for 2006). *Id.* at 400.

On remand, the Commission in the underlying proceeding (“the Opinion No. 480 proceeding”) first deferred action on the refund issue until a separate

proceeding (“the Opinion No. 468 proceeding”) involving similar issues, which it set for hearing, was resolved. Order on Partial Remand, *La. Pub. Serv. Comm’n v. FERC*, 129 FERC ¶ 61,238 at P 8 (2009) (attached as Appendix 1 to Louisiana’s Petition). (The Opinion No. 468 proceeding arose from another Louisiana complaint regarding the treatment of interruptible load for purposes of cost equalization calculations among the Entergy operating companies. That dispute has reached this Court four times, including an appeal that is currently pending. See *La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) (vacating orders that dismissed complaint); *La. Pub. Serv. Comm’n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (reversing FERC orders in part and remanding for further proceedings); *Ark. Pub. Serv. Comm’n v. FERC*, Nos. 08-1330 & 08-1363 (D.C. Cir. filed Oct. 14, 2008) (voluntary remand granted); *La. Pub. Serv. Comm’n v. FERC*, No. 13-1155 (D.C. Cir. filed May 3, 2013) (pending; briefing completed).)

After it ruled on the related issues in the Opinion No. 468 proceeding, the Commission issued an Order on Remand in the Opinion No. 480 proceeding that (1) denied refunds for the period from September 2001 to May 2003, but held that ruling in abeyance pending the outcome of an additional hearing in the Opinion No. 468 proceeding¹; and (2) directed Entergy to calculate bandwidth payments

¹ The Commission issued a final order in that proceeding in March 2013, which is on review before this Court in D.C. Cir. No. 13-1155.

and receipts for the period from June 1, 2005 through December 31, 2005. Order on Remand, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,047 at PP 31-32, 34 (2011) (attached as Appendix 3 to Louisiana's Petition). Louisiana then, on November 21, 2011, filed a request for clarification and/or rehearing of that order (attached as Appendix 4 to Louisiana's Petition), which remains pending before the Commission. (Two other parties, the Arkansas Public Service Commission and Union Electric Company, also filed requests for rehearing on the same date. Those requests likewise remain pending.)

In December 2011, Entergy submitted a compliance filing with respect to the calculation of refunds for the period from June to December 2005. Louisiana filed a protest to that compliance filing, which also remains pending.

Bandwidth-Related Proceedings: Annual Bandwidth Calculations And Other Filings

In addition to addressing refund issues in the Opinion No. 468 and Opinion No. 480 proceedings, the Commission has issued an array of orders in other proceedings concerning the bandwidth remedy.

Beginning in 2007, Entergy has submitted seven annual filings to implement the bandwidth remedy; the first four were challenged in numerous respects by Louisiana and other parties, in hearings before administrative law judges (with several interlocutory appeals to the Commission), on exceptions to the Commission, and (as to the first three bandwidth proceedings) on review before

this Court and the Fifth Circuit. *See Entergy Servs., Inc.*, 130 FERC ¶ 61,023 (2010), *on reh'g*, 139 FERC ¶ 61,103 (2012) (first bandwidth proceeding), *on appeal*, *La. Pub. Serv. Comm'n v. FERC*, No. 12-1282 (D.C. Cir. filed July 5, 2012); *Entergy Servs., Inc.*, 137 FERC ¶ 61,029 (2011), *reh'g denied*, 142 FERC ¶ 61,013 (2013) (second bandwidth proceeding), *on appeal*, *La. Pub. Serv. Comm'n v. FERC*, Nos. 13-60140, *et al.* (5th Cir. filed Mar. 5, 2013); *Entergy Servs., Inc.*, 130 FERC ¶ 61,170 (2010) (interlocutory order in third bandwidth proceeding); *Entergy Servs., Inc.*, 139 FERC ¶ 61,105 (2012), *on reh'g and clarification*, 145 FERC ¶ 61,047 (2013) (third bandwidth proceeding), *on appeal*, *La. Pub. Serv. Comm'n v. FERC*, No. 13-60874 (5th Cir. filed Dec. 11, 2013); *Entergy Servs., Inc.*, 132 FERC ¶ 61,065 (2010), *on reh'g*, 137 FERC ¶ 61,019 (2011), *on reh'g and clarification*, 145 FERC ¶ 61,049 (2013) (rulings on scope of issues in fourth bandwidth proceeding, which remains pending before an ALJ). (The fifth through seventh annual bandwidth proceedings are in abeyance, pending outcomes of various proceedings concerning related issues.)

In addition, the Commission also has ruled on bandwidth-related issues in at least four complaint proceedings: three brought by Louisiana (one of which was fully litigated in a hearing before an administrative law judge) and one by the Arkansas Public Service Commission (in which Louisiana participated, and filed a request for rehearing). *See La. Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC

¶ 61,010 at P 27 (2008) (setting certain issues in 2008 complaint for hearing; dismissing others because they were already pending in first annual bandwidth proceeding); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,003 (2010) (setting 2010 complaint for hearing); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107 at P 24 (2012) (affirming ALJ's denial of 2010 complaint); *reh'g pending*; *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,102 (2012) (denying 2011 complaint in part), *reh'g pending*; *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 (2009), *reh'g denied*, 137 FERC ¶ 61,030 (2011), *reh'g denied*, 142 FERC ¶ 61,012 (2013), *on appeal*, *La. Pub. Serv. Comm'n v. FERC*, Nos. 13-60140, *et al.* (5th Cir. filed Mar. 5, 2013).

Indeed, just since the Commission issued the Order on Remand in October 2011 (and Louisiana requested rehearing in November 2011), the Commission has issued at least a dozen substantive orders² on bandwidth issues alone — not counting the additional hearing and rulings in the Opinion No. 468 proceeding, let alone other proceedings and appeals arising from the Entergy system and disputes among Entergy and its various state regulators. *See, e.g., Council for the City of New Orleans and La. Pub. Serv. Comm'n v. FERC*, 692 F.3d 172 (D.C. Cir. 2012),

² *See* FERC orders cited *supra* at pp. 5-6. This figure does not include any procedural orders (such as orders granting rehearing for further consideration), or any orders or decisions issued by administrative law judges.

cert. denied, 133 S. Ct. 2382 (2013) (concerning exit of certain Entergy operating companies from Entergy System Agreement).

The Extraordinary Remedy Of Mandamus Is Not Warranted In These Circumstances

“[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *accord*, *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002); *N. States Power Co. v. U.S. Dep’t of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997); *see also* *Yablonski v. United Mine Workers*, 454 F.2d 1036, 1038 (D.C. Cir. 1971) (writs of mandamus are “among the most potent weapons in the judicial arsenal” and, “as extraordinary remedies, . . . are reserved for really extraordinary causes”) (internal quotation marks and citations omitted). A petitioner’s burden is high: “The party seeking mandamus has the burden of showing that ‘its right to the issuance of the writ is clear and indisputable.’” *N. States Power Co.*, 128 F.3d at 758 (citation omitted); *accord*, *Power*, 292 F.3d at 784.

In particular, “[t]he central question in evaluating ‘a claim of unreasonable delay’” —on which Louisiana bases its request for extraordinary relief — “is ‘whether the agency’s delay is so egregious as to warrant mandamus.’” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *Telecommc’ns Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984)). The first and most important factor is that “the time agencies take to make decisions must be

governed by a ‘rule of reason.’” *Core Commc’ns*, 531 F.3d at 855 (quoting *Telecommc’ns Research*, 750 F.2d at 79). “[T]he primary purpose of the writ in circumstances like these is to ensure that an agency does not thwart our jurisdiction by withholding a reviewable decision.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004), *quoted in Core Commc’ns*, 531 F.3d at 856.

Louisiana cannot meet its high burden to show such foot-dragging. Louisiana claims that the Commission has “unreasonably delay[ed]” or “withh[e]ld” a decision on refunds for Entergy’s unduly discriminatory cost allocations. Pet. 3, 23. Louisiana’s request for rehearing and/or clarification of the Order on Remand has been pending for just over two years, but the Commission reasonably held its determination as to refunds in abeyance while similar refund issues were resolved in a separate proceeding (the Opinion No. 468 proceeding, which included a full hearing before an ALJ) in which Louisiana itself was the complainant, and which was completed (subject to pending appellate review) only in March 2013. In the meantime, the Commission has devoted significant attention and resources to bandwidth-related disputes, issuing at least a dozen orders on an array of complex issues (many, if not most, litigated by Louisiana). As shown above, the Commission’s handling of those many disputes has been anything but dilatory.

Nevertheless, the Commission intends to issue an order on Louisiana's pending Request for Rehearing and/or Clarification in the Opinion No. 480 proceeding by the end of February 2014. If Louisiana objects to the Commission's resolution of matters in that order, it will be able to seek further agency rehearing (if appropriate) of that order or judicial review of a final order pursuant to the ordinary procedures under section 313 of the Federal Power Act, 16 U.S.C. § 825l.

Accordingly, the petition for extraordinary relief should be denied, and Louisiana's substantive challenges to the Commission's orders should be left to the normal appellate process.

CONCLUSION

For the reasons stated, this Court should deny the petition for writ of mandamus.

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