

129 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Louisiana Public Service Commission and the City
Council of New Orleans

Docket No. EL00-66-013

v.

Entergy Corporation

Docket No. EL95-33-009

Louisiana Public Service Commission

v.

Entergy Services, Inc.

ORDER ON VOLUNTARY REMAND

(Issued December 17, 2009)

1. In response to a petition for review of the Commission's orders issued earlier in this proceeding,¹ on April 3, 2007, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Commission for further proceedings.² Subsequently, the Commission issued orders in response to the court's remand.³ These orders were in turn appealed to the D.C. Circuit by the Arkansas Public Service Commission (Arkansas Commission) and Entergy Services, Inc. (Entergy).⁴ Upon

¹ *Louisiana Public Service Commission v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh'g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005).

² *Louisiana Public Service Commission v. FERC*, 482 F.3d 510 (D.C. Cir. 2007).

³ *Louisiana Public Service Commission v. Entergy Corp.*, 120 FERC ¶ 61,241 (2007) (Remand Order), *reh'g denied*, 124 FERC ¶ 61,275 (2008) (Rehearing Order).

⁴ *See Arkansas Public Service Commission v. FERC*, Nos. 08-1330, *et al.* (D.C. Cir. October 14, 2008). Entergy is the service company for the six public utility operating subsidiaries of the Entergy Corporation: Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, LLC, Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc. (Operating Companies).

consideration of petitioners' briefs filed with the court, the Commission moved for a voluntary remand to more fully consider their arguments. On June 24, 2009, the court granted the Commission's motion.

2. This case arose from a complaint by the Louisiana Public Service Commission and the Council of the City of New Orleans (collectively, Louisiana) against Entergy and its Operating Companies concerning Entergy's inclusion of interruptible load in the allocation of capacity costs. The Commission eventually determined that it was unjust and unreasonable for Entergy to include interruptible load in its calculation of peak load responsibility.⁵ The only issue remaining for decision is whether refunds are legally permissible, and, if so, appropriate.

3. In the Remand Order and the Rehearing Order, the Commission noted that the court found that the Commission had not adequately justified its finding that, under the statute, it lacked authority, in the circumstances of this case, to order refunds. The Commission further concluded that, given the court's findings on the refund issue and given its rejection of the Commission's contrary reasoning, Entergy should make refunds to its customers pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2006).

4. On appeal, petitioners contended that the Commission failed to comply with the court's mandate in two respects: (1) by not making the findings necessary to support ordering refunds under section 206(c), and (2) by failing to exercise equitable discretion to determine whether refunds were appropriate.

5. Having reexamined the matter, the Commission seeks further submissions to elicit the views of the parties on two matters: (1) the applicability of section 206(c), (i.e., when and how it would apply), and (2) if refunds are legally permissible, are they equitable in the circumstances presented. Therefore, as discussed below, we are setting these two matters for a paper hearing.

I. Background

6. In Opinion No. 468, the Commission reviewed an Initial Decision in the complaint proceeding.⁶ On the issue of refunds, the judge concluded that FPA section 206(c) left "little room for refunds among affiliates of a holding company such as Entergy."⁷

⁵ See Opinion No. 468, 106 FERC ¶ 61,228 at P 60-77.

⁶ *Louisiana Public Service Commission v. Entergy Services, Inc.*, 96 FERC ¶ 63,002 (2001).

⁷ *Id.* at 65,023.

Nonetheless, based on what he described as the uncontroverted testimony of Louisiana's witness Mr. Baron, the judge found that refunds were appropriate because there would be no trapped costs unrecoverable by Entergy.⁸

7. The Commission reversed the judge on refunds. Noting that the case involved reallocation of costs among Operating Companies, the Commission concluded that it could not "make the requisite finding" under section 206(c) "that there would not be a reduction in revenues because the Operating Companies would be able to recover the monies that would be refunded as a result of the reallocation of costs among such companies."⁹ The Commission discounted the Baron testimony on which the judge had relied in ordering refunds as having "no probative value."¹⁰ The Commission, therefore, ordered a rate change based on the revised cost allocation solely on a prospective basis and did not order refunds.¹¹

8. In Opinion No. 468-A, the Commission denied Louisiana's request for rehearing on refunds. As the Commission explained, "[w]e could not make the findings required by the statute; hence, we could not order refunds."¹² The Commission also rejected Louisiana's claim that *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), allowed the Commission to order refunds even though doing so would require state commissions to allow surcharges in their retail rates. The Commission acknowledged the discretionary nature of its refund authority, but, because the statute barred refunds here, determined that there was no need to explore the equities involved.¹³

9. On judicial review, the D.C. Circuit began its examination of the refund issue by setting out the parties' positions. In the court's view, the Commission had declined to order refunds because it could not find, as required by section 206(c), that Entergy "would not experience any reduction in revenues" should refunds be ordered.¹⁴ The court explained that the Commission's finding was based on its concern that "a state

⁸ *Id.* at 65,024.

⁹ Opinion No. 468, 106 FERC ¶ 61,228 at P 84.

¹⁰ *Id.* P 87.

¹¹ *Id.* P 88.

¹² Opinion No. 468-A, 111 FERC ¶ 61,080 at P 21.

¹³ *Id.*

¹⁴ *Louisiana Public Service Commission v. FERC*, 482 F.3d at 519 (quoting Opinion No. 468-A, 111 FERC ¶ 61,080 at P 21-22).

commission might not permit a utility to pass the costs of refunds through to retail customers because the retroactive nature of a refund would conflict with the state's filed rate doctrine."¹⁵ The court rejected the Commission's position because the Commission had failed to explain "why the requirements of the filed rate doctrine would not be satisfied" by all parties being "on notice as of the filing of Louisiana's complaint in 1995 that Entergy's calculation of peak load responsibility might be held unjust and unreasonable."¹⁶ In this regard, the court noted, the Commission had "previously taken the position that a refund ordered pursuant to [section] 206(c)" would be prospective from the refund effective date, rather than retroactive.¹⁷

10. The court also found that the agency had failed to explain why "under the Supremacy Clause," a refund ordered by the Commission could not be recovered in retail rates given that, on the other hand, a rate increase ordered by the Commission may be recovered.¹⁸

11. In the Remand Order, the Commission relied on the court's finding that the statute did not bar the Commission's ordering refunds in this case, and ordered refunds.¹⁹ The Commission affirmed this finding on rehearing.²⁰ In so doing, the Commission acknowledged that the court did not *explicitly* compel the Commission to reverse its prior determination that it lacked authority to order refunds. In fact, the Commission observed that the court invited the Commission to provide further support for this finding, if it could do so. At the same time, however, the Commission explained that the court found inadequate all the reasons that the Commission provided in Opinion Nos. 468 and 468-A

¹⁵ *Id.*

¹⁶ *Id.* at 520.

¹⁷ *Id.* (citing *Blue Ridge Power Agency v. Appalachian Power Co.*, 57 FERC ¶ 61,100, at 61,374 (1991)).

¹⁸ *Id.* at 520 (citing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 369-72 (1988)). The court noted the intervenors' theory that, under section 206(c), a Commission-ordered refund does not preempt inconsistent state ratemaking. *Id.* at 519-20 n.*. However, the court declined to reach this argument because it had not been addressed by the Commission.

¹⁹ Remand Order, 120 FERC ¶ 61,241 at P 8.

²⁰ Rehearing Order, 124 FERC ¶ 61,275 at P 18-29. The Commission also relied on the judge's "analysis of the relevant testimony" in ordering refunds. As petitioners point out on appeal, however, Opinion No. 468 rejected this testimony.

for its conclusion that it lacked authority to order refunds in the circumstances present in this case.²¹

12. Because the Commission did not have any additional, persuasive reasons to not order refunds – beyond those already provided in Opinion Nos. 468 and 468-A, which had been rejected by the court – the Commission stated that it had no choice but to reverse its prior decision on this issue and instead order refunds. Additionally, the Commission found that the court’s discussion of why the Commission erred in phasing out the inclusion of interruptible load, and the court’s holding that it would be unreasonable to allow Entergy to continue to charge rates reflecting the inclusion of interruptible load in the computation of peak load, provided a convincing justification for imposing refunds, i.e., so that rates that more accurately reflected the proper treatment of interruptible load could be put in place at the earliest date possible.²²

13. The Commission emphasized that the court had expressly dispelled one of the Commission’s principal concerns with ordering refunds, i.e., that the language of section 206(c) precluded refunds under the circumstances involved in this proceeding.²³ The Commission also relied on the court’s rejection of the Commission’s concerns about the filed rate doctrine based on the fact that all parties were on notice that the rates at issue might be held unjust and unreasonable.²⁴

II Discussion

14. Having reviewed the parties’ briefs on appeal, the Commission finds that further analysis is required. As described above, the court’s opinion raises the issue of the applicability of the filed rate doctrine with respect to refunds ordered pursuant to FPA section 206(c), because any refund is prospective for purposes of the doctrine.²⁵ While the court acknowledged the legislative history of section 206(c), it nonetheless suggested that the Supremacy Clause of the United States Constitution would preempt any cost trapping at the retail level. In an effort to better understand the parties’ positions on the

²¹ *Id.* P 18-23.

²² *Id.* P 27-28.

²³ *Id.* P 29; *see* 482 F.3d at 520, n.25.

²⁴ Rehearing Order, 124 FERC ¶ 61,275 at P 29.

²⁵ *See* 482 F.3d at 520.

circumstances in which section 206(c) would apply, the Commission wishes the parties to more fully address the applicability of section 206(c).²⁶

15. Intertwined with the legal issue of the applicability of section 206(c) are, of course, the facts and circumstances to be weighed in deciding whether it is appropriate to order refunds in this case. The petitioners' arguments convince us that the Commission must address with more specificity the question of whether, assuming refunds are legal, they should be granted here as a matter of our equitable discretion. In this regard, we emphasize that, as the court has long recognized, the Commission's "general policy" is one of "granting full refunds."²⁷ Thus, the parties should address whether there are special circumstances militating against applying this general policy here.

16. In view of the foregoing, we request that the parties file briefs addressing the unresolved refund issues presented in this case, as well as submitting any relevant written evidence on the factual question of whether ordering refunds is appropriate here. Initial briefs and evidence must be submitted on or before 30 days from the date of issuance of this order; reply briefs and evidence will be due 21 days thereafter.

The Commission orders:

The parties may submit initial briefs and evidence on the refund issues within 30 days of the date of issuance of this order, as discussed herein. The parties may submit reply briefs and evidence within 51 days of the date of issuance of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁶ On appeal, the Arkansas Commission has also raised the issue of whether the court's recent decision in *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009), limiting the Commission's ability to order rate increases, is relevant to any remedial action we might take here. Because that case was handed down after we issued the orders on remand, the Commission has not yet had a chance to address this question.

²⁷ *Towns of Concord v. FERC*, 955 F.3d 67, 76 (D.C. Cir. 1992); accord, e.g., *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).