

129 FERC ¶ 61,238  
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

Docket Nos. EL01-88-007

v.

Federal Energy Regulatory Commission

ORDER ON PARTIAL REMAND

(Issued December 17, 2009)

1. In response to a petition for review of the Commission's orders issued earlier in this proceeding,<sup>1</sup> the United States Court of Appeals for the District of Columbia Circuit, on April 15, 2008, issued an order remanding the matter in part to the Commission for further proceedings.<sup>2</sup> At issue was whether the Commission was empowered to order refunds under the specific circumstances presented in this proceeding. The court found that the Commission had not provided a sufficient rationale for denying refunds in the circumstances of this case. Also at issue was whether the Commission impermissibly delayed the implementation of the bandwidth remedy. The Court found that the Commission had not presented a reasonable explanation for its decision to delay implementation of the bandwidth remedy, and accordingly granted the Louisiana Public Service Commission's petition for review and remanded the issue for further proceedings. For the reasons discussed below, the Commission is deferring action on this proceeding until a separate proceeding involving similar issues is resolved.

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<sup>1</sup> *Louisiana Public Service Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g, Louisiana Public Service Comm'n. v. Entergy Servs., Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in part and remanded in part, sub nom. Louisiana Public Service Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

<sup>2</sup> *Louisiana Public Service Comm'n. v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (Remand Order).

## **I. Background**

### **A. The Entergy System**

2. Entergy Corporation (Entergy) is a public utility holding company that provides electric service at wholesale and retail in Arkansas, Louisiana, Mississippi and Texas. It currently does so through six operating companies (Operating Companies) named after their respective jurisdictions: Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy Gulf States, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc. The Entergy System is governed by a System Agreement; the current System Agreement was filed in 1982. The System Agreement acts as an interconnection and pooling agreement, and provides for the joint planning, construction and operation of new generating capacity in the Entergy System.

### **B. Prior Commission Orders and Court Remand**

3. In Opinion Nos. 480 and 480-A, the Commission held that the Entergy System was no longer in rough production cost equalization and adopted a bandwidth remedy. This remedy achieves rough production cost equalization on Entergy's System by not allowing any Operating Company to have production costs that are more than 11 percent above or below the system average production costs. Under the bandwidth remedy, each calendar year, the production costs of each Operating Company are calculated, with payments made by the low cost Operating Company(ies) to the high cost Operating Company(ies) such that, after reflecting the payments and receipts, no Operating Company would have production costs more than 11 percent above the Entergy System average or more than 11 percent below the Entergy System average.

4. The Commission also found in Opinion No. 480 that the bandwidth remedy should apply prospectively in calendar year 2006, with the first payments occurring in 2007. The Commission held that any reallocation of costs prior to Opinion No. 480 would require the payment of refunds among the Operating Companies. The Commission reasoned that it could not implement a retroactive bandwidth remedy because it had previously found that refunds among the Operating Companies are precluded by section 206(c) of the Federal Power Act (FPA).<sup>3</sup> The Commission held that section 206(c) prohibited refunds among electric companies of a registered holding company to the extent one or more of the electric companies making refunds cannot surcharge its customers or otherwise obtain retroactive cost recovery. The Commission stated that it had addressed the same issue (i.e., the reallocation of costs among Entergy Operating

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<sup>3</sup> *Id.* P 145; *see* 16 U.S.C. § 824e(c) (2006).

Companies) in another Entergy proceeding, Opinion No. 468,<sup>4</sup> and held unambiguously that refunds among the Operating Companies were prohibited.<sup>5</sup>

5. In the Remand Order, the court held that the Commission failed to offer a reasoned explanation for denying refunds. The court stated that the Commission had relied solely on Opinion No. 468, but noted that the court had (subsequent to the Commission's issuance of Opinion No. 480) held that the Commission had failed in Opinion No. 468 to offer a reasoned explanation for why the cost of Commission-ordered refunds by one group of Entergy subsidiaries could not be recovered, and hence for why they are barred by section 206(c).<sup>6</sup> The court held that because its holding in *Louisiana Public Service Comm'n* rejected the only rationale upon which the Commission relied for denying refunds in the instant case, it was therefore remanding the issue for further proceedings.

6. The court also found that the Commission had not provided a reasonable explanation for the Commission's decision to delay implementation of the bandwidth remedy. In Opinion No. 480, the Commission decided on June 1, 2005 that the bandwidth remedy would become "effective for the calendar year 2006."<sup>7</sup> In Opinion No. 480-A, the Commission elaborated that use of the first calendar year following issuance of Opinion No. 480 would be the most "appropriate and equitable" way to implement a remedy. The Commission added that adoption of a remedy that would involve prior years would necessarily result in refunds, and reiterated its belief that the Commission is prohibited from providing refunds under section 206(c). In the Remand Order, the court held that the Commission's argument that use of the first calendar year of data is "the most appropriate and equitable way" to implement the bandwidth remedy was a conclusion rather than a reason, and that the Commission had failed to explain why it believes that the first calendar year is the most equitable time.<sup>8</sup>

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<sup>4</sup> *Louisiana Public Service Comm'n v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh'g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005).

<sup>5</sup> *Id.*

<sup>6</sup> Remand Order, 522 F.3d 378 at 399 (citing *Louisiana Public Service Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007)).

<sup>7</sup> Opinion No. 480, 111 FERC ¶ 61,311 at P 145.

<sup>8</sup> Remand Order, 522 F.3d 378 at 400.

7. Subsequent to the court's remand, Entergy filed a motion for further proceedings and Union Electric Company (Union Electric) filed motions for late intervention and for summary disposition.

## II. Commission Determination

8. In an order being issued contemporaneously with this one, the Commission is establishing a paper hearing regarding outstanding refund issues in Docket Nos. EL00-66-013 and EL95-33-009.<sup>9</sup> As discussed above, however, the Commission relied on its earlier findings in that proceeding when making its determinations in the instant case.<sup>10</sup> Accordingly, given the establishment of a paper hearing in that proceeding, we find that it is appropriate to defer further action in the instant case until the paper hearing ordered in Docket Nos. EL00-66-013 and EL95-33-009 is resolved.<sup>11</sup>

### The Commission orders:

The Commission defers action on the partial remand in this docket until the paper hearing ordered in Docket Nos. EL00-66-013 and EL95-33-009 is resolved.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>9</sup> *Louisiana Public Service Commission v. Entergy Corp.*, 129 FERC ¶ 61,237 (2009).

<sup>10</sup> *Supra* P 5-6.

<sup>11</sup> Entergy's motion requesting further proceedings and Union Electric's motions for late intervention and summary disposition will be addressed in the order to be issued subsequent to the proceedings in Docket Nos. EL00-66-013 and EL95-33-009.