

137 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

Docket No. EL01-88-007

v.

Entergy Services, Inc.

ORDER ON REMAND

(Issued October 20, 2011)

1. In response to a petition for review of the Commission's orders issued earlier in this proceeding,¹ 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.² 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 Commission's petition for review and remanded the issue for further proceedings.

2. On December 19, 2009, the Commission issued an order on partial remand³ in this proceeding, which deferred action until a paper hearing on similar issues in Docket

¹ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005), *order on reh'g*, *Louisiana Pub. Serv. 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 Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

² *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

³ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 129 FERC ¶ 61,238 (2009).

Nos. EL00-66-013 and EL95-33-009 (Opinion No. 468⁴ Proceeding) was completed. In this order, consistent with the Commission's findings in the order that resolved the paper hearing,⁵ we conclude that, while we have authority to grant refunds in this case for the 15-month refund period (September 13, 2001 through May 2, 2003), we invoke our equitable discretion to deny them. However, we hold that ruling in abeyance pending a further Commission order. We also find that, consistent with the court's findings on the effective date, the remedy previously ordered by the Commission, i.e. the implementation of the bandwidth formula, shall take effect June 1, 2005, the date that the Commission found that the Entergy System's rates were unjust, unreasonable and unduly discriminatory, and thus we direct Entergy to calculate any necessary bandwidth payments from that date.

I. Background

A. The Entergy System

3. Entergy Corporation is a public utility holding company that provides electric service at wholesale and retail in Arkansas, Louisiana, Mississippi and Texas. 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

4. The Commission has held that the System Agreement requires that production costs be "roughly equal" among the Operating Companies.⁶ 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

⁴ *Louisiana Pub. Serv. 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).

⁵ *Louisiana Pub. Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp.*, 132 FERC ¶ 61,133 (2010) (Opinion No. 468 Amended Remand Order), *order granting reh'g in part and denying reh'g in part*, 135 FERC ¶ 61,218 (2011) (Opinion No. 468 Remand Rehearing Order).

⁶ Opinion No. 480, 111 FERC ¶ 61,311 at P 136.

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. The Commission determined that a +/- 11 percent bandwidth would apply if the Entergy System exceeded historical cost disparities, but would otherwise allow the Entergy System to maintain the flexibility that it had traditionally enjoyed.⁷

5. In Opinion No. 480, issued June 1, 2005, the Commission found that the bandwidth remedy should apply prospectively in calendar year 2006, with the first payments, based on calendar-year 2006 production costs, 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).⁸ The Commission held that section 206(c) prohibited refunds among operating public utilities of a registered holding company to the extent one or more of the companies making refunds cannot surcharge its customers or otherwise obtain cost recovery. The Commission stated that it had addressed the same issue (i.e., the reallocation of costs among Entergy's Operating Companies) in another Entergy proceeding, the Opinion No. 468 proceeding, and held unambiguously that refunds among the Operating Companies were prohibited.⁹

6. 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 recently 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).¹⁰ The court held that because its earlier holding in *Louisiana Pub. Serv. 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.

⁷ *Id.* P 144.

⁸ *Id.* P 145; *see* 16 U.S.C. § 824e(c) (2006).

⁹ *Id.*

¹⁰ *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d at 399 (citing *Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007)).

7. 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 that the bandwidth remedy would become "effective for the calendar year 2006."¹¹ 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). However, 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.¹²

C. Motion for Further Proceedings

8. Entergy filed a motion arguing that further proceedings are needed before the Commission issues an order on remand on the section 206(c) refund issue in the instant case. Entergy argues that the Commission must make the requisite finding under section 206(c) that Entergy will not experience any reduction in revenues as a result of refunds, and that the record does not support such a finding. Entergy contends that, before the Commission may order refunds in any case involving a section 206(c) situation, the Commission must first determine that the holding company will not experience any reduced revenues due to an Operating Company's inability to recover such refund amounts in its rates.¹³

9. Entergy contends that the court did not direct the Commission to order refunds, but instead to make a "reasoned determination" under section 206(c). Entergy argues that in Opinion No. 480 the Commission found that the record in this case was insufficient to make such a determination when it stated: "there is no evidence in this record indicating that the Entergy Operating Companies making a refund would be able to obtain retroactive cost recovery for those refunds."¹⁴ Entergy further argues that, even if the Commission makes the requisite finding under section 206(c) that refunds will not result in a loss of revenues to the holding company system, it still has discretion to determine

¹¹ Opinion No. 480, 111 FERC ¶ 61,311 at P 145.

¹² *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d at 400.

¹³ Entergy July 17, 2008 Motion at 10.

¹⁴ *Id.* (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 145).

whether or not to order refunds under the facts in this case so long as the decision has a rational basis.

10. Entergy also argues that the Commission must provide a reasoned explanation for the effective date of the remedy, noting that the court did not order the Commission to commence the bandwidth remedy starting from June 1, 2005. Entergy contends that although the Commission may have reasonably exercised its discretion to order a remedy prospective in nature, the court held that the Commission did not articulate its reasoning well enough for appellate review. Entergy contends that the existing record is sufficient for the Commission to provide further reasoning in support of its decision regarding the effective date of the prospective bandwidth remedy.

11. The Arkansas Commission and the City Council of New Orleans jointly respond that the record in this proceeding demonstrates that refunds may not be awarded under section 206(c).¹⁵ They argue that the situation considered in section 206(c), where refunds shall not be ordered in a proceeding involving two or more utilities that are affiliates within a holding company system, is the exact circumstance presented in this case. They disagree with Entergy's claim that additional evidence is required because, they argue, refunds are barred as a matter of law. They also argue that if section 206(c) does not prohibit refunds in this case as a matter of law, no further evidentiary proceedings should be conducted.

12. The Louisiana Commission and Occidental argue that there is no need to receive new evidence to make the remedy effective June 1, 2005 pursuant to the court's decision. They argue that the Commission has eliminated any valid basis for delaying the remedy and any legal basis to deny refunds. The Louisiana Commission and Occidental argue that parties have already had the opportunity to submit evidence on equitable issues and there is no need to reopen the record for a second hearing on the matter. They contend that the Commission ruled that Entergy's rates were unduly discriminatory during the refund period, which means that it can only be equitable to award refunds.

13. The Louisiana Commission and Occidental move for summary disposition on the remanded issues, and argue that the Commission should order Entergy to implement the bandwidth remedy with payments beginning June 1, 2005, based on the same test year procedure that was used for the prospective payment remedy that began June 1, 2007. They argue that, with respect to what they refer to as the refund-effective period, September 13, 2001 to May 2, 2003,¹⁶ the Commission should apply the bandwidth

¹⁵ Arkansas Commission and the Council of the City of New Orleans August 15, 2008 Answer at 2.

¹⁶ In the underlying proceeding, the parties agreed to a 20-week extension of the 15-month refund effective period provided for by section 206(b) of the FPA (16 U.S.C. (continued...))

formula to the cost imbalances in the refund period and reallocate the costs accordingly. They argue that the Commission should instruct Entergy to prorate the data for the months of September 2001 and April 2003.¹⁷

14. In its answer, Entergy argues that refunds are necessarily prohibited because the current record does not contain sufficient evidence to support a finding under section 206(c) that it will not experience any reduction in revenues.¹⁸ Entergy disputes the Louisiana Commission's assertion that Entergy waived its right to be heard on the refund issue because it did not file an exception to the Initial Decision¹⁹ on the refund issue, arguing that the Initial Decision did not even contain the word "refund" except in discussing issues unrelated to the section 206 refund issue.

15. The Arkansas Commission responds that the Commission should summarily affirm its determination that refunds are unlawful in the circumstances of this case. It contends that the Louisiana Commission's failure to address the section 206(c) bar to refunds is fatal to its refund claim because it has the burden of proof.²⁰

16. The Louisiana Commission responds that it has no remaining burden of proof with respect to the refund issue because it carried its burden of proving Entergy's cost allocations as unjust, unreasonable and unduly discriminatory.²¹ It contends that Entergy and the Arkansas Commission have not provided a valid reason for continuing to delay the implementation of a remedy.²²

§ 824e(b) (2006)) as part of a negotiated compromise that included a motion to extend the dates of the procedural schedule and initial decision by 20 weeks. Entergy sought the extension to give it time to develop a new resource plan that it relied on as evidence in this proceeding. *Order of Chief Judge Extending Initial Decision*, Docket No. EL01-88-001 (Oct. 10, 2002).

¹⁷ Louisiana Commission August 15, 2008 Answer at 31.

¹⁸ Entergy September 5, 2008 Answer at 2 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 145).

¹⁹ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 106 FERC ¶ 63,012 (2004) (Initial Decision).

²⁰ Arkansas Commission September 2, 2008 Answer at 4.

²¹ Louisiana Commission September 12, 2008 Answer at 3.

²² *Id.* P 6.

D. Union Electric's Motion to Intervene Out-of-Time and Motion for Summary Disposition

17. On August 15, 2008, Union Electric filed a motion to intervene out-of-time.²³ It states that it received a bill from Entergy Arkansas associated with the implementation of the bandwidth remedy in Docket No. ER07-956-000, the proceeding addressing Entergy's first bandwidth compliance filing (covering calendar year 2006). Union Electric states that the increase in costs to it are substantial, amounting to approximately \$12 million on an annual basis in 2007. Union Electric states that it acted promptly to intervene in Docket No. EL01-88 following issuance of the court's remand and the submission of Entergy's motion on July 17, 2008. Union Electric argues that its interest in this proceeding is substantial and unique because Union Electric is the only party to a 1999 agreement under which Entergy Arkansas would attempt to recover a portion of any additional payments it is assigned because of this remand proceeding. Union Electric adds that allowing it to intervene at this stage of the proceeding is appropriate because to do so would not disrupt the proceeding nor unduly prejudice or burden other parties.

18. The Louisiana Commission opposes the motion, arguing that the proceeding would be disrupted, and the Louisiana Commission would be prejudiced by attempts to allow Union Electric to litigate issues that either were litigated or should have been litigated in this docket. It argues that, although Union Electric claims to have a unique position, it fails to allege how its interests differ from other existing intervenors that are opposing the refund issue.²⁴

19. Union Electric filed an answer to the Louisiana Commission, arguing that there is good cause for its late intervention, specifically that it could not have known at an earlier stage that its intervention was necessary to protect its interests as a customer. It further argues that its late intervention will neither disrupt nor delay the proceeding, and that it does not intend to attempt to relitigate its contract issues that are properly before the Commission in other proceedings.

20. Subsequent to its motion to intervene out of time, Union Electric filed a motion for summary disposition, or, in the alternative, for further procedures. Union Electric argues that any refunds the Commission may order may not be recovered from Union Electric because it lacked sufficient notice of the potential for such refunds and surcharges. Union Electric argues that it had no reason to anticipate that Entergy Arkansas would attempt to pass through surcharges designed to roughly equalize production costs among the various Operating Companies under the agreement between Union Electric and

²³ Union Electric August 15, 2008 Motion to Intervene Out-of-Time at 1.

²⁴ Louisiana Commission August 27, 2008 Answer at 2.

Entergy Arkansas. Union Electric contends that, if the Commission does not summarily dispose of the issue then the Commission should set the remanded refund issue and the issue of Union Electric's lack of notice for further proceedings in the captioned docket.²⁵

21. The Louisiana Commission responds that Union Electric is not a party to this proceeding. It adds that Union Electric's contract with Entergy Arkansas is not at issue in the remanded docket.²⁶ The Louisiana Commission further asserts that, even if Union Electric's contract were at issue, its contract, which allows Entergy Arkansas to recover purchased energy costs, gave Union Electric ample notice that it would be required to pay its share of purchased energy costs.

22. Entergy answers that Union Electric's motion for summary disposition has section 206(c) implications, arguing that, before the Commission may order refunds, it must find that Entergy Arkansas is permitted to surcharge all Entergy Arkansas' wholesale customers for payments associated with service taken during the 2001-2003 time period. Entergy contends that Union Electric ties its notice argument to the plain language of its contract, and notes that this issue is being decided in Docket No. ER07-956-001.²⁷

23. The Arkansas Commission responds, stating that it does not take a position on Union Electric's contract claim, and reiterates its position on section 206(c).

24. Union Electric responds that the Commission is obligated to consider the issue of Union Electric's lack of notice and rule on its merits.²⁸ Union Electric also contends that even though parties were on notice that the instant complaint proceeding implicated the System Agreement, nothing contained in its contract with Entergy Arkansas, the complaint, or Commission notices provided sufficient notice that the dispute over rough production cost equalization among the Operating Companies had any relationship to the Operating Companies' purchased energy costs.

²⁵ Union Electric December 3, 2008 Answer at 17.

²⁶ Louisiana Commission December 18, 2008 Answer at 2.

²⁷ The Commission decided in Opinion No. 505 that the 1999 Agreement between Entergy Arkansas and Union Electric does not allow Entergy Arkansas to collect an allocated portion of its bandwidth payments from Union Electric through the purchased energy variable in the rate formula set forth in the 1999 Agreement. *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at P 100 (2010).

²⁸ Union Electric January 2, 2009 Answer at 6.

II. Discussion

A. Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), we will deny Union Electric's motion to intervene out-of-time. The late intervention was filed more than seven years after the complaint was filed and more than three years after Opinion No. 480 was issued. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting late intervention.²⁹ Union Electric has not met this higher burden of justifying its very late intervention after multiple Commission orders and also an appeal to the D.C. Circuit and, accordingly, we deny its motion to intervene. As we stated in *Florida Power & Light Co.*, 99 FERC ¶ 61,318, at 62,358 (2002), a potential party must take appropriate steps to protect its interests in a timely manner, and taking a "wait and see" approach falls short. Union Electric, by waiting until this late date to intervene, failed to protect its interests in a timely manner.

26. Union Electric had notice that a complaint raising the justness and reasonableness of charges under the System Agreement had been initiated in this docket against all of the Operating Companies, and that the proceeding concerned the System Agreement. Entergy Arkansas, a counterparty to the 1999 agreement at issue with Union Electric, was in fact expressly listed in the notice.³⁰ We also note that two other Arkansas customer groups, Arkansas Electric Cooperative Corporation and Arkansas Electric Energy Consumers, Inc., timely intervened in this proceeding in response. Accordingly, Union Electric has failed to demonstrate sufficient cause justifying late intervention. Because late intervention is not granted and Union Electric is therefore not a party to this proceeding, we decline to consider Union Electric's motion for summary disposition.

27. Regarding Entergy's motion for further procedures regarding the section 206(c) refunds issue, on December 19, 2009, the Commission issued an order on partial remand³¹ in this proceeding, which deferred action until a paper hearing on similar issues in the Opinion No. 468 proceeding was completed. In the Opinion No. 468 proceeding, several of the same parties that are participating in the instant case, including Entergy and the Louisiana Commission, submitted briefs discussing the applicability of section 206(c)

²⁹ See, e.g., *ISO New England*, 124 FERC ¶ 61,096, at P 7 (2008); *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

³⁰ 66 Fed. Reg. 33,242 (2001).

³¹ *Louisiana Pub. Serv. Comm'n v. FERC*, 129 FERC ¶ 61,238 (2009).

and whether refunds were legal and appropriate. Because several of the same parties, including Entergy, are addressing the same legal issue in the instant case as in the Opinion No. 468 proceeding, we deny Entergy's motion for more procedures in this case. The section 206(c) issue was briefed in the paper hearing, and that hearing resulted in Commission orders³² that specifically address the refund issues that are addressed below. Accordingly, we find that no further procedures are necessary here.

B. Commission Determination

1. Refunds

28. In the court's remand, the court found inadequate all the reasons that the Commission provided in Opinion Nos. 480 and 480-A for its conclusion that it lacked authority to order refunds in the circumstances present in this case. Specifically, in Opinion No. 480, the Commission found that it had addressed the issue of reallocation of costs among the Operating Companies in Opinion No. 468, and held unambiguously that refunds among the Operating Companies were prohibited.³³ The Commission further held that it was unable to make the requisite finding that there would not be a reduction in revenues and that the Operating Companies would be able to recover the monies that would be refunded as a result of the reallocation of such costs.

29. As to the Commission's findings that refunds were unwarranted due to section 206(c), the court noted that the Commission's reliance on Opinion No. 468 was no longer valid because the court had since overruled the Commission's findings on refunds in that case. The court held that the Commission had failed to explain why, in cases such as the instant case, the cost of Commission-ordered refunds by one group of Entergy subsidiaries to another could not be recovered, and hence why they are barred by section 206(c).

30. However, since the issuance of the court's remand, this specific issue has been directly addressed by the Commission in the orders that resulted from the paper hearing in the Opinion No. 468 proceeding. In the Opinion No. 468 Remand Order, the Commission found that "[s]ection 206(c) gives the Commission the specific authority to order refunds prospectively from a set date, the refund effective date, for a fifteen month period."³⁴ On rehearing, the Commission affirmed its finding that the Commission has

³² *Louisiana Pub. Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp.*, 132 FERC ¶ 61,133 (2010), *order granting reh'g in part and denying reh'g in part*, 135 FERC ¶ 61,218 (2011).

³³ Opinion No. 480, 111 FERC ¶ 61,311 at P 145.

³⁴ Opinion No. 468 Amended Remand Order, 132 FERC ¶ 61,133 at P 23.

the authority to order refunds under section 206(c). However, upon further consideration, the Commission invoked its equitable discretion not to order refunds. It ruled that

[o]n 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. 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.^[35]

The Commission further found that, in that 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.³⁶

31. We find that the same considerations that led us to invoke our equitable discretion not to order refunds in the Opinion No. 468 Remand Rehearing exist in the instant case. This case, like the Opinion No. 468 proceeding, does not involve a case where a utility has been unjustly enriched by over-collecting revenues. Instead, in a case involving the bandwidth remedy, the issue is whether production costs have been properly allocated among the various Entergy Operating Companies. In view of the foregoing, the Commission will apply here our usual practice in such cases, invoking our equitable discretion not to order refunds, notwithstanding our authority to do so.

32. We note, however, that on October 6, 2011 the Commission issued an order³⁷ establishing an additional paper hearing in the Opinion No. 468 proceeding that will further examine under what circumstances it is appropriate for the Commission to invoke its equitable discretion to deny refunds. Because our ruling here relies on our finding regarding refunds in the Opinion No. 468 proceeding, our ruling here is held in abeyance until the paper hearing ordered by the October 2011 Order is resolved by a further Commission order.

³⁵ Opinion No. 468 Remand Rehearing Order, 135 FERC ¶ 61,218 at P 23 (internal citations omitted).

³⁶ *Id.* P 24.

³⁷ *Louisiana Pub. Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp.*, 137 FERC ¶ 61,018 (2011) (October 2011 Order).

2. Effective Date of the Bandwidth Remedy

33. In the Opinion No. 468 proceeding, the court on remand determined that the Commission, having found that it was not just and reasonable to allow Entergy to consider interruptible load in assigning cost responsibility, could not delay implementation of that decision over a 12-month phase-in period.³⁸ Consistent with the court's decision on this issue, the Commission directed Entergy to immediately eliminate all interruptible load from the computation of charges in Service Schedules MSS-1 (Reserve Equalization) and MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies).³⁹ Similarly, in the court's remand in this proceeding, the court noted that the Commission did not rebut the Louisiana Commission's contention that it is an abuse of discretion for the Commission to delay implementation of a remedy until 2007 for calendar-year 2006 production costs, having found on June 1, 2005 that the System Agreement's rates were unduly discriminatory. The court explained that it had confronted a similar Commission decision in the Opinion No. 468 proceeding and held that the Commission had acted arbitrarily and capriciously "by allowing Entergy to phase interruptible load out of its calculation of peak load over the course of a year," thereby permitting it to "continue to bill for costs the Commission has determined may not be justly and reasonably recovered."⁴⁰

34. Therefore, in response to the court's remand, we will implement the bandwidth remedy on June 1, 2005, the date the Commission's order in Opinion No. 480 determined that the rates were unjust and unreasonable. To allow the bandwidth remedy to be implemented on June 1, 2005 is consistent with the court's direction that absent a reasonable explanation for a delay to implement the bandwidth remedy, it would be arbitrary and capricious of the Commission to delay implementation of a just and reasonable rate. Therefore, Entergy must calculate bandwidth payments and receipts for the seven-month period of June 1, 2005 through December 31, 2005, and show those calculations with supporting workpapers in a compliance filing to be submitted within 60 days of the date of this order. Payments and receipts must be based on the bandwidth

³⁸ *Louisiana Public Service Commission v. FERC*, 482 F.3d at 518.

³⁹ *Louisiana Pub. Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp.*, 120 FERC ¶ 61,241, at P 7 (2007), *order denying reh'g*, 124 FERC ¶ 61,275 (2008).

⁴⁰ *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d at 375 (citing 482 F.3d at 518).

formula in Service Schedule MSS-3 of the System Agreement.⁴¹ In addition, Entergy must make any payments and receipts within 90 days of the date of this order.

The Commission orders:

(A) Entergy is hereby directed to file, within 60 days of the date of this order, a compliance filing that calculates the bandwidth payments and receipts for the period June 1, 2005 through December 31, 2005, as discussed in the body of this order.

(B) Entergy is hereby directed to make any payments and receipts required by this order, within 90 days of the date of this order.

(C) The Commission's ruling regarding refunds is hereby held in abeyance, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴¹ Calculations must be based on the bandwidth formula accepted in Docket Nos. EL01-88-004 and EL08-88-006. *See La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006) and *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095 (2007).