

154 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Tony Clark.

City of Osceola, Arkansas

Docket No. EL16-7-000

v.

Entergy Arkansas, Inc.
Entergy Services, Inc.

ORDER DENYING COMPLAINT

(Issued February 18, 2016)

1. On October 29, 2015, pursuant to sections 206 and 306 of the Federal Power Act (FPA),¹ the City of Osceola, Arkansas (Osceola) filed a complaint (Complaint) against Entergy Arkansas, Inc. (Entergy Arkansas) and Entergy Services, Inc. (Entergy Services) (collectively, Entergy). Osceola requests that the Commission compel Entergy to refund \$4,481,221.90, plus interest, in rough production cost equalization bandwidth payments²

¹ 16 U.S.C. §§ 824e, 825e (2012).

² In Opinion Nos. 480 and 480-A, the Commission found that the Entergy System Agreement no longer achieved rough production cost equalization, and ordered modifications known as the “bandwidth remedy,” to equalize production costs among the Entergy Operating Companies (Operating Companies), within a +/- 11 percent bandwidth of the system-wide average. Under the bandwidth remedy, when an Operating Company’s total production costs exceed the allowed +/- 11 percent deviation from the system average total production cost, the Operating Company must pay or receive an amount that brings the disparity within the +/- 11 percent bandwidth. In this way, the bandwidth remedy roughly equalizes production costs across the Entergy system by reallocating them (i.e., requiring equalization payments) from Operating Companies with low production costs to those with high production costs. In its Opinion Nos. 480 and 480-A, Entergy included in Service Schedule MSS-3 the formula for implementing the rough production cost equalization bandwidth remedy. The Commission also required

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(bandwidth equalization payments) that Entergy Arkansas recorded in Account 555, Purchased Power, and passed through the purchased energy variable of the energy rate formula contained in the Power Coordination, Interchange and Transmission Agreement (Service Agreement)³ between Entergy Arkansas and Osceola, from 2007 through 2009. Osceola contends that because the formula rate in the Service Agreement predates the Commission's bandwidth remedy by many years, Entergy cannot legitimately characterize the formula rate's Account 555 purchased energy expense as including bandwidth equalization payments, and therefore, Entergy Arkansas' pass-through of bandwidth equalization payments via the purchased energy variable of the formula rate violates the filed rate doctrine.⁴ Further, Osceola claims that in Opinion Nos. 505 and 505-A,⁵ the Commission held that Entergy Arkansas had improperly passed through to Union Electric Company (Union Electric), under a substantially identical energy rate formula and service agreement,⁶ bandwidth equalization payments that Entergy Arkansas

Entergy to make annual bandwidth filings to determine any necessary payments among the Operating Companies. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005), *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part*, *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047 (2011), *order on reh'g*, 146 FERC ¶ 61,152 (2014), *order on compliance*, 146 FERC ¶ 61,153 (2014), *Entergy Servs., Inc.*, 151 FERC ¶ 61,112 (2015) (Order Accepting Comprehensive Bandwidth Recalculation). Entergy Arkansas is the sole Operating Company involved in the Complaint. Entergy Arkansas terminated its participation in the Entergy System Agreement effective December 19, 2013.

³ Osceola and Entergy Arkansas' predecessor, Arkansas Power & Light Co. (Arkansas Power & Light), executed the Service Agreement on March 22, 1982. The parties amended the Service Agreement five times and terminated it on September 30, 2009. It appears as Exhibit A to the Complaint and as Exhibit A to Entergy's November 30, 2015 Answer (Entergy November 30 Answer).

⁴ Under the filed rate doctrine, no regulated entity may charge a rate other than that which the Commission fixes, and the Commission may not retroactively alter a rate that it has fixed. *Ark. La. Gas. Co. v. Hall*, 453 U.S. 571, 577-578 (1981); *Columbia Gas Transmission Co. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990).

⁵ *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at PP 100-104 (2010), *order on reh'g*, Opinion No. 505-A, 139 FERC ¶ 61,103, at PP 18-39 (2012).

⁶ The Union Electric service agreement appears as Exhibit B to the Complaint.

had recorded in Account 555, and required Entergy Arkansas to refund the bandwidth equalization payments with interest. Accordingly, Osceola seeks the same relief here.⁷

2. In this order, we find that Osceola previously settled the claim on which its Complaint rests, and accordingly we deny the Complaint.

I. Background

3. From December 22, 1982, through September 30, 2009, Entergy Arkansas and its predecessor, Arkansas Power & Light, provided wholesale partial requirements service to Osceola under the Service Agreement. By settlement (1988 Agreement) dated February 2, 1989, in Docket No. ER89-159-000, Osceola and Arkansas Power & Light revised the Service Agreement rate formulas and, as relevant here, established an annual rate redetermination process to update the formula rate inputs.⁸ Pursuant to that process, Entergy Arkansas filed three annual rate redetermination updates at issue here: the 2007 Formula Rate Update in Docket No. ER07-630-000, the 2008 Formula Rate Update in Docket No. ER08-752-000, and the 2009 Formula Rate Update in Docket No. ER09-877-000. Osceola intervened in the 2007, 2008, and 2009 Formula Rate Update cases, and the parties resolved each one by black-box settlement and the subsequent filing of a refund report.⁹

4. Contemporaneously with the 2007 and 2008 Formula Rate Update cases, Osceola intervened, but did not enter an appearance or participate in, Entergy's first bandwidth implementation proceeding in Docket No. ER07-956-000, in which, *inter alia*, the

⁷ Complaint at 1-2, 5-6, 8-12, 20-24.

⁸ The 1988 Agreement appears as one of many Service Agreement amendments included in Exhibit A to the Complaint; it also appears as Exhibit B to the Entergy November 30 Answer.

⁹ In the 2007 Formula Rate Update case, the Commission accepted the black-box settlement and terminated the docket on February 6, 2008 (*see Entergy Servs., Inc.*, 122 FERC ¶ 61,109 (2008)), and accepted the compliance refund report on July 30, 2008. In the 2008 Formula Rate Update case, the Commission accepted the black-box settlement and terminated the docket on April 30, 2009 (*see Entergy Servs., Inc.*, 127 FERC ¶ 61,100 (2009)), and accepted the compliance refund report on August 14, 2009. In the 2009 Formula Rate Update case, the Commission accepted the black-box settlement and terminated the docket on March 26, 2010 (*see Entergy Ark., Inc.*, 130 FERC ¶ 61,246 (2010)), and accepted the compliance refund report on June 18, 2010.

Commission allowed the proper allocation of bandwidth payments and receipts to wholesale customers to be addressed by the parties.¹⁰

5. In the first bandwidth implementation case, Union Electric litigated its claim that Entergy Arkansas had recorded bandwidth equalization payments in Account 555, Purchased Power, and unlawfully passed them through to Union Electric under the purchased energy variable of the energy rate formula contained in its service agreement. Union Electric ultimately prevailed before the Commission in Opinion Nos. 505 and 505-A, where the Commission held that bandwidth equalization payments cannot legitimately be characterized as purchased energy expenses charged to Account 555, but instead are payments to roughly equalize production costs among the Operating Companies. Accordingly, the Commission required Entergy Arkansas to refund the bandwidth equalization payments it had passed through to Union Electric.¹¹

6. After the Commission ordered Entergy Arkansas to make refunds to Union Electric in the first bandwidth implementation case, Osceola, which had intervened in but not appeared or participated in the proceeding, sued Entergy Arkansas in state court on common law contract grounds to enforce the Commission's refund order as to Osceola. Osceola contended that Entergy Arkansas had breached the Service Agreement by including bandwidth equalization payments in an energy rate formula that was substantially identical to Union Electric's, and that therefore Entergy Arkansas owed Osceola refunds too.¹²

7. Entergy removed the case to the U.S. District Court for the Eastern District of Arkansas, on grounds that the case rested on an alleged violation of a Commission-approved rate schedule, and was subject to the Commission's exclusive jurisdiction. The District Court dismissed with prejudice, finding that: (1) under the filed rate doctrine, it lacked jurisdiction to hear Osceola's claim; and (2) the doctrine of *res judicata* barred Osceola's claim, because Osceola failed to raise it during the first bandwidth implementation hearing.¹³

¹⁰ *Entergy Servs., Inc.*, 120 FERC ¶ 61,094, at P 17 (2007); Complaint at 2; Entergy November 30 Answer at 8.

¹¹ Opinion No. 505, 130 FERC ¶ 61,023 at PP 100-104; Opinion No. 505-A, 139 FERC ¶ 61,103 at PP 30-39.

¹² Complaint at 2; Entergy November 30 Answer at 11-12, Weinstein Declaration P 20.

¹³ *City of Osceola v. Entergy Ark., Inc.*, No. 3:13CV00011, 2014 U.S. Dist. LEXIS 59925 (E.D. Ark. Apr. 30, 2014). *See also* Complaint at 2; Entergy November 30

(continued...)

8. Osceola appealed the District Court's judgment to the U.S. Court of Appeals for the Eighth Circuit. On appeal, the Eighth Circuit held that the Commission has primary jurisdiction over Osceola's claim, and referred the case to the Commission, without prejudice.¹⁴ Osceola then filed the instant Complaint.

II. The Complaint

9. Osceola states that the Complaint raises substantially similar issues to those addressed in the first annual bandwidth implementation proceeding, in which Osceola was "an inactive intervenor"¹⁵ and a proceeding in Docket No. EL08-60-000, "in which Osceola was not a party but which involved a substantially identical contract issue regarding Entergy's contract with Union Electric."¹⁶ Osceola states that May 7, 2012, the date that the Commission issued Opinion No. 505-A, is when it believes its cause of action accrued and that it subsequently requested that Entergy refund its bandwidth payments, but Entergy refused.¹⁷

10. The heart of Osceola's Complaint is that: (1) the Service Agreement's formula rates, including its energy rate formula, are substantially identical to the formula rates contained in Union Electric's service agreement; (2) Entergy Arkansas passed bandwidth equalization payments through the purchased energy variable of both agreements' energy rate formula; and (3) Osceola is therefore entitled to the same relief the Commission granted Union Electric.¹⁸

Answer at 12.

¹⁴ *City of Osceola v. Entergy Ark., Inc.*, 791 F.3d 904, 910 (8th Cir. 2015).

¹⁵ Complaint at 2.

¹⁶ *Id.* at 3. Docket No. EL08-60-000 involved a complaint filed by Union Electric against Entergy Arkansas concerning Entergy's recovery of bandwidth equalization through the Union Electric Service Agreement. The Commission dismissed the complaint as moot because the issues had been resolved in the first annual bandwidth implementation proceeding. *See Union Elec. Co. v. Entergy Ark., Inc.*, 140 FERC ¶ 61,078 (2012).

¹⁷ *Id.* at 6.

¹⁸ *See supra* note 7.

11. In support of its Complaint, Osceola contends that neither the Formula Rate Update settlements nor the doctrine of *res judicata* bar its Complaint.

12. First, Osceola offers an affidavit by its expert witness John Painter,¹⁹ who testifies in detail concerning the annual Formula Rate Update filings and procedures, which appear in paragraph 5 of the 1988 Agreement. Those procedures provide as follows:

On or about March 1 of each year, [Arkansas Power & Light] shall provide the Commission and the Customers with informational schedules showing the development of each applicable rate, based on data for the prior calendar year, together with supporting workpapers If the Commission Staff or the Customers, after review of such informational schedules, should determine that a hearing is needed to investigate the cost determinations contained therein, such a hearing may be requested by an appropriate written filing with the Commission The parties agree that such a hearing, if instituted by the Commission, will be for the sole purpose of reviewing, pursuant to Section 205 of the Federal Power Act, the data contained in the informational schedules that form the input components of the formulary rates contained in Attachment A.

13. According to Mr. Painter, paragraph 5 obligates Entergy Arkansas to make annual filings to redetermine the level of the production demand rate (and other rates and charges), using the Service Agreement formulas and Entergy Arkansas' actual cost data for the prior year. However, Mr. Painter maintains that Entergy Arkansas' annual 2007, 2008, and 2009 filings did not provide the data and calculations required to update the energy rate because, under the Service Agreement, Entergy Arkansas updated the energy rate monthly, based on actual fuel and purchased energy costs incurred in each billing month. Accordingly, Mr. Painter claims that the black-box settlements in the 2007, 2008 and 2009 Formula Rate Update cases resolved all rates and charges in those proceedings *but* the energy rate.²⁰ Consequently, Mr. Painter asserts that the settlements in those proceedings do not bar the instant Complaint.²¹

14. Second, Osceola claims that the District Court's *res judicata* determination does not bar Osceola's instant Complaint because *res judicata*, if applicable, would prohibit

¹⁹ Mr. Painter's Affidavit appears as Exhibit C to the Complaint.

²⁰ Painter Affidavit at P 19.

²¹ *Id.* PP 19-29.

Osceola from filing its Complaint in any forum, and the Eighth Circuit expressly referred the claim back to the Commission, without prejudice.²²

15. Finally, Osceola states that before filing its state court action, it made a good faith effort to resolve its dispute with Entergy Arkansas. Osceola reiterates that the Service Agreement and energy rate formula are substantially identical to Union Electric's, and concludes that Entergy Arkansas knew or should have known that Opinion Nos. 505 and 505-A required Entergy Arkansas to make refunds to Osceola too.²³

III. Notice and Responsive Pleadings

16. Notice of the Complaint was published in the *Federal Register*, 80 Fed. Reg. 68,527 (2015), with answers, interventions and protests due on November 30, 2015.

17. Entergy filed a timely Answer to the Complaint. On December 17, 2015, Osceola filed an answer to Entergy's November 30 Answer and on January 4, 2016, Entergy filed an answer to Osceola's December 17, 2015 answer.

18. In its Answer, Entergy contends that Osceola previously raised and settled its instant claim in each of the 2007, 2008, and 2009 Formula Rate Update settlements, which resolved all outstanding issues in those proceedings. In particular, Entergy states that contrary to Osceola's assertions, the "input components of the formulary rates contained in Attachment A," to which paragraph 5 of the 1988 Agreement refers, explicitly include the energy rate that appears at pages 7-8 of Attachment A. In addition, Entergy notes that the Commission set energy rate input issues for hearing in the Formula Rate Update proceedings, at Osceola's request. As a result, Entergy contends that the pass-through of bandwidth equalization payments from Account 555 to the Service Agreement energy rate was clearly at issue in the annual update cases, and that when Osceola entered into black-box settlements that resolved all issues in those proceedings, it barred its instant Complaint.²⁴

19. With regard to Osceola's *res judicata* arguments, Entergy contends that even if Osceola had not settled its claim in the Formula Rate Update proceedings, *res judicata*

²² Complaint at 12.

²³ *Id.* at 26.

²⁴ Entergy November 30 Answer at 2-5, 9-11, 13-27.

would bar the instant Complaint because Osceola could have raised its claim in the first bandwidth implementation proceeding, but failed to do so.²⁵

20. Finally, Entergy argues that because the pleadings present no material issues of disputed fact, the Commission should dismiss the Complaint without conducting an evidentiary hearing.²⁶

IV. Discussion

A. Procedural Matters

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Osceola's December 17, 2015 answer and Entergy's January 4, 2016 answer and will, therefore, reject them.

B. Commission Determination

22. As discussed below, we deny the Complaint based on the written record before us, as well as on Osceola's pleadings in the 2007, 2008, and 2009 Formula Rate Update proceedings, the settlements in those proceedings, and the Commission's orders accepting them. We find that these pleadings, settlement agreements, and Commission orders fully dispose of the Complaint. Consequently, we need not address whether: (1) *res judicata* bars the Complaint; or (2) the Union Electric and Osceola service agreements are the same or similar. We likewise decline to invade the Formula Rate Update proceedings' privileged settlement negotiations²⁷ by discussing which party sought or provided what data or by inquiring what lies inside the black box agreements.

²⁵ *Id.* at 3, 27-36.

²⁶ *Id.* at 4, 36-37 (citing *New Summit Hydro, LLC*, 150 FERC ¶ 61,030, at P 21 (2015) (citations omitted)); *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 118 FERC ¶ 61,169, at P 38 (2007)).

²⁷ 18 C.F.R. § 385.602 (2015).

1. **The 2007 Formula Rate Update Proceeding in Docket No. ER07-630-000**

23. Entergy Arkansas filed its 2007 Formula Rate Update on March 13, 2007. The energy rate formula at issue here is one of the components of that filing.²⁸

24. On June 1, 2007, Osceola and the Hope Water & Light Commission (Hope) (collectively, Arkansas Cities) jointly filed comments on Entergy Arkansas' 2007 Formula Rate Update filing. In their comments, the Arkansas Cities raised concerns with Entergy Arkansas' energy rate inputs.²⁹ In its June 29, 2007 hearing order, the Commission listed the protested issues, and finding that Entergy Arkansas' 2007 Update raised issues of material fact that could not be resolved based on the record before it, ordered hearing and settlement judge procedures. Among the issues that the Commission listed in setting the 2007 Formula Rate Update for hearing were two that Osceola raised: "(1) a disparity in Entergy Arkansas' energy rate inputs that requires additional data requests; and (2) how Entergy Arkansas developed its formula energy rate for 2006."³⁰

25. Although Entergy Arkansas had not yet begun flowing the bandwidth equalization payments through Osceola's energy rate formula when Osceola and Hope filed the June 1, 2007 comments, Entergy Arkansas acknowledges that it began passing them through immediately thereafter, in June 2007.³¹ As a result, Osceola received actual notice that Entergy Arkansas passed the bandwidth equalization payments through Osceola's energy formula rate in its July bill,³² even before the first settlement conference in the 2007 Formula Rate Update proceeding took place on July 12, 2007. In addition,

²⁸ See Entergy Arkansas 2007 Wholesale Formula Rate Update – Osceola, Docket No. ER07-630-000, at C.4-C.5 (filed Mar. 13, 2007).

²⁹ Arkansas Cities June 1, 2007 Comments and Motion to Consolidate at 5-7.

³⁰ *Entergy Ark., Inc.*, 119 FERC ¶ 61,336, at P 7 (2007).

³¹ Entergy Answer at Weinstein Declaration P 8.

³² We note that the Commission's first order on compliance with Opinion Nos. 480 and 480-A, *supra* note 2, required Entergy to transparently and separately bill the amounts attributable to the two distinct functions of Service Schedule MSS-3: pricing energy exchanged among the Operating Companies, and providing for rough production cost equalization (i.e., bandwidth) payments. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 at PP 31-32.

as an intervenor in the first bandwidth implementation proceeding in Docket No. ER07-956-000, Osceola knew, first-hand, that Union Electric had framed the bandwidth equalization payment issue as an unlawful energy rate pass-through in its late intervention in that docket on August 3, 2007, after receiving its first bill that reflected the pass-through on July 5, 2007.³³

26. For both of these reasons, Osceola was well-aware of the bandwidth equalization payment pass-through issue at the earliest stages of settlement negotiations in the 2007 Formula Rate Update proceeding, and that it fell squarely within both the scope of the energy rate formula contained in Entergy Arkansas' filing and the "energy rate inputs" issue that the Commission set for hearing. Consequently, when Osceola settled the 2007 Formula Rate Update proceeding in a black-box settlement (2007 Settlement) that "resolved all outstanding issues in the above-captioned proceeding"³⁴ in exchange for reduced rates,³⁵ it resolved all energy rate input issues and cannot now be heard to demand compensation beyond the level at which it settled the case.³⁶

³³ Union Electric August 3, 2007 Motion to Intervene Out-of-Time at 3-4.

³⁴ 2007 Settlement, Docket No. ER07-630-000, at 1 (filed Nov. 2, 2007).

³⁵ A comparison of Entergy Arkansas' filed and settled rates shows that the 2007 Settlement reduced Osceola's monthly production demand rate from \$9.00/kW to \$8.76/per kW, transmission demand rate from \$1.51/kW to \$1.37/kW, and distribution demand rate from \$0.51/kW to \$0.49/kW. *Compare* Entergy Arkansas 2007 Wholesale Rate Update, Docket No. ER07-630-000, at 2 (filed Mar. 13, 2007) *with* 2007 Settlement, Docket No. ER07-630-000, at 3-4 (filed Nov. 2, 2007).

³⁶ We note that even if no parties to the proceeding had raised any energy rate formula issues in their comments or protests, and the Commission had not mentioned the issue in its June 29, 2007 hearing order, the Commission's order set Entergy Arkansas' *entire* filing for hearing. *See Entergy Ark., Inc.*, 119 FERC ¶ 61,336 at P 13. As a result, when Osceola settled the proceeding without having reserved the bandwidth equalization payment issue for trial, and without having had the Chief Judge sever the bandwidth equalization payment issue and consolidate it with another proceeding, *see* 18 C.F.R.

§ 385.503(a) (2015), Osceola resolved all issues in the proceeding, as the 2007 Settlement correctly states.

2. **The 2008 Formula Rate Update Proceeding in Docket No. ER08-752-000**

27. Entergy Arkansas filed its 2008 Formula Rate Update on March 28, 2008. The energy rate formula at issue here is one of the components of that filing.³⁷

28. On June 2, 2008, Arkansas Cities jointly filed a protest and comments on Entergy Arkansas' 2008 Formula Rate Update filing. The Arkansas Cities again protested Entergy Arkansas' energy rate inputs, stating specifically:

There is a disparity in [Entergy Arkansas'] Energy Rate Inputs that needs resolving. In FERC Docket No. ER07-956 [the first bandwidth implementation proceeding], [Entergy Arkansas] is proposing to collect its [Service Schedule] MSS-3 costs in the energy rate. The issue is presently being litigated in the ER07-956 docket over how and if these costs are allowed to be collected in the energy rate.³⁸

29. In its July 31, 2008 hearing order, the Commission listed the protested issues, and finding that Entergy Arkansas' 2008 Update raised issues of material fact that could not be resolved based on the record before it, ordered hearing and settlement judge procedures. Among the issues that the Commission listed in setting the 2008 Formula Rate Update for hearing was the concern Osceola raised as to "whether Entergy Arkansas can collect its MSS-3 costs in the energy rate and how such costs would be collected."³⁹

30. As Entergy aptly notes, because the bandwidth equalization payments are made pursuant to Service Schedule MSS-3, it could not be clearer that the Commission had set the bandwidth equalization payment pass-through issue for hearing in the 2008 Formula Rate Update proceeding.⁴⁰ Nonetheless, following settlement negotiations in that proceeding, Osceola entered into a black-box settlement (2008 Settlement) that "resolve[d] all outstanding issues in the above-captioned proceedings as they relate to Osceola,"⁴¹ in exchange for reduced rates.⁴² As a result, here again, when Osceola settled

³⁷ See Entergy Arkansas 2008 Wholesale Formula Rate Update, Docket No. ER08-752-000, at C.4-C.5 (filed Mar. 28, 2008).

³⁸ Arkansas Cities, Protest, Docket No. ER08-752-000, at 4 (filed June 2, 2008).

³⁹ *Entergy Ark., Inc.*, 124 FERC ¶ 61,126, at P 8 (2008).

⁴⁰ Entergy November 30 Answer at 16.

⁴¹ 2008 Settlement, Docket No. ER08-752-000, at 1 (filed Feb. 26, 2009).

the 2008 Formula Rate Update proceeding in a black-box agreement that “resolved all outstanding issues in the above-captioned proceedings as they relate to Osceola,” in exchange for reduced rates, it resolved all energy rate issues and cannot now be heard to demand compensation beyond the level at which it settled the case.⁴³

3. The 2009 Formula Rate Update Proceeding in Docket No. ER09-877-000

31. Entergy Arkansas filed its 2009 Formula Rate Update on March 23, 2009. The energy rate formula at issue here is one of the components of that filing.⁴⁴

32. On June 2, 2009, Osceola filed a protest and comments on Entergy Arkansas’ 2009 Formula Rate Update filing. Osceola again protested Entergy Arkansas’ energy rate inputs, using the same language as in its protest in the 2008 Formula Rate Update proceeding.⁴⁵

33. In its August 4, 2009 hearing order, the Commission listed the protested issues, and finding that Entergy Arkansas’ 2009 Update raised issues of material fact that could not be resolved based on the record before it, ordered hearing and settlement judge

⁴² The 2008 Settlement provided Osceola a lump-sum refund of \$138,058.60, including interest. Entergy Answer at Weinstein Declaration P 18.

⁴³ We note, here too, that even if no parties to the proceeding had raised any energy rate formula issues in their comments, interventions or protests, and the Commission had not mentioned the issue in its July 31, 2008 hearing order, the Commission’s order set Entergy Arkansas’ *entire* filing for hearing. *See Entergy Ark., Inc.*, 124 FERC ¶ 61,126 at P 14. As a result, when Osceola settled the proceeding without having reserved the bandwidth equalization payment issue for trial, and without having had the Chief Judge sever the bandwidth equalization payment issue and consolidate it with another proceeding, *see* 18 C.F.R. § 385.503(a), Osceola resolved all issues in the proceeding, as the 2008 Settlement correctly states.

⁴⁴ *See* Entergy Arkansas 2009 Wholesale Formula Rate Update, Docket No. ER09-877-000, at C.4-C.5 (filed Mar. 23, 2009).

⁴⁵ Osceola, Initial Comments and Protest, Docket No. ER09-877-000, at 3-4 (filed June 2, 2009).

procedures. Among the issues that the Commission listed in setting the 2009 Formula Rate Update for hearing was the energy rate inputs concern that Osceola had raised.⁴⁶

34. Osceola entered into settlement negotiations with Entergy Arkansas and reached a black-box settlement (2009 Settlement) that “resolve[d] all issues in Docket No. ER09-877-000.” In exchange for resolving all issues in the proceeding, Entergy Arkansas paid Osceola a lump-sum refund of \$110,000. As a result, when Osceola settled the 2009 Formula Rate Update proceeding in a black-box agreement that “resolve[d] all issues in Docket No. ER09-877-000” in exchange for a \$110,000 lump-sum refund, it resolved all energy rate input issues and cannot now be heard to demand compensation beyond the level at which it settled the case.⁴⁷

35. Longstanding Commission policy favors settlements.⁴⁸ Settlements provide utilities and their customers the benefit of rate certainty, and allow them to rely on the finality of Commission-approved rates.⁴⁹ For these reasons, the Commission enforces settlements to ensure that parties abide by the deals they strike in Commission-approved settlements, preserve the benefits of parties’ bargains,⁵⁰ and maintain the strength and vitality of the Commission’s settlement policy. As the Commission stated in *Equitrans*,

⁴⁶ *Entergy Ark., Inc.*, 128 FERC ¶ 61,133 (2009).

⁴⁷ We note, once again, that even if no parties to the proceeding had raised any energy rate formula issues in their comments, interventions or protests, and the Commission had not mentioned the issue in its August 4, 2009 hearing order, the Commission’s order set Entergy Arkansas’ *entire* filing for hearing. *See Entergy Ark., Inc.*, 128 FERC ¶ 61,133 at P 8. As a result, when Osceola settled the proceeding without having reserved the bandwidth equalization payment issue for trial, and without having had the Chief Judge sever the bandwidth equalization payment issue and consolidate it with another proceeding, *see* 18 C.F.R. § 385.503(a), Osceola resolved all issues in the proceeding, as the 2009 Settlement correctly states.

⁴⁸ *See Pa. Gas & Water Co. v. FPC*, 463 F.2d 1242 (D.C. Cir. 1972); *United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 209 (D.C. Cir. 1969).

⁴⁹ *Iroquois Gas Transmission Syst. L.P.*, 69 FERC ¶ 61,165, at 61,631 (1994) (citing *Associated Gas Distrib. v. FERC*, 893 F.2d 348 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 907 (1990)).

⁵⁰ *Sunoco, Inc. (R&M) v. Transcon. Gas Pipe Line Corp.*, 114 FERC ¶ 61,180, at P 58 (2006) (*Sunoco*) (citing *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 407 (D.C. Cir. 2005) (*Brooklyn Union Gas*)), *aff’d sub nom. Transcon. Gas Pipe Line Corp. v.*

(continued...)

L.P., “a party to a rate settlement generally should be able to rely upon the terms and conditions of that settlement until a new rate case can be conducted.”⁵¹ In affirming the Commission, the U.S. Court of Appeals for the D.C. Circuit added: “Like FERC, we think it obvious that . . . [utilities] and their customers might hesitate to enter rate settlements if a subset of settling parties could later pull the rug out from under them.”⁵² As a result, we decline here, as we have before, to let one party unilaterally unravel existing settlements and cast the parties back into complex litigation over long-settled issues.⁵³

4. Osceola’s FPA Section 206 Rights

36. As a final matter, Osceola argues that the 2007, 2008, and 2009 Settlements do not bar its Complaint because section 4 of the Service Agreement reserves Osceola’s right “to make unilaterally an application to the FERC or any successor agency, for a change in rates, charges, classification, or service, or any rule, regulation or contract relating thereto, under Section 206 of the Federal Power Act.”⁵⁴ According to Osceola, by settling the 2007, 2008, and 2009 Formula Rate Update cases, it “did not and could not waive its right to bring this Complaint as expressly permitted by the Service Agreement.”⁵⁵

FERC, 485 F.3d 1172 (D.C. Cir. 2007).

⁵¹ *Equitrans, L.P.*, 106 FERC ¶ 61,013, at P 14 (2004).

⁵² *Brooklyn Union Gas*, 409 F.3d at 407.

⁵³ *Sunoco*, 114 FERC ¶ 61,180 at P 58.

⁵⁴ Osceola Complaint at 17. Section 4 of the Service Agreement appears as both Osceola’s and Entergy’s Exhibit A at 3-4.

⁵⁵ *Id.*

37. In response, Entergy contends that section 4 of the Service Agreement merely reserves Osceola's right to seek a rate change under FPA section 206, which can take effect prospectively only.⁵⁶ As a result, Entergy argues that even if Osceola had not already settled its energy rate issues in the 2007, 2008, and 2009 Formula Rate Update cases, this provision would afford Osceola no relief because the Service Agreement terminated in 2009.⁵⁷

38. Contrary to both parties' assertions, the Commission's longstanding precedent allows participants to challenge formula rate input or implementation errors whenever the participants discover them,⁵⁸ and to recover refunds for past periods in which a utility has misapplied a formula rate or otherwise charged rates that are contrary to the filed rate.⁵⁹ However, that precedent would only apply here if there were, in fact, a live issue regarding Entergy Arkansas' pass-through of bandwidth equalization payments. As discussed above, by resolving all issues contained in Entergy Arkansas' 2007, 2008, and 2009 Formula Rate Update filings, Osceola relinquished its FPA section 206 right to recover the very same bandwidth equalization payments for which it accepted reduced rates and lump-sum refunds in the 2007, 2008, and 2009 Settlements. As a result, neither section 206 of the FPA nor section 4 of the Service Agreement permits Osceola to recover its 2007, 2008, and 2009 bandwidth equalization payments again here.

⁵⁶ Entergy November 30 Answer at 26-27. See 16 U.S.C. § 824e (a), (b).

⁵⁷ Entergy November 30 Answer at 2.

⁵⁸ See, e.g., *Delmarva Power & Light Co.*, 145 FERC ¶ 61,055, at P 22 (2013) (*Delmarva*); *Pub. Serv. Co. of N.M.*, 143 FERC ¶ 61,227, at P 14 (2013); *Entergy Servs., Inc.*, 145 FERC ¶ 61,049, at P 9 (2013) (*Entergy Services*) (citing *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306, at P 35 (2008)); *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, at P 112 (2009) (*Pioneer Transmission*); *Pub. Serv. Elec. Gas Co.*, 124 FERC ¶ 61,303, at P 17 (2008) (*PSEG*); *Va. Elec. & Power Co.*, 123 FERC ¶ 61,098, at P 46 (2008).

⁵⁹ See, e.g., *Delmarva*, 145 FERC ¶ 61,055 at P 23; *Entergy Services*, 145 FERC ¶ 61,049 at P 10; *Pioneer Transmission*, 126 FERC ¶ 61,281 at nn.100-101; *PSEG*, 124 FERC ¶ 61,303 at nn.17-18 (citations omitted); *Quest Energy, L.L.C. v. Detroit Edison Co.*, 106 FERC ¶ 61,227, at P 21 (2004). See also *Yankee Atomic Elec. Co.*, 60 FERC ¶ 61,316, at 62,094, 62,096-97 (1992) (noting the Commission's authority to order refunds of imprudent costs charged to customers through formula rates in prior periods).

The Commission orders:

Osceola's Complaint is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.