

LOUISIANA PUBLIC SERVICE COMMISSION

RESOLUTION NO. 2012-04

IN RE: DOCKET NO. U-29764 - LOUISIANA PUBLIC SERVICE COMMISSION, EX PARTE. IN RE: ENTERGY LOUISIANA, LLC AND ENTERGY GULF STATES, INC., RETAIL PROCEEDING TO ESTIMATE AND IMPLEMENT IN RETAIL RATES IN 2007 THE ROUGH EQUALIZATION IMPACT OF FERC OPINION NOS. 480 AND 480-A, FERC DOCKET NO. EL01-88-000, LPSC VS. ENTERGY CORP.

(Decided at the LPSC Business & Executive Session October 24, 2012)

The Louisiana Public Service Commission ("LPSC" or "Louisiana Commission"), for the reasons cited below, adopts the following Resolution addressing the Federal Energy Regulatory Commission ("FERC" or "the Commission"), and requesting (1) a prompt decision on the Louisiana Commission's pending requests for clarification, rehearing, and protest in FERC Docket No. EL01-88-007 regarding refunds and delay of the implementation of the bandwidth remedy; (2) a prompt decision on the Louisiana Commission's pending request for rehearing in FERC Docket Nos. EL00-66-014 and EL95-33-010 regarding refunds, and (3) a prompt decision on the Louisiana Commission's request for rehearing of Opinion 506 in FERC Docket No. ER07-682-002. The refund and delay of remedy issues in FERC Docket EL01-88-007 have been pending on remand from the court of appeal since April 15, 2008, four and one-half years. The refund issue in FERC Docket Nos. EL00-66-014 and EL95-33-010 has been pending on remand from the court of appeal since 2007, more than five years. The Louisiana Commission's rehearing request in FERC Docket No. ER07-682-002 has been pending for two and one-half years. Because of the immense importance of these issues to Louisiana consumers, and the growing prejudice that occurs through delay, the LPSC hereby resolves:

FERC OPINION 480 REFUND AND DELAY OF REMEDY

WHEREAS:

1. In Opinion No. 480, on June 1, 2005, the FERC held that "the Entergy Agreement is no longer just and reasonable" and "a just and reasonable remedy is needed." 111 F.E.R.C. ¶ 61,311 (2005), ¶ 28. The FERC adopted a +/- 11 percent bandwidth remedy to ensure that operating company production costs would not vary from System average by more than 11 percent. In Opinion No. 480-A, however, the FERC ordered that the remedy would not take effect until 2007. 113 F.E.R.C. ¶ 61,282, ¶ 54. The FERC also denied refunds.

AND WHEREAS:

2. The LPSC appealed the delay-of-remedy and denial of refunds to the court of appeals, which held that the FERC had not provided an adequate basis for delaying the

remedy once it found that the Entergy cost allocations were unreasonable. 522 F.3d at 400. The court relied on its earlier ruling that the FERC impermissibly delayed a remedy when it phased in the removal of interruptible loads from Entergy's cost allocation formulas. *Louisiana Public Service Comm'n v. FERC*, 482 F.3d 510, 518 (D.C. Cir. 2007).

AND WHEREAS:

3. The court of appeal also 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). 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.

AND WHEREAS:

4. In its *Order on Remand* issued October 20, 2011, 137 F.E.R.C. ¶ 61,047, the Commission ordered that the bandwidth remedy be implemented on June 1, 2005, the date the Commission's order in Opinion 480 determined that the rates were unjust and unreasonable. The Commission concluded: "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 this order." 137 F.E.R.C. at ¶ 34.

AND WHEREAS:

5. The Commission *Order on Remand* also denied refunds, invoking its "equitable discretion" not to order refunds, notwithstanding its authority to do so. 137 F.E.R.C. at ¶31. The Commission, however, held that ruling in abeyance until the additional paper hearing ordered in FERC Docket Nos. EL00-66-017 and EL95-33-011 is resolved by a further Commission order.

AND WHEREAS:

6. The Louisiana Commission asked for clarification of the *Order on Remand* with respect to its elimination of the delay of remedy to confirm that the Commission intended that the remedy to commence for a two-year period on June 1, 2005. The Louisiana Commission sought rehearing on the Commission directive to base the bandwidth payments on a formula that was modified in subsequent compliance filings. The Louisiana Commission also sought rehearing on the Commission's failure to provide for interest on the remedy payments required to correct the unlawful delay of remedy. To the extent the Commission's decision not to order refunds for the refund effective period was intended to be a final determination, which is not clear from the language in the *Order on Remand*, the Louisiana Commission sought rehearing on that decision. *Request for Clarification and/or Rehearing on Behalf of the Louisiana Public Service Commission and Request for Expedited Action on Clarification Request*, filed November 21, 2011.

AND WHEREAS:

7. Entergy made a compliance filing on its delay-of-remedy calculation on December 19, 2011. The Louisiana Commission protested the compliance filing because that filing fails to calculate production costs based on actual data, but instead uses a hybrid averaging technique. In addition, the compliance filing fails to use the required ETR-26/ETR-28 remedy methodology, does not provide for the payment of interest, and does not provide a remedy for the full 24 month period of delay. *Protest on Behalf of the Louisiana Public Service Commission to Compliance Filing of Entergy Services, Inc.*, filed January 9, 2012.

AND WHEREAS:

8. The delay-of-remedy and refund issues have been under consideration on remand for almost four years, since the court's decision of April 15, 2008. This extensive delay extends the actual delay of the remedy to a period approaching seven years. Opinion No. 480 was issued on June 1, 2005.

FERC OPINION 468 REFUNDS

AND WHEREAS:

9. In Opinion Nos. 468 and 468-A issued in FERC Docket Nos. EL00-66-014 and EL95-33-010 the Commission determined that it was unjust and unreasonable to include interruptible loads in the 12 Coincident Peak formula for allocating responsibility for capacity

and reserves among the Entergy operating companies. *Louisiana Public Service Comm'n v. Entergy Corp.*, Opinion No. 468, 106 F.E.R.C. ¶ 61,228 (2004), *reh'g denied*, Opinion No. 468-A, 111 F.E.R.C. ¶ 61,080 (2005). The FERC phased in the elimination of the interruptible loads, however, and denied refunds for the refund-effective period after the filing of the LPSC's complaint in 1995.

AND WHEREAS:

10. On appeal, the D.C. Circuit reversed the delay in implementing a full remedy and determined that the Commission had not adequately explained the decision to deny refunds. *Louisiana Public Service Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007). The court found that the Commission had not explained how Section 206(c) of the Federal Power Act could be construed to prohibit refunds. *Id.* at 518-19. The court also determined that the Commission had not explained any discretionary basis to deny refunds. *Id.*

AND WHEREAS:

11. On the remand from that decision, the Commission required immediate implementation of the remedy and ordered refunds. *Order on Remand*, 120 F.E.R.C. ¶ 61,241 (2007). On rehearing, the Commission further explained that its determination that the cost allocation was unjust and unreasonable provides "a convincing justification for imposing refunds, *i.e.*, so that rates that more accurately reflect the proper allocation of interruptible load can be in place at the earliest date possible." *Order Denying Rehearing*, 124 F.E.R.C. ¶ 61,275 (2008), ¶ 27.

AND WHEREAS:

12. Entergy reallocated costs pursuant to the Commission's Orders and imposed surcharges and granted refunds to accomplish the reallocations. [Refund Report of Entergy Services, Inc. (Nov. 19, 2007)]. The LPSC protested Entergy's Refund Report, arguing that the calculated refunds did not reflect the actual cost reallocations resulting from the removal of the interruptible load. [LPSC Protest (Dec. 20, 2007)]. That dispute eventually was set for settlement procedures and a hearing, and the parties reached a settlement on the refund and surcharge amounts. Entergy filed the Settlement Agreement, to which all the parties and the Trial Staff agreed, on May 11, 2011. [Settlement Agreement (May 11, 2011)].

AND WHEREAS:

13. Although all the parties ultimately settled the dispute over the amounts due if refunds were made, Entergy and the Arkansas Public Service Commission ("APSC") appealed the decision to impose refunds. The Commission requested a voluntary remand to consider further the issues raised on appeal. In its *Amended Order on Remand*, the Commission again determined that refunds are not prohibited by Section 206(c) and that equity required that refunds be made. 132 F.E.R.C. ¶ 61,133 (2010). The Commission focused on the inequity borne by Louisiana consumers due to Entergy's unjust and unreasonable cost misallocations and its "policy" to correct unjust and unreasonable rates with refunds. *Id.*, ¶¶ 31-32. As the Commission said, "there is no doubt that Entergy's inclusion of interruptible load affected the Operating Companies' cost of service, led to an overcharge to Louisiana customers, and resulted in unjust and unreasonable rates." *Id.*, ¶ 32.

AND WHEREAS:

14. Entergy, the APSC and the Mississippi Public Service Commission ("MPSC") again applied for rehearing. In the *Rehearing Order*, the Commission reaffirmed its rulings that Section 206(c) does not prohibit refunds, but reversed its position on the equitable discretion issue. 135 F.E.R.C. ¶ 61,218 (2011), ¶¶ 20-25. The Commission provided no reason why it is equitable to leave in place unjust and unreasonable cost allocations that discriminated against some customers and preferred others.

AND WHEREAS:

15. The Louisiana Commission requested rehearing of the FERC order denying refunds. In response, the Commission set the matter for a paper hearing and established a schedule for the submission of briefs by interested parties. *Order Establishing Paper Hearing*, 137 F.E.R.C. ¶61,018 (October 6, 2011). All briefs have now been submitted for consideration by the Commission.

AND WHEREAS:

16. Opinion Nos. 468 and 468A were decided in 2005 and the refund issue has been under consideration on remand from the court of appeal since 2007.

AND WHEREAS:

17. The resolution of the refund issue in FERC Docket EL01-88-007 is being held in abeyance pending the resolution of the refund issue in this case. *Order on Remand*, 137 F.E.R.C. at ¶ 32.

FERC OPINION NO. 506

AND WHEREAS:

18. FERC Opinion 506, issued in FERC Docket No. ER07-682-002 on January 11, 2010, approved Entergy's proposal to apply a new form of "labor ratio" to G&I Plant costs and A&G expenses for the purpose of calculating and comparing operating company production costs in the bandwidth remedy. *Opinion 506*, 130 F.E.R.C. ¶61,026 (2010). That proposal was opposed by the Louisiana Commission and several other parties. Entergy sought to include the labor costs billed to the operating companies by two separate, affiliated companies -- Entergy Services, Inc. ("ESI") and Entergy Operations, Inc. ("EOI").

AND WHEREAS:

19. As compared to the methods employed in Exhibits ETR-26 and ETR-28 to quantify "production" costs, the new proposal increases the total costs allocated to production for the System by about \$140 million in a highly disparate manner. EAI's total costs were increased by more than \$71 million through the two combined changes. The other companies' costs increased much less or decreased. Thus, there is a substantial impact on payments and receipts under the bandwidth, as compared to the methodology approved by the Commission.

AND WHEREAS:

20. Opinion 506 erroneously approved the inclusion of affiliate labor costs in the labor ratio used to allocate G&I plant costs and A&G expenses. The Louisiana Commission and the City of New Orleans requested a rehearing of Opinion 506 on February 12, 2010, more than two and one-half years ago. The Commission has not acted on the rehearing request.

AND WHEREAS:

21. The FERC is delaying refunds due as a result of FERC Opinions 505, 509 and the order on rehearing in Docket No. EL07-52-001 until the issuance of an order on rehearing of Opinion No. 506 in FERC Docket ER07-682-002.

AND WHEREAS:

22. There appears to be no impediment to the FERC issuing its decision on rehearing in Docket No. ER07-682-002 on a prompt basis. That matter has been under consideration on rehearing for more than two years, since the FERC's issuance of Opinion No. 506 on January 11, 2010.

AND WHEREAS:

23. The delay in FERC Dockets EL01-88-007, EL00-66-014, EL95-33-010 and ER07-682 -002 is prejudicial to ratepayers whose electric rates are regulated by the LPSC. Because ratepayers move, die, shut down businesses and plants, and change usage patterns, any delay increases the likelihood that unduly discriminatory charges to some ratepayers cannot be corrected through a remedy. Further, delay itself is injurious, especially in the event that refunds are not accompanied by the payment of interest. Additionally, the impact of the delay is magnified for Louisiana ratepayers who have absorbed the catastrophic impact of devastating hurricanes and a massive oil spill in the Gulf of Mexico during the period of delay.

AND WHEREAS:

24. The FERC's own Strategic Plan and Performance Criteria call for the expeditious resolution of pending cases. The FERC "Timeliness" standard states:

The Commission's goal is to reach an appropriate resolution of each proceeding in an expeditious manner. Toward that end, the Commission has steadily decreased the time it takes to act on projects, such as LNG import terminals, gas storage facilities and interstate natural gas pipelines. . . . The Commission also sets and tracks compliance with goals for timely resolution of filings for cost recovery, new services or changes to existing services, as well as opinions resolving initial decisions, complaints and FPA section 203 applications.

NOW, THEREFORE, THE LOUISIANA PUBLIC SERVICE COMMISSION HEREBY RESOLVES that it is of high importance that FERC finally resolve the refund and delay-of-remedy issues in Docket No. EL01-88-007, the refund issue in Docket Nos. EL00-66-014 and EL95-33-010, and the rehearing of Docket No. ER07-682-002. As a matter of federal/state comity and interagency cooperation, the LPSC respectfully requests that the FERC proceed without further delay to issue decisions in these dockets.

BATON ROUGE, LOUISIANA

October 24, 2012

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