

167 FERC ¶ 61,240
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Louisiana Public Service Commission

Docket No. EL18-142-001

v.

System Energy Resources, Inc.
Entergy Services, Inc.

ORDER DISMISSING REHEARING

(Issued June 20, 2019)

1. On September 24, 2018, the Louisiana Public Service Commission (Louisiana Commission) and System Energy Resources, Inc. and Entergy Services, Inc. (collectively, SERI) requested rehearing of the Commission's August 24, 2018 order in this proceeding granting in part, denying in part, and dismissing in part the Louisiana Commission's complaint against SERI.¹ For the reasons discussed below, we dismiss the requests for rehearing.

I. Background

2. SERI sells electric power produced by the Grand Gulf Nuclear Station (Grand Gulf) to four Entergy Operating Companies² pursuant to a Unit Power Sales Agreement (UPSA), a Commission-jurisdictional wholesale rate schedule. The UPSA contains a

¹ *La. Pub. Serv. Comm'n v. Sys. Energy Resources, Inc.*, 164 FERC ¶ 61,134 (2018) (August 2018 Order).

² The four Entergy Operating Companies purchasing the Grand Gulf output are: Entergy Arkansas, Inc. (now named Entergy Arkansas, LLC); Entergy Mississippi, Inc. (now named Entergy Mississippi, LLC); Entergy Louisiana, LLC; and Entergy New Orleans, Inc. (now named Entergy New Orleans, LLC). A fifth Entergy Operating Company, Entergy Texas, Inc., does not purchase Grand Gulf output from SERI.

(continued ...)

cost-based formula rate that includes, among other things, a component for a return on equity (ROE).

3. On January 23, 2017, the Arkansas Public Service Commission (Arkansas Commission) and the Mississippi Public Service Commission (Mississippi Commission) filed a complaint against SERI in Docket No. EL17-41-000. In that complaint, the Arkansas Commission and Mississippi Commission alleged that SERI's ROE under the UPSA was unjust and unreasonable. On September 29, 2017, the Commission issued an order establishing hearing and settlement judge procedures and setting a refund effective date.³

4. The Louisiana Commission filed its complaint in the instant docket on April 27, 2018. The Louisiana Commission alleged that the ROE in the formula rate in the UPSA is unjust and unreasonable. In addition, it asserted that SERI's capital structure and the depreciation rates currently incorporated into SERI's rates are unjust and unreasonable. The Louisiana Commission stated that there is "some overlap with issues pending" in Docket No. EL17-41-000 (i.e., the Arkansas Commission's and Mississippi Commission's earlier complaint), as that proceeding also involves SERI's ROE.⁴ According to the Louisiana Commission, however, that proceeding did not reflect the more recent economic data that are now available. The Louisiana Commission therefore requested that the Commission set the instant complaint for hearing, establish a refund effective date pursuant to Federal Power Act (FPA) section 206(b),⁵ and, after due proceedings, reset SERI's ROE, equity ratio, and depreciation rates to just and reasonable levels.

5. In the August 2018 Order, the Commission granted in part, denied in part, and dismissed in part the Louisiana Commission's complaint. The Commission granted the complaint with respect to the ROE element, established hearing and settlement judge procedures, and set a refund effective date.⁶ The Commission denied the complaint with

³ See *Ark. Pub. Serv. Comm'n v. Sys. Energy Resources, Inc.*, 160 FERC ¶ 61,141 (2017).

⁴ Louisiana Commission Complaint at 6.

⁵ 16 U.S.C. § 824e(b) (2012).

⁶ August 2018 Order, 164 FERC ¶ 61,134 at P 1.

(continued ...)

respect to capital structure and dismissed the complaint with respect to depreciation rates.⁷

6. In addition, the Commission denied SERI's motion to dismiss the ROE element of the Louisiana Commission's complaint, explaining that the Commission has previously allowed successive complaints when presented with new analysis.⁸ In support of this determination, the Commission noted that the Louisiana Commission submitted a new, two-step Discounted Cash Flow (DCF) analysis for a new time period, with new, more current data.⁹

II. Requests for Rehearing

7. SERI argues that the Commission erred in establishing a refund effective date for the Louisiana Commission's complaint.¹⁰ In particular, SERI argues that FPA section 206 "precludes refunds for more than a fifteen-month period absent dilatory behavior on the part of the utility,"¹¹ and "provides a form of statutory protection to a utility."¹² SERI contends that, by establishing a second refund effective date, the Commission ignored this protection and subjected SERI to refunds beyond the statutory fifteen-month limit.¹³

8. The Louisiana Commission addresses the Commission's denial of the complaint with respect to capital structure. The Louisiana Commission states that its amended complaint, filed contemporaneously in Docket No. EL18-204-000 with its request for rehearing in the instant docket, demonstrates that SERI cannot qualify under the Commission's three-part test for use of the company's actual capital structure.¹⁴ The

⁷ *Id.* P 27.

⁸ *Id.* P 27, n.61.

⁹ *Id.* P 27.

¹⁰ SERI Request for Rehearing at 5-15.

¹¹ *Id.* at 5.

¹² *Id.* (citing *Emera Maine v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017)).

¹³ SERI Request for Rehearing at 6.

¹⁴ Louisiana Commission Request for Rehearing at 1-2.

(continued ...)

Louisiana Commission “does not contend that the [August 2018 Order] was erroneous,”¹⁵ and the Louisiana Commission “concedes that” its complaint in this docket “did not apply the three-part test or provide allegations and evidence showing that the test is inapplicable.”¹⁶ Instead, the Louisiana Commission argues that the allegations in its amended complaint are now sufficient to support adoption of the parent’s capital structure or a reasonable capital structure appropriate for a utility with SERI’s low risk.¹⁷ Accordingly, the Louisiana Commission merely “seeks reconsideration of the dismissal” in light of “the *prima facie* showing in the Amended Complaint that SERI fails the three-part test and that its equity ratio is excessive.”¹⁸

III. Procedural Matters

9. On October 24, 2018, the Louisiana Commission submitted a motion for leave to answer and answer to SERI’s request for rehearing. Rule 713(d)(1) of the Commission’s Rules of Practice and Procedure prohibits answers to a request for rehearing.¹⁹ We will therefore deny the Louisiana Commission’s motion for leave to answer and reject its answer.

IV. Discussion

10. Rule 713(b) of the Commission’s Rules of Practice and Procedure permits requests for rehearing “of any final decision or other final order in a proceeding.”²⁰ A final order is one that imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.²¹ SERI’s request for

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ 18 C.F.R. § 385.713(d)(1) (2018).

²⁰ 18 C.F.R. § 385.713(b) (2018); *see also* 16 U.S.C. § 825l (a) (2012) (parties “aggrieved by an order issued by the Commission in a proceeding . . . may apply for a rehearing within thirty days after the issuance of such order”).

²¹ *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm’n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (“Final agency action ‘mark[s] the consummation of the agency’s decision making process’ and is ‘one by which rights or obligations have been (continued ...)”

rehearing focuses solely on the August 2018 Order’s treatment of the ROE element of the Louisiana Commission’s complaint. But the Commission made no final determinations regarding SERI’s ROE in the August 2018 Order.²² Rather, the Commission commenced hearing and settlement judge procedures to examine the challenged rates.²³ The August 2018 Order thus reflects only the Commission’s preliminary analysis that the Louisiana Commission’s complaint, as to SERI’s ROE, raises “issues of material fact that cannot be resolved based on the record before [the Commission]” and that the “challenged rates may be unjust and unreasonable.”²⁴

11. Where Commission action is not final and is to be succeeded by further Commission action, a request for rehearing may be dismissed.²⁵ Accordingly, SERI’s request for rehearing is dismissed.

determined, or from which legal consequences will flow.”) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

²² See *Investigation of Terms & Conditions of Pub. Util. Mkt.-Based Rate Authorizations*, 103 FERC ¶ 61,349, at 62,373 (2003) (“Because the November 20 Order initiated an investigation and thus was not a final order, we will not consider requests for rehearing of the November 20 Order.”); *City of Hamilton*, 82 FERC ¶ 61,349, at 62,359 (1998) (“Setting this matter for a trial-type hearing does not impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.”); *Fla. Mun. Power Agency vs. Fla. Power & Light Co.*, 65 FERC ¶ 61,372, at 63,012 (1993) (“By not allowing rehearing of findings that were expressly preliminary . . . the Commission was exercising its discretion to develop workable, efficient procedures.”).

²³ August 2018 Order, 164 FERC ¶ 61,134 at P 26.

²⁴ *Id.* P 27

²⁵ See *Talen Energy Marketing, LLC*, 160 FERC ¶ 61,103, at P 8 (2017) (dismissing request for rehearing as premature where underlying order made no final determinations); *Va. Electric and Power Co.*, 158 FERC ¶ 61,083, at P 3 (2017) (same); *Internal MISO Generation v. Midcontinent Indep. System Operator, Inc.*, 156 FERC ¶ 61,020, at P 10 (2016) (dismissing requests for rehearing of Commission order that “did not make any final determinations,” but rather “established a paper hearing to assess” the relevant issues); *Entergy Servs., Inc.*, 156 FERC ¶ 61,112, at P 4 (2016) (explaining that an order “establish[ing] procedures to consider the issue of the post-withdrawal settlement benefits . . . did not reflect a final decision with respect to that issue”); *Shetek Wind Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,250, at P 154 (2012) (collecting cases).

(continued ...)

12. Nevertheless, because SERI asserts that the August 2018 Order is: (1) contrary to law and the readily ascertainable legislative intent of FPA section 206(b);²⁶ (2) inconsistent with precedent;²⁷ and (3) based on an “improper and impermissibly hollow standard,”²⁸ we note that, even if we were to consider SERI’s request for rehearing on the merits, we would deny it. The August 2018 Order does not circumvent the fifteen-month refund period, as SERI suggests,²⁹ and it is consistent with the Commission’s statutory obligations and long-standing Commission policy on ROE complaints.³⁰

13. FPA section 206 requires that “[w]henver the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date.”³¹ FPA section 206 further provides that:

[a]t the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force[.]³²

14. As FPA section 206 makes clear, the Commission “*shall* establish a refund effective date” for each proceeding instituted on complaint,³³ and at the conclusion of such a proceeding “the Commission *may* order refunds” for up to fifteen months after the

²⁶ SERI Request for Rehearing at 6-9.

²⁷ *Id.* at 10-12.

²⁸ *Id.* at 12-14.

²⁹ *Id.* at 10.

³⁰ *Consumer Advocate Div. of the Pub. Serv. Comm’n of W. Va. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288 (*Consumer Advocate I*), order on reh’g, 68 FERC ¶ 61,207 (1994) (*Consumer Advocate II*); *Southern Co. Servs., Inc.*, 68 FERC ¶ 61,231 (1994) (*Southern Co. I*), order on reh’g, 83 FERC ¶ 61,079 (1998) (*Southern Co. II*).

³¹ 16 U.S.C. § 824e(b) (2012).

³² *Id.*

³³ *Id.* (emphasis added).

(continued ...)

refund effective date established for that proceeding.³⁴ The two complaints filed against SERI were filed separately by different parties and based on different facts and data, thereby commencing separate proceedings.³⁵ The Commission set both proceedings for hearing and, as required by the FPA, established a refund effective date for each proceeding. Although the complaints were ultimately consolidated, because the separate fifteen-month refund limitation under FPA section 206 is linked to the refund effective date in each proceeding, the fifteen-month refund limitation separately applies to each complaint.

15. Further, although Congress's adoption of a fifteen-month refund limitation in the Regulatory Fairness Act³⁶ gave public utilities some rate certainty in FPA section 206 proceedings, SERI misinterprets the level of certainty that Congress provided. To find, as SERI argues,³⁷ that the fifteen-month refund limitation in FPA section 206 requires the Commission to deny a complaint under these circumstances—i.e., deny a complaint that is based on unique facts when a similar complaint is already pending—would prohibit any party from challenging a utility's ROE as long as there is another complaint involving that utility's ROE pending before the Commission. The language of FPA section 206 does not support such a finding. Limiting refunds in a particular case to fifteen months was not intended to shield a utility's rates from a later complaint any more than the existence of one pending FPA section 205³⁸ rate increase shields the customers of a public utility from a second, pancaked FPA section 205 rate increase filed later by that same utility.³⁹ Rather, the refund limitation in FPA section 206 affects only the Commission's refund authority in a particular proceeding at the conclusion of that

³⁴ *Id.* (emphasis added).

³⁵ The Louisiana Commission filed a notice of intervention in the EL17-41 docket, but that complaint was filed by the Arkansas Commission and the Mississippi Commission. Similarly, the complaint in this docket was filed only by the Louisiana Commission, and the Arkansas Commission and Mississippi Commission also each filed notices of intervention in response to the Louisiana Commission's complaint.

³⁶ Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299 (1988).

³⁷ SERI Request for Rehearing at 8-9.

³⁸ 16 U.S.C. § 824d (2012).

³⁹ The Regulatory Fairness Act was “intended to add symmetry” between the Commission's treatment of section 205 rate-increase filings and section 206 complaints seeking rate decreases. See *ENE (Environment Northeast) v. Bangor Hydro-Electric Co.*, 151 FERC ¶ 61,125, at P 28 and n.73 (2015) (internal citations omitted).

(continued ...)

proceeding; it does not limit a party's right to file a new complaint, the Commission's authority to set such a new complaint for hearing, or the Commission's obligation to establish a new refund effective date (and thus establish a fifteen-month refund limitation) for that new proceeding. A contrary determination would be inconsistent with the purpose of the Regulatory Fairness Act.

16. Moreover, contrary to SERI's assertions, allowing the instant complaint to stand does not create an "impermissibly low bar."⁴⁰ The Commission has previously allowed successive complaints regarding the same ROE where the subsequent complaints are based on "new, more current data," explaining that "[t]his is particularly critical given that what is at issue is return on equity[,] which, "in contrast to other cost of service issues . . . can be particularly volatile."⁴¹ As the Commission observed in the August 2018 Order, the Louisiana Commission has submitted a new, two-step DCF analysis for a new time period, with new, more current data.⁴²

17. SERI also argues that, under FPA section 206, a utility can be subject to a refund period greater than fifteen months only if the utility is at fault (i.e., if a delay in resolving a complaint is caused by its "dilatory behavior").⁴³ SERI maintains that by allowing complainants to circumvent the fifteen-month refund limitation, the Commission has weakened this congressionally-mandated incentive structure and rendered both the fifteen-month refund limitation and the corresponding "penalty" for "dilatory behavior" nullities.⁴⁴ We find this argument unpersuasive. The August 2018 Order does not render the "dilatory conduct" provision a nullity because the Commission is not extending the fifteen-month refund period for the earlier complaint but is establishing a new refund

⁴⁰ SERI Request for Rehearing at 14.

⁴¹ *Consumer Advocate II*, 68 FERC at 61,998; see also *Southern Co. II*, 83 FERC at 61,385-86.

⁴² August 2018 Order, 164 FERC ¶ 61,134 at P 27.

⁴³ SERI Request for Rehearing at 6 (citing 16 U.S.C. § 824e(b)) ("[I]f the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding.").

⁴⁴ *Id.*

(continued ...)

period for a new complaint. The August 2018 Order thus does not implicate the dilatory conduct provision.

18. In further support of this argument, however, SERI points to the *Southern Company* and *Consumer Advocate* proceedings, where, SERI argues, the Commission established that successive complaints with separate refund periods are allowed only in limited factual circumstances not present here.⁴⁵ SERI therefore argues that the Commission should have dismissed the Louisiana Commission's complaint because the complaint did not contain new claims or changed circumstances sufficient to justify an additional proceeding.⁴⁶ We disagree. The August 2018 Order is fully consistent with the precedent cited by SERI.

19. In *Consumer Advocate I*, the Commission found that it could investigate Allegheny Generating Company's ROE despite the fact that the Commission was already investigating the same ROE in another proceeding.⁴⁷ In reaching that conclusion, the Commission explained that the record in the ongoing proceeding was based on market data that ended in 1992 and, because the new investigation relied on more recent information, the earlier proceeding did not bar the subsequent investigation.⁴⁸ To the contrary, the Commission explained that this new data meant that it "was, essentially, initiating an entirely new investigation; not just prolonging the ongoing investigation."⁴⁹

20. The Commission reiterated that conclusion in *Southern Company*. Relying on *Consumer Advocate I*, the Commission concluded that it could institute a second FPA section 206 proceeding concerning the justness and reasonableness of the ROE included in Southern Company's formula rates notwithstanding an existing investigation into the same ROE. Once again, the Commission explained that the second proceeding was "an entirely new proceeding" because it was "based on an entirely separate factual record,

⁴⁵ *Id.* at 10-12 (citing *Southern Co. I*, 68 FERC ¶ 61,231, *order on reh'g*, 83 FERC at 61,386; *Consumer Advocate I*, 67 FERC at 62,000, *order on reh'g*, 68 FERC ¶ 61,207).

⁴⁶ SERI Request for Rehearing at 11-12.

⁴⁷ *Consumer Advocate I*, 67 FERC at 62,000 and n.7.

⁴⁸ *Id.*

⁴⁹ *Southern Co. II*, 83 FERC at 61,385 (explaining the Commission's holding in *Consumer Advocate I*).

(continued ...)

[and] may or may not reach the same conclusions as those reached in the earlier ROE proceeding.”⁵⁰

21. Similar circumstances are present here. As the Commission noted in the August 2018 Order, the DCF analysis in the Louisiana Commission’s complaint was based on financial data that was from a different time period than the DCF analysis in the earlier complaint.⁵¹ Accordingly, as in *Southern Company*, the Louisiana Commission’s complaint relies on different facts. Also, although the two complaint proceedings have been consolidated for purposes of hearing and settlement judge procedures, the Commission may or may not reach the same conclusions regarding SERI’s ROE with respect to each complaint. The Commission therefore neither ignored its own precedent nor sidestepped its policy pronouncements;⁵² rather, it correctly declined to dismiss the instant complaint in light of these changed circumstances.

22. As a final matter, we also dismiss the Louisiana Commission’s request for rehearing. The Louisiana Commission “concedes” that it failed to provide evidence showing that the Commission’s three-part test was inapplicable in this proceeding.⁵³ The Louisiana Commission also admits that the Commission did not err in the August 2018 Order.⁵⁴ There is thus no basis upon which to grant rehearing. Moreover, the Commission has already issued an order in response to the Louisiana Commission’s amended complaint, establishing additional hearing and settlement judge procedures.⁵⁵ We decline to address that matter further here.

⁵⁰ *Southern Co. II*, 83 FERC at 61,386.

⁵¹ August 2018 Order, 164 FERC ¶ 61,134 at P 27.

⁵² SERI Request for Rehearing at 12.

⁵³ Louisiana Commission Request for Rehearing at 3.

⁵⁴ *Id.* at 2.

⁵⁵ *La. Pub. Serv. Comm’n v. Sys. Energy Resources, Inc.*, 166 FERC ¶ 61,022 (2019).

The Commission orders:

The requests for rehearing are hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.