

148 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

East Texas Electric Cooperative, Inc.
Sam Rayburn Electric Cooperative, Inc.
Tex-La Electric Cooperative of Texas, Inc.

Docket No. EL14-43-000

v.

Entergy Texas, Inc.

Entergy Texas, Inc.

Docket No. EL14-69-000

v.

East Texas Electric Cooperative, Inc.
Sam Rayburn Electric Cooperative, Inc.
Tex-La Electric Cooperative of Texas, Inc.

ORDER ON COMPLAINTS, ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES, AND CONSOLIDATING PROCEEDINGS

(Issued September 18, 2014)

1. In this order, we set for hearing and settlement judge procedures a complaint filed by East Texas Electric Cooperative, Inc., Sam Rayburn Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc. (collectively, East Texas Cooperatives) in Docket No. EL14-43-000 against Entergy Texas, Inc. (Entergy Texas) and a complaint filed by Entergy Texas in Docket No. EL14-69-000 against East Texas Cooperatives. We also consolidate Docket No. EL14-43-000 with Docket No. EL14-69-000.

I. Background

2. On April 30, 2014, East Texas Cooperatives filed a complaint under sections 206 and 306 of the Federal Power Act (FPA) and Rule 206 of the Commission's Rules of Practice and Procedure¹ against Entergy Texas (East Texas Cooperatives Complaint). East Texas Cooperatives allege that Entergy Texas violated the Second Amended and Restated Agreement for Partial Requirements Wholesale Electric Service between East Texas Cooperatives and Entergy Texas (Partial Requirements Agreement) by calculating East Texas Cooperatives' share of the Entergy Texas 2013 rough production cost equalization (bandwidth)² payments, as provided for in Opinion Nos. 480 and 480-A,³ in a way that is inconsistent with the Partial Requirements Agreement. East Texas Cooperatives allege that for 2013 they have been unjustly assigned 22 percent of Entergy Texas' overall 2013 bandwidth payment, even though their energy use under the Partial Requirements Agreement was only about 3 percent of Entergy Texas' energy sales. East Texas Cooperatives state that as a result, they have been overcharged by \$2.86 million. East Texas Cooperatives request that the Commission order Entergy Texas to determine East Texas Cooperatives' share of the 2013 bandwidth payments as required by the Partial Requirements Agreement and consistent with Entergy Texas' past practice under the Agreement, and that the Commission direct Entergy Texas to make all necessary refunds.

¹ 16 U.S.C. §§ 824e, 825e (2012); 18 C.F.R. §§ 385.206 (2014).

² The purpose of the bandwidth remedy is to roughly equalize production costs among the Entergy Operating Companies (Operating Companies). The Operating Companies include Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States Louisiana), Entergy Louisiana, LLC, Entergy Mississippi, Inc. Entergy New Orleans, Inc., and Entergy Texas, Inc. (Entergy Texas). Entergy Arkansas withdrew from the System Agreement in December 2013. The remedy provides that each calendar year the production costs of each Operating Company are calculated, with payments made by the low cost Operating Company(ies) to the high cost Operating Company(ies) such that, after reflecting the payments and receipts, no Operating Company would have production costs more than 11 percent above the Entergy System average or more than 11 percent below the Entergy System average.

³ *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 136, *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).

3. On June 20, 2014, Entergy Texas filed a complaint against East Texas Cooperatives under sections 206 and 306 of the FPA and Rules 206 and 212⁴ of the Commission's Rules of Practice and Procedure (Entergy Texas Complaint). Entergy Texas alleges in its complaint that to the extent that the Commission holds in Docket No. EL14-43-000 that Entergy Texas must allocate its bandwidth payments using an energy method or that it otherwise violated the Partial Requirements Agreement with respect to the allocation method used for the 2013 bandwidth payment, its allocation of its 2005 bandwidth receipts to East Texas Cooperatives was unjust and unreasonable, as it used the same disparity allocation methodology for both bandwidth periods. Entergy Texas also requests that the Commission consolidate its complaint proceeding with the East Texas Cooperatives Complaint proceeding in Docket No. EL14-43-000.

II. Notice of Filings and Responsive Pleadings

4. Notice of the East Texas Cooperatives Complaint was published in the *Federal Register*, 79 Fed. Reg. 26,425 (2014), with answers, interventions and protests due on or before May 20, 2014. The Public Utility Commission of Texas filed a notice of intervention, and Entergy Texas filed a timely motion to intervene and answer. On June 6, 2014, East Texas Cooperatives filed an answer to Entergy Texas' answer.

5. Notice of the Entergy Texas Complaint was published in the *Federal Register*, 79 Fed. Reg. 36,504 (2014) with answers, interventions and protests due on or before July 21, 2014. On July 21, 2014, East Texas Cooperatives filed an answer to the Entergy Texas Complaint.

III. Complaints and Responsive Pleadings

A. East Texas Cooperatives Complaint

1. Complaint

6. East Texas Cooperatives state that their complaint arises out of the annual bandwidth compliance filings that Entergy Services, Inc. (Entergy) has made since 2007 pursuant to Service Schedule MSS-3 of the Entergy System Agreement (System Agreement). East Texas Cooperatives state that in the first three Entergy annual bandwidth compliance cases, Entergy determined that the Operating Company from which East Texas Cooperatives took partial requirements service (initially in 2007, Entergy Gulf States, Inc., then in 2008, Entergy Gulf States Louisiana, and, starting

⁴ 18 C.F.R. § 385.212 (2014).

in 2009, Entergy Texas) was owed payments (credits) as a result of Entergy Arkansas's production costs being much lower than the system average.

7. East Texas Cooperatives state that the Commission determined in the first bandwidth compliance proceeding that the then-applicable partial requirements agreement allowed for the pass-through of a share of annual bandwidth credits/payments to East Texas Cooperatives.⁵ East Texas Cooperatives state that under the relevant provisions of the partial requirements agreement(s) applicable at the time, their share of the bandwidth credits in the first three annual bandwidth compliance cases was determined by adjusting the Operating Company's total fuel costs to reflect the overall payment or credit due to that Operating Company, and then using the bandwidth-adjusted total fuel cost as an input to the fuel cost adjustment mechanism under the then-applicable partial requirements agreement. According to East Texas Cooperatives, the credit resulted in a reduced per kWh fuel adjustment charge, which was then multiplied by East Texas Cooperatives' monthly energy usage from July through December of the compliance year. East Texas Cooperatives state that this methodology produced a share of bandwidth credits for East Texas Cooperatives in the first three bandwidth compliance years roughly proportional to the ratio of their energy use over the refund period to the relevant Energy Operating Company's total energy sales for that year.

8. East Texas Cooperatives state that in December 2011, Entergy made a bandwidth compliance filing outside of the regular annual bandwidth filings⁶ to allocate additional bandwidth credits and payments for a seven-month period in 2005 resulting from an appellate court decision. In that filing, Entergy used a methodology East Texas Cooperatives term the disparity method. East Texas Cooperatives state that under the disparity method:

⁵ East Texas Cooperatives Complaint at 5 (citing *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010)). In that proceeding, the presiding judge held that the contract between Entergy Texas and East Texas Cooperatives allowed bandwidth credits to be passed through to East Texas Cooperatives through the Agreement's fuel cost adjustment clause as energy. *Entergy Services, Inc.*, 124 FERC ¶ 63,026, at P 414 (2008). While not explicitly addressed in Opinion No. 505, that order adopted findings by the presiding judge not otherwise addressed. Opinion No. 505, 130 FERC ¶ 61,023 at P 12.

⁶ Entergy Servs. Inc., December 19, 2011, Compliance Filing in Docket No. EL01-88-010 (2011 Compliance Filing).

The actual production costs of each Operating Company and the average production costs of the system are calculated consistent with Service Schedule MSS-3. The system average production costs are then allocated to each Operating Company to obtain each Operating Company's respective allocation of system average production costs. Next, each Operating Company's allocated average production costs are compared to the Operating Company's actual production costs to determine the dollar and percent disparity from system average costs.⁷

9. East Texas Cooperatives state that Entergy Texas subsequently applied the disparity method to determine the allocations between its retail and wholesale customers, apparently in response to the Commission's acceptance in Opinion No. 514 of the disparity method for allocations among Operating Companies.⁸ East Texas Cooperatives

⁷ East Texas Cooperatives Complaint at 6 n.13 (citing *Entergy Servs., Inc.*, Opinion No. 514, 137 FERC ¶ 61,029, at P 16 n.13 (2011)).

⁸ In Opinion No. 514, the Commission addressed a three-step methodology that Entergy Services proposed for apportioning production costs between Entergy Texas and Entergy Gulf States Louisiana following the separation of Entergy Gulf States, Inc. into Entergy Texas and Entergy Gulf States Louisiana. Step one was to determine whether, using 2007 as the test year, any Operating Company exceeded the 11 percent bandwidth threshold, and, if so, how much of a change in production costs would be necessary to bring all the Operating Companies within the bandwidth. Step two was to calculate the portion of bandwidth payments that Entergy Gulf States Louisiana wholesale customers would receive using an energy allocator. Step three was to allocate the remaining balance of Entergy Gulf States, Inc.'s 2007 production costs between Entergy Texas and Entergy Gulf States Louisiana using an energy allocator for variable production costs and a demand allocator for fixed production costs in the manner prescribed by section 30.12 of Service Schedule MSS-3. The respective shares of Entergy Texas and Entergy Gulf States Louisiana's actual production costs would be compared to their respective share of system average production costs to determine their respective disparities. A bandwidth payment would then be calculated for Entergy Texas and Entergy Gulf States Louisiana to reduce their respective disparities to the same level as the other Operating Companies receiving bandwidth payments. In Opinion No. 514, the Commission approved steps one and three, but expressly rejected step two of the proposed allocation methodology. The Commission explained that step two "is inconsistent with Service Schedule MSS-3" because the formula "does not require a separate carving out of the wholesale requirements customers." Opinion No. 514, 137 FERC ¶ 61,029 at PP 187-189. In a December 19, 2011 compliance filing in Docket No. EL01-88-010 implementing the

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state that as a result, East Texas Cooperatives received a total bandwidth credit of approximately \$3.55 million in 2012.

10. East Texas Cooperatives state that for calendar year 2012 Entergy Texas' annual production costs were below the +/- 11 percent threshold, and thus for the first time, Entergy Texas was required to make a bandwidth remedy payment to another Operating Company. According to East Texas Cooperatives, Entergy used the disparity method to determine that Entergy Texas' payment would be \$14.6 million, all of which would go to Entergy New Orleans. East Texas Cooperatives state that Entergy Texas informed them that their share of the bandwidth payment, as calculated under the disparity method, would be \$3.221 million, or 22 percent of Entergy Texas' total bandwidth payment obligation. East Texas Cooperatives estimate that if Entergy Texas had calculated their share of Entergy Texas' 2013 payments in the same manner as it had in the first three annual bandwidth compliance proceedings (i.e., using an energy allocation methodology), their share of the 2013 bandwidth payments would instead have been approximately \$440,000, or about 3 percent of Entergy Texas' total bandwidth payment. East Texas Cooperatives state that instead they were assessed, and paid under the Partial Requirements Agreement, a monthly stand-alone charge of \$644,200 from August through November 2013. East Texas Cooperatives state that in response to their inquiry as to why the bandwidth charges were higher than expected, Entergy Texas informed them that it was utilizing the disparity method to calculate their share, and that because they were now Entergy Texas' sole wholesale customer, they would have to bear the entire cost burden assigned to the wholesale jurisdiction.

11. East Texas Cooperatives state that there is no dispute that under the terms of the Partial Requirements Agreement, they should bear responsibility for their fair share of the bandwidth payments that Entergy Texas must make as a result of the 2013 Entergy bandwidth compliance filing.⁹ However, they argue that Entergy Texas unilaterally changed the methodology used to allocate bandwidth payments and credits to East Texas Cooperatives as established in the Partial Requirements Agreements and thus violated the

Commission's direction to provide bandwidth payments for the last seven months of 2005, Entergy provided an exhibit demonstrating application of the disparity methodology to Entergy Gulf States Louisiana and Entergy Texas and to their retail customers, but it did not describe the allocation methodology for allocating such costs to their wholesale customers. *See* Docket No. EL01-88-010, Entergy Services, Inc. December 19, 2011 Compliance Filing at 5, Exhibit C.1.

⁹ East Texas Cooperatives Complaint at 9.

filed rate doctrine.¹⁰ East Texas Cooperatives state that Entergy Texas determined East Texas Cooperatives' share of bandwidth credits in the first three bandwidth cases by including the Operating Company's total bandwidth credit as an input to the fuel adjustment clause. According to East Texas Cooperatives, this resulted in a share of bandwidth credits roughly proportional to the ratio of their energy use under the Partial Requirements Agreement to the relevant Operating Company's total energy sales. East Texas Cooperatives maintain that this was exactly as described in the fuel adjustment clause of the Partial Requirements Agreement.¹¹

12. In addition, East Texas Cooperatives argue that Entergy Texas subsequently decided to determine East Texas Cooperatives' bandwidth payment using a different method, the disparity method, which is nowhere permitted under the Partial Requirements Agreement, including in its fuel adjustment clause.¹² According to East Texas Cooperatives, Entergy Texas' decision is contrary to the terms of the Partial Requirements Agreement and inconsistent with Entergy Texas' prior practice, is not warranted by Opinion No. 514, and should not be deemed excused because East Texas Cooperatives failed to correct Entergy Texas' use of the disparity method to calculate East Texas Cooperatives' share of bandwidth credits for the seven-month period in 2005.¹³

13. East Texas Cooperatives note that the fuel adjustment clause in the Partial Requirements Agreement includes bandwidth payments and credits as an item within the fuel variable used to calculate fuel adjustments.¹⁴ They argue that the Partial

¹⁰ *Id.* at 10.

¹¹ *Id.*

¹² *Id.* at 10-11.

¹³ *Id.* at 11-12.

¹⁴ *See id.* at 13. East Texas Cooperatives quote the following language from the fuel adjustment clause of the Partial Requirements Agreement:

Energy and energy-related billings to Company under the Entergy System Agreement pursuant to current and any future service schedules including any charges (additions) or payments (credits) to the Company resulting from production cost equalization calculations ("Bandwidth Remedy") resulting from FERC Opinion Nos. 480 and 480-A and successor FERC

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Requirements Agreement explicitly provides that the bandwidth payments and credits will flow through as fuel costs, which they state are determined on an energy basis and included in the per kWh charge that results from the calculation prescribed under section 1 of the fuel adjustment clause.¹⁵ East Texas Cooperatives also argue that Entergy made its use of this allocation method clear to the Commission when it explained in the second bandwidth case that “bandwidth payments and receipts are paid for and received by wholesale customers in accordance with their Commission-filed rates as energy costs via the wholesale fuel adjustment clause.”¹⁶ They assert that nothing in the fuel adjustment clause, or anywhere else in the Partial Requirements Agreement, authorizes Entergy Texas to develop a lump-sum bandwidth payment for East Texas Cooperatives and to assess that payment on a non-energy basis outside the fuel adjustment clause.¹⁷ East Texas Cooperatives maintain that there can be no dispute that they and Entergy Texas intended that the bandwidth credits or payments would flow through the fuel adjustment clause, and the Commission must give effect to the unambiguous intent of the parties.¹⁸

14. According to East Texas Cooperatives, “Entergy Texas apparently is relying on the Commission’s Opinion Nos. 514 and 514-A to justify [its] change in methodology,”¹⁹ but they assert that Opinion No. 514 approved Entergy’s use of a disparity methodology to determine the allocation of credits among the Operating Companies.²⁰ East Texas Cooperatives argue that Opinion No. 514 does not address the methodology that should

Opinions or Orders related to the Bandwidth Remedy, net of any reimbursement for sales of energy to others.

East Texas Cooperatives Complaint, Ex. No. ETC-100, Partial Requirements Agreement, Exhibit C.

¹⁵ *Id.* at 13.

¹⁶ *Id.* (quoting Opinion No. 514, 137 FERC ¶ 61,029 at P 174).

¹⁷ *Id.* at 13-14.

¹⁸ *Id.* at 14 (citing *Southern California Edison Co. v. FERC*, 502 F.3d 176 (D.C. Cir. 2007)).

¹⁹ *Id.*

²⁰ *Id.* at 15 (citing Opinion No. 514, 137 FERC ¶ 61,029 at P 189).

be used to determine bandwidth credits and payments under the Partial Requirements Agreement or, more generally, to allocate costs among customers within a single Operating Company.²¹ East Texas Cooperatives state that the Commission expressly noted in Opinion No. 514 that it was not deciding upon an allocation among retail jurisdictions.²² They also state that in response to Entergy's compliance filing in that proceeding, the Commission stated that "[t]he bandwidth remedy provides *only* for the allocation of payments and receipts among the Operating Companies."²³ East Texas Cooperatives argue that this express ruling directly contradicts any claim that Opinion No. 514 required a change to Entergy Texas' allocation methodology.

15. East Texas Cooperatives state that while Entergy calculated its bandwidth payments to East Texas Cooperatives for the seven-month period in 2005 using the disparity method, with East Texas Cooperatives receiving a larger share of bandwidth payments than would otherwise have been the case, this one-time occurrence does not establish that Entergy Texas properly used the disparity method to calculate East Texas Cooperatives' share of the 2013 bandwidth payments.²⁴ East Texas Cooperatives reiterate that the Partial Requirements Agreement does not authorize the disparity method.²⁵

16. They also argue that they did not waive their right to challenge Entergy's actions regarding the 2013 bandwidth adjustment by not addressing Entergy's calculation of the bandwidth payments related to the 2011 Compliance Filing. East Texas Cooperatives contend that the 2011 Compliance Filing was made well before the Order on Compliance Filing in the Opinion No. 514 proceeding, which dealt with the compliance filing required by Opinion No. 514, where they maintain the Commission made clear that Entergy improperly applied the disparity method to determine the allocation of bandwidth credits among retail and wholesale customers.²⁶ According to East Texas

²¹ *Id.*

²² *Id.* at 16 (citing Opinion No. 514, 137 FERC ¶ 61,029 at P 154).

²³ *Id.* at 17 (quoting *Entergy Servs., Inc.*, 142 FERC ¶ 61,011, at P 8 (2013)) (emphasis supplied by East Texas Cooperatives).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 18 (citing *Entergy Servs., Inc.*, 142 FERC ¶ 61,011 at P 22).

Cooperatives, this means that the 2011 Compliance Filing could not have established a precedent for using the disparity method to determine bandwidth credits and payments for customers of an Operating Company given that it was a subsequent Commission order that specifically rejected the use of the disparity method for that purpose.²⁷

17. Finally, East Texas Cooperatives argue that use of the disparity method in this case to calculate their share of Entergy Texas' bandwidth payments produces inequitable and absurd results. They maintain that the use of the disparity method as an allocation mechanism among the Operating Companies makes sense in the context of the bandwidth remedy, as it serves the bandwidth remedy's goal of ensuring "rough production cost equalization" among the Operating Companies.²⁸ However, East Texas Cooperatives argue that customers do not have electric production costs that must be roughly equalized in order to effectuate the bandwidth remedy.²⁹ According to East Texas Cooperatives, using the disparity method to determine their share of Entergy Texas' 2013 bandwidth payments produces an inequitable result because their 2013 bandwidth payments, as calculated by Entergy Texas, total 22 percent of Entergy Texas' overall 2013 bandwidth payment obligation, even though East Texas Cooperatives' energy use in 2013 was, according to their estimation, only about three percent of Entergy Texas' total energy sales.

2. Entergy Texas Answer

18. In its answer, Entergy Texas notes that East Texas Cooperatives only request an adjustment of the 2013 bandwidth payment that East Texas Cooperatives owed under the disparity method. East Texas Cooperatives do not request application of an energy methodology to the 2011 Compliance Filing's 2005 bandwidth period that resulted in East Texas Cooperatives receiving, under the disparity method, more bandwidth credits from Entergy Texas than they would have under an energy allocation methodology.³⁰ Entergy Texas requests that, if the Commission finds that the energy allocation methodology should be applied to the 2013 bandwidth period, it also be applied to the 2005 bandwidth period. It states that there is no reason why different allocation

²⁷ *Id.*

²⁸ *Id.* at 19 (quoting *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 144 (2005)).

²⁹ *Id.*

³⁰ Entergy Texas Answer at 2-3, 11.

methodologies should be applied for the two periods and states that credits to, and payments from, East Texas Cooperatives for the two periods should be offset.

19. Entergy Texas disputes that it violated the filed rate doctrine by unilaterally changing the methodology used to allocate bandwidth payments and credits to East Texas Cooperatives.³¹ Entergy Texas maintains that the Partial Requirements Agreement does not speak to the method to be used to determine the East Texas Cooperatives' share of Entergy Texas' bandwidth payments and receipts, and Entergy Texas thus did not change any allocation methodology specified in that agreement. Entergy Texas argues that, as a result, it did not violate the filed rate doctrine.³² Entergy Texas also states that the Commission has held that when a tariff is silent or ambiguous regarding Commission policy, the tariff should be interpreted as consistent with Commission policy.³³ Entergy Texas also states that its use of the disparity method was in direct response to Commission guidance on a formula rate that has been the subject of continued debate and evolution. According to Entergy Texas, given the Partial Requirements Agreement's silence as to the appropriate allocation method to be used for allocations to East Texas Cooperatives, it cannot be unjust and unreasonable for Entergy Texas to allocate its bandwidth payments and receipts to its wholesale jurisdiction using the method the Commission approved for wholesale allocations among the Operating Companies.³⁴

20. Entergy Texas states that the Commission concluded in Opinion No. 505 that "bandwidth payments cannot be attributed solely to energy or purchased energy or described as strictly purchased energy expense, but are a combination of both demand and energy costs for all production resources, not just purchases."³⁵ Entergy Texas also

³¹ *Id.* at 5.

³² *Id.*

³³ *Id.* at 6 (citing *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, 101 FERC ¶ 61,127, at P 35 (2002)).

³⁴ *Id.*

³⁵ *Id.* at 6-7 (quoting Opinion No. 505, 130 FERC ¶ 61,023 at P 102). In Opinion No. 505, the Commission allowed the Operating Companies to pass through bandwidth remedy costs and credits to wholesale customers if their contracts so allowed. The Commission found, for example, that a contract between Entergy Arkansas and its customer Union Electric did not contain a provision allowing such pass throughs, and it directed Entergy Arkansas to refund the allocation of bandwidth charges previously

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states that in Opinion No. 514 the Commission rejected as part of the proposed methodology for apportioning production costs between Entergy Texas and Entergy Gulf States Louisiana a calculation of the portion of bandwidth payments to be received by Entergy Gulf States' wholesale customers that used an energy allocation.³⁶ Entergy Texas also argues that the Commission did not go so far as to find that the allocation methodology for wholesale customers should be energy-based or disparity based, but instead left the issue open as beyond the scope of the proceeding.³⁷

21. Entergy Texas states that in light of the Commission's conclusion in Opinion No. 505 that bandwidth payments should not be construed solely as purchased energy expenses and its renewed approval in Opinion No. 514 of the use of the disparity method for bandwidth allocations among the Operating Companies, Entergy Texas determined that it was more appropriate to allocate its bandwidth payments and receipts to wholesale customers based on the disparity method. Entergy Texas states that it is not claiming that the Commission upheld in Opinion No. 514 the use of the disparity method for allocating an Operating Company's bandwidth receipts or payments to its wholesale load. Entergy Texas instead contends that because the Partial Requirements Agreement does not dictate the method for determining East Texas Cooperatives' share of Entergy Texas' bandwidth payments and receipts, it is just and reasonable for Entergy Texas to allocate its bandwidth payments and receipts to its wholesale load in a way that is consistent with the way allocations occur among the Operating Companies.³⁸ Entergy Texas argues that both allocations involve wholesale transactions, and like the bandwidth formula, the Partial Requirements Agreement reflects a combination of both demand and energy costs for all of Entergy Texas' production resources, not just purchases.³⁹

collected from Union Electric. *See* Opinion No. 505, 130 FERC ¶ 61,023 at PP 100-104. As noted above, the presiding judge held in that proceeding that the contract between Entergy Texas and East Texas Cooperatives allowed bandwidth credits to be passed through to East Texas Cooperatives through the Agreement's fuel cost adjustment clause as energy. *Entergy Services, Inc.*, 124 FERC ¶ 63,026, at P 414 (2008). While not explicitly addressed in Opinion No. 505, that order adopted findings by the presiding judge not otherwise addressed. Opinion No. 505, 130 FERC ¶ 61,023 at P 12.

³⁶ *Id.*

³⁷ *Id.* at 8.

³⁸ *Id.* at 8-9.

³⁹ *Id.* at 9.

3. East Texas Cooperatives Answer

22. In an answer, East Texas Cooperatives clarify that the same allocation methodology should govern both the 2005 and 2013 periods.⁴⁰ They request, however, that the Commission should not simply offset payments for the two periods but rather consider whether Entergy Texas' violation of the filed rate or other Commission policy should prevent it from benefitting from its unilateral change to the allocation methodology specified in the Partial Requirements Agreement.⁴¹

23. In addition, East Texas Cooperatives reject Entergy Texas' assertion in its answer that the Partial Requirements Agreement does not prescribe a specified allocation methodology for bandwidth payments and receipts. Rather, they contend, the Partial Requirements Agreement explicitly addresses the treatment of bandwidth payments or credits, dictating that they are to be flowed through the fuel adjustment clause.⁴² East Texas Cooperatives argue that Entergy Texas does not explain how a disparity method allocation can be reconciled with the structure of the Partial Requirements Agreement's fuel adjustment clause and that Entergy Texas offers no reasonable explanation why these contractual provisions should be discarded and ignored.⁴³

24. East Texas Cooperatives also argue that Opinion Nos. 505 and 514 do not justify the application of the disparity methodology to wholesale customers. They maintain that in Opinion No. 505, the Commission ruled that Entergy must recover its bandwidth obligations consistent with the terms of its agreements with wholesale customers and thus forbade Entergy from recovering its total bandwidth payments through the purchased energy variable. East Texas Cooperatives argue that in the present case, the Partial Requirements Agreement is unambiguous that Entergy Texas' bandwidth obligations (both energy and demand components) can be passed through to East Texas Cooperatives, but only through the fuel adjustment clause mechanism contained in the agreement, and not as line item added to their bills. East Texas Cooperatives argue that

⁴⁰ East Texas Cooperatives Answer at 2.

⁴¹ *Id.*

⁴² *Id.* at 3-4.

⁴³ *Id.* at 4.

rather than justify Entergy Texas' modification of its bandwidth allocation methodology, Opinion No. 505 affirms that its actions were inappropriate and unjustified.⁴⁴

25. With regard to Opinion No. 514, East Texas Cooperatives argue that Entergy Texas misapplies the Commission's approval of the disparity method for allocating costs among the Operating Companies as an affirmation that the same policy is just and reasonable when applied to the allocation of bandwidth obligations between wholesale and retail customers. They note that in Opinion No. 514, the Commission held that determining the method for allocating an individual Operating Company's bandwidth payment or receipt to its wholesale load was beyond the scope of that proceeding. East Texas Cooperatives further argue that Opinion No. 514 was not intended to change how Entergy allocated bandwidth obligations to them and other wholesale customers, and it did not rewrite what they describe as the unambiguous provisions of the Partial Requirements Agreement governing recovery of bandwidth obligations.⁴⁵

B. Entergy Texas Complaint

1. Complaint

26. In its June 20, 2014 complaint, Entergy Texas reiterates that it believes that it is just and reasonable to allocate its bandwidth payments and receipts to its wholesale load in a way that is consistent with its allocations among the Operating Companies.⁴⁶ However, it states that if the Commission holds in response to the East Texas Cooperatives Complaint in Docket No. EL14-43-000 that Entergy Texas should have used an energy-based methodology to allocate its 2013 bandwidth payments to East Texas Cooperatives, or otherwise violated the Partial Requirements Agreement, then, for the same reasons, Entergy Texas' use of the disparity method to allocate its 2005 Bandwidth Receipts to East Texas Cooperatives was unjust and unreasonable and in violation of the Partial Requirements Agreement.⁴⁷

27. Entergy Texas notes East Texas Cooperatives received approximately \$1.838 million more for the 2005 bandwidth period under the disparity method than they would have received if Entergy Texas allocated their share of those receipts using the energy

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ Entergy Texas Complaint at 8.

⁴⁷ *Id.* at 9.

method. Entergy Texas asserts that either an energy-based allocator is required for all allocations or it is not required at all.⁴⁸ Entergy Texas thus concludes that if the Commission determines that an energy-based method should be used to allocate bandwidth payments and receipts to a wholesale customer, allowing East Texas Cooperatives to keep a portion of the 2005 bandwidth receipts based on the disparity method while reducing their share of the 2013 bandwidth payment to reflect the energy method would amount to a windfall and an inequitable result.⁴⁹

28. Entergy Texas requests that the Commission consolidate its complaint with the East Texas Cooperatives Complaint in Docket No. EL14-43-000. It states that these complaints address the same question, viz., the appropriate method for allocating East Texas Cooperatives' post-Opinion No. 514 bandwidth payments or receipts to its wholesale load. Entergy Texas notes that both complaints concern the rights and obligations of the same parties and both are based on the same underlying facts.

2. Answer

29. In their answer to the Entergy Texas Complaint, East Texas Cooperatives state that they do not oppose Entergy Texas' motion to consolidate and do not contest Entergy Texas' contention that the same allocation methodology should apply to both the 2005 and 2013 bandwidth payments and credits. However, East Texas Cooperatives also state that they do not agree that the refund due to them for overcharges associated with the 2013 bandwidth payments must be reduced to reflect the additional credits they received from the 2005 bandwidth receipts. East Texas Cooperatives argue that the Commission should find that Entergy Texas' action violated Commission policies, including the filed rate doctrine, and thus no offset is warranted.⁵⁰

30. East Texas Cooperatives reiterate their position that Entergy Texas has not been authorized or directed by any Commission order to allocate bandwidth obligations other than in accordance to what East Texas Cooperatives maintain the Partial Requirements Agreement requires. They argue that Entergy Texas has unilaterally changed the provisions of the Partial Requirements Agreement, and this violates the filed rate doctrine. East Texas Cooperatives state that as a result of this violation, they do not concede that the application of the same allocation methodology for both the 2005 and

⁴⁸ *Id.* at 11.

⁴⁹ *Id.*

⁵⁰ East Texas Cooperatives Answer to Entergy Texas Complaint at 2.

2013 bandwidth allocations mandates that any refunds due to them from the 2013 bandwidth payments must be offset by a corresponding adjustment to the 2005 bandwidth credits. East Texas Cooperatives state that the Commission should determine whether Entergy Texas' violation of the filed rate doctrine, or any other applicable Commission policy, prevents Entergy Texas from benefitting from its unilateral change to the allocation methodology utilized in prior bandwidth adjustments.⁵¹

IV. Discussion

A. Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely, unopposed motion to intervene serve to make the entities that filed them parties to the proceedings in which they were filed.

32. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept East Texas Cooperatives' answer in Docket No. EL14-43-000 because it has provided information that assisted us in our decision-making process.

33. The Commission's policy is to consolidate matters only if a trial-type evidentiary hearing is required to resolve common issues of law and fact and consolidation will ultimately result in greater administrative efficiency.⁵² Those conditions are met here, as we are setting for hearing matters addressing essentially identical issues of law and fact, and consolidation will ultimately result in greater administrative efficiency. Accordingly, we will grant Entergy Texas' request to consolidate Docket No. EL14-43-000 with Docket No. EL14-69-000.

⁵¹ *Id.* at 6-7.

⁵² *See So. Cal. Edison Co.*, 129 FERC ¶ 61,304, at P 26 (2009), *amended by* 130 FERC ¶ 61,092 (2010); *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 27 (2008), *order on reh'g*, 127 FERC ¶ 61,164 (2009), *order on remand*, 134 FERC ¶ 61,155, *reh'g denied*, 136 FERC ¶ 61,222 (2011); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at P 25 (2008).

B. Commission Determination

34. We find that the complaints raise issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set the complaints for investigation and a trial-type, evidentiary hearing under section 206 of the FPA.

35. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁵³ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁵⁴ The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

36. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,⁵⁵ we will set the refund effective in Docket No. EL14-43-000 at the earliest date possible, i.e., April 30, 2014, the date of the East Texas Cooperatives Complaint, and we will set the refund effective in Docket No. EL14-69-000

⁵³ 18 C.F.R. § 385.603 (2014).

⁵⁴ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

⁵⁵ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

at the earliest date possible, i.e., June 20, 2014, the date of the Entergy Texas Complaint.⁵⁶

37. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within twelve months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by September 30, 2015. Thus, we estimate that, if the case were to go to hearing immediately, we would be able to issue our decision within approximately eight months of the filing of briefs on and opposing exceptions, or by July 31, 2016.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the East Texas Cooperatives Complaint and the Entergy Texas Complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2014), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge

designates a settlement judge. If the parties decide to request a specific judge, they must

⁵⁶ The Commission may order refunds for past periods where a public utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate. See *DTE Energy Trading, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,062, at P 28, *order on reh'g*, 113 FERC ¶ 61,214 (2005), *reh'g denied*, 119 FERC ¶ 61,109 (2007); *Quest Energy, L.L.C. v. Detroit Edison Co.*, 106 FERC ¶ 61,227, at P 21 (2004).

make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) The refund effective date established in Docket No. EL14-43-000 pursuant to section 206(b) of the FPA will be April 30, 2014, as discussed in the body of this order.

(F) The refund effective date established in Docket No. EL14-69-000 pursuant to section 206(b) of the FPA will be June 20, 2014, as discussed in the body of this order.

(G) Docket Nos. EL14-43-000 and EL14-69-000 are hereby consolidated for the purposes of settlement, hearing, and decision.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.