

153 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

Docket No. EL01-88-011

v.

Entergy Services, Inc.

ORDER DENYING REHEARING

(Issued October 15, 2015)

1. On March 31, 2014, Entergy Services, Inc. (Entergy) requested rehearing of the Commission's ruling in a prior order¹ that Entergy must include interest, beginning June 1, 2006, on the recalculated bandwidth payment and receipt amounts for the seven-month period from June 1, 2005 through December 31, 2005. For the reasons discussed below, the request for rehearing is denied.

I. Background

2. In the Remand Rehearing Order, the Commission reconsidered its order² issued in response to a remand³ from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The court had remanded orders issued earlier in this

¹ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,152 (2014) (Remand Rehearing Order).

² *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,047 (2011) (Order on Remand).

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

proceeding, Opinion Nos. 480 and 480-A,⁴ for further proceedings. At issue was: (1) whether the Commission was empowered to order refunds under the specific circumstances presented in this case, and (2) whether the Commission impermissibly delayed implementation of the bandwidth remedy.⁵ In the Order on Remand, the Commission invoked its equitable discretion not to order refunds and established June 1, 2005 as the date that Opinion No. 480's remedy would become effective. The Commission held that Entergy must calculate bandwidth payments for the seven-month period of June 1, 2005 through December 31, 2005, and show those calculations with supporting workpapers in a compliance filing.⁶

3. In the Remand Rehearing Order, the Commission denied requests for rehearing regarding the major issue noted above, but granted rehearing with regard to the issue of interest due on delayed remedy payments. The Commission stated that, although it had stated in a prior order that interest would not be required on annual bandwidth payments,⁷ it noted that in that order the Commission held that there was no need to require that interest be paid because settlements were being made within a reasonable time period once the calculations were completed (i.e., calculations are completed and settlements are made beginning June 1 for the previous calendar year, shortly after the company closes its books for that year). The Commission ruled that, however, due to the length of time that has passed in the instant case, it was appropriate for the Commission to follow its

⁴ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006) (Bandwidth Compliance Order I), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007) (Bandwidth Compliance Order II), *aff'd in part and remanded in part, Louisiana Remand*, 522 F.3d 378, *order on remand*, 137 FERC ¶ 61,047, *order on reh'g*, 146 FERC ¶ 61,152, *order rejecting compliance filing*, 146 FERC ¶ 61,153 (2014).

⁵ In brief, the bandwidth remedy achieves rough production cost equalization on Entergy's system by not allowing any Operating Company to have more than 11 percent above or below the system average production costs. Under the bandwidth remedy, 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). A more complete description of the bandwidth remedy and the procedural history of this case can be found in the Remand Rehearing Order. Remand Rehearing Order, 146 FERC ¶ 61,152 at PP 3-9.

⁶ Order on Remand, 137 FERC ¶ 61,047 at P 34.

⁷ Remand Rehearing Order, 146 FERC ¶ 61,152 at P 42 (citing Bandwidth Compliance Order II, 119 FERC ¶ 61,095 at P 32).

general policy and require interest to be paid to ensure full compensation.⁸ The Commission explained that this finding was consistent with *Anadarko*, in which the court explained that “interest is simply a way of ensuring full compensation. This is why the delay between the time of the customers’ injury and the granting of relief is a reason for awarding interest, not denying it”⁹ The Commission noted that this finding is also consistent with its more recent orders regarding the bandwidth remedy.¹⁰

4. Entergy requested rehearing of the Remand Rehearing Order with regard to the issue of interest on bandwidth payments. The Louisiana Public Service Commission (Louisiana Commission) filed an answer.

II. Request for Rehearing

5. Entergy argues that the Commission departed from prior precedent without an adequate explanation when it required Entergy to include interest on the recalculated bandwidth payments and receipts for the seven-month period. Entergy contends that, although the Commission may deviate from past rulings, either with or without a change in circumstances, the Commission must provide a reasoned analysis and explain its departure from past precedents.¹¹ Entergy notes that, in its orders accepting Entergy’s compliance filing establishing the bandwidth remedy, the Commission held that bandwidth payments and receipts should not include interest, reasoning that interest is not required because the bandwidth remedy is a prospective remedy that does not involve refunds.¹² Entergy contends that the Commission’s reversal is inconsistent with the bandwidth formula. It contends that, in the compliance filings accepting the bandwidth formula, the Commission rejected the Louisiana Commission’s arguments that bandwidth payments and receipts should include interest, and accordingly the bandwidth formula in Service Schedule MSS-3 does not include interest. It notes that the Commission explicitly ruled that *Anadarko* is “not applicable” because the bandwidth payments are

⁸ *Id.* (citing *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999) (*Anadarko*) (“[t]he Commission’s general policy, in effect for many years, requires interest to be paid on various kinds of overcharges.”)).

⁹ *Id.* (citing *Anadarko*, 196 F.3d at 1268).

¹⁰ *See, e.g., Entergy Servs., Inc.*, 139 FERC ¶ 61,104, at ordering para. (C) (2012), *reh’g denied*, 145 FERC ¶ 61,046, at PP 8-9 (2013); *Entergy Servs., Inc.*, 142 FERC ¶ 61,011, at P 21 (2013) *reh’g denied*, 148 FERC ¶ 61,087, at PP 11-12 (2014).

¹¹ Entergy Request for Rehearing at 9.

¹² *Id.* at 9 (citing Bandwidth Compliance Order I, 117 FERC ¶ 61,203 at P 51; Bandwidth Compliance Order II, 119 FERC ¶ 61,095 at P 32).

not refunds.¹³ Entergy notes, however, that in the Remand Rehearing Order the Commission reached the opposite conclusion and ruled that interest was necessary to ensure full compensation and that *Anadarko* – and the Commission’s general policy on refunds – was applicable to bandwidth payments.

6. Entergy argues that, by requiring interest, the Commission has altered the nature of the bandwidth formula and reversed its prior ruling that bandwidth payments and receipts should be based on the bandwidth formula in Service Schedule MSS-3. Entergy contends that the Commission’s recent orders requiring interest do not address the Commission’s reasoning in the initial bandwidth compliance filing orders. Entergy contends that the Commission has ignored the primary reasoning the Commission gave: it ruled that interest is not appropriate due to the nature of the bandwidth remedy, i.e., that the bandwidth remedy is a prospective remedy that does not involve refunds. It argues that the Commission has not explained why this reasoning does not apply to the seven-month period.¹⁴

7. Entergy adds that the Commission’s ruling requiring interest on bandwidth payments for the seven-month period is inconsistent with the Opinion No. 468¹⁵ proceeding, which the Commission has stated is similar to this case. It contends that although the issue of interest in the Opinion No. 468 remand proceeding was ultimately decided by the Commission’s ruling that the Louisiana Commission’s request for interest was untimely, the Commission has not addressed the fact that the Commission initially made a ruling on the merits that interest was not required.¹⁶ Entergy notes that the Commission has attempted to distinguish its rulings not requiring that interest be added to bandwidth payments on the grounds that the bandwidth payments are paid only six months after the close of the calendar year to which they apply, whereas the delay here is much longer.¹⁷ Entergy argues, however, that the delay of five years and four months in this proceeding is not sufficiently different from the delay of three years and four months in the Opinion No. 468 proceeding to warrant a different result.

8. Entergy also argues that interest should not be required because the Commission’s general policy supporting interest on refunds for overcharges, as stated in *Anadarko*, is

¹³ *Id.* at 10 (citing Bandwidth Compliance Order II, 119 FERC ¶ 61,095 at P 32).

¹⁴ *Id.* at 11.

¹⁵ *Louisiana Pub. Serv. Comm’n v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh’g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005).

¹⁶ Entergy Request for Rehearing at 12.

¹⁷ *Id.* at 13.

inapplicable under the circumstances of this case. Entergy notes that in *Anadarko*, the U.S. Court of Appeals for the D.C. Circuit found that the Commission's general policy requiring interest on various kinds of overcharges serves three purposes:

[T]o (1) provide just compensation for losses, or costs, imposed upon those who have paid excessive rates; (2) reflect the benefits which were available to companies which collected excessive rates; and (3) not provide incentives for any party to prolong litigation.¹⁸

9. Entergy contends that none of these purposes that support a general policy in favor of interest on refunds for overcharges is applicable under the circumstances present here. First, Entergy notes that this case involves payments and receipts among the Operating Companies, not refunds for overcharges. Entergy contends that in light of the prospective nature of the bandwidth remedy, the purpose of requiring interest to compensate parties for the time value of money does not apply. It argues that bandwidth payments and receipts are not designed to compensate parties for overcharges in past periods. Entergy argues that for this reason, the Commission previously held that "the Commission's general policy to allow interest to be paid on various types of overcharges ... is not applicable here since ... bandwidth payments are not refunds."¹⁹

10. Second, Entergy contends that requiring interest on overcharges to reflect the benefits available to companies that collected excessive rates is not applicable here. Entergy explains that in the Remand Rehearing Order, the Commission correctly concluded that this proceeding involves cost allocations among the Operating Companies, but not an over-recovery of costs by Entergy as a whole.²⁰ It argues that, because Entergy as a whole did not recover any excessive rates, there is no need to impose interest to reflect the benefits Entergy received from retaining the overcharges. Entergy contends that, in this respect, the same rationale that the Commission applied when it declined to impose its general rule favoring refunds for overcharges also should be applied in declining to impose the general rule favoring interest on refunds for overcharges. Entergy contends that the fact that the Commission's underlying rationale for interest payments rests on similar equitable grounds to its policy on refunds is further underscored by the Commission's "time value of money" refund policy applicable to public utilities that fail to file jurisdictional agreements on a timely basis. It explains that in *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*,²¹ the

¹⁸ *Id.* (citing *Anadarko*, 196 F.3d at 1267).

¹⁹ *Id.* at 15 (citing Bandwidth Compliance Order II, 119 FERC ¶ 61,095 at P 32).

²⁰ *Id.*

²¹ 64 FERC ¶ 61,139 (1993) (*Prior Notice*).

Commission determined that a utility that had failed to file jurisdictional agreements on a timely basis must pay “refunds” equal to the time value of money on interest payments.²² Entergy further explains that this remedy was found appropriate on an equitable basis because it was necessary to deter (and remedy) violations of the statutory requirement to file jurisdictional agreements on a timely basis.

11. Third, Entergy argues that eliminating an incentive to prolong litigation is also not applicable here. It explains that Entergy had no financial incentive to delay bandwidth payments and receipts because those payments and receipts are a zero sum game among the Operating Companies and Entergy as a whole does not recover additional revenues and is not unjustly enriched by the payments. Finally, Entergy argues that there is no basis for concluding that the equitable circumstances in this case differ from those in the Opinion No. 468 remand proceeding such that a different result should apply on the interest issue. It notes that here, as in the Opinion No. 468 remand proceeding, the delayed payments involve cost allocations among the Operating Companies where Entergy as a whole was not unjustly enriched and did not over-recover revenues. Entergy also adds that here, as in the Opinion No. 468 remand proceeding, Entergy was not responsible for the delay in implementing the remedy, but rather the delay was caused by the Commission’s reconsideration of the issue after appellate review.²³

III. Commission Determination

A. Procedural Matters

12. Rule 713(d)(1) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2015), prohibits answers to a request for rehearing. Therefore, we reject the Louisiana Commission’s answer.

B. Discussion

13. The request for rehearing is denied. We disagree with Entergy’s contention that the Commission failed to adequately explain its decision to require interest on bandwidth payments. In the orders accepting the compliance filing that established the bandwidth remedy, the Commission exercised its remedial discretion not to order interest on those payments because “there is a necessary delay owing to the need to perform the calculations, and, once the calculations are completed, the Commission is requiring settlements to be made in a reasonable time period, i.e., before the end of the calendar

²² Entergy Request for Rehearing at 16 (citing *Prior Notice*, 64 FERC at 61,979).

²³ *Id.* at 17.

year.”²⁴ However, in the instant case, and fully consistent with the logic of the Bandwidth Compliance Order I, given the significant delay since the June 1, 2005 effective date of bandwidth payments for the seven-month period at issue, the Commission appropriately found that in order to ensure full compensation it should require interest. This ruling is also consistent with numerous recent orders regarding interest and the bandwidth formula.²⁵ Accordingly, we reaffirm the prior ruling that it was appropriate to allow interest to ensure full recovery.²⁶

14. We disagree that requiring interest has changed the nature of the bandwidth formula. Entergy contends that interest is not appropriate because the Commission has stated that the bandwidth remedy is prospective in nature and does not involve refunds. However, nothing about the fact that the bandwidth remedy is prospective in nature precludes the Commission from awarding interest where the payment of the remedy is significantly delayed. In addition, we note that “the breadth of agency discretion is, if anything at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions.”²⁷ In this instance, the Commission was well within its remedial discretion in ordering interest, and has explained why it reached the conclusion it did here.

15. Moreover, while Entergy claims that “the purpose of requiring interest,” i.e., “where a utility has been unjustly enriched,”²⁸ is not implicated here, we disagree. The payment of interest is not, contrary to Entergy’s interpretation, just a matter of relieving a utility of its unjust enrichment. Rather, interest ensures that the amounts to be refunded are, in fact, refunded through the addition of interest so that the recipient receives payment in inflation-adjusted dollars. As the U.S. Court of Appeals for the Third Circuit has explained, the very point of refunds is to make the recipients whole and this does not

²⁴ Bandwidth Compliance Order I, 117 FERC ¶ 61,203 at P 51.

²⁵ See, e.g., *Entergy Servs., Inc.*, 139 FERC ¶ 61,104, at ordering para. (C) (2012), *reh’g denied*, 145 FERC ¶ 61,046, at P 8 (2013) (requiring interest on bandwidth payments in the first annual bandwidth proceeding due to the passage of time); *Entergy Servs., Inc.*, 142 FERC ¶ 61,011, at P 21 (2013), *reh’g denied*, 148 FERC ¶ 61,087 at P 14 (2014) (requiring interest on bandwidth payments in the second annual bandwidth proceeding due to the passage of time).

²⁶ See *Anadarko*, 196 F.3d at 1267 (“[t]he Commission’s general policy, in effect for many years, requires interest to be paid on various kinds of overcharges”).

²⁷ *Louisiana Remand*, 522 F.3d at 393 (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)).

²⁸ Entergy Request for Rehearing at 15-16.

occur if the amounts are not adjusted for inflation.²⁹ Here, where a significant period of time had passed, it was appropriate for the Commission to recognize that fact by adhering to its general policy and provide for interest, rather than make an exception.

16. Entergy also argues that the Commission declined to require interest in an ongoing Entergy proceeding which did not require interest on delayed payments concerning the treatment of interruptible load. In that case, unlike here, the Commission determined that the Louisiana Commission's request for interest was an untimely, and thus impermissible, request for rehearing.³⁰ Accordingly, the Commission denied the Louisiana Commission's untimely request without making any determination regarding the propriety of paying interest.³¹ Further, the Commission ultimately reversed its decision ordering refunds in that proceeding, so any issue of interest on refunds became moot.³² To the extent that the Commission's determination here is inconsistent with the interruptible load proceeding, we note that the Commission's determination, as noted above, is consistent with the numerous more recent decisions that we have issued requiring interest on bandwidth payments.³³ Declining to require interest, as Entergy requests, would create an inconsistency with these more recent cases.

17. Entergy also argues that the general policy considerations set forth in *Anadarko* in support of interest are inapplicable to bandwidth payments. However, the first policy consideration, just compensation, is fully applicable. In the circumstances of this case, the implementation date of the bandwidth remedy has been pushed back seven months to June 1, 2005, and full compensation requires interest from that date until the date of the Intra-System Bill that will reflect the bandwidth calculation amounts for calendar year 2006. The significant passage of time diminishes the economic value of bandwidth payments, and interest is an appropriate means by which the Commission, under its broad remedial authority, may restore any potential bandwidth payments to their appropriate economic value.

²⁹ *Washington Urban League v. FERC*, 886 F.2 1381, 1386 (3rd Cir. 1989); accord, e.g., *Southern Illinois Power Cooperative v. MISO*, 116 FERC ¶ 61,117, at P 20 (2006); *Central Power and Light Co.*, 98 FERC ¶ 61,069, at 61,185 (2002); *Cambridge Electric Light Co.*, 66 FERC ¶ 61,346, at 62,162 (1994), *reh'g denied*, 67 FERC ¶ 61,368 (1994).

³⁰ *Entergy Servs. Inc.*, 145 FERC ¶ 61,046 at P 9.

³¹ *Id.*

³² *Id.*

³³ See *supra* note 25.

The Commission orders:

The request for rehearing 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.