

124 FERC ¶ 61,275
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Louisiana Public Service Commission and the Council of the City of New Orleans	Docket Nos.	EL00-66-006 and EL00-66-010
v.		
Entergy Corporation		

Louisiana Public Service Commission	Docket No.	EL95-33-008
v.		
Entergy Services, Inc.		

Entergy Services, Inc.	Docket No.	ER00-2854-007
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ORDER DENYING REHEARING

(Issued September 19, 2008)

1. On September 20, 2007, the Commission issued an order¹ that, in response to a court remand,² directed Entergy³ to calculate charges for the Entergy system that would immediately exclude interruptible load from the computation of peak load responsibility under two Service Schedules (i.e., Service Schedules MSS-1 and MSS-5) and to make refunds to Entergy's Louisiana customers reflecting the difference between what Entergy

¹ *Louisiana Public Service Commission v. Entergy Corp.*, 120 FERC ¶ 61,241 (2007) (September 2007 Order).

² *Louisiana Public Service Commission v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (Remand Order).

³ Entergy is composed of Entergy Services, Inc. and its various public utility operating companies, i.e., Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc. (Operating Companies).

charged these customers (based on Opinion Nos. 468 and 468-A)⁴ and what it would have charged had Entergy removed all interruptible load from the computation of peak load responsibility on April 1, 2004. The order also directed Entergy to make refunds associated with the fifteen month period commencing with the refund effective date, and to file a refund report. Entergy and Retail Regulators⁵ filed requests for rehearing. These rehearing requests are opposed by the Louisiana Public Service Commission (Louisiana Commission).

2. On January 4, 2008, Louisiana Commission filed a motion to require the payment of interest on the refunds due under the compliance filing that Entergy made in response to Opinion Nos. 468 and 468-A. Louisiana Commission's motion is opposed by Entergy and by Retail Regulators. Finally, on July 2, 2008, Louisiana Commission filed a motion to lodge a decision by the Louisiana Supreme Court.

3. In this order, we deny rehearing of the September 2007 Order and deny Louisiana Commission's motion to direct Entergy to pay interest on the refunds due under the compliance filing that Entergy made in response to Opinion Nos. 468 and 468-A. We also will dismiss a pending request for rehearing of an earlier order that Louisiana Commission filed as a precautionary matter in Docket Nos. EL00-66-006, ER00-2854-007, and EL95-33-008.⁶

I. BACKGROUND

A. Entergy's System Agreement and Computation of Responsibility Ratio

4. Entergy's System Agreement consists of seven Service Schedules, which allocate costs among the Operating Companies. These are MSS-1 (Reserve Equalization); MSS-2 (Transmission Equalization); MSS-3 (Exchange of Electric Energy Among the Companies); MSS-4 (Unit Power Purchase); MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies); MSS-6 (Distribution of Operating Expenses of the System Operation Center); and MSS-7 (Merger Fuel Protection).

⁴ *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh'g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005).

⁵ Composed of Arkansas Public Service Commission (Arkansas Commission), Mississippi Public Service Commission (Mississippi Commission), and City Council of New Orleans.

⁶ We will address Entergy's November 19, 2007 compliance filing, submitted in Docket No. EL00-66-012, in a separate order.

Certain of the system costs are allocated among the Operating Companies in proportion to the load each Operating Company places on the system at the time of the system peak. This proportionate cost responsibility of each Operating Company is called its "Responsibility Ratio."

5. More specifically, each Operating Company's Responsibility Ratio is calculated by determining that Operating Company's load responsibility (Company Load Responsibility) as a proportion of the total load responsibility for the combined Operating Companies; i.e., the Company's Load Responsibility compares that Operating Company's twelve monthly loads that are coincident with the system's monthly peak loads to the system's monthly peak loads for the twelve-month period ending with the month prior to its application. Thus, each Company's Load Responsibility historically has been determined using a "rolling" average of that Operating Company's contribution to the system's monthly peak over the preceding twelve months.⁷

B. Commission Orders and Court Remand

6. In Opinion Nos. 468 and 468-A, the Commission directed Entergy to exclude interruptible load from the calculation of the Responsibility Ratio under Service Schedule MSS-1 (Reserve Equalization) and Service Schedule MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies) beginning April 1, 2004 (i.e., the exclusion of interruptible load from the rolling average peak load responsibility would be phased in over a twelve-month period).⁸ In addition, the Commission found that, under the circumstances presented, it was not authorized by the Federal Power Act (FPA) to order refunds.⁹

7. On appeal, the court determined that the Commission, having found that it was not just and reasonable to allow Entergy to consider interruptible load in assigning cost responsibility (i.e., in determining the Responsibility Ratio), could not delay implementation of that decision over a 12-month phase-in period.¹⁰ The court also determined that the Commission had not adequately supported its conclusion that it lacked authority to order refunds.

8. In response to that Remand Order, the Commission issued its September 2007 Order directing Entergy to (1) recalculate each company's peak load responsibility to remove interruptible load from the computation of charges for the Entergy system (since

⁷ Opinion No. 468-A, 111 FERC ¶ 61,080 at P 3.

⁸ *Id.* P 60-77.

⁹ *Id.* P 82-89; *see* 16 U.S.C. § 824e(c) (2006).

¹⁰ 482 F.3d at 518.

April 1, 2004); (2) make refunds to Entergy's Louisiana customers reflecting the difference between what Entergy charged (based on Opinion Nos. 468 and 468-A) and what it would have charged had Entergy at that time immediately removed all interruptible load from the computation of peak load responsibility; (3) make refunds associated with the fifteen-month period commencing with the refund effective date; and (4) file a refund report within 30 days of issuance of the order.¹¹

C. Requests for Rehearing of the September 2007 Order

9. On October 22, 2007, separate requests for rehearing of the September 2007 Order were filed by Entergy and Retail Regulators. On November 21, 2007, Louisiana Commission filed for leave to file an answer to the rehearing requests.

D. Motion for Payment of Interest

10. On January 4, 2008, Louisiana Commission filed a motion to require the payment of interest on the refunds due under the compliance filing that Entergy made in response to Opinion Nos. 468 and 468-A. On January 22, 2008, Entergy and Retail Regulators separately filed answers to Louisiana Commission's motion.

E. Rehearing of 2006 Compliance Order

11. Earlier, on September 16, 2005, Entergy filed a compliance filing in response to a separate and earlier Commission order issued on August 17, 2005, conditionally accepting Entergy's May 2005 filing in compliance with Opinion Nos. 468 and 468-A. By order dated August 18, 2006, the Commission accepted Entergy's compliance filing.¹² Louisiana Commission filed a request for rehearing of that order, as a precautionary matter, in the event that, on appeal, the United States Court of Appeals for the D.C. Circuit granted a motion by the Commission arguing that Louisiana Commission lacked standing to object to the "phase-in" remedy adopted by the Commission in Opinion Nos. 468 and 468-A.

¹¹ September 2007 Order, 120 FERC ¶ 61,241 at P 2.

¹² *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 116 FERC ¶ 61,156 (2006) (2006 Compliance Order).

II. DISCUSSION

A. Procedural Issues

12. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2008), bars answers to rehearing requests. Thus, we will deny Louisiana Commission's motion for leave to file an answer to the rehearing requests.

B. Requests for Rehearing of September 2007 Order

1. Overview

13. On rehearing, Retail Regulators make five main arguments. First, procedurally, they argue that the Commission erred when it issued the September 2007 Order without first providing an additional opportunity for comments. Second, they argue that the court's Remand Order never found that refunds were authorized in this case and the Commission misconstrued the court's Remand Order when it found otherwise. Third, they argue that the imposition of refunds in this case is inconsistent with the clear language and legislative history of FPA section 206(c). Fourth, they argue that the September 2007 Order is inconsistent with the findings of fact that the Commission made in Opinion Nos. 468 and 468-A. Finally, they argue the Commission acted in an arbitrary and capricious manner by reversing, without explanation, its policy regarding refunds in cases that create new rate structures/methodologies.

14. Entergy's request for rehearing similarly argues that FPA section 206(c) requires the Commission, before ordering refunds, to make a factual finding that the refunds would not result in any reduction in revenues by Entergy and that the record does not support such a finding. Entergy also argues that the Commission erred by ordering refunds without fully explaining its findings under FPA section 206(c). Finally, Entergy argues that the Commission erred by departing, without explanation or analysis, from its established practice of weighing equitable factors in determining the appropriateness of refunds in proceedings under FPA section 206.

15. As explained below, we are not persuaded to reach a different result than we reached in the September 2007 Order and so we deny rehearing.

2. Additional Opportunity for Comments

16. Retail Regulators argue, procedurally, that the court's Remand Order calls for additional proceedings and the Commission should have afforded the parties an additional opportunity to present their views before ordering refunds. We find that the Retail Regulators' arguments seeking an additional opportunity for comment overlook several important considerations. First, the questions of when interruptible load should be removed from the computation of peak load responsibility and whether refunds should

be ordered were argued by both sides and were considered by the Commission when it issued Opinion Nos. 468 and 468-A. Thus, the Commission could have issued an order earlier, and likewise can do so now, reaching the same conclusions suggested by the court in the Remand Order, without soliciting any further comments. The court's Remand Order did not divest the Commission of its discretion to decide what further procedures, if any, were needed to effectuate the court's rulings and, after a review of the court's Remand Order, the Commission in the September 2007 Order properly exercised its discretion and concluded that it could decide the issues without further procedures.¹³ In any event, given our consideration below of the rehearing requests of Retail Regulators and Entergy, we have afforded these parties a sufficient opportunity to be heard.¹⁴

3. Appropriateness of Refunds

17. Retail Regulators argue that the Commission misconstrued the court's Remand Order when it found that the court had determined that the Commission has refund authority in this case. Retail Regulators argue, to the contrary, that the Remand Order left this an open issue. In addition, they argue that the provisions of FPA section 206(c) preclude the imposition of refunds under the circumstances presented in this case. Entergy raises similar concerns.

18. We agree with Retail Regulators that the Remand Order did not *explicitly* compel the Commission to reverse its prior determination that it lacked authority to order refunds. In fact, the court invited the Commission to provide further support for this finding, if it could do so. At the same time, however, the court found inadequate all the reasons that the Commission provided in Opinion Nos. 468 and 468-A for its conclusion that it lacked authority to order refunds in the circumstances present in this case.¹⁵

¹³ See *Southeastern Michigan Gas Company and Michigan Gas Company v. FERC*, 133 F.3d 34, 38 (D.C. Cir. 1998), where the court affirmed the Commission's procedure, in response to a remand, of issuing an order adopting a different result than it had reached in earlier orders, rather than elaborating on its prior position. The court held that once the Commission reacquired jurisdiction, it was free to reconsider its earlier decision and reach a different result.

¹⁴ See *State of California, ex rel. Lockyer v. FERC*, 329 F.3d 700, 711 (9th Cir. 2003), where the court found that, even if the Commission initially erred by denying a hearing, the Commission provided all procedural protections required under the FPA when it gave consideration to the parties' claims on rehearing.

¹⁵ In their rehearing requests, Retail Regulators and Entergy urge the Commission to reach the same conclusions here that the Commission originally reached in Opinion

(continued...)

19. Specifically, in Opinion No. 468, the Commission found that (1) the presiding judge erred when he ordered refunds in this case, because the case involves a reallocation of costs among the Entergy Operating Companies and thus falls within the scope of FPA section 206(c); and (2) the Commission was unable to make the requisite finding that there would not be a reduction in revenues and that the Entergy Operating Companies would be able to recover the monies that would be refunded as a result of the reallocation of costs among such companies.¹⁶

20. In Opinion No. 468-A, the Commission denied rehearing and laid out three reasons why the Commission was not ordering refunds. First, the Commission found that Louisiana Commission had ignored the relevant statutory language, which limits the Commission's authority to order refunds in cases where the refund would be funded from a reallocation of costs among the Operating Companies. The Commission found that it could not order refunds because, under the circumstances presented, it was unable to make the findings required by the statute.¹⁷

21. Second, the Commission explained that its authority to order refunds is discretionary and the Commission exercised its discretion not to order refunds. The Commission expressly rejected the argument that the Commission must order refunds, unless the Commission can show that none are warranted.¹⁸

22. Third, the Commission rejected the argument that *Mississippi Power* and *Entergy Louisiana*¹⁹ essentially allow the Commission to order utilities to collect surcharges from

Nos. 468 and 468-A, and that the court found unpersuasive. As noted below, the Commission does not believe that these arguments add significantly to the reasoning that the Commission provided in the earlier orders and that the court found inadequate.

¹⁶ Opinion No. 468, 106 FERC ¶ 61,228 at P 83-84, 88. The Commission specifically considered and found unpersuasive testimony by a Louisiana Commission witness arguing that Entergy could recover these costs. *Id.* P 85-87. The Commission also rejected the argument that Entergy's correction of past billing errors provided precedent for ordering refunds in this case. *Id.* P 89.

¹⁷ Opinion No. 468-A, 111 FERC ¶ 61,080 at P 21.

¹⁸ *Id.*

¹⁹ *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) (*Mississippi Power*); *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003) (*Entergy Louisiana*).

their retail customers.²⁰ The Commission found that this argument misread the meaning of these cases and overlooked the fact that the Commission's jurisdiction is limited to jurisdiction over wholesale rates and that directly prescribing retail rates exceeds its authority. The Commission found that the fact that state commissions, in setting retail rates, are not authorized to second guess the Commission's wholesale rate determinations was in no way inconsistent with the Commission's declining to overstep its jurisdictional limits by directly prescribing retail rates.²¹

23. Finally, in Opinion No. 468 the Commission directed Entergy to remove interruptible load from the calculation of peak load responsibility under Service Schedule MSS-1 (Reserve Equalization) and Service Schedule MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies),²² and in Opinion No. 468-A the Commission clarified that this change should be phased in over a twelve month period.²³

24. On review of Opinion Nos. 468 and 468-A, the court rejected the Commission's determination that the removal of interruptible load from peak responsibility should be phased in over a twelve-month period, and found that it was unreasonable for the Commission not to implement this change immediately.

25. As to the Commission's findings that refunds were unwarranted, the court described FPA section 206(c) as "address[ing] the Congress' concern that the cost of Commission-ordered refunds -- as opposed, presumably, to a change in rates mandated by the Commission -- would be 'trapped' on the books of the paying subsidiary if the state utility commission prevented the utility from recovering that cost from its retail customers. In particular, the Committee [i.e., the Senate Committee on Energy and Natural Resources] feared the state utility commissions would invoke the filed rate doctrine to prevent the pass through."²⁴

26. The court also held that the Commission had failed to explain why, in cases such as the instant case, where all parties were on notice that the rates at issue might be held unjust and unreasonable and refunds might be ordered, refunds would not be permissible

²⁰ Opinion No. 468-A, 111 FERC ¶ 61,080 at P 19, 22.

²¹ *Id.* P 22.

²² Opinion No. 468, 106 FERC ¶ 61,228 at P 77.

²³ Opinion No. 468-A, 111 FERC ¶ 61,080 at P 30-34.

²⁴ Remand Order, 482 F.3d at 520.

under either the filed rate doctrine or FPA section 206(c).²⁵ Moreover, the court was unmoved by the Commission's assertion that the imposition of refunds was discretionary and that the Commission need not justify its decision not to order refunds.²⁶

27. The Commission does not have any additional, persuasive reasons in support of its original finding that it lacked refund authority in the circumstances present in this case – beyond those already provided in Opinion Nos. 468 and 468-A and rejected by the court. If the Commission's reasons in Opinion Nos. 468 and 468-A are inadequate, then the Commission has no choice but to reverse its prior decision on this issue. Additionally, we find that the court's discussion of why the Commission erred in phasing out the inclusion of interruptible load, and the court's holding that it would be unreasonable to allow Entergy to continue to charge rates reflecting the inclusion of interruptible load in the computation of peak load, provide 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.

28. While the court did not explicitly compel the Commission to order refunds, the court's discussion -- rejecting the Commission's finding that refunds could not and should not be ordered -- eliminated the factors that in the underlying orders had led the Commission to conclude that refunds were unwarranted, and left the Commission with a reasonable basis to now require refunds. Retail Regulators and Entergy nevertheless ask us to again find, as we did originally in Opinion Nos. 468 and 468-A, that refunds cannot be ordered. We see no point in re-arguing to the court essentially the same findings (and reasons) – even if somewhat differently phrased -- that we advanced in Opinion Nos. 468 and 468-A, and that the court emphatically rejected.

29. Specifically, the court expressly dispelled one of the Commission's principal concerns with ordering refunds, i.e., the Commission's concern that the language of FPA section 206(c) precluded refunds under the circumstances involved in this proceeding; the court rejected the Commission's finding that FPA section 206(c) was an obstacle to refunds in the instant case.²⁷ The court also rejected the Commission's concerns about the filed rate doctrine with its explanation that this would not be an issue in instances,

²⁵ *Id.* While the Commission previously read FPA section 206(c) as not allowing refunds in this case, the court disagreed that there was a statutory bar to refunds in this case.

²⁶ *Id.*

²⁷ *Id.* at 520, n.25.

such as here, where all parties were on notice that the rates at issue might be held unjust and unreasonable.²⁸

C. Interest Payments

30. On January 4, 2008, Louisiana Commission filed a motion to require the payment of interest on the refunds due under the compliance filing that Entergy made in response to Opinion Nos. 468 and 468-A.²⁹ On January 22, 2008, Entergy and Retail Regulators separately filed answers to Louisiana Commission's motion. As explained below, we will deny Louisiana Commission's motion.

1. Louisiana Commission's Motion

31. Louisiana Commission notes that, in Opinion No. 468, the Commission ordered Entergy to remove interruptible load when calculating peak load responsibility effective April 1, 2004. In addition, Louisiana Commission states that Entergy sought a delay in the date for making a compliance filing until after requests for rehearing or clarification were resolved by the Commission and that Entergy asserted that "deferral of the compliance filing will not harm anyone because Entergy is not challenging the April 1, 2004 effective date for the changes imposed in Opinion No. 468."

32. Further, Louisiana Commission states that, after the Commission denied rehearing in Opinion No. 468-A, Entergy made a compliance filing that showed the language changes in the System Agreement required under the Commission's orders, but did not

²⁸ We note that Louisiana Commission moves to enter in the record a decision by the Louisiana Supreme Court affirming a Louisiana Commission decision allowing the pass-through to Louisiana retail customers of a FERC-ordered refund and rejecting arguments that this constituted retroactive ratemaking. We will grant Louisiana Commission's motion to lodge.

²⁹ Louisiana Commission's motion makes reference to refunds due in compliance with Opinion Nos. 468 and 468-A. We note that the Commission declined to order refunds in both of those orders. *See* Opinion No. 468, 106 FERC ¶ 61,228 at P 82-89; Opinion No. 468-A, 111 FERC ¶ 61,080 at P 21-23. However, Entergy's May 2005 compliance filing included refunds to implement rates consistent with the effective date established in Opinion Nos. 468 and 468-A. The refunds were due because the Commission had granted Entergy's request for an extension of time to make the compliance filing ordered in Opinion No. 468 until after the Commission issued its order on requests for rehearing of Opinion No. 468.

provide refund calculations. The Commission ordered the production of work papers in an order issued on August 17, 2005.³⁰

33. Louisiana Commission states that its review of the work papers leads it to conclude that Entergy apparently did not pay interest on the amounts refunded. Louisiana Commission states that Entergy's calculations include only adjustments to the actual System Agreement payments and make no provision for interest.

34. Louisiana Commission argues that the Commission should require Entergy to pay interest on the amounts Entergy refunded to its Louisiana customers pursuant to the compliance filing that Entergy submitted in response to Opinion No. 468-A. Louisiana Commission states that, when Entergy sought a delay in complying with Opinion No. 468, Entergy represented that a delay would "not cause any harm to anyone." Louisiana Commission argues that only by requiring the payment of interest can the Commission ensure that this representation remains true, because Louisiana consumers would otherwise suffer economic harm from the delay in receipt of the rate reduction required under Opinion Nos. 468 and 468-A. Further, Louisiana Commission argues that the Commission's regulations³¹ and precedent³² provide for the payment of interest on refunds.

2. Answers of Entergy and Retail Regulators

35. Entergy responds that Louisiana Commission's request for interest should be rejected on procedural grounds because the request for interest constitutes an untimely and improper request for rehearing of Opinion Nos. 468 and 468-A, and of the August 2005 Order. Entergy notes that in Opinion Nos. 468 and 468-A, and in the August 2005 Order, the Commission did not order interest. As Louisiana Commission did not raise the issue of interest at that time, and as the Commission did not order interest to be paid, Entergy argues that Louisiana Commission should not be permitted now to seek modification of Opinion Nos. 468 and 468-A or of the August 2005 Order.

36. Retail Regulators make three main arguments opposing Louisiana Commission's motion for interest payments. First, they argue that just as the Commission has the

³⁰ *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 112 FERC ¶ 61,192, at P 14 (2005) (August 2005 Order).

³¹ *See* 18 C.F.R. § 35.19a (2008).

³² Citing *Montana Consumer Counsel v. PPL Montana, LLC*, 121 FERC ¶ 61,127 at P 11-13 (2007) (*PPL Montana*). In *PPL Montana*, the Commission found it equitable and appropriate to order interest payments because the company had the use of money based on a Commission action that a court later found to be erroneous.

discretion to decline to order refunds, it likewise has the discretion not to order the payment of interest on refunds.

37. Second, they argue that while the September 2007 Order directed the payment of refunds, it made no mention of the payment of interest on those refunds. In this regard, Retail Regulators argue that the Commission could have mandated interest in the September 2007 Order, had it wanted to, but conspicuously chose to omit any mention of interest payments. Further, Louisiana Commission could have sought rehearing of the September 2007 Order on this point, but did not do so. Thus, Retail Regulators argue that Louisiana Commission is barred from raising the issue now and its January 4 Motion amounts to a collateral attack on the Commission's September 2007 Order that should be denied.

38. Third, Retail Regulators argue that Louisiana Commission's reliance on section 35.19a of the Commission's regulations, 18 C.F.R. § 35.19a (2008), is misplaced, because this section deals with refund requirements under FPA section 205 suspension orders, and the refunds ordered by the Commission in its September 2007 Order are not the result of any suspension order but result from a court-ordered remand. Thus, they argue that section 35.19a provides no support for Louisiana Commission's request for the payment of interest on refunds in a case, such as here, involving an FPA section 206 complaint.

3. Commission Finding

39. In the Commission's August 2005 Order, the Commission conditionally accepted Entergy's May 18, 2005 compliance filing in response to Opinion Nos. 468 and 468-A.³³ That order also directed Entergy to provide workpapers that would detail its elimination of interruptible load from the computation of peak load responsibility.³⁴ The Commission did not, however, require the payment of interest. On September 16, 2005, Entergy provided the required workpapers; those workpapers showed that Entergy did not include any interest payments. While Louisiana Commission protested Entergy's compliance filing, its protest did not take issue with Entergy not providing any interest payments. On August 18, 2006, the Commission accepted Entergy's compliance filing.³⁵ Like the August 2005 Order, the 2006 Compliance Order did not direct Entergy to pay interest on any refunds.

³³ Opinion No. 468, 106 FERC ¶ 61,228 at P 88-89; Opinion No. 468-A, 111 FERC ¶ 61,080 at P 21-23.

³⁴ August 2005 Order, 112 FERC ¶ 61,192 at P 14. We note that Entergy's May 18, 2005 compliance filing did not include any interest payments.

³⁵ 2006 Compliance Order, 116 FERC ¶ 61,156 at P 10.

40. While Louisiana Commission filed a request for rehearing of the 2006 Compliance Order, its rehearing request did not take issue with Entergy not including interest payments. Its motion for the payment of interest was filed on January 4, 2008, long after the time for filing a request for rehearing of either the August 2005 Order or the 2006 Compliance Order had elapsed.³⁶ The Louisiana Commission's motion is essentially an untimely, and thus impermissible, request for rehearing of these orders.³⁷ In any event, given the fact that no requests for rehearing of these orders were filed on the interest payment issue, and more than two years elapsed before the Louisiana Commission filed its motion, even if the motion were not statutorily barred as an untimely request for rehearing, we would exercise our discretion and decline to reopen this matter now, to add such a requirement.³⁸ Our finding here is consistent with *New England Power Pool*, 95 FERC ¶ 61,449 at 62,629, *reh'g denied*, 96 FERC ¶ 61,227 at 61,920-21 (2001), where we denied a request for interest in a case where the earlier order did not order interest, i.e., was silent as to the ordering of interest and the petitioner did not file a timely request for rehearing challenging this aspect of the earlier order. Finally, we see nothing in the language of section 35.19a of our regulations³⁹ that would dictate a contrary result, i.e., that would require interest in any and all cases decided by the Commission.⁴⁰

³⁶ See 16 U.S.C. § 8251(a) (2006) (providing that requests for rehearing must be filed within 30 days).

³⁷ We note, likewise, that the September 2007 Order did not order interest on the refunds directed in that order and that Louisiana Commission did not file a request for rehearing of that order.

³⁸ We note that the D.C. Circuit has long recognized that the Commission's discretion is "at zenith" when "fashioning ... remedies." *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

³⁹ 18 C.F.R. § 35.19a (2008).

⁴⁰ To the extent that Retail Regulators' answer to Louisiana Commission's January 4, 2008 motion addresses interest on refunds ordered in the September 2007 Order, we note that Louisiana Commission's motion did not address interest on such refunds. Rather, Louisiana Commission has raised the issue of interest on such refunds in its protest to Entergy's November 19, 2007 filing, submitted in Docket No. EL00-66-012, to comply with the September 2007 Order. As noted above, we will address that compliance filing in a separate order.

D. Rehearing of 2006 Compliance Order

41. As stated above, Louisiana Commission filed a precautionary rehearing request of the 2006 Compliance Order accepting Entergy's September 16, 2005 compliance filing, in case on appeal the court found that it lacked standing to argue against the "phase-in" remedy adopted by the Commission in Opinion Nos. 468 and 468-A. In fact, the court found that Louisiana Commission did have standing to raise this argument and, in fact, Louisiana Commission prevailed on this issue on appeal. Accordingly, we will dismiss as moot its still pending request for rehearing of the August 2006 Order.

The Commission orders:

(A) The requests by Entergy and Retail Regulators for rehearing of the September 2007 Order are hereby denied, as discussed in the body of this order.

(B) The request by Louisiana Commission for rehearing of the 2006 Compliance Order is hereby dismissed, as discussed in the body of this order.

(C) Louisiana Commission's motion requesting interest payments is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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