



The D.C. Circuit Remands FERC Order Denying Refunds for Changes to Cost Allocation

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The LPSC again petitioned for review, and in 2007 the D.C. Circuit remanded the case again, this time on the issue of refunds.⁶ The D.C. Circuit concluded that the Louisiana utilities should be able to pass through the costs of the refunds to their ratepayers. It reasoned that, contrary to FERC's concerns, such cost recovery would not be barred under the filed rate doctrine in a situation where all parties were on notice that the capacity allocation might be found unjust and unreasonable, and refunds ordered.

On remand, FERC again declined to order refunds. Although acknowledging a long-standing "policy of granting full refunds to correct unjust and unreasonable rates,"⁷ FERC argued that there was a separate line of precedent concerning situations involving misallocated costs and issues of rate design. In those situations, FERC claimed that it "traditionally" declined to order refunds. The LPSC again petitioned for review.

In this most recent order, the D.C. Circuit takes issue with FERC's reasons for departing from its "general policy" of ordering refunds for unjust and unreasonable rates. The court found that FERC has no specific policy against refunds in rate design cases, but has instead declined to issue refunds in such cases due to specific considerations that are not pertinent to the refunds in *LPSC v. FERC*. FERC identified the following reasons for denying refunds in cost allocation cases: "potential under-recovery by the utility; consumers' and utilities' inability to revisit past decisions; a 'detrimental effect upon an organized market'; different generations of consumers paying the surcharges and receiving the past benefits; and the 'complication and cost of rerunning markets.'"⁸ FERC itself had ruled out the possibility of under-recovery in this case. As for the other considerations, FERC determined that refunds were not warranted

because (1) Entergy had not *over-recovered* and (2) Entergy could not revisit its past decisions.²

The D.C. Circuit accepted neither explanation. It noted that FERC did not explain why “a lack of over-recovery should automatically negate refunds.” It further observed that FERC had not identified any past decisions that Entergy was unable to revisit, or “why that fact—presumably true in every refund decision—was more significant here than in other decisions in which it orders refunds.”¹⁰ The D.C. Circuit concluded that FERC “cannot reasonably apply a policy that is based on factors that it acknowledges are not present in a given case.”¹¹ The court directed FERC on remand to consider the factors present in the case and reach a “reasonable accommodation” among them with regard to refunds.

¹ *La. Pub. Serv. Comm’n v. FERC*, No. 13-1155, slip op. at 2 (D.C. Cir. Dec. 5, 2014) (“December Order”).

² *La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) ; *La. Pub. Serv. Comm’n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007).

³ *La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999).

⁴ December Order at 6.

⁵ Section 206(c) specifically governs refunds among the electric companies that are subsidiaries of the same holding company. Briefly, FERC may not order refunds if the refunds to some of the subsidiaries would be paid by an increase in costs to the other subsidiaries, *unless* those subsidiaries would be able to recover those costs from their ratepayers. 16 U.S.C. § 824e(c).

⁶ *La. Pub. Serv. Comm’n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007).

⁷ December Order at 7.

⁸ *Id.* at 13 (citing *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 142 FERC ¶ 61,211, at P 55 & n.127 (2013)).

⁹ *Id.*

¹⁰ *Id.* at 14.

¹¹ *Id.*

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