

166 FERC ¶ 61,022  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

Docket No. EL18-204-000

v.

System Energy Resources, Inc.  
Entergy Services, Inc.

ORDER ON COMPLAINT, ESTABLISHING HEARING AND  
SETTLEMENT JUDGE PROCEDURES, AND ESTABLISHING REFUND  
EFFECTIVE DATE

(Issued January 17, 2019)

1. On September 24, 2018, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint (Complaint) against System Energy Resources, Inc. and Entergy Services, Inc. (collectively, SERI)<sup>1</sup> pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA)<sup>2</sup> and Rule 206 of the Commission's Rules of Practice and Procedure.<sup>3</sup> The Louisiana Commission states that it intends for the Complaint to be an amendment to a complaint that it had filed in Docket No. EL18-142-000. The Louisiana Commission asserts that the Complaint filed here provides additional facts on SERI's capital structure to support the argument in the complaint in Docket No. EL18-142-000

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<sup>1</sup> SERI is a wholly-owned subsidiary of Entergy Corporation (Entergy), a utility holding company headquartered in New Orleans, Louisiana. The Louisiana Commission regulates the retail rates and services of Entergy Louisiana, LLC (Entergy Louisiana). Entergy Services, Inc. is a service subsidiary of Entergy that provides accounting, legal, regulatory, and other services to Entergy subsidiaries. *See* Complaint at 4-5. Entergy Services, Inc. was renamed Entergy Services, LLC effective September 30, 2018.

<sup>2</sup> 16 U.S.C. §§ 824e, 825e, 825h (2012).

<sup>3</sup> 18 C.F.R. § 385.206 (2018).

that SERI's capital structure is unjust and unreasonable. In this order, for the reasons discussed below, we establish hearing and settlement judge procedures and set a refund effective date of September 24, 2018, the date the Complaint was filed.

## **I. Background**

2. SERI sells electric power produced by the Grand Gulf nuclear unit (Grand Gulf) to four Entergy Operating Companies<sup>4</sup> pursuant to their Unit Power Sales Agreement (UPSA). In the complaint in Docket No. EL18-142-000, the Louisiana Commission contended that the return on equity (ROE) in the formula rate in the UPSA was unjust and unreasonable. The Louisiana Commission also asserted that SERI's capital structure and the depreciation rates were unjust and unreasonable. On August 24, 2018, the Commission granted the complaint with respect to the ROE element and established hearing and settlement judge procedures.<sup>5</sup> However, the Commission denied the complaint with respect to the allegations regarding capital structure, and dismissed the complaint with respect to the depreciation rates.

3. In the Docket No. EL18-142-000 complaint, the Louisiana Commission argued that SERI's capital structure is "unusually rich in equity," with an equity ratio of 64.9 percent, and that Entergy had pushed up SERI's equity ratio to cross-subsidize more highly-leveraged activities.<sup>6</sup> The Louisiana Commission further argued that, under existing agreements, SERI had transferred almost all of its risk to the four Entergy Operating Companies that purchase the Grand Gulf facility's output, but that SERI has an equity far greater than the composite equity ratio of its customers.<sup>7</sup> The Louisiana Commission also contended that SERI has no need for an equity ratio that exceeds 49 percent, and that the equity ratio should be adjusted to a more historical norm of approximately 35 to 40 percent. The Louisiana Commission argued that the Commission

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<sup>4</sup> The four Entergy Operating Companies purchasing the Grand Gulf output are Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Louisiana, Entergy New Orleans, LLC (Entergy New Orleans), and Entergy Mississippi, Inc. (Entergy Mississippi) (jointly, customer Entergy Operating Companies). The fifth Entergy Operating Company, Entergy Texas, Inc. (Entergy Texas), does not purchase Grand Gulf output from SERI.

<sup>5</sup> *La. Pub. Serv. Comm'n v. Sys. Energy Resources, Inc.*, 164 FERC ¶ 61,134 (2018) (August 24 Order).

<sup>6</sup> *Id.* P 7 (citing Louisiana Commission Apr. 27, 2018 Complaint at 18 (Docket No. EL18-142-000)).

<sup>7</sup> *Id.*

should adjust SERI's capital structure to a "more normal and reasonable level" that reflects SERI's allegedly low risk.<sup>8</sup>

4. In denying the Docket No. EL18-142-000 complaint's allegations on capital structure, the Commission found that the Louisiana Commission had not demonstrated that SERI's capital structure is not just and reasonable and that the Louisiana Commission had cited no precedent for capping, for ratemaking purposes, the level of common equity in capital structures for individual utilities. The Commission explained that, in approving the capital structure to be used for ratemaking purposes, it uses an operating company's actual capital structure if the operating company: (1) issues its own debt without guarantees; (2) has its own bond rating; and (3) has a capital structure within the range of capital structures approved by the Commission.<sup>9</sup> The Commission stated that if the operating company meets these requirements, then the Commission will find that the operating company has demonstrated a separation of financial risks between the operating company and the parent company.<sup>10</sup> The Commission concluded that the Louisiana Commission had not presented any evidence that SERI does not meet the requirements of the Commission's three-part test, failure of which would call into question the justness and reasonableness of using SERI's actual capital structure for ratemaking purposes.<sup>11</sup>

5. On September 24, 2018, the Louisiana Commission filed a request for rehearing of the August 24 Order in light of the contemporaneously filed Complaint concerning capital structure in this proceeding.<sup>12</sup> In its request, the Louisiana Commission states it "does not contend that the [August 24 Order] was erroneous" and that it "concedes that [it] did not apply the three-part test or provide allegations and evidence showing that the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* P 32 (citing *Ass'n of Bus. Advocating Tariff Equity Coalition v. Midcontinent Indep. Sys. Operator, Inc.* 156 FERC ¶ 61,060, at P 29 (2016)).

<sup>10</sup> *Id.* (citing *Transcon. Gas Pipe Line Corp.*, Opinion No. 414, 80 FERC ¶ 61,157, at 61,664 (1997) (quoting *Ky. W. Va. Gas Co.*, 2 FERC ¶ 61,139, at 61,325 (1978) ("In our opinion a utility should be regulated on the basis of its being an independent entity; that is, a utility should be considered as nearly as possible on its own merits and not on those of its affiliates."))).

<sup>11</sup> *Id.* P 34.

<sup>12</sup> SERI filed a request for rehearing of the August 24 Order's actions with respect to ROE.

test is inapplicable in the [first] complaint [in Docket No. EL18-142-000].”<sup>13</sup> Instead, the Louisiana Commission seeks reconsideration of the August 24 Order’s dismissal of the first complaint as it pertains to capital structure “based in the *prima facie* showing in the . . . [instant] Complaint [in Docket No. EL18-204-000] that SERI fails the three-part test and that its equity ratio is excessive.”<sup>14</sup> The Louisiana Commission also requests that, if the Commission decides to dismiss the instant Complaint, “the Commission declare the ruling final even though it will be the first ruling on the . . . Complaint.”<sup>15</sup> The Louisiana Commission states that a declaration of finality would permit prompt judicial review.

## II. Complaint

6. In the Complaint, the Louisiana Commission argues that SERI does not meet the requirements of the Commission’s three-part test for determining whether to use an operating company’s actual capital structure. First, the Louisiana Commission states that SERI does not issue its own debt without guarantees. The Louisiana Commission states that SERI’s debt is guaranteed by Entergy and by the customer Entergy Operating Companies under separate agreements. The Louisiana Commission cites Entergy’s 2017 Form 10-K report to the U.S. Securities and Exchange Commission (SEC) to argue that Entergy has entered into a Capital Funds Agreement whereby Entergy agrees to supply SERI with sufficient capital to maintain SERI’s equity capital at an amount equal to a minimum of 35 percent of SERI’s total capitalization to permit the continued commercial operation of Grand Gulf. The Louisiana Commission quotes from the Form 10-K report to show that Entergy has supplemented the Capital Funds Agreement to provide that debt incurred by SERI for the financing of Grand Gulf may be secured by SERI’s rights under the Capital Funds Agreement on a pro rata basis and to show that Entergy has agreed to make cash capital contributions directly to SERI to enable SERI to make payments related to its Grand Gulf-related debts. In the event of default, Entergy will make the payments directly to the holders of the debt.<sup>16</sup>

7. The Louisiana Commission argues that SERI’s debt is also guaranteed through an “Availability Agreement” which obligates the customer Entergy Operating Companies to pay all of SERI’s costs in specified percentages. The Louisiana Commission again quotes from the Form 10-K report to show that the monthly payments of the customer

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<sup>13</sup> Louisiana Commission Sept. 24, 2018 Request for Rehearing, Docket No. EL18-142-001, at 3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 6.

<sup>16</sup> Complaint at 7-8.

Entergy Operating Companies to SERI for Grand Gulf energy and capacity would at least equal SERI's total operating expenses for Grand Gulf and interest charges. The Louisiana Commission quotes language in the Form 10-K report which states that SERI has assigned its right to payments and advances from the customer Entergy Operating Companies as security for its one outstanding series of first mortgage bonds and that the assignment agreements relating to the Availability Agreement provide that the customer Entergy Operating Companies will make payments directly to SERI. The Louisiana Commission also states that the UPSA requires the customer Entergy Operating Companies to pay all the costs of SERI regardless of whether and how much output they receive.<sup>17</sup>

8. The Louisiana Commission also argues that SERI has no independence from its parent with respect to financing “or anything else.”<sup>18</sup> It states that each of SERI's corporate officers is an executive officer of Entergy, and that SERI pays none of its officers. The Louisiana Commission states that SERI is the only company in the Entergy system with zero employees, and it thus cannot be viewed as determining its own financing independent of its parent. The Louisiana Commission states that SERI is a shell corporation created to own Grand Gulf, which other Entergy companies operate.<sup>19</sup>

9. The Louisiana Commission states that the third requirement in the Commission's three-part test – that the utility's capital structure is within the range of capital structures approved by the Commission – was adopted in an order involving Transcontinental Gas Pipe Line Corporation.<sup>20</sup> The Louisiana Commission argues that in that order the Commission moved from a focus on a comparison of a pipeline's capital structure to capital structures in a proxy group to a focus on capital structures approved by the Commission. The Louisiana Commission argues that, in that proceeding, the Commission made clear that the approved capital structures would have to be those of other pipelines.<sup>21</sup> For these reasons, the Louisiana Commission argues that SERI's focus on pipeline cases in its motion to dismiss the Louisiana Commission's complaint in Docket No. EL18-142-000 is wrong because natural gas pipelines have always been viewed as different in risk from a traditional electric utility. Thus, the Louisiana

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<sup>17</sup> *Id.* at 9-11.

<sup>18</sup> *Id.* at 12.

<sup>19</sup> *Id.* at 11-12.

<sup>20</sup> *Id.* at 12 (citing *Transcon. Gas Pipe Line Corp.*, Opinion No. 414-A, 84 FERC ¶ 61,084 (1998)).

<sup>21</sup> *Id.* (citing Opinion No. 414-A, 84 FERC ¶ 61,084 at 61,419).

Commission argues that to determine the appropriate capital structure for ratemaking, the Commission must compare SERI's capital structure to those of comparable firms. It argues that, in SERI's case, the appropriate comparison must be to extremely low risk electric utilities that engage in electricity production and that have guarantees of cost collection from affiliates and the parent. The Louisiana Commission states that the Commission has "never approved a capital structure anywhere close to 66 percent for a utility like SERI."<sup>22</sup>

10. The Louisiana Commission also asserts that, to account for the difference between the capital structures of SERI and its parent, the Commission would have to reduce SERI's ROE by hundreds of basis points after setting it to a just and reasonable level for comparable utilities. The Louisiana Commission argues that risk factors and market conditions unrelated to capital structure call for reducing SERI's ROE to 7.08 percent. The Louisiana Commission calculates SERI's ROE at 10.84 percent. The Louisiana Commission argues that the Entergy consolidated capital structure should be used for ratemaking for SERI and that SERI's equity ratio should be reduced to 35.8 percent.<sup>23</sup>

11. The Louisiana Commission argues that SERI has transferred almost all of its risk to the customer Entergy Operating Companies but that SERI's capital structure has an equity ratio far greater than the composite equity ratio of the customer Entergy Operating Companies. The Louisiana Commission cites the testimony of its witness, Mr. Sisung, to argue that the average equity ratio of electric utilities in the United States with credit ratings similar to SERI is 48.11 percent in 2018. The Louisiana Commission states that SERI is a utility with extremely low risk compared to the average U.S. electric utility and that SERI does not need an equity ratio higher than the average of other utilities having substantially greater risk than SERI. For these reasons, the Louisiana Commission argues that SERI has an obligation to maintain a capital structure that is reasonable in cost to consumers but that it has not done so. The Louisiana Commission further argues that SERI's equity ratio should be set at Entergy's equity ratio, 35.8 percent, which would be consistent with the Commission's three-part test. The Louisiana Commission adds that in any case, SERI's equity ratio should be no higher than 49 percent, the equity ratio of SERI combined with the customer Entergy Operating Companies.<sup>24</sup>

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<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.* at 15-17.

<sup>24</sup> *Id.* at 17-19.

### III. Notice and Responsive Pleadings

12. Notice of the Complaint was published in the *Federal Register*, 83 Fed. Reg. 49,378 (2018), with answers, interventions, and comments due on or before October 15, 2018. The Arkansas Public Service Commission (Arkansas Commission), the Council of the City of New Orleans, Louisiana (New Orleans Council), and the Mississippi Public Service Commission and the Mississippi Public Utilities Staff filed notices of intervention. On October 15, 2018, SERI filed a motion to dismiss and an answer to the Complaint. On October 30, 2018, the Louisiana Commission filed an answer to SERI's answer. Also on October 30, 2018, the Louisiana Commission filed a motion to substitute an attachment to the Complaint.<sup>25</sup> On November 13, 2018, SERI filed a response to the Louisiana Commission's answer. On December 4, 2018, the Louisiana Commission filed a reply to SERI.

#### A. SERI's Motion to Dismiss and Answer

13. SERI argues that the Complaint is barred by the doctrines of *res judicata* and collateral estoppel, stating that the Commission has already determined the merits of the Louisiana Commission's allegations on the issues and that everything in the Complaint has already been raised or could have been raised in Docket No. EL18-142-000. SERI states that the Louisiana Commission can point to no changed circumstances from when the Commission dismissed that complaint.<sup>26</sup> SERI states that, according to the Commission's definition of *res judicata*, a judgment on the merits is conclusive in a subsequent proceeding when that proceeding is on the same cause of action and is between the same parties as in the prior proceeding.<sup>27</sup> SERI states that the doctrine of collateral estoppel prohibits a party from bringing a different claim on an issue that has

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<sup>25</sup> In the motion, the Louisiana Commission states that it inadvertently attached the wrong Attachment A to the Complaint. The Louisiana Commission states that Attachment A to the Complaint should have been the complaint in Docket No. EL18-142-000 but that it instead submitted a complaint filed in Docket No. EL18-152-000. Thus, the Louisiana Commission submits as Attachment A the complaint in Docket No. EL18-142-000 and requests that the attached complaint be substituted as Attachment A to the Complaint.

<sup>26</sup> SERI Motion to Dismiss and Answer at 6.

<sup>27</sup> *Id.* at 7 (quoting *Greensboro Lumber Co. v. Rayle Elec. Membership Corp.*, 40 FERC ¶ 61,283, at 61,918 (1987)).

already been decided provided the issue was actually litigated and determined and the determination was essential to the judgment.<sup>28</sup>

14. SERI argues that the only new arguments and evidence presented by the Louisiana Commission in the Complaint are those about the Capital Funds Agreement and the citations to Entergy's Form 10-K report. SERI argues that these new points should have been raised and cited previously, so that preclusion now applies.<sup>29</sup> SERI argues that the Louisiana Commission is unable to cite to any new or changed circumstances, relying extensively on the same data and many of the same arguments that it did in the complaint in Docket No. EL18-142-000.

15. SERI also argues that the Complaint is meritless and should be dismissed. SERI states that the Louisiana Commission fails to prove that SERI does not meet the Commission's three-part test. SERI argues that the Louisiana Commission has not proven that SERI does not issue its own debt without guarantees. SERI states that the Capital Funds Agreement provides only for Entergy to provide capital to SERI and does not mean that SERI's first mortgage bonds are guaranteed. SERI states that, if SERI were to default on its debt, then its right to payments would go to its debtors and not to SERI but that does not mean that the debt issued by SERI is guaranteed by Entergy. SERI argues that the Availability Agreement also does not mean that the customer Entergy Operating Companies guarantee SERI's debt, but only that SERI has used different streams of payment as collateral on debt that it has issued.<sup>30</sup>

16. SERI argues that the Louisiana Commission fails to prove that SERI's capital structure is outside the range of capital structures approved by the Commission. SERI states that there is no support in the law for asserting that the Commission can only compare SERI to electric utilities engaged in the production of electricity with extremely low risk and guarantees of collection from the affiliates and parent. SERI asserts that the Commission has accepted capital structures with equity ratios far above SERI's.

17. SERI also argues that the Louisiana Commission is attempting to bypass the requirements of the FPA by joining the Complaint with its rehearing request of Docket No. EL18-142-000 in order to maintain the refund effective date in that earlier proceeding. SERI states that the Louisiana Commission did not allege in the rehearing

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<sup>28</sup> *Id.* at 7-8 (citing *Modesto Irrigation Dist.*, 125 FERC ¶ 61,174, at P 10 n.16).

<sup>29</sup> *Id.* at 8-9.

<sup>30</sup> *Id.* at 12-14.

request that the August 24 Order was erroneous; thus, the rehearing request should be dismissed.

18. Finally, SERI argues that the Louisiana Commission's intention is to have the Commission "declare" that a dismissal of the Complaint would be a final order in order to permit prompt judicial review without having to first seek rehearing. SERI argues that the Commission should reject this attempt to "deprive the Commission of its statutory right to consider arguments raised on rehearing before the matters are raised on appeal."<sup>31</sup>

**B. Louisiana Commission Answer**

19. The Louisiana Commission states that SERI's reliance on the doctrines of *res judicata* and collateral estoppel is misplaced as the Commission did not rule on the adequacy of the allegations in the Complaint and did not decide the merits of SERI's compliance with the Commission's three-part test. The Louisiana Commission states that the Commission's dismissal of the capital structure portion of the complaint in Docket No. EL18-142-000 was concerned with the adequacy of the allegations to state a claim and not the merits of a well-stated claim. The Louisiana Commission also states that it is standard practice to allow a litigant an opportunity to amend a claim.<sup>32</sup>

20. The Louisiana Commission argues that SERI fails to show that SERI meets the Commission's three-part test or that its capital structure is just and reasonable. The Louisiana Commission states that it provided evidence that SERI's debt is guaranteed, and that SERI has no real answer to this evidence. The Louisiana Commission argues that through the Capital Funds Agreement and the Availability Agreement, Entergy and the customer Entergy Operating Companies have agreed to pay SERI's debt in the event of default.<sup>33</sup>

21. The Louisiana Commission states that the Commission's three-part test is designed to determine whether or not the subsidiary is independent of the parent in its financing activities and that the Commission tests independence to ensure that the parent cannot manipulate the subsidiary's capital structure to the detriment of ratepayers. The Louisiana Commission argues that Entergy forces captive customers to cross-subsidize

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<sup>31</sup> *Id.* at 16-18.

<sup>32</sup> Louisiana Commission Answer at 4-8.

<sup>33</sup> *Id.* at 9-13.

Entergy's unregulated operations and that the Commission is obliged to correct what the Louisiana Commission describes as abusive activity.<sup>34</sup>

22. The Louisiana Commission repeats its argument that SERI's capital structure is not within the range the Commission has approved for electric utilities. The Louisiana Commission notes that SERI only cites pipeline cases in support of its argument that the Commission has approved higher equity ratios. The Louisiana Commission states that the Commission has long distinguished electric utilities from pipelines in rate of return cases and that the Commission has never approved an equity ratio as high as SERI's in an electric case.<sup>35</sup>

### C. SERI Response

23. SERI states that the Louisiana Commission provides no valid argument that the doctrines of *res judicata* and collateral estoppel do not bar the Complaint. SERI repeats its argument that every point in the Complaint either was or could have been pled in the original complaint. SERI argues that the order on the prior complaint was an order on the merits.<sup>36</sup> SERI states that the Louisiana Commission is mistaken in claiming that it did not have an opportunity to fully and fairly litigate its claims in Docket No. EL18-142-000. SERI states that the Louisiana Commission submitted hundreds of pages of legal argument, testimony, and other exhibits in support of its claim; that the Louisiana Commission was represented by outside counsel; and that the Louisiana Commission had the right to present its arguments to the Commission again, on rehearing, and possibly to a U.S. Court of Appeals.<sup>37</sup>

24. SERI argues that the Louisiana Commission ignores much of the relevant precedent discussed in SERI's Motion to Dismiss that demonstrates that the Louisiana Commission's claim is foreclosed. SERI states that the Louisiana Commission ignores the long line of Commission precedent holding that a preclusion doctrine would not apply only if significant changes in circumstances have occurred. SERI repeats its argument

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<sup>34</sup> *Id.* at 15.

<sup>35</sup> *Id.* at 16-17.

<sup>36</sup> SERI Response at 2-3.

<sup>37</sup> *Id.* at 4.

that there have been no changed circumstances that would allow for the Complaint to proceed.<sup>38</sup>

**D. Louisiana Commission Reply**

25. The Louisiana Commission argues that SERI misrepresents the law on *res judicata*.<sup>39</sup> The Louisiana Commission also argues that the Commission should allow the Complaint to proceed because it supplies the allegations and evidence that the Commission found lacking in the August 24 Order and because the August 24 Order “appears to have adopted a new across-the-board test and pleading requirement for capital structures.”<sup>40</sup> It asks the Commission to grant the Complaint or set it for hearing and reject the motion to dismiss.<sup>41</sup>

**IV. Discussion**

**A. Procedural Matters**

26. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the notices of intervention serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept the Louisiana Commission’s answer, SERI’s response, and the Louisiana Commission’s reply because they have provided information that assisted us in our decision-making process.

**B. Substantive Matters**

27. First, regarding arguments about the Louisiana Commission’s rehearing request, we note that the Commission will address the requests for rehearing of the August 24 Order in a separate order. Additionally, we find that the doctrines of *res judicata* and collateral estoppel do not bar the Complaint. The Commission has stated that these doctrines only apply “where the issues presented have been fully litigated and decided on

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<sup>38</sup> *Id.* at 5.

<sup>39</sup> Louisiana Commission Reply at 2.

<sup>40</sup> *Id.* at 4-5.

<sup>41</sup> *Id.* at 7.

the merits, and no new circumstances would justify relitigation.”<sup>42</sup> The Commission has also stated that “[c]ritical to the application of these doctrines is that there was, in fact, an ‘original judgment on the merits’ so as to foreclose relitigation of a ‘question decided.’”<sup>43</sup> This scenario is not present here. In fact, in the August 24 Order, the Commission stated only that the “Louisiana Commission has not presented any evidence that SERI does not meet the requirements of the Commission’s three-part test, failure of which would call into question the justness and reasonableness of using its capital structure for ratemaking purposes” and that the Louisiana Commission “does not argue that the capital structure employed by SERI in its formula rate is inaccurate, unreflective of its actual capital structure, or inconsistent with capital structures that have been approved by the Commission for ratemaking purposes.”<sup>44</sup> We find that these findings do not constitute an original judgment. Rather, the language in the August 24 Order indicated that the allegations in the complaint in Docket No. EL18-142-000 concerning capital structure did not establish a *prima facie* case to justify setting that issue for hearing. Thus, there was no hearing litigating SERI’s capital structure in Docket No. EL18-142-000, and the August 24 Order cannot be considered an “on the merits” judgment on SERI’s capital structure. For this reason, we deny the motion to dismiss and find that the doctrines of *res judicata* and collateral estoppel do not apply here.

28. We find that the Complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement procedures ordered below. Accordingly, we set the Complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA. We will leave to the discretion of the Chief Administrative Law Judge whether it is appropriate to

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<sup>42</sup> See *La. Pub. Serv. Comm’n v. Entergy Corp.*, 149 FERC ¶ 61,245, at P 25 (2014) (quoting *Entergy Servs, Inc.*, Opinion No. 514-A, 142 FERC ¶ 61,013, at P 26 (2013)).

<sup>43</sup> See *Cities of Anaheim, Azusa, Banning, Colton, Pasadena, & Riverside, Ca. v. Trans Bay Cable, L.L.C.*, 147 FERC ¶ 61,189, at P 12 (2014) (finding that a prior Commission decision does not “constitute[s] a judgment on the merits, i.e., the Commission made no findings as to the justness and reasonableness of the current [transmission revenue requirement] that would preclude [the complainants] from filing a section 206 complaint . . . regarding that issue”).

<sup>44</sup> August 24 Order, 164 FERC ¶ 61,134 at PP 34-35.

consolidate this proceeding and the complaint proceeding in Docket No. EL18-142-000 for purposes of settlement, hearing and decision.<sup>45</sup>

29. While we are setting the Complaint 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.<sup>46</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.<sup>47</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order 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.

30. 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. Section 206(b) permits the Commission to order refunds for a 15-month refund period following the refund effective date. Consistent with our general policy of providing maximum protection to customers,<sup>48</sup> we will set the refund effective date at the earliest date possible, i.e., September 24, 2018.

31. 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

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<sup>45</sup> See 18 C.F.R. § 385.503(a) (2018); see also *Entergy Servs., Inc.*, 153 FERC ¶ 61,031, at P 25 (2015).

<sup>46</sup> 18 C.F.R. § 385.603 (2018).

<sup>47</sup> 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 days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

<sup>48</sup> 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, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

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 January 31, 2020. Thus, we estimate that, absent settlement, we would be able to issue our decision within approximately eight months of the filing of briefs on and opposing exceptions, or by November 30, 2020.

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 section 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 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 (2018), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 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 the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(C) Within 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 the 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 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 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 pursuant to section 206(b) of the FPA is September 24, 2018, as discussed in the body of this order.

(F) The Chief Administrative Law Judge is authorized to consider whether to consolidate the Complaint with Docket No. EL18-142-000 for purposes of settlement, hearing, and decision, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.