

132 FERC ¶ 61,133  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Louisiana Public Service Commission  
and the Council of the City of New Orleans

Docket No. EL00-66-013

v.

Entergy Corporation

Louisiana Public Service Commission

Docket No. EL95-33-009

v.

Entergy Services, Inc.

AMENDED ORDER ON REMAND

(Issued August 13, 2010)

1. This case, which involves the calculation of charges for the Entergy system,<sup>1</sup> is on remand from the United States Court of Appeals for the District of Columbia Circuit.<sup>2</sup> In its earlier orders, the Commission held that, while Entergy must exclude interruptible load from its computation of peak load responsibility for its Operating Companies, the new allocation method could be phased in over twelve months. The Commission further held that, while the company's cost allocation resulted in unjust and unreasonable rates, refunds were precluded here by section 206(c) of the Federal Power Act (FPA),

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<sup>1</sup> The Entergy system consists of Entergy Services, Inc. (Entergy), and its various public utility operating companies: Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas; and Entergy Gulf States, Inc. (Operating Companies).

<sup>2</sup> *Louisiana Public Service Commission v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (*Louisiana Public Service Commission*).

16 U.S.C. § 824e(c) (2006).<sup>3</sup> On appeal, the court held that the Commission had erred by allowing the new allocation method to be phased in over twelve months, rather than being fully implemented immediately.<sup>4</sup> The court also held that the Commission had failed to sufficiently explain why FPA section 206(c) barred refunds in this case, and remanded that issue “for a more considered determination.”<sup>5</sup>

2. The Commission subsequently issued orders in response to the court’s remand, determining that refunds were both legal and appropriate.<sup>6</sup> These orders were in turn appealed to the D.C. Circuit by the Arkansas Public Service Commission (Arkansas) and Entergy.<sup>7</sup> However, on June 24, 2009, in response to a motion by the Commission, the court remanded the refund issue so that the agency could address it more fully. The Commission then issued an order asking the parties to file further briefs and evidentiary submissions on this issue.<sup>8</sup>

3. As discussed further below, the Commission finds in this order that, given the D.C. Circuit’s decision and the specific circumstances presented in this case, FPA section 206(c) does not bar refunds and refunds would be appropriate.

## **BACKGROUND**

4. This case originally arose from a complaint filed with the Commission by the Louisiana Public Service Commission (Louisiana) in 1995, alleging that the formula for peak load responsibility used by Entergy was unjust and unreasonable because it allocated capacity costs to its Operating Companies based upon peak demand for both firm and interruptible load, to the detriment of Louisiana ratepayers. The Commission

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<sup>3</sup> *Louisiana Public Service Commission v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh’g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005) (Opinion No. 468).

<sup>4</sup> 482 F.3d at 518.

<sup>5</sup> *Id.* at 520.

<sup>6</sup> *Louisiana Public Service Commission v. Entergy Corp.*, 120 FERC ¶ 61,241 (2007) (2007 Remand Order), *reh’g denied*, 124 FERC ¶ 61,275 (2008).

<sup>7</sup> *Arkansas Public Service Commission, et al. v. FERC*, Nos. 08-1330, *et al.* (D.C. Cir. October 14, 2008).

<sup>8</sup> *Louisiana Public Service Commission v. Entergy Corp.*, 129 FERC ¶ 61,237 (2009) (Remand Order).

initially upheld Entergy's cost allocation method.<sup>9</sup> On appeal, however, the D.C. Circuit reversed, holding that the Commission had not adequately explained its decision.<sup>10</sup>

5. On remand, the Commission instituted a proceeding under FPA section 206 and established May 14, 1995 as the refund effective date.<sup>11</sup> Subsequently, in Opinion No. 468, the Commission held that Entergy's inclusion of interruptible load when calculating each Operating Company's load responsibility was unjust and unreasonable. However, the Commission went on to hold that, consistent with the System Agreement, this should be accomplished over a twelve-month period.<sup>12</sup> In addition, the Commission concluded that it was constrained from ordering refunds by FPA section 206(c).<sup>13</sup>

6. As explained above, 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, could not delay implementation of that decision over a 12-month phase-in period.<sup>14</sup> In the Commission's earlier remand orders, the Commission complied with this aspect of the court's mandate. Thus, the only remaining matter involves refunds. The court rejected the Commission's decision that FPA section 206(c) barred the agency from granting refunds in this case, based on the operation of the filed rate doctrine.<sup>15</sup> The court also found that the Commission did not exercise its equitable discretion to deny refunds, as the Commission's order did not expressly make such a finding.<sup>16</sup> In this order, the Commission supplements its earlier orders and further addresses these two issues.

7. In response to the Remand Order, the Arkansas Public Service Commission and the Mississippi Public Service Commission (collectively Arkansas/Mississippi) jointly

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<sup>9</sup> *Louisiana Public Service Commission v. Entergy Services, Inc.*, 76 FERC ¶ 61,168 (1996), *reh'g denied*, 80 FERC ¶ 61,282 (1997).

<sup>10</sup> *Louisiana Public Service Commission v. FERC*, 184 F.3d 892 (D.C. Cir. 1999).

<sup>11</sup> *Louisiana Public Service Commission v. Entergy Corp.*, 93 FERC ¶ 61,013 (2000).

<sup>12</sup> Opinion No. 468, 106 FERC ¶ 61,228 at P 60-77.

<sup>13</sup> *Id.* P 82-89.

<sup>14</sup> 482 F.3d at 518.

<sup>15</sup> *Id.* at 520.

<sup>16</sup> *Id.*

filed a brief opposing refunds, as did Entergy. Louisiana filed a brief and evidentiary submission supporting refunds. Reply briefs were filed by the same parties. Additionally, Louisiana filed a Motion for Leave to File Response and Responsive Evidentiary Submission to Address New Evidence Attached to Reply Brief of Entergy Services, Inc., to which Entergy filed an opposition, and, alternatively, an answer.

8. In addition, Union Electric Company d/b/a AmerenUE (AmerenUE) filed a motion to intervene out-of-time. AmerenUE ties its motion to its involvement in another proceeding, in Docket No. EL01-88-000. AmerenUE also states that (1) it has a substantial interest in the outcome of this proceeding; (2) its participation will not unduly prejudice other parties; (3) it agrees to accept the record of the proceeding as it currently stands; and (4) it does not seek to raise any new arguments or submit any new evidence at this time.

## **DISCUSSION**

### **A. Procedural Matters**

9. We deny Louisiana's motion for leave to file a response, as the proffered material is unnecessary for us to make our decision. Therefore, we also deny Entergy's motion to file an answer to the response as moot.

10. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.<sup>17</sup> AmerenUE has not met this higher burden of justifying its very late intervention after multiple Commission orders and also two separate appeals to the D.C. Circuit and, accordingly, we deny its motion to intervene. As we stated in *Florida Power & Light Company*, 99 FERC ¶ 61,318, at 62,358 (2002), a potential party must take appropriate steps to protect its interests in a timely manner, and taking a "wait and see" approach falls short. AmerenUE, by waiting until this late date to intervene, failed to protect its interests in a timely manner. The Commission, moreover, established the paper hearing to add to the record. By its own admission, AmerenUE's intervention adds nothing to the record.<sup>18</sup> It appears to be

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<sup>17</sup> See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

<sup>18</sup> AmerenUE argues that allowing its intervention will aid the Commission in its decision-making process. At the same time, however, it states that it will accept the record as it stands and it "will not be presenting any new arguments or submit any new evidence at this time." AmerenUE Motion at 12. Given that AmerenUE does not intend

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positioning itself to file a request for rehearing if it prefers a different outcome, and if such is the case, it is yet another reason for denying AmerenUE's unusually late intervention.

**B. The Refund Issue**

**1. Parties' Arguments**

11. Arkansas/Mississippi argue that enabling Louisiana to receive a refund would require adding a surcharge to Commission-jurisdictional wholesale rates, which would amount to impermissible retroactive ratemaking.<sup>19</sup> The parties further assert that Arkansas law, paralleling federal law, does not allow for recovery of past costs through future surcharges.<sup>20</sup>

12. Arkansas/Mississippi focus on the language of FPA section 206, under which "retroactive refunds are allowed only for a 15-month period and only if specific conditions are met."<sup>21</sup> In this regard, they cite *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009), which states that "[section] 206(b) authorizes only retroactive refunds (rate decreases), not retroactive rate increases."<sup>22</sup> Accordingly, they argue, section 206(b) does not permit a refund in this situation, as it would violate the filed-rate doctrine. In their view, even before section 206(c) was adopted, it was "settled law" that the FPA did not allow retroactive rate increases to be paid by some customers to offset the refunds issued to others.<sup>23</sup>

13. In any event, Arkansas/Mississippi argue that section 206(c) prohibits issuing refunds to affiliated entities when doing so requires other affiliated entities of the same holding company to pay increases to offset them.<sup>24</sup> Essentially, they argue that the

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to present any new arguments or evidence, we fail to see how allowing this intervention will aid the Commission in its decision-making.

<sup>19</sup> Arkansas/Mississippi Initial Brief at 4-5.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 7.

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

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.* at 12-13.

statute creates a presumption that refunds will not be issued absent a showing that those operating companies liable for a surcharge could recover the increased cost through their retail rates. In their view, because the record indicates that the relevant states would not allow the Operating Companies to surcharge their ratepayers for retroactive refunds, the Commission cannot make the requisite showing to permit refunds.<sup>25</sup>

Arkansas/Mississippi maintain that Supreme Court cases requiring states to flow through FERC-approved wholesale costs in retail rates are irrelevant in view of Congress subsequently enacting section 206(c).<sup>26</sup>

14. Finally, Arkansas/Mississippi argue that there are no equitable grounds for authorizing refunds, even if legally permissible, because of the Commission's policy not to require refunds in rate design cases.<sup>27</sup> These parties further contend that refunds would be inequitable because a substantial period of time has elapsed since the overcharges, so that the likelihood is that today's customers, who would be the ones who would pay the refunds or reap their benefits, would not be the same customers served by Entergy in 1995-96.<sup>28</sup>

15. Entergy also argues that FPA section 206(c) prohibits the Commission from ordering refunds here. Before ordering refunds, Entergy asserts, "the Commission must make an express finding that the Operating Companies making the refunds will be able to fully recover the cost of those refunds through surcharges added to wholesale and retail rates,"<sup>29</sup> so that the holding company is kept whole.<sup>30</sup> Entergy further maintains that the Commission cannot order refunds unless it rejects "the possibility that practical barriers to full recovery of the refunds through surcharges might arise, even if federal preemption and the filed rate doctrine are found to apply."<sup>31</sup> Therefore, to order refunds here,

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<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.* at 14 (citing *Nantahala P & L Co. v. Thornberg*, 476 U.S. 953 (1986) (*Nantahala*); *Mississippi P & L Co. v. Moore*, 487 U.S. 354 (1988) (*Mississippi Power*)).

<sup>27</sup> *Id.* at 19 (citing *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983); *Union Electric Co.*, 58 FERC ¶ 61,247, at 61,818 (1990); *Union Electric Co.*, 64 FERC ¶ 61,355 at 63,468 (1993); *Portland General Electric Co.*, 106 FERC ¶ 61,193, at P 5 & n.4 (2004)).

<sup>28</sup> *Id.*

<sup>29</sup> Entergy Brief at 7.

<sup>30</sup> *Id.* at 9.

Entergy believes that the Commission must “must expressly find that state regulators” will allow Entergy to fully recover its costs.<sup>32</sup>

16. Alternatively, Entergy argues that, even if the Commission finds that section 206(c) authorizes refunds in this proceeding, the Commission should exercise its discretion to deny them.<sup>33</sup> In Entergy’s view, a refund order will not require it to “disgorge excess revenues,” but rather would effectively require a payment by one group of customers to another.<sup>34</sup> Entergy goes on to assert that, because it received no net gain, refunds are inappropriate.<sup>35</sup> Further militating against refunds, in Entergy’s view, is its good faith in interpreting the System Agreement and the administrative burdens of implementing refunds.<sup>36</sup>

17. By contrast, Louisiana argues that refunds are both legal and appropriate here. In Louisiana’s view, the D.C. Circuit’s opinion in *Louisiana Public Service Commission* forecloses arguments that the filed rate doctrine is a barrier to refunds or that the Supremacy Clause does not guarantee a pass-through of costs incurred to retail rates.<sup>37</sup> Louisiana also argues that, as *City of Anaheim* involved a filing by a seller under a typical wholesale contract, it has no application here.<sup>38</sup>

18. Louisiana further maintains that alleged practical barriers to Entergy’s recovery of Commission-ordered cost reallocations should not prevent refunds. In any event, Louisiana observes, the fact that Entergy has already collected both refunds and surcharges in this case demonstrates that no such practical barriers exist.<sup>39</sup>

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<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.* at 13.

<sup>33</sup> *Id.* at 16.

<sup>34</sup> *Id.* at 20.

<sup>35</sup> *Id.* at 21 (citing *Southern Co. Servs., Inc.*, 64 FERC ¶ 61,033, at 61,332 (1993)).

<sup>36</sup> Entergy Initial Brief at 23.

<sup>37</sup> Louisiana Initial Brief at 12-15.

<sup>38</sup> *Id.* at 26-28.

<sup>39</sup> *Id.* at 20.

19. Finally, Louisiana argues strenuously that the equities favor providing refunds to Louisiana consumers who were subject to an unjust and unreasonable rate for nearly a decade after the filing of the complaint.<sup>40</sup>

**2. Commission Determination**

**a. Section 206(c) Authority**

20. In determining the scope of the Commission's refund authority under section 206(c), our first question is, naturally, "[w]hat says the statute?"<sup>41</sup> Section 206(c) states, as relevant here, that, in a section 206 case involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of section 206 "shall not be ordered" to the extent that such refunds would result from a Commission order that "(1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company," but that refunds, in whole or in part, may be ordered by the Commission if it determines that "the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order."

21. On its face, section 206(c) appears to prohibit the Commission from ordering refunds in a case involving two or more utilities of a registered holding company, when such refunds would both result from reallocation of cost responsibility among the utilities of such registered holding company and result in a reduction of overall system revenues due to the inability of one or more of the utilities to recover the refunds from their respective customers.<sup>42</sup> However, the statute alternatively provides that the exemption

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<sup>40</sup> *Id.* at 30.

<sup>41</sup> *Towns of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992).

<sup>42</sup> *See* 482 F.3d at 518-19. The limitation in section 206(c) on the Commission's ordering refunds was itself limited to a circumstance where there were two or more electric utility companies of a "registered holding company" as that term was defined in the Public Utility Holding Company Act of 1935 (PUHCA 1935). 16 U.S.C. § 824e(c) (2006); *see* 15 U.S.C. §§ 79b(a)(7) and (a)(12), 79e (2006). However, the Public Utility Holding Company Act of 1935 was repealed by section 1263 of the Energy Policy Act of 2005, and so there are no longer any "registered holding companies." Energy Policy Act of 2005, Pub. L. No. 109-58, § 1263, 119 Stat. 594, 974 (2005). As a result, section

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does not apply if the Commission can determine that the registered holding company would not experience a reduction in revenues. In that case, the Commission retains its usual discretion under section 206 to decide whether to order refunds.<sup>43</sup>

22. However, the Commission must read section 206(c) in light of the court's decision in *Louisiana Public Service Commission*, which rejected the Commission's explanation that the Commission was barred from ordering refunds in this case. The court made two basic points. First, it held that the Commission had "fail[ed] to explain why the requirements of the filed rate doctrine would not be satisfied with respect to the refunds at issue considering that all parties were on notice as of the filing of Louisiana's complaint in 1995 that Entergy's calculation of peak load responsibility might be held

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206(c) has and over time will have an increasingly limited reach as the Commission works through pending cases that date back to when there were registered holding companies.

<sup>43</sup> Cf. 482 F.3d at 520 (discussing Commission's view in its earlier orders of legislative history); S. Rep. No. 100-491 at 6-7; 1998 U.S.C.C.A.N. at 2688. While Entergy during the relevant time period was a registered holding company, as we noted in Opinion No. 468 we have ordered refunds even then when faced with what we characterized as "the more typical case," i.e., the case of rates that we found to be excessive – notwithstanding the presence of a registered holding company and section 206(c). See Opinion No. 468, 106 FERC ¶ 61,228 at P 84 & n.156, and cases cited therein. In this regard, not every refund made by a utility necessarily means that a sister utility in the same holding company has to make up the difference. Rather, the monies refunded can come from monies that otherwise would be paid out as dividends to shareholders. In fact, this is the typical source of monies refunded by public utilities, especially in the case of those public utilities that are not part of holding companies and thus would have no sister utility, and per the cases cited in Opinion No. 468 even in the case of public utilities that are part of holding companies. See *id.* In this regard, we emphasize that public utilities, such as the Operating Companies, are not guaranteed a profit, but only an opportunity to make a profit. See, e.g., *California Independent System Operator Corp.*, 119 FERC ¶ 61,076, at P 501, *order on reh'g*, 120 FERC ¶ 61,271 (2007); *accord FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-54 (1962) (explaining that the "hazard of not making a profit" rests with the company); *Transwestern Pipeline Co.*, Opinion No. 238-A, 36 FERC ¶ 61,175 at 61,444 (1986) ("Investors in the natural gas industry . . . are by no means guaranteed freedom from risk or competition").

unjust or unreasonable.”<sup>44</sup> Second, it concluded that the Commission had failed to explain “why, under the Supremacy Clause, a rate increase ordered by the Commission may be recovered through retail rates but a refund ordered by the Commission may not be.”<sup>45</sup>

23. Having reexamined the issue, the Commission finds that the court’s reasoning on the filed rate doctrine cannot here be refuted. Arkansas/Mississippi’s argument that refunds here would be retroactive ratemaking is mistaken. Section 206 gives the Commission the specific authority to order refunds prospectively from a set date, the refund effective date, for a fifteen-month period. Pursuant to section 206, the Commission here established May 14, 1995 as the refund effective date, which put the parties on notice that refunds from that date forward were possible.<sup>46</sup> This is distinguishable from a true retroactive ratemaking scenario. Indeed, under Arkansas/Mississippi’s reasoning, the Commission would never be able to order refunds in a section 206 proceeding, which is an erroneous result inconsistent with the express language of section 206 that authorizes refunds.

24. The Commission similarly has identified no way to reasonably distinguish the Supreme Court’s reasoning in *Nantahala* and *Mississippi Power* from the situation presented here. Those cases hold that the Supremacy Clause of the United States

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<sup>44</sup> 482 F.3d at 520. While the Commission, in Opinion No. 468, referenced the legislative history of section 206(c) in support of its argument at that time that it could not make the finding required by section 206(c) before refunds could be ordered, *see* Opinion No. 468, 106 FERC ¶ 61,228 at P 84 & n.157; S. Rep. No. 100-491 at 6-7, the court found this legislative history essentially irrelevant, finding that the filed rate doctrine has been satisfied because “all parties were on notice as of the filing of Louisiana’s complaint in 1995 that Entergy’s calculation of peak load responsibility might be held unjust and unreasonable.” 482 F.3d at 520. The Commission agrees that all parties were on notice, as of the filing of Louisiana’s complaint in 1995, that Entergy’s rates might be found unjust and unreasonable.

<sup>45</sup> *Id.* (citing *Mississippi Power*, 487 U.S. at 369-72).

<sup>46</sup> We note that on November 19, 2007, in Docket No. EL00-66-012, Entergy submitted a refund report that summarized the refunds for the 15-month period of May 14, 1995 through August 13, 1996. Entergy also calculated the amount of refunds due as a result of eliminating the phase-in of the interruptible load for the period April 1, 2004 through March 31, 2005. In its report, Entergy states that the amounts for the period April 1, 2004 through March 31, 2005 have already been included on its Intra-System Bill, and therefore, the refunds have been paid.

Constitution<sup>47</sup> prevents state commissions from trapping Commission-ordered wholesale costs at the retail level. The parties advance no persuasive reason why this same logic does not equally apply to orders directing refunds, and we cannot ascertain one.

25. Nor can we give credence to Arkansas/Mississippi's assertion that Congress intended section 206(c) to not provide for refunds under the circumstances presented in spite of the Supreme Court's interpretation of the Supremacy Clause in *Nantahala* and *Mississippi Power*. The legislative history gives no such indication, and we would not assume that Congress intended to rule on this Constitutional issue *sub silentio*.<sup>48</sup>

26. The Commission also rejects Entergy's argument that the Commission must interpret section 206(c) with reference to "practical problems" at the retail level that might impede Entergy's full recovery of costs.<sup>49</sup> In this regard, Entergy maintains that the retail ratemaking processes in the different states here would not necessarily allow total recovery of "one-time, non-recurring costs," such as the refunds here, "in retail base rates."<sup>50</sup> Such alleged practical problems would not overcome a Constitutional doctrine like the Supremacy Clause.<sup>51</sup> Nor does the legislative history of section 206(c) indicate that Congress had such alleged practical problems in mind when enacting this provision. Rather, the Senate Report makes clear that Congress was solely concerned with a registered holding company absorbing costs that "can result from the operation of the filed rate doctrine at both the wholesale and retail jurisdictional levels and in effect create a 'trapping' of costs."<sup>52</sup> As explained above, however, the filed rate doctrine does not trap costs here. Indeed, not only is Entergy's assertion that such costs might be trapped largely speculative,<sup>53</sup> but the record also indicates that the Operating Companies have already recovered some of the costs in question at the retail level.<sup>54</sup>

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<sup>47</sup> U.S. Constitution, Article VI.

<sup>48</sup> See *supra* note 44 (citing legislative history).

<sup>49</sup> Entergy Reply Brief at 10.

<sup>50</sup> *Id.*

<sup>51</sup> Cf. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, No. 08-861, slip op. at 18 (U.S. June 28, 2010) (fact that a given law or procedure may be, e.g., useful does not save it if it is contrary to the Constitution).

<sup>52</sup> S. Rep. No. 100-491 at 7; 1998 U.S.C.C.A.N. at 2688.

<sup>53</sup> See, e.g., Entergy Reply Brief at 11 (indicating that "it is not clear whether, or how much of" certain costs could be recovered by two operating companies, as the

27. Entergy objects that the Commission cannot make the statutorily-required finding of “full recoverability as a matter of law” merely by invoking federal preemption and notice.<sup>55</sup> This reasoning, Entergy argues, “would mean that the statutorily-required finding is effectively a nullity and could be made as a matter of law in every case where FPA section 206(c) applies.”<sup>56</sup>

28. The Commission is ruling today only on the case before it. In light of the court’s decision in *Louisiana Public Service Commission*, we find that the statute does not bar refunds in this case. This interpretation is consistent with the overall purpose of section 206, mandating the Commission to remedy the effect of unjust and unreasonable rates, including, when permitted, by means of refunds.

29. We also reject the argument that *City of Anaheim* presents a legal barrier to refunds here. In that case, the Commission reviewed a complaint by wholesale generators “that they were under-compensated as a result of the [Commission]-approved rate they were required to charge electricity purchasers.”<sup>57</sup> The Commission issued an order on July 26, 2006, finding the old rate no longer just and reasonable, but did not establish a new rate until February 13, 2007, which it made retroactively effective beginning June 1, 2006.<sup>58</sup> This action, the court concluded, violated section 206(a), which “[o]n its face . . . , prohibits retroactive adjustment of rates.”<sup>59</sup> This finding has no bearing here, where the Commission properly established a refund effective date, and thus properly established a 15-month refund period consistent with FPA section 206(b).

30. The court in *City of Anaheim* also addressed section 206(b), stating that section 206(b) “applies in cases where a complainant is a *purchaser* alleging that the

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companies have deferred filings at the retail level pending the Commission’s decision here).

<sup>54</sup> See *Entergy Louisiana LLC v. Louisiana Public Service Comm’n*, 990 So.2d 716 (La. 2008).

<sup>55</sup> *Id.* at 7.

<sup>56</sup> Entergy Reply Brief at 5.

<sup>57</sup> 558 F.3d at 522.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

rates it paid were too high,”<sup>60</sup> but then holding that “[b]y contrast, this case [i.e., the facts present in *City of Anaheim*] involves a complainant *seller* alleging that the rates it received were too low.”<sup>61</sup> Here, however, Louisiana’s ratepayers were paying excessive amounts because Entergy was improperly including interruptible load in the computation of peak load responsibility, i.e., the instant proceeding involves purchasers complaining that the rates they paid were too high.

**b. Equitable Discretion**

31. Having determined that section 206(c) does not prohibit refunds in this case, we now turn to the general considerations governing refunds under section 206. There is no question that the Commission has a policy of granting full refunds to correct unjust and unreasonable rates.<sup>62</sup> The only issue is whether Arkansas/Mississippi and Entergy have

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<sup>60</sup> *Id.* at 524 (emphasis in original). The court went on to state: “That provision [i.e., section 206(b)] permits [Commission]-ordered refunds ‘of any amounts paid . . . in excess of those which would have been paid under the just and reasonable rate.’ *Id.*” (emphasis in original).

<sup>61</sup> *Id.* at 524 (emphasis in original).

<sup>62</sup> *E.g.*, *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003); *Town of Concord v. FERC*, 955 F.3d 67, 76 (D.C. Cir. 1992); *accord Louisiana Public Service Commission v. FERC*, 174 F.3d 218, 223, 224 (D.C. Cir. 1999) (“Commission’s self-described general policy is to provide refunds to remedy overcharges”); *Corporation Commission of the State of Oklahoma v. American Electric Power Co.*, 125 FERC ¶ 61,237, at P 33 (2008) (“Commission’s general policy is to order refunds for overcharges”); *Entergy Services, Inc.*, 82 FERC ¶ 61,098, at 61,369 (1998) (“the Commission’s general policy is to order refunds to remedy overcharges”), *aff’d*, 174 F.3d 218 (D.C. Cir. 1999).

Moreover, last year the D.C. Circuit again recognized that this is the case, noting that the Commission’s “general practice” is to order refunds when it concludes that the rates charged were unjust and unreasonable. *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009) (*Westar Energy*). In fact, in this latest case, the court found “nothing unreasonable about the Commission’s adhering to its standard approach” when it denied a request to waive a company’s refund liability. *Id.* What the Commission has done here is simply to abide by its general policy – having found Entergy’s rates to be unjust and unreasonable, the Commission has ordered refunds.

demonstrated any reason here for the Commission to deviate from its policy of granting full refunds.<sup>63</sup> We hold that they have not.

32. First, there is no doubt that Entergy's inclusion of interruptible load affected the Operating Companies' cost of service, led to an overcharge to Louisiana customers, and resulted in unjust and unreasonable rates.<sup>64</sup> That Entergy's doing so was not undertaken in bad faith does not militate against applying the Commission's general refund policy here; the Commission presumes, absent contrary evidence, that all regulated entities are

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<sup>63</sup> The Commission would need to justify its *not* ordering refunds in a case like this, where the Commission finds that rates were unjust and unreasonable, because *not* ordering refunds would be inconsistent with its general policy. While we justify ordering refunds below, we also note that the same justification is simply not necessary when the Commission is applying its general policy and ordering refunds in the face of rates found to be unjust and unreasonable.

An agency "may not depart, *sub silentio*, from its usual rules of decision to reach a different, unexplained result in a single case," *See, e.g., California Trout v. FERC*, 572 F.3d 1003, 1023 (9<sup>th</sup> Cir. 2009). In fact, in laying out the background of this case, the court noted that it had earlier granted a petition for review because the Commission "did not give an adequate explanation for *departing* from the precedent it had set out in *Kentucky Utilities Co.*, 15 FERC ¶ 61,002, at 61,004-05 (1981)." 482 F.3d at 513-14 (emphasis added). What we do here, however, is to apply – not depart from – our "usual rules of decision." As suggested by *Westar Energy*, there is no comparable requirement that an agency must justify with a comparably detailed explanation its "adhering to its standard approach." *Westar Energy*, 568 F.3d at 989. Yet that is exactly what the parties who object to our ordering refunds seek – that we justify with equal rigor our decision to apply our general policy of ordering refunds.

In sum, therefore, having found Entergy's rates unjust and unreasonable, our general policy provides for refunds and so we have ordered refunds; no further and more specific justification is required.

<sup>64</sup> *See* 482 F.3d at 514; Opinion No. 468, 106 FERC ¶ 61,228 at P 61-77; *accord* 120 FERC ¶ 61,241 at P 6. *See generally Electrical District No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) (describing "Federal Power Act's primary purpose" as "protecting the utility's customers"); *accord FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1962) (purpose of Natural Gas Act is "to protect consumers against exploitation at the hands of natural gas companies," "to underwrite just and reasonable rates to the consumers of natural gas," and "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges").

acting in good faith,<sup>65</sup> but that does not automatically make their rates just and reasonable. Second, contrary to Arkansas/Mississippi's position, this is not a rate design case where customer usage patterns are relevant. Rather, it involves a misallocation of costs, so that one group of customers was paying too much, while others paid too little. Third, we do not see the passage of time as affecting the equities one way or the other. Under the facts of this case, we do not consider the length of time to be a relevant factor, and we decline to consider this a relevant factor in determining whether refunds are equitable. This is not a case where the dilatory behavior of a party or some other special circumstance is responsible for the delay.

The Commission orders:

(A) To the extent it has not already done so, Entergy and/or its Operating Companies is hereby directed to make a compliance filing to remove interruptible load from the computation of peak load responsibility since April 1, 2004, within 30 days of the date of issuance of this order.

(B) To the extent it has not already done so, Entergy and/or its Operating Companies is hereby directed, within 30 days of the date of issuance of this order to make refunds as discussed above, and to file a refund report within 60 days of the date of issuance of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>65</sup> Cf., e.g., *New England Power Co.*, 31 FERC ¶ 61,047 at 61,082, ("good faith is presumed on the part of the utility absent a showing of inefficiency or improvidence", citing *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63, 72 (1935)), *reh'g denied*, 32 FERC ¶ 61,113 (1985), *aff'd*, 800 F.2d 280 (1<sup>st</sup> Cir. 1986).