

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Hinds, LLC,
Duke Energy Hot Spring, LLC,
Duke Energy Southaven, LLC,
Duke Energy North America, LLC

Docket Nos. EL02-107-001
EL02-107-002

v.

Entergy Services, Inc.,
Entergy Operating Companies,

Entergy Services, Inc.

ER02-405-004
ER02-405-005

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued November 17, 2006)

1. The Commission in *Duke Hinds II* granted a complaint filed by Duke¹ against Entergy² and found that Entergy was in violation of the Commission's long-standing

¹ Duke Energy Hinds, LLC (Duke Hinds), Duke Energy Hot Spring, LLC (Duke Hot Spring), Duke Energy Southaven, LLC (Duke Southaven), and Duke Energy North America, LLC (collectively, Duke).

² The complaint was filed against Entergy Operating Companies and Entergy Services, Inc., which acts as their agent. The Entergy Operating Companies include: Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States, Inc. (Entergy Gulf States), Entergy Louisiana, Inc., Entergy Mississippi, Inc. (Entergy Mississippi), and

(continued)

transmission service pricing policy by unjustly and unreasonably charging Duke a transmission rate that is based on both the network average embedded costs and incremental costs.³

2. The Commission required Entergy to revise three Interconnection Agreements (IAs) and its future transmission rates to Duke to be consistent with Commission policy. We also dismissed as moot Duke Hinds' request for rehearing of *Duke Hinds I*,⁴ which conditionally accepted a revised IA between Entergy Mississippi and Duke Hinds. In addition, we accepted Entergy's compliance filing made in response to *Duke Hinds I*, subject to further modifications.

3. This order denies in part and grants in part rehearing of *Duke Hinds II*. It also grants the request for clarification filed by Duke. In addition, this order addresses Entergy's February 27, 2003 compliance filing made in response to *Duke Hinds II*, as well as the mechanics of the crediting mechanism for the contracts at issue.

I. Background

4. The facts of this case are described in detail in *Duke Hinds I* and *Duke Hinds II*, but are summarized briefly below.

5. *Duke Hinds I* was issued in response to a filing by Entergy in Docket No. ER02-405 in which Entergy proposed certain changes to the original Duke Hinds IA. The Commission conditionally accepted the unexecuted revised Duke Hinds IA. We denied Duke's request that we require reclassification of certain transmission upgrades as network upgrades for which Duke would receive transmission credits. We also stated that the Commission could act on behalf of a party to revise terms and conditions to which the parties agreed and that the Commission has accepted only if it found that the contract was contrary to the public interest under section 206 of the Federal Power Act (FPA).⁵ We found that Duke did not provide any basis for such a finding. Thus, in *Duke Hinds I* we found that Duke was not entitled to transmission credits.

Entergy New Orleans, Inc. For convenience, we will refer to these entities collectively as Entergy in this order.

³ *Duke Energy Hinds, LLC v. Entergy Services, Inc.* 102 FERC ¶ 61,068 (2003) (*Duke Hinds II*).

⁴ *Entergy Services, Inc.*, 98 FERC ¶ 61,290 (2002) (*Duke Hinds I*).

⁵ 16 U.S.C. § 824(e) (2000).

6. On April 12, 2002, Duke filed a request for rehearing of *Duke Hinds I*. On July 10, 2002, Duke also filed a complaint in Docket No. EL02-107 against Entergy concerning three IAs between Duke and Entergy: the Duke Hinds IA at issue in *Duke Hinds I*, as well as the Duke Southaven IA, and the Duke Hot Spring IA. Duke argued that Entergy, in violation of its Open Access Transmission Tariff (OATT) and Commission policy, is charging unjust and unreasonable transmission rates to Duke by charging a rate that is based on network average embedded costs while failing to provide credits to reflect Duke's payments for certain network upgrades that were improperly directly assigned to Duke in the original IAs. The complaint also argued that Entergy has unjustly and unreasonably failed to provide interest on the funds advanced by Duke for various upgrades to Entergy's transmission network.

7. In *Duke Hinds II*, the Commission granted Duke's complaint, finding that Entergy had violated the Commission's transmission service pricing policy by unjustly and unreasonably charging a rate for transmission service that is based on both the network average embedded costs and incremental costs. The Commission agreed with Duke that the Commission should have evaluated the IAs using the just and reasonable standard of review, rather than the public interest standard of review, since the IAs contain provisions that allow either party to unilaterally request changes to the IAs under section 205 or 206.⁶ The Commission found that the facilities at issue were network facilities rather than direct assignment facilities and agreed with Duke that the direct assignment violated the prohibition against "and" pricing (as explained below). Thus, we ordered Entergy to reclassify the facilities and to pay Duke back through transmission credits and related interest for Duke's payment for the facilities.

8. Duke's request for rehearing of *Duke Hinds I* raised the same pricing issues that were addressed in the complaint proceeding. Accordingly, in light of our decision in the complaint proceeding, we dismissed the request for rehearing as moot.

II. Requests For Rehearing

9. Entergy filed a timely request for rehearing and, in the alternative, a request for clarification of *Duke Hinds II*.

⁶ Specifically, section 23.4 of each of the Duke agreements provides:

Amendments. ... Notwithstanding the foregoing, nothing contained herein shall be construed as affecting in any way the right of [Entergy] or [Duke] to unilaterally make application to FERC for a change in rates, terms or conditions of service under sections 205 and 206 of the Federal Power Act ...

10. Duke filed a timely request for rehearing and clarification. Entergy filed a motion for leave to answer, and an answer to, Duke's request for rehearing.

11. The Louisiana Public Service Commission (Louisiana Commission) submitted a timely request for rehearing. In addition, the Arkansas Public Service Commission and the Mississippi Public Service Commission timely submitted a joint request for rehearing. For convenience, we will refer to these three entities collectively as the State Commissions in this order.

12. Southern Company Services, Inc. (Southern) and Pacific Gas and Electric Company (PG&E) filed motions to intervene out of time and requests for rehearing.

13. Calpine Corporation and Los Medanos Energy Center LLC (Calpine) filed a joint motion to intervene out of time.

A. Procedural Matters

14. Southern argues that we should allow its late motion to intervene because *Duke Hinds II* could have profound effects throughout the electric and gas industries. Southern also argues that we should allow its late intervention because it has already intervened in another proceeding, Docket No. EL02-88, involving the same pricing issues raised here. Southern argues that one day after the Commission issued *Duke Hinds II*, the Commission issued *Pacific Gas and Electric*, in which the Commission acts on several pending proceedings including Docket No. EL02-88 and which relies entirely on *Duke Hinds II*.⁷ Southern argues that in order to fully address the issues raised in *Pacific Gas and Electric* and the basis for the Commission's determinations therein, it should be granted late intervention here. Furthermore, Southern asserts that its intervention will not disrupt these proceedings and that no party will be prejudiced or burdened.

15. PG&E also seeks late intervention and argues that extraordinary circumstances exist justifying its request. PG&E states that in another proceeding, Docket No. ER02-1330, PG&E filed an interconnection agreement that raises the same issues as those here. The agreement was accepted by the Commission for filing subject to the outcome of the rehearing in the case at hand.⁸ PG&E argues that the Commission reversed course in *Duke Hinds II* and issued *Pacific Gas and Electric*, which included Docket No. ER02-

⁷ *Pacific Gas and Electric Co.*, 102 FERC ¶ 61,070 (2003), *reh'g pending (Pacific Gas and Electric)*.

⁸ *Pacific Gas and Electric Co.*, 101 FERC ¶ 61,079 (2002), *order on reh'g*, 102 FERC ¶ 61,070 (2003), *reh'g pending*.

1330, the following day. PG&E argues that since the Commission made the outcome of PG&E's agreements contingent on the outcome of these proceedings, it must be permitted to participate here.

16. Finally, Calpine argues that its motion for late intervention should be granted because its interconnection agreements with PG&E are at issue in Docket No. ER02-1330.

17. 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.⁹ Southern has not met this higher burden of justifying its late intervention. Southern is not directly affected by the rulings in this case, and its policy concerns are shared with, and adequately represented by, other parties. Nor are we persuaded by Southern's argument that because it is an intervenor in EL02-88, it should be allowed to intervene here. In light of our decision to deny Southern's late motion to intervene, we will dismiss Southern's request for rehearing. Because Southern is not a party to this proceeding, it lacks standing to seek rehearing of *Duke Hinds II* under the FPA and the Commission's regulations.¹⁰

18. We will, however, grant PG&E's late motion to intervene. We accepted its interconnection agreement, which raises the same issues as in the case at hand, subject to the outcome of this proceeding. Because *Duke Hinds II* reversed *Duke Hinds I* and directly affected our acceptance of the PG&E interconnection agreement, we find that extraordinary circumstances exist to grant PG&E's motion.¹¹ For the same reasons, we will also grant Calpine's late motion to intervene.

19. On March 12, 2003, Entergy filed a motion for a stay of *Duke Hinds II* (and other related orders). Duke opposed the motion. In light of our action herein, the request for a stay is mooted.

20. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2006), prohibits answers to requests for rehearing. Therefore, the Commission will reject Entergy's answer to Duke's rehearing request.

⁹ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

¹⁰ See 16 U.S.C. § 8251(a) (2000); 18 C.F.R. § 385.713(b)(2006).

¹¹ See *NorAm Gas Transmission Company*, 81 FERC ¶ 61,204 (1997).

B. Analysis**1. Challenges to Transmission Service Pricing Policy****a. Argument**

21. Entergy and the State Commissions challenge the reasonableness of the Commission's transmission service pricing policy (and our crediting policy, which implements that transmission pricing policy for generator interconnections). They contend that *Duke Hinds II* improperly shifts interconnection costs onto Entergy's retail ratepayers. They assert that by requiring credits for the facilities at issue here, *Duke Hinds II* forces retail ratepayers to subsidize generators and violates the principle of cost causation. They also argue that our policy promotes the inefficient siting of generation facilities. Furthermore, the State Commissions argue that *Duke Hinds II* violates the pricing standard in section 212 of the FPA,¹² which provides that retail and other transmission customers should not bear the costs of transmission service to customers requesting service under section 211 of the FPA.¹³

b. Commission Determination

22. We will apply our long-standing transmission service pricing policy in this case.¹⁴ The transmission pricing policy provides for transmission rates to reflect the higher of: (1) an average embedded cost (rolled-in) rate *or* (2) an incremental cost rate for the network upgrades needed for the generator interconnection.¹⁵ This is known as “or” pricing.¹⁶ This policy bars a transmission provider from charging a transmission rate based on the full rolled-in cost of its transmission service if the customer has already paid

¹² 16 U.S.C. § 824k (2000).

¹³ 16 U.S.C. § 824j (2000).

¹⁴ *See, e.g., Consumers Energy Company*, 95 FERC ¶ 61,233 (*Consumers I*), *order on reh'g*, 96 FERC ¶ 61,132 (2001) (*Consumers II*).

¹⁵ An incremental rate allows the transmission provider to recover the entire cost of the network upgrades from that one customer, thereby protecting all other transmission customers from having to bear any of the costs of the network upgrades.

¹⁶ *See Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act; Policy Statement, FERC Statutes and Regulations Preambles January 1991-June 1996* ¶ 31,005 (1994).

for expansion of the grid by funding grid upgrades (*i.e.*, “and” pricing); thus, the customer is not charged twice for the same service.

23. Where a generator pays for upgrades located “at or beyond” the point of interconnection to the transmission grid, it is entitled to credits, with interest, because these are network upgrades.¹⁷ As the Commission stated in *Consumers I*, its policy regarding credits for network upgrades enforces its prohibition against “and” pricing.¹⁸ Moreover, the Commission, in *Consumers II*, affirmed its earlier finding that credits for network upgrades were appropriate because the integrated transmission grid is a cohesive network whose expansion benefits all users of the grid, and rejected the direct assignment of integrated grid (*i.e.*, network) facilities.¹⁹

24. We note that this policy was affirmed in court. In *Entergy Services, Inc. v. FERC*,²⁰ the court rejected many of the very arguments raised here. For instance, the court rejected the argument that our pricing policy imposes on all users of the grid costs that benefit only the new generator; the court found reasonable the Commission's view

¹⁷ *Consumers II*, 96 FERC at 61,560. *See also Entergy Gulf States, Inc.*, 98 FERC ¶ 61,014 (2002), *reh'g denied*, 99 FERC 61,095 (2002); *Nevada Power Co.*, 111 FERC ¶ 61,161, *order on reh'g*, 113 FERC ¶ 61,007 (2005), *appeal docketed sub nom. Entergy Services, Inc. v. FERC*, Nos. 05-1238, *et al.* (D.C. Cir. 2006).

¹⁸ *See* 95 FERC at 61,804.

¹⁹ *See* 96 FERC at 61,561, citing *Appalachian Power Company*, 63 FERC ¶ 61,151, at p. 61,978, *supplemental order*, 64 FERC ¶ 61,327 (1993). This treatment was adopted in Order No. 2003, *et al.* *See* Order No. 2003-A, 69 Fed. Reg. 15,932 at P 580.

²⁰ 319 F.3d 536 (D.C. Cir. 2003) (*Entergy*). Entergy argues that the court opinion is inapplicable here because that case did not involve the issue of retroactivity. Entergy Request for Rehearing at 3, n 3. It is true that the case did not raise that issue. However, the court unequivocally upheld our policy requiring crediting, and its finding that our policy does not, for example, result in a subsidy of new generators by other transmission customers directly contradicts the challenges to our policy raised by Entergy and the State Commissions. Moreover, as discussed below, we are not imposing the correct rate retroactively in this case.

that all customers benefit from a truly competitive market, which requires comparable access to transmission.²¹

25. We disagree with the argument that our policy promotes the inefficient siting of generation facilities. Under the Commission's policy, a generator is required to provide the up front funding to finance the cost of the interconnection facilities required for its interconnection. We believe this provides the generator with a strong incentive to make efficient siting decisions. Moreover, a number of the factors that influence siting decisions are beyond the control of both the generator and the Commission. Most importantly, the approval and siting of new generating facilities are ultimately under the control of state authorities.

26. The contention of the State Commissions that *Duke Hinds II* is contrary to the pricing standards of section 212 of the FPA is irrelevant; Entergy's filings were made and reviewed under sections 205 and 206 of the FPA. The section 212 pricing provision applies when the Commission orders transmission service under section 211, but the IAs here are part of the open access transmission service that we ordered all public utilities to provide through OATTs in Order No. 888.²² Order No. 888 was issued under our sections 205 and 206 authority, not under sections 211 and 212.²³ As discussed above, the U.S. Court of Appeals has upheld the crediting policy under section 205. This pricing policy does not result in a subsidy by wholesale, retail and transmission customers because, as the court held, the integrated transmission grid is a cohesive network and upgrades benefit all users, not just the newly-interconnecting generator.

²¹ 319 F.3d at 544.

²² *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,694 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

²³ Nevertheless, our crediting policy applied in the order does not violate section 212 because it promotes economic efficiency, is just and reasonable, and is needed to prevent transmission providers that have an incentive to discourage competitors from unduly discriminating against those competitors.

2. Sanctity of Contract

a. Argument

27. The State Commissions argue that the Commission erred in *Duke Hinds II* by failing to apply the public interest standard of the *Mobile-Sierra*²⁴ doctrine.

b. Commission Determination

28. Our application of our transmission pricing policy in this case is consistent with the sanctity of contracts and does not expose contract parties to risks for which they did not bargain. Entergy agreed to provisions in the IAs that allow either party to unilaterally request changes to the IAs under sections 205 or 206.²⁵ As we found in *Duke Hinds II*, this means that we have the authority to require changes if the contracts are unjust and unreasonable. Entergy does not deny that this is the case. A utility that has signed such a contract has no legitimate expectation that the contract will never be revised. The State Commissions claim that we should have applied the higher "public interest" standard under the *Mobile-Sierra* doctrine (that is, we should only require a change if the contracts are shown to be contrary to the public interest), but they provide no support for this claim. They simply assume that the Commission cannot require changes to a contract that is unjust and unreasonable regardless of the fact that the contract itself provides otherwise. The fact that Duke did not challenge the lack of a crediting provision when the original IAs were filed does not mean that it waived its right, specifically preserved in the IAs, to challenge them later. The Commission's acceptance of the original IAs²⁶ without ordering modification was inconsistent with our long-standing transmission pricing policy; however, that does not deprive us of the obligation to remedy that inconsistency by ensuring that Entergy does not continue indefinitely charging unjust and

²⁴ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

²⁵ We note that in *Entergy Services, Inc.*, 116 FERC ¶ 61,269 (2006), the Commission approved Entergy's proposal to allow its Independent Coordinator of Transmission to reevaluate the previously-incurred interconnection costs in certain contracts that contain provisions that allow either party to unilaterally request changes to the interconnection agreement under sections 205 or 206 of the FPA.

²⁶ The IAs were accepted by delegated letter order, as is the case for many uncontested filings.

unreasonable transmission rates, especially when requested to remedy that inconsistency by a party to the contract in accordance with its contractual rights.

3. Retroactive Ratemaking

a. Argument

29. Entergy, PG&E and the State Commissions argue that regardless of the correctness of the Commission's transmission pricing policy, *Duke Hinds II* violated the filed rate doctrine and the rule against retroactive ratemaking by directing Entergy to refund, in the form of transmission credits, charges that had already been made. The Louisiana Commission similarly argues that *Duke Hinds II* exceeds the Commission's authority because it requires reparations in violation of the filed rate doctrine and the rule against retroactive ratemaking.

30. Additionally, Entergy and the State Commissions contend that *Duke Hinds II* retroactively requires interest on those credits, contrary to the "interim" policy established in *American Electric Power Service Corporation*.²⁷

31. Finally, Entergy argues that in *Duke Hinds II*, the Commission arbitrarily and capriciously departed from the decision in *Consumers I*, which Entergy characterizes as holding that the facility classification policies and resulting transmission crediting requirements established therein would not be applied on a retroactive basis.

b. Commission Determination

32. Rehearing petitioners' argument that *Duke Hinds II* violates the filed rate doctrine and the rule against retroactive ratemaking by requiring Entergy to make refunds has no merit. The rule against retroactive ratemaking forbids us to order reparations; we cannot order a utility to give back to a customer money the utility has already collected. However, this rate doctrine does not mean that the utility is entitled to continue charging a transmission rate that is contrary to Commission policy. We are not requiring that Duke receive refunds for excessive transmission rates it paid before the refund effective date. Our order granted prospective rate relief only, thus ensuring that Entergy's subsequent rates for transmission service under Entergy's OATT are just and reasonable.

33. To ensure prospective rate relief, the crediting period should begin on the refund effective date (*i.e.*, as discussed below, September 9, 2002). To the extent that Entergy has provided transmission service with respect to the facilities at issue *prior* to this refund

²⁷ 97 FERC ¶ 61,098 (2001) (*AEP*).

effective date, and Duke has paid the on-file transmission rates for service *prior* to the refund effective date (that is, the generator did not receive any credits for such service), no adjustments are to be made to those pre-refund effective date rates and payments. In other words, credits are only to be applied for transmission service taken on or after the refund effective date; to do otherwise would create a refund effective date earlier than that provided for by the FPA, as well as violate the filed rate doctrine and rule against retroactive ratemaking.

34. Based on our clarification of the crediting policy, as discussed above, the dollar amount of the credits, which initially is equal to Duke's outlay for network upgrades, is to be reduced by an amount equal to the transmission service payments made by Duke prior to the refund effective date. Thus, as a hypothetical (which does not include interest), if Duke's total outlay for network facility upgrades was \$5 million, and it took \$1 million worth of transmission services prior to the refund effective date, Duke is eligible to receive total transmission credits of \$4 million (\$5 million in network facility upgrade outlay minus \$1 million in transmission charges).

35. We disagree with Entergy's and the State Commission's contention that *Duke Hinds II* retroactively requires interest on those credits. As discussed above, we will not require credits and interest prior to the refund effective date. Moreover, in *AEP*, the Commission noted that the then-pending rulemaking on interconnection (Order No. 2003)²⁸ was addressing the question of interest and stated that "until the conclusion of the [rulemaking process]," utilities were required to include in the credits interest on the money the generator advanced for network upgrades. We described this policy as interim in nature because the issue was pending in the interconnection rulemaking.²⁹ Thus, *AEP* required credits with interest during the pendency of the rulemaking. Our requirement in *Duke Hinds II* that Entergy pay interest on the credits is consistent with *AEP*.

²⁸ See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs., ¶ 31,160 (2004) (Order No. 2003-A), *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004) (Order No. 2003-B), *order on reh'g*, 111 FERC ¶ 61,401 (2005) (Order No. 2003-C), *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004), *appeal docketed sub nom. National Association of Regulatory Commissioners v. FERC*, Nos. 04-1148, *et al.* (D.C. Cir. argued Oct. 13, 2006).

²⁹ *AEP* at 61,530.

36. In *Consumers I*, the Commission corrected inadvertent language in a prior case that could be read to require credits only for certain types of network upgrades.³⁰ That inadvertent language conflicted directly with language elsewhere in the same case and in other Commission orders and was clearly contrary to the Commission's long-standing transmission pricing policy. *Consumers I* recognized that several other cases had carried forward this confusion. It stated that "[o]ur clarification here would apply equally to those cases."³¹ On rehearing of *Consumers I*, a party argued that this was a collateral attack on the justness and reasonableness of the IAs in all these prior cases. In response, we stated in *Consumers II* that our statement about retroactive effect was simply designed to let the industry know that any IA filed would be subject to the clarified policy.³² *Consumers II* did not state that we would refuse to modify a contract under FPA section 206 (assuming the contract itself allows such modification) if that contract is shown to be unjust and unreasonable.³³ Such a showing has been made in the case at hand. The court in *Entergy* discussed the *Consumers I* and *II* cases and agreed that they clarified inadvertent statements that would have allowed a form of transmission pricing ("and" pricing) that was contrary to our long-standing transmission pricing policy.³⁴

4. Which Facilities are Eligible for Credits with Interest

a. Argument

37. Duke seeks clarification that the Commission's directive that Entergy pay Duke interest on credits applies not only to the facilities that were improperly directly assigned to Duke, but also to all other upgrades to Entergy's transmission system that Duke paid for.

³⁰ The erroneous language in this case appeared to state that credits were not required for upgrades needed to remedy short-circuit and stability problems on the grid (*i.e.*, network facility upgrades).

³¹ *Consumers I*, 95 FERC at 61,804.

³² In *Consumers II*, we stated that "[w]e clarify that we did not intend to apply the findings in [*Consumers I*] retroactively" *Consumers II*, 96 FERC at 61,561.

³³ We further note that even under the public interest standard, the Commission can modify a contract, though it is less likely to do so.

³⁴ *Entergy*, 319 F.3d at 541–542.

b. Commission Determination

38. In response to Duke's request for clarification as to which facilities should be eligible for interest on credits, we refer back to *Duke Hinds II*, where we stated that Entergy must provide transmission credits with interest for network upgrades – including Required and Optional System Upgrades.³⁵

5. Refund Effective Date

a. Argument

39. Duke argues that the Commission erred in establishing the effective date for Duke's relief in *Duke Hinds II*. In *Duke Hinds II* we directed Entergy to revise its transmission rates to Duke prospectively from the date of *Duke Hinds II* -- *i.e.*, January 28, 2003. However, Duke argues, the Commission should have established a refund effective date of 60 days after the date on which Duke filed its complaint, which would be September 9, 2002. Duke points out that the Commission granted a refund effective date 60 days after the initiation of the section 206 proceeding in *Pacific Gas and Electric*, which was issued one day after *Duke Hinds II* and which addresses the same pricing issues. Duke also points out that section 206 permits refund effective dates that are no earlier than 60 days after the filing of the complaint, but no later than five months after the expiration of the 60-day period.³⁶

b. Commission Determination

40. We will grant Duke's request for rehearing. In cases where, as here, the Commission institutes an investigation on a complaint under section 206 of the FPA, section 206(b), as it was in effect at the time that Duke filed its complaint, requires that the Commission establish a refund effective date that is no earlier than 60 days after the date a complaint was filed, but no later than five months after the expiration of such 60-day period. Consistent with our general policy of providing maximum protection to customers, we will set the refund effective date at the earliest date possible, *i.e.*, 60 days after the filing of Duke's complaint, which is September 9, 2002.

³⁵ 102 FERC ¶ 61,068 at P 28.

³⁶ We note that section 206(b) of the FPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005), to require that in the case of a proceeding instituted on a complaint, the refund effective date shall not be earlier than the date of the filing of such complaint or later than 5 months after the filing of such complaint.

II. Compliance Filing

A. Background

41. In *Duke Hinds II*, the Commission directed Entergy to reclassify the facilities at issue – the Lakeover Substation, the Freeport Substation Upgrades and the Etta Switch Station – as Required System Upgrades (*i.e.*, network facility upgrades) in the IAs, rather than interconnection facilities, and to provide that Duke is entitled to transmission credits from the date of the order for the costs associated with these facilities. The order further directed Entergy to provide that when Entergy pays Duke credits, the credits will reflect interest on the monies from the date of the order, consistent with 18 C.F.R. § 35.19(a)(a)(2) (2006).

42. On February 27, 2003, Entergy filed its compliance filing under protest. Entergy filed the following: (1) First Revised Duke Hot Spring IA (Duke Hot Spring IA); (2) Second Revised Duke Hinds IA; and (3) Second Revised Duke Southaven IA. In each of the IAs, the facilities which were previously incorrectly classified as direct assignment facilities and the estimated costs have been removed from Appendix A of the respective IAs and added to the Required System Upgrades in Appendix B of the respective IAs. Also, in Appendix B of each of the IAs language was added stating that “Required System Upgrades are eligible for transmission credits and interest from January 28, 2003, with such interest calculated in accordance with 18 C.F.R. § 19(a)(a)(2) (2006), and with such crediting and interest calculations consistent with the final disposition of Docket Nos. EL02-107-000, ER02-405-002, and ER02-405-003.”

B. Notice of Filing and Responsive Pleadings

43. Notice of Entergy’s compliance filing was published in the *Federal Register*, 62 Fed. Reg. 11,826 (2003), with interventions, protests and comments due on or before March 20, 2003.

44. On March 20, 2003, Duke filed a protest claiming that Entergy should make a number of revisions to its compliance filing.

45. On April 4, 2003, Entergy filed a response to Duke’s protest.

C. Discussion

1. Procedural Matters

46. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2006), prohibits an answer to a protest unless otherwise ordered by the

decisional authority. We are not persuaded to accept Entergy's answer and will, therefore, reject it.

2. Argument

47. Duke asks the Commission to direct Entergy to make a number of revisions to its compliance filing. First, Duke asks the Commission to direct Entergy to revise the Duke Hot Spring IA to ensure that Entergy provides transmission credits, plus interest, for the Hot Spring-Arklahoma-McNeil Substation Upgrades. Duke requests that the Commission confirm that it granted Duke's complaint with respect to the need for transmission credits for all network facilities, including these upgrades that had originally been classified as Required System Upgrades, as well as those now reclassified as such (*i.e.*, the Lakeover Substation, the Freeport Substation Upgrades and the Etta Switch Station).

48. Duke argues that Entergy should revise the crediting and interest language in Appendix B of the Duke Hot Spring IA so that it applies to "All Required System Upgrades . . ." not just "The following System Upgrades . . ." Further, the language "The Estimated Costs for initially-identified Required System Upgrades..." and the language "incurred pursuant to 102 FERC ¶ 61,068 (2003)" should be deleted. Duke notes that this revision would increase the Estimated Costs for the Required System Upgrades that are eligible for Transmission credits and interest from \$13,114,000 to \$14,823,000 and would increase the Estimated Tax Cost from \$9,786,567 to \$11,054,567.

49. Second, Duke states that the Duke Hot Spring IA should be revised to make conforming changes to section 8.3.1 (Credits for System Upgrades) and section 1.18 (Required System Upgrades). Section 8.3.1 should be revised to add "Required System Upgrades and" immediately before the phrase "Optional System Upgrades" wherever it occurs. Also, section 1.18 of the Duke IA should have the following sentence added to the end of the section: "Customers who pay for Required System Upgrades will be entitled to credits against transmission charges when transmission service is obtained under the Entergy Transmission Tariff."

50. Third, Duke requests that all of the IAs be revised to provide for interest on transmission credits for all network facilities, not just those network facilities formerly classified under the IAs as Interconnection Facilities. This request is consistent with Duke's request for clarification.

51. Finally, Duke asserts that Appendix B should be revised to correct the disparate treatment of tax gross-up amounts between Optional System Upgrades and Required System Upgrades. Appendix B should read as follows: "Company acknowledges that

the credits for Optional System Upgrades and Required System Upgrades provided for under section 8.3.1 of this Agreement shall, on a dollar for dollar basis, include Tax Costs paid by Customer.”

3. Commission Determination

52. We direct Entergy to revise the IAs as proposed by Duke; in addition, we direct Entergy to revise the IAs to reflect the new effective date we establish in this order.

53. In *Duke Hinds II*, we granted Duke’s complaint in its entirety. In that order, we discuss the Hot Spring-Arklahoma-McNeil Substation Upgrades and noted that they were classified as Required System Upgrades, but were directly assigned to Duke Hot Spring. In granting the complaint, we stated that Entergy’s transmission pricing policy violates our prohibition against “and” pricing. Accordingly, we required Entergy to revise the IAs to state that the facilities at issue are eligible for transmission credits to calculate its transmission rate for service to Duke’s facilities in a manner that adheres to our policy prohibiting “and” pricing and that acknowledges that the facilities in question are network upgrades.³⁷ We direct Entergy to revise the Duke Hot Spring IA to provide transmission credits – with interest – for all required system upgrades.

54. We will direct Entergy to revise the IAs to provide for interest on transmission credits for all network upgrades, not just those formerly classified as Interconnection Facilities. This is consistent with our granting of Duke’s request for clarification and consistent with *Consumers II*.

55. Finally, we direct Entergy to revise the language in Appendix B to correct the disparate treatment of tax gross-up amounts, as Duke proposes. The current disparate treatment of Optional and Required Facility Upgrades is not consistent with *Duke Hinds II*.

56. Entergy is to provide Duke with transmission credits for service taken with respect to the particular facilities at issue in each IA, with the amount of the credits adjusted, based on our clarification of the crediting policy, as discussed above.³⁸ As noted earlier, credits are only to be applied to service taken on or after the refund effective date (*i.e.*,

³⁷ *Duke Hinds II* at P 22-23.

³⁸ As an initial matter, we find that the Duke IAs at issue were entered into prior to the January 20, 2004 effective date of Order No. 2003. As a result, the transmission crediting policies in Order No. 2003 are not relevant to the Commission’s determination on the issues in this proceeding.

September 9, 2002). This approach is consistent with the filed rate doctrine and the rule against retroactive ratemaking.

57. Thus, where Duke and Entergy agreed that Duke's investment in upgrades was to be directly assigned to it, we will enforce that agreement, up until the point when the directed changes to it become effective – the refund effective date. We also will enforce Duke's right, as stated in the IA, to file to modify the contract prospectively. The adjustment factors we set forth in this order accomplish those goals. In short, we are providing Duke with the maximum protection we can after the refund effective date, while simultaneously preserving the original bargain struck between the parties before the refund effective date. Further, the adjustment factor is directly correlated to the dollar amount of transmission service taken by the Duke prior to its filing to modify its IA.

58. Interest (calculated in accordance with 18 C.F.R. § 35.19(a)(2)(ii)) is to accrue on the total amount due, as adjusted, as of the refund effective date, and to continue accruing until the total amount, as adjusted, has been fully credited.

59. If Entergy has not provided Duke with transmission credits thus far, Entergy must provide refunds for the period starting September 9, 2002 up to the date when Entergy begins to provide transmission credits. With respect to the refund obligation for this locked-in period, we will require Entergy to pay Duke a lump sum refund of the amount of transmission payments Duke made between September 9, 2002 and the date when Entergy begins to provide transmission credits, with interest calculated in accordance with 18 C.F.R. § 35.19(a)(2)(ii).

The Commission orders:

(A) The requests for late intervention are hereby granted and denied, as discussed in the body of this order.

(B) The request for rehearing filed by Southern is hereby dismissed, as discussed in the body of this order.

(C) The requests for rehearing filed by Entergy, the State Commissions and PG&E are hereby denied, as discussed in the body of this order.

(D) Duke's requests for rehearing and clarification are hereby granted.

(E) Entergy's February 27, 2003 compliance filing is hereby accepted as modified, as discussed in the body of this order.

(F) Entergy is hereby directed to file, within 30 days of the date of this order, revised versions of each of the Duke agreements at issue in this proceeding reflecting the modifications discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.