

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Arkansas Electric Cooperative Corporation

Docket No. EL05-15-008

v.

Entergy Arkansas, Inc.

ORDER ON REHEARING

(Issued June 25, 2007)

1. This order addresses Entergy Arkansas, Inc.'s (Entergy) request for rehearing of Opinion No. 488, an Order on Initial Decision issued by the Commission on October 25, 2006.¹ The Commission denies the request for rehearing.

I. Background

2. A detailed background of this case is contained in the Initial Decision² and in Opinion No. 488; therefore, we will provide a summary. Arkansas Electric Cooperative Corporation (Arkansas Electric or AECC) is part owner of electric generation facilities in Arkansas and provides wholesale power to its customers using Entergy's transmission system. Arkansas Electric and Entergy entered into a Power Coordination, Interchange and Transmission Service Agreement (Power Agreement) on June 27, 1977, as part of a settlement, which integrates all of Arkansas Electric's generation resources with those of Entergy. The Power Agreement makes Entergy responsible for dispatching and scheduling Arkansas Electric's generation resources and establishes a settlement billing mechanism, *i.e.*, "redispatch," under which Arkansas Electric is billed based on the theoretical assumption that, to the extent the power that Entergy actually decides to

¹ *Arkansas Electric Cooperative Corp. v. Entergy Arkansas, Inc.*, 117 FERC & 61,099 (2006) (Opinion No. 488).

² *Arkansas Electric Cooperative Corp. v. Entergy Arkansas, Inc.*, 114 FERC & 63,015 (2006) (Initial Decision).

dispatch from Arkansas Electric's generating units is less than the power Entergy actually delivers to Arkansas Electric's customers, Arkansas Electric purchases the deficiency from Entergy.³ Arkansas Electric filed a complaint asserting that Entergy was overcharging it for power it purchased from Entergy under their Power Agreement. In a nutshell, the dispute at issue is over the price for such purchased power. Entergy claims that it can charge an expensive "Replacement Energy" rate because Arkansas Electric's generation is never "available" for dispatch due to Entergy transmission system constraints.⁴ Arkansas Electric contends that, as long as the amount of power Entergy supplies to Arkansas Electric's customers does not exceed the rated capacity of its generating units, the price it pays for the power purchased from Entergy, which Arkansas Electric dubs "substitute energy," is generally equal to the relatively inexpensive incremental cost of fuel at the Arkansas Electric coal-fired generating units.⁵ Thus, it asserts, under the Power Agreement's billing mechanism, it generally does not matter how much power the Entergy dispatcher actually decides to dispatch from Arkansas Electric's generating units for system purposes because all the power is to be priced at the Arkansas Electric low fuel cost as if the power theoretically was produced from those generating units and economically dispatched to serve its customers.

3. The central ruling of the Initial Decision was that the "plain language" of two

³ The Power Agreement's billing, i.e., "redispatch," provisions are located in Article V, section 5 and have corresponding Redispatching Principles in Exhibit E of the Power Agreement that clarify the billing mechanism. Article III, section 5 also provides for billing during "Outages" (planned maintenance or emergencies) and describes the "Replacement Energy" rate that applies in such circumstances.

⁴ As noted in Opinion No. 488, at P 13 n.7, Entergy's witness Ralston described the following five transmission system operational constraints, the presence of which Entergy claims permits it to charge the expensive "Replacement Energy" rate: (1) moment-to-moment changes in loads; (2) Independent Power Producer (IPP) imbalances; (3) third-party deliveries of energy to and from the Entergy Control Area; (4) QF purchases; and (5) transmission constraints. Ex. EAI-9 at 27.

⁵ As noted in Opinion No. 488, at P 4 n.4, for simplicity in dealing with the billing issues that Arkansas Electric raises in the instant proceeding, we will treat the "substitute energy" cost as generally being the cost of fuel at Arkansas Electric's coal-fired units and take no position on the billing issues raised in another proceeding, Docket No. EL05-135-000, which the Commission deferred to the courts to resolve regarding whether and in what circumstances its more expensive gas-fired generation costs apply. *See Entergy Arkansas, Inc.*, 112 FERC ¶ 61,306 (2005).

general provisions of the Power Agreement, *i.e.*, the lead paragraph of section 5 of Article V and Redispatching Principle No. 3, set forth below, authorize Entergy to factor in transmission system constraints and thereby charge the expensive “Replacement Energy” rate. As a result, the Initial Decision denied Arkansas Electric’s complaint, thus permitting Entergy to factor in such system constraints with the result that Entergy could continue billing the expensive Replacement Energy rate for one hundred percent of Arkansas Electric’s customers’ demand that formerly was billed at the inexpensive incremental fuel rate (“substitute energy” rate). These sections provide:

Section 5. Energy. It is the intent of both parties that all resources of both parties will be dispatched by [Entergy] for maximum combined efficiency, and that [Arkansas Electric’s] Resources will, on a retroactive basis, considering their availability on an hour- to-hour basis, be used to theoretically redispatch [Arkansas Electric’s] load from [Arkansas Electric's] Resources.

Exhibit E, Redispatching Principles:

(3) For redispatch purposes appropriate consideration will be given to other operating constraints which limit the availability of the plant to the [Entergy] dispatcher.

4. Opinion No. 488 reversed the Initial Decision, finding that the determination in the Initial Decision did not conform to the specific billing provisions and Redispatching Principles of the contract or to the longstanding course of performance between the parties. Opinion No. 488 found that the Initial Decision relied on an incorrect interpretation of an ambiguous reference to “availability” in the general billing principles of the Power Agreement in a way that conflicts with the specific billing provisions of Article III, section 5, “Outages” and Redispatching Principles No. 6 and 7 of the Power Agreement. The Commission found that the expensive “Replacement Energy” rate could only be charged in circumstances that the record reflected did not occur: (1) If there were “Outages” (planned maintenance or emergencies) at Arkansas Electric’s plants (Article III, section 5) or (2) if Arkansas Electric’s customers’ demand exceeded the rated capacity of its generation units (Redispatching Principle No. 7). The Commission found that Redispatching Principle No. 6 applies and only factors in Arkansas Electric’s customer requirements, actual output from its units, and the “capability” of its units which the Power Agreement defines as the “net generating capability based on tests.” System operating constraints are not a factor. Redispatching Principle No. 6 provides:

If the capability of [Arkansas Electric] Resources is sufficient to supply [Arkansas Electric] requirements and if [Arkansas Electric] requirements are greater than the energy supplied from [Arkansas

Electric] Resources in an hour, [Arkansas Electric] will pay to [Entergy] [Arkansas Electric]'s incremental cost per kWh of the energy deficiency.

The Commission explained through a hypothetical example that, pursuant to Principle No. 6, as long as Arkansas Electric's customers' demand did not exceed the rated capacity of its generation units, any deficiency between the actual power produced from its units and the power supplied its customers is to be priced at Arkansas Electric's incremental cost of fuel (coal), the inexpensive so-called "substitute energy" rate. Thus, it would be economically indifferent as to the actual amount of power the Entergy dispatcher decides to dispatch from Arkansas Electric's units. The only exception is for "Outages" when the units are down for planned maintenance or emergencies, when the expensive Replacement Energy rate would apply. Commission noted that the record did not reflect that Entergy was claiming Outages or a lack of generation capacity and that it rested its claim for the expensive Replacement Energy rate solely on its theory that transmission system constraints may somehow be factored into the billing calculation. Accordingly, finding that Entergy should have been billing at the inexpensive incremental cost of fuel "substitute energy" rate, the Commission reversed the Initial Decision, ordered Entergy to cease and desist the collection of the unlawful charges, and to refund, with interest, any such charges previously collected.

II. Discussion

5. Entergy requests rehearing of Opinion No. 488 and a reversal of the Commission's holding that Entergy cannot consider transmission system operating constraints when determining the "availability" of Arkansas Electric generation resources for purposes of after-the-fact redispatch billing. Alternatively, Entergy requests that the Commission grant rehearing to allow Entergy to consider those system operating constraints which Arkansas Electric causes or to which it contributes.

6. In general, Entergy argues that the Commission's determination was not supported by the language of the agreements; was inconsistent with the parties' intent, normal operations, and good utility practice; and unfair in its effects as it holds Arkansas Electric harmless from the impact of system operating constraints. Entergy observes that the Commission equates "availability" with the term "capability," and in doing so, argues that the Commission gives the same meaning to two different resource measures and ignores the hourly variation in a resource's ability to supply energy to the dispatcher. Entergy also asserts that this understanding of economic dispatch is at odds with the Energy Policy Act of 2005 and Commission decisions, as well as specific provisions of the agreements at issue. Entergy contends that the agreements governing the joint Entergy-Arkansas Electric arrangement call for recognition of system operating

constraints in determining Arkansas Electric's contribution of energy from its resources to the Entergy dispatcher.

7. Contrary to Entergy's arguments regarding who should bear risks of transmission system constraints, the issue in this case is not what the Power Agreement should be, but, rather, what the Power Agreement is. More particularly, the issue is whether Entergy could justify billing exclusively at the expensive Replacement Energy rate rather than the relatively inexpensive Arkansas Electric incremental fuel-based rate (the so-called "substitute energy rate). Although we will address Entergy's arguments in more detail below, we note at the outset that Entergy never clearly explains what provision of the Power Agreement it believes expressly permits it to bill the expensive Replacement Energy rate, irrespective of the physical ability of Arkansas Electric's generation resources to produce power, simply because Entergy does not need power from those resources to meet its system requirements because of its purchases from other sources, or because it has load variations or imbalances, or remote parts of its transmission system have undefined operating constraints. In Opinion No. 488, in contrast, the Commission set forth the specific provisions of the Power Agreement that explain when the inexpensive fuel-based "substitute energy" rate applies and when the expensive Replacement Energy rate applies and found unsupported Entergy's interpretation of the Power Agreement as giving it the right to always charge the expensive Replacement Energy rate based on claimed transmission system constraints.

8. To recap, as the Commission observed, Entergy generally should have been billing the relatively inexpensive incremental fuel rate (substitute energy rate) under Redispatching Principle No. 6. Redispatching Principle No. 7 and the "Outages" provision, Article III, section 5, are the only provisions of the Power Agreement that provide for application of the expensive Replacement Energy rate that Entergy claims it always has the right to charge because of constraints on its transmission system. Both provisions are most reasonably interpreted as being limited to consideration of the physical ability of Arkansas Electric's generation units to produce power and do not consider transmission system constraints. The "Outages" provision, Article III, section 5, provides for Replacement Energy pricing only in circumstances of emergencies or planned maintenance, neither of which applied here. Principle No. 7 factors in the physical "capability" of the units, specifically defined in Article II, section 18 of the Power Agreement as the net generating capability of the Arkansas Electric units based on

tests.⁶ The Commission found that Redispatching Principle Nos. 1, 2 and 3, referred to in Principle No. 7, all concern the actual capability of the units to produce power that may be dispatched.⁷ Thus, under Principle No. 7, in the absence of “Outages” at the plants, the Replacement Energy rate only applies to the amount of power Entergy actually delivers to Arkansas Electric’s customers that exceeds the tested maximum capacity of the Arkansas Electric generating units. Principle No. 7 dovetails with Principle No. 6 which applies the lower Arkansas Electric incremental fuel rate (substitute energy rate) to power Entergy supplies Arkansas Electric’s customers that does not exceed the tested maximum capacity of Arkansas Electric’s generating units.⁸ Although not specified in the text of Principle No. 6, this Principle likewise must assume that no “Outages” apply. Thus, these two billing Principles appear to subsume all possible billing circumstances (in the absence of “Outages”) in which Arkansas Electric owes money to Entergy. Because Entergy does not rely on “Outages” to support its recent billing practice, the only criteria for deciding which of the two billing principles applies is whether the power supplied to Arkansas Electric’s customers exceeded or did not exceed the tested capacity of Arkansas Electric’s generation resources when the power was supplied.⁹ Entergy transmission system operating constraints have no place in that construct.

⁶ Redispatching Principle No. 7 provides:

If the capability of [Arkansas Electric] Resources is not sufficient to supply [Arkansas Electric] requirements in an hour, [Arkansas Electric] may purchase Replacement Energy in accordance with Article III, section 5, after giving consideration to the principles in 1, 2 and 3 above.

⁷ Redispatching Principles Nos. 1 and 2 require the minimum and maximum capacity of the units, respectively, to be considered in billing. Principle No. 3 permits consideration of “other” operating constraints that limit the availability of the plant to the Entergy Dispatcher.

⁸ The lower rate under Principle No. 6 only applies to the “energy deficiency,” i.e., the amount of power actually delivered by Entergy to Arkansas Electric’s customers that exceeds the amount of power actually produced at Arkansas Electric’s generation units. Pursuant to Article V, section 5(a)(i), the amount of power actually produced at Arkansas Electric’s units is credited so that it is charged nothing for that portion of the power supplied its customers.

⁹ The counterpart to Redispatching Principle No. 7, i.e., Article V, section 5(c) of the billing provisions “(Excess Energy),” is the only other billing provision of the Power Agreement that applies Replacement Energy pricing, but ambiguously applies such

(continued)

9. This fact notwithstanding, Entergy billed as if there were a third “Redispatching Principle” that allows it to bill the expensive Replacement Energy rate solely based on operating circumstances on its transmission system even when there are no “Outages” and the tested capability Arkansas Electric generation resources exceeds its customers’ demand. Entergy does not contest that, at all times here relevant, there were no “Outages” and the tested capacity of Arkansas Electric’s generation resources always exceeded its customers’ demand. Hence, Redispatching Principle No. 6 would always have required the lower Arkansas Electric incremental fuel rate (substitute energy rate) to apply. Thus, not only does Entergy’s phantom “system constraints” billing theory fail to fit into Redispatching Principle No. 7, which is the only source of authority to charge the Replacement Energy rate in the absence of “Outages,” its theory conflicts with Redispatching Principle No. 6, which applies the lower Arkansas Electric incremental fuel rate in the exact circumstances reflected in the record.

10. Entergy argues that the Commission defines “availability” too narrowly as the tested capability of the units as that term is used in the other provisions of the Power Agreement on which Entergy relies, *i.e.*, the first paragraph of Article V, section 5, and Billing Principle No. 3. Entergy runs through a number of uses of the term “availability” in those and other provisions of the Power Agreement where it claims that limiting that term to mean only the tested capability of the units would not make sense.

11. As the Commission recognized, the term “availability” is ambiguous in the context of Article V, section 5, and Billing Principle No. 3, and the Power Agreement also applies Replacement Energy pricing in circumstances of “Outages”, *i.e.*, planned maintenance and emergencies, as provided in Article III, section 5. Unfortunately, the Power Agreement is not well-written and scatters provisions explaining how billing is to occur in three separate parts of the agreement. Chiefly because Entergy did not cite “Outages” as the basis for billing the expensive Replacement Energy rate, at several places in Opinion No. 488 where the Commission addressed the meaning of the term

pricing when Arkansas Electric did not have sufficient generation resources “available” – the very term being litigated. On rehearing, Entergy, at 16, makes passing reference to this provision but fails to explain what it thinks it means or to otherwise discuss this provision throughout the remainder of its request for rehearing. As discussed herein and in Opinion No. 488, while it is reasonable to interpret that ambiguous billing provision as referring to its more precise counterpart in the Redispatching Principles, *i.e.*, Redispatching Principle No. 7, which would define availability in terms of the tested capacity of the units, it also could encompass unavailability of generation resources due to “Outages” under Article III, section 5. Neither type of unavailability, however, would encompass Entergy transmission system operating constraints.

“availability” the discussion of the meaning of the term “availability” inadvertently left out a reference to the “Outages” circumstance when all or a portion of the rated capacity of Arkansas Electric’s generation resources is physically not usable. The Commission, nevertheless, recognized throughout Opinion No. 488 that such “Outages” could reduce the actual ability of the generation units to produce power and thus, “Outages” can render the units “unavailable” to the Entergy Dispatcher.¹⁰ While “Outages” generally can be presumed to be the exception rather than the norm, and did not in fact occur here to affect billing anyway Opinion No. 488, nonetheless, should have consistently added the exception that “availability” of Arkansas Electric generation resources can be defined as the tested capability of the Arkansas Electric generation resources *in the absence of Outages of those generation resources*. Such harmless error, assuming it even rises to that level, does not invalidate Opinion No. 488.

12. That said, however, there is nothing else in the billing provisions or Redispatching Principles of the Power Agreement to permit the term “availability” to be defined further, *i.e.*, to go beyond the physical ability of the Arkansas Electric generation units to produce power so as to allow Entergy to consider transmission system operating constraints in billing. Nothing in the “Billing” sections or “Redispatching Principles” of the Power Agreement expressly incorporates Entergy’s theory that transmission system conditions and operating constraints are factors that are used to actually calculate bills for power it sells Arkansas Electric. In the end, Entergy’s equity-type arguments continue to confuse the factors it must take into account in *actual* dispatch with the limited factors it is permitted to consider in applying the theoretical economic *redispatch* billing provisions of the Power Agreement. We turn now to Entergy’s specific arguments.

13. In commencing its argument, instead of referring to the Power Agreement, Entergy asserts, at 12-13, that the Commission’s interpretation of after-the-fact redispatch conflicts with the Co-Owner Operating Agreements (Operating Agreements). Entergy states that these Operating Agreements establish how Entergy is to operate the Co-Owned Units, and clearly contemplate a sharing of the costs associated with Entergy’s operational control of the Co-Owned Units. It notes that the Operating Agreements require each party to pay its proportionate share of all items of cost and to:

...share in all obligations and liability, except as otherwise provided herein, incurred in conjunction with Independence SES, and not otherwise expressly provided for, and in the event of any doubt whether

¹⁰ *E.g.*, Opinion No. 488, at P 53-54, 56.

responsibility for a particular cost, obligation or liability is provided for in this agreement, such cost, obligation or liability shall be so shared.¹¹

Entergy argues, at 13, that “the [Power Agreement] clearly allows Entergy to consider the effects of system operating constraints in determining the availability of AECC Resources for redispatch billing purposes. However, if the [Power Agreement] were silent or ambiguous, the provisions from the ISES OA and White Bluff OA plainly establish that system operating constraints must be proportionately shared among the Co-Owners.”

14. This argument is irrelevant to the Commission’s determination in Opinion No. 488. Cost-sharing in the Operating Agreements has no bearing on the billing issue at hand, which is governed by the Power Agreement. The sharing of the costs of operations pursuant to those other agreements does not dictate how billing works under the Power Agreement and certainly cannot be used to trump specific billing provisions and Principles of the Power Agreement.

15. Entergy then turns to the Power Agreement and argues, at 15, that the Commission erred by holding that “availability” actually means “capability,” which the Power Agreement defines as the rated capacity of the units, in its interpretation of Redispatching Principle No. 7. Entergy asserts that Arkansas Electric may purchase Replacement Energy if it does not have sufficient resources “available” to the Entergy Dispatcher, “e.g., if they are not producing at full capability pursuant to Redispatching Principle Nos. 1, 2, and 3.” It asserts that the Commission’s interpretation renders Redispatching Principle No. 3 meaningless and conflicts with Redispatching Principle No. 2. Entergy argues that if the parties to that agreement had intended that Redispatching Principle No. 7 “alone” determine how Arkansas Electric resources are measured in billing redispatch, they would not have developed Redispatching Principle Nos. 1, 2 and 3 and they would not have referenced them in Redispatching Principle No. 7.

16. As noted earlier herein and in Opinion No. 488, Redispatching Principle No. 7 is not the only provision of the Power Agreement that provides for Replacement Energy pricing; the “Outages” provision also provides for such pricing but the record reflects here that Entergy is not relying on “Outages” to support its case. As discussed later in more detail, at P 18-19, Principle No. 3, which is to be considered in applying Principle No. 7, most reasonably is defined to require Entergy to consider both the rated capacity

¹¹ Rehearing Request at 13, *citing* ISES Operating Agreement, § 4.1; Ex. AEC-5 at 6-7 (White Bluff Operating Agreement, §2(a)) (setting forth corresponding provision for cost sharing).

of Arkansas Electric's resources and whether there are "Outages" at Arkansas Electric's generating plants, with no reference to transmission system operating constraints. Moreover, Entergy never clearly explains how the reference in Principle No. 7 to the generation capacity-related Principle Nos. 1 and 2 supports its claim that billing under Redispatching Principle No. 7 is not limited to rated capacity.

17. Entergy argues that the Power Agreement does not support Opinion No. 488's limitations on Entergy's ability to consider transmission system operating constraints and on the circumstances in which Entergy may charge for replacement energy. Entergy alleges, at 16, that "the Commission's reading of these provisions [Article V, section 5(c) and the corresponding Redispatching Principle No. 7] as limitations on Entergy's ability to supply Replacement Energy for deficiencies due to system operating constraints conflicts with the [Power Agreement] as a whole and fails to give effect to all its provisions." Further, Entergy states, at 16, that "Article V, section 5(c) does in fact provide one of the circumstances in which Entergy may charge for Replacement Energy. It provides for Replacement Energy charges '[f]or any energy used by AECC on redispatch for which AECC did not have sufficient AECC Resources *available*.'" We previously found, and we affirm here, that Redispatching Principle No. 7 corresponds to Article V, section 5(c) and provides an explanation of that provision. The Commission relied on the entire contract and interpreted it as a whole. In its argument, Entergy relies on only those provisions that use the word "available," which the Commission found to be ambiguous, and neglects to explain how its interpretation of those provisions is consistent with Redispatching Principle Nos. 6 and 7.

18. In addressing Redispatching Principle No. 3, the Commission found that the reference to "other operating constraints that limit the availability of the plant to the [Entergy] dispatcher" to mean consideration of "other" operating constraints of the Arkansas Electric generating *units*.¹² To reach this conclusion, Entergy asserts, at 17, that "the Commission tenuously argues that because Redispatching Principle Nos. 1 and 2 define the minimum and maximum operating levels for each unit, other operating constraints in Redispatching Principle No. 3 must mean *unit* operating constraints...[b]ut Redispatching Principle No. 3 expressly addresses the availability of the *plant*, not the unit." Whether one refers to constraints at "the plant" (which consists of two generating "units," related generating equipment and fuel) or to the constraints of the units themselves, the reference to "the plant" does nothing to support a "plain" reading of Redispatching Principle No. 3 as a reference to transmission system operating constraints. Moreover, the Commission did not find, as Entergy incorrectly implies, that because Redispatching Principle Nos. 1 and 2 refer to rated capacity of the units,

¹² Opinion No. 488, at P 60.

Redispatching Principle No. 3 must be limited to referring to unit-specific constraints. The Commission engaged in that analysis to show why the reference to “availability” in Redispatching Principle No. 3 is ambiguous.

19. The Commission finds that Entergy reads Redispatching Principle No. 3 out of context. As Entergy argues, at 10, “[a] fundamental tenet of contract interpretation is that a contract provision should be interpreted, where possible, as consistent with the contract as a whole and that contract must be interpreted as a whole.” Redispatching Principle No. 3 must be read in conjunction with Redispatching Principle Nos. 1 and 2, which establish the maximum and minimum operating levels for each unit and, therefore, at each plant. As discussed above, “other” operating constraints at the Arkansas Electric generation plants, such as emergencies or planned maintenance “Outages,” in addition to the operational constraints of the maximum and minimum capacity of the units at each plant, may limit the “availability” of the full rated plant capacity to the Entergy Dispatcher. Thus, the term “*other* operating constraints” is reasonably interpreted to refer to operating constraints at the plant that affect the ability of the generating units to produce power and does not necessarily include operating constraints on the Entergy transmission system as Entergy argues and the Initial Decision found. Our point simply is that, in light of the specific billing provisions and Redispatching Principles that explain when Entergy may bill at the expensive Replacement Energy rate, the Redispatching Principles are all most reasonably read to be limited to the Arkansas Electric generating units, not to Entergy’s transmission system. None of the billing provisions or Redispatching Principles support factoring such transmission system constraints into the amount owed.

20. Entergy argues, at 17, that there are many non-unit operating constraints that may limit the “availability” of the plant to the Entergy dispatcher. Entergy cites to the cross examination of Arkansas Electric’s witness, Mr. Louis Fish, and attempts to characterize his testimony as a statement against interest:

Q: Leaving aside the redispatch provisions for a moment, would you agree that in the real world other operating constraints, whether at the plant or remote, in fact can limit the availability of a plant to the system dispatcher?

A: Well, they won’t limit the available capability of the plant. They may limit the dispatcher’s ability to get to it.¹³

¹³ Rehearing Request at 17, *citing* Tr. 190:1-8; Initial Decision at P 38.

21. The testimony of Mr. Fish is not an admission against interest. Mr. Fish confirms that operating constraints remote from a plant, *i.e.*, transmission system constraints, will not limit the “available capability” of the plant. This is fully consistent with the Commission’s finding that “availability” generally, and as used in the Power Agreement, means the capability of the units to produce power.

22. Entergy, at 18, also refers to Mr. Ricky Bittle’s testimony that physical problems, such as wet coal, a damaged boiler, or when a storm takes out a transmission line directly tied to one of the units, would legitimately reduce the capability of the generation to be used in the redispatch billing. As discussed earlier herein, we agree that the availability of a plant can turn not only on the rated capability of the units at the plant but also on Outages at the plants. These circumstances are contemplated in Article III, section 5 of the Power Agreement, which provides for Arkansas Electric to pay the expensive Replacement Energy rate for power Entergy must supply Arkansas Electric’s customers from Entergy system resources rather than Arkansas Electric generation because of an emergency or planned maintenance at the Arkansas Electric plants. All of the circumstances pointed out by Entergy above are unforeseen physical emergencies which would take place at the plant and, therefore, would appear to be addressed by Article III, section 5 of the Power Agreement as emergencies. These circumstances would still not be classified as *transmission system* operating constraints. Moreover, even if so classified, Entergy did not claim these types of circumstances occurred to warrant charging the Replacement Energy rate. It claimed remote transmission system operational constraints. Wet coal, for example, would not affect transmission system operations.

23. Entergy alleges, at 18, that in interpreting Redispatch Principle No. 3 and Article III, section 5 as limitations on Entergy’s ability to supply and charge for Replacement Energy, the Commission failed to address the Power Agreement’s definition of “Replacement Energy” which, in Article II, section 18, states:

The term “Replacement Energy” as used herein shall mean electric energy which one party desires to purchase from the other party for reasons including, *but not limited to*, deferring use of fuel or water, *transmission system operations*, scheduled short outages of generating units, environmental conditions, selling replacement energy to another party or other reasons of similar nature. (emphasis added)

Entergy asserts, at 19, that “the definition of Replacement Energy unequivocally states that AECC may purchase Replacement Energy for multiple reasons, including ‘transmission system operations,’ rather than only when the rated capacity of AECC Resources is exceeded or when AECC Resources experience an outage.”

24. Entergy has too narrowly construed the definition of “Replacement Energy” to relate only to purchases of power by Arkansas Electric from Entergy. By its terms, the definition of Replacement Energy refers to “energy which one party desires to purchase from the other party” which could mean that either party, including Entergy, may wish to buy power from the other. Thus, Entergy may wish to buy power from Arkansas Electric as a consequence of Entergy transmission system operational constraints, which explains the inclusion of a reference to transmission system operations in the definition.

Article V, section 5(a)(iii) provides that if Entergy dispatches more power from Arkansas Electric’s generation resources than necessary to meet Arkansas Electric’s customers’ load, which could be because Entergy needs the power as a consequence of its transmission system constraints, Entergy will buy the power from Arkansas Electric and pay Arkansas Electric at Arkansas Electric’s incremental fuel rate plus an adder.¹⁴

25. Entergy asserts, at 19, that “[t]he Commission’s rationale...would completely protect [Arkansas Electric] from any problems on the transmission system.” It argues that this result was “clearly” not contemplated by the numerous provisions of the Power Agreement and that it is “much more reasonable to read other provisions, such as Article II, section 18, Article V, section 5, and Redispatching Principle Nos. 3 and 9, as clarifications of or supplements to Redispatching Principle Nos. 6 and 7.”

26. Entergy confuses the issue as turning on what Entergy believes would be equitable, as opposed to what is the most reasonable interpretation of the Power Agreement. In any event, Entergy obtained over \$600 million in system generation capacity to use for its system purposes in return for the Power Agreement’s unusual billing provisions under which the generator, Arkansas Electric, is deemed to buy power from the transmission provider, Entergy.¹⁵ Entergy, in short, complains of the pricing provisions operating exactly as agreed-upon.

27. Entergy argues, at 19, that the Commission ignores the effect of what Entergy asserts are the corresponding provisions of the Co-Owner Agreements concerning Entergy’s supply of substitute energy, particularly section 8.4 of the ISES Operating Agreement, which states in part:

In certain circumstances where [Entergy] may, for its overall system requirements, *elect* not to schedule generation from either or both of the Independence Unit No. 1 or Independence Unit No. 2 of

¹⁴ See Opinion No. 488, Appendix.

¹⁵ See, Arkansas Electric Brief Opposing Exceptions at 1.

Independence SES when either such Unit is capable of generation, [Entergy] shall schedule and make available to the Participants who have Ownership Shares in any Unit not so scheduled an amount of energy from other of its resources in accordance with the requirements of such Participants equal to each Participant's Ownership Share of the net capability of the Unit not so scheduled at the time of the election of [Entergy] not to schedule generation from such Unit. In such event, energy shall be paid for on the basis of the average cost per ton of the coal stockpile for the Independence SES and the heat rate of the relevant Unit assuming operation at 60% loading during summer test conditions. (emphasis added)

28. Entergy argues, at 20, that, according to this provision, it must supply substitute energy when it “elects” not to schedule from capable units. It argues that “the option to make an election in dispatching a unit ... governs whether ‘capability’ or ‘availability’ should be used to establish [Arkansas Electric’s] entitlement to energy from a Co-Owned Unit.” Thus, it argues, Entergy supplies inexpensive substitute energy when it has the option to “elect” to do so; if not, it asserts, when the Entergy dispatcher must limit output of the Arkansas Electric generation resources because of transmission system conditions, “its availability to the [Entergy] dispatcher in that hour is limited and [Arkansas Electric’s] entitlement to energy is governed not by the unit’s capability but rather by the amount of energy the [Entergy] dispatcher receives from the unit and delivers to load.” In addition, Entergy asserts that the last sentence of section 8.4 affects billing.

29. Entergy’s attempt to distinguish “capability” from “availability” begs the issue of what “availability” means and obscures how billing works. Billing is based on a number of factors: actual output, capability of the units (both rated capacity and whether they are off-line for maintenance or emergencies), and Arkansas Electric’s customers’ demand. As the Commission observed in Opinion No. 488, at P 62, use of Arkansas Electric’s generation capacity is at the discretion of the Entergy dispatcher, so any decision regarding how much power is to be dispatched from the unit is arguably an “election.” Moreover, as the Commission further observed in Opinion No. 488, at P 62, that provision does not govern billing and, instead, governs ownership shares (entitlement) of the energy generated from the co-owned Arkansas Electric units. Arkansas Electric’s ownership share is not affected by the foregoing factors. Thus, this provision is irrelevant. Once again, Entergy is mistaken in suggesting that only the *actual* amounts of energy its dispatcher decides to dispatch from Arkansas Electric’s generating units matters. Billing, *i.e.*, redispatch, is based on theoretical dispatch and assumes that as long as what Arkansas Electric’s generation resources are capable of producing is sufficient to serve its customers’ load, the power Entergy delivers to Arkansas Electric’s customers is,

in fact, produced and dispatched from Arkansas Electric's generation resources irrespective of the amount of power actually dispatched from those resources. To only bill based on actual amounts of power the Entergy dispatcher dispatches from the Arkansas Electric's generation resources destroys the whole concept of theoretical redispatch underlying the Power Agreement. Finally, Entergy's assertion that the last sentence of section 8.4 of the Operating Agreement provides the basis of payments which affects billing only serves to disprove its position. Consistent with Redispatching Principle No. 6, the last sentence of section 8.4 of the Operating Agreement provides that the inexpensive Arkansas Electric incremental fuel rate is the rate that applies to the extent power actually dispatched from Arkansas Electric generating units is insufficient to meet its customers' demand, not the expensive Replacement Energy rate.

30. As noted earlier, Entergy, at 21-22, challenges the Commission's definition of the term "availability," which it states that the Commission equates with the term "capability." It asserts that "the Commission's treatment of the two terms as interchangeable is the basis for its decision, and the crux of its error." It states that the Commission's definition of availability conflicts with the plain meaning of the Power Agreement. Entergy states that "the Commission argues that the use of 'capability' in Redispatching Principle No. 6 informs the proper definition of 'availability' in Redispatching Principle No. 3... [b]ut Redispatching Principle No. 6 must complement other provisions of the [Power Agreement], not exclude them. The maximum dependable capability as determined by an annual test cannot change due to emergencies, outages, or system operating constraints. The hour-to-hour availability to the [Entergy] dispatcher, however, will be affected by each of these factors."

31. As discussed earlier, at P 11, we agree that the ambiguous term "availability" as used in the general provisions of the Power Agreement on which Entergy and the Initial Decision rely, Article V, section 5 and Principle No. 3, can be interpreted to require billing to include consideration of whether Arkansas Electric's generation resources are off-line for scheduled maintenance or emergencies as expressly provided in the "Outages" provision, Article III, section 5. However, even though, when taken out of context, the term "availability" is broad enough to cover whatever else Entergy would wish to include, the Power Agreement provides no specific billing calculation to reflect unavailability due to Entergy transmission system constraints. Neither the Initial Decision nor Entergy on rehearing explain how they get from the general (Article V, section 5 and Principle No. 3) to the specific (billing at the expensive Replacement Energy rate). In the circumstances under which billing generally has been occurring, *i.e.*, no Outages and more than sufficient capacity of Arkansas Electric's coal-fired generation resources to meet Arkansas Electric's customers' demand, Redispatching Principle No. 6 applies and requires any deficiency in power actually supplied to its customers be priced at the inexpensive Arkansas Electric incremental fuel rate (the substitute energy rate).

32. In Opinion No. 488, at P 64, the Commission found that other provisions of the Power Agreement that include the term “availability” also support the finding that the term concerns the capacity of the unit and not system operating constraints. The Commission stated, for example, Article V, section 5(a)(iv) of the “Billing” provisions of the Power Agreement provides: “[f]or purposes of these calculations, and for dispatching purposes [Arkansas Electric] will keep [Entergy] informed as to availability of each of its units as well as costs and availability of fuel at each of its units.” The Commission queried, “[i]f ‘availability’ means what Entergy and the Initial Decision contend and turns on whether there are system operating constraints at that time, then how could Arkansas Electric be able to inform Entergy of the availability of the units; only Entergy would know that.” On rehearing, Entergy states that “[t]he irrationality of the Commission’s interpretation of ‘availability’ is obvious if one imposes FERC’s definition of availability into that section.” It queries, at 23: “[i]f, as the Commission believes, availability means rated capacity pursuant to Article II, Section 17, why would [Arkansas Electric] be required to keep Entergy informed of the rated capacity of a unit?” Entergy states that, unlike rated “capability,” “availability” may change on an hour-to-hour basis.

33. We agree that “availability” of fuel has nothing to do with the rated capacity of the generating units. However, the Power Agreement does not necessarily use all terms consistently and, in the context of Article V, section 5(a)(4), the term is used in reference to both the availability of the units and the availability of fuel. Entergy gains nothing from that fact; it still does not suggest that “availability” of a plant or unit for purposes of after-the-fact theoretical billing turns on Entergy transmission system constraints. As the Commission observed, Arkansas Electric cannot be held responsible for informing Entergy of its own transmission system operating constraints. The hour-to-hour “availability” of Arkansas Electric’s generating units can turn on whether they are off-line for “Outages.” The Power Agreement specifically accommodates such “Outages” in providing for the expensive Replacement Energy rate for deficiencies due to Outages. That begs the issue of whether there is some provision in the Power Agreement that requires that expensive rate to apply in the absence of an Outage, given that the rated capacity of Arkansas Electric’s generation units has always exceeded its customers’ demand for energy.

34. In Opinion No. 488, the Commission also referred to the definition of Arkansas Electric “Owned Resources” in Article II, section 1, of the Power Agreement to support its conclusion that “availability” cannot concern transmission system constraints. Article II, section 1, defines Arkansas Electric Owned Resources to mean: “the electric generating facilities owned by [Arkansas Electric] (including [Arkansas Electric]’s share of power and energy in any jointly owned facilities) located within the [Entergy] Load Control Area and which are available for dispatching by [Entergy].” The Commission stated that, obviously, a determination by the Entergy dispatcher that an Arkansas

Electric generating unit is not “available” for dispatch cannot alter the ownership interest Arkansas Electric has in that unit. Entergy argues, at 23, that “[i]t strains logic to argue that ‘available for dispatch’ somehow indicates that ‘availability’ and ‘dispatchability’ are two distinct concepts.” Instead, it asserts, if one applies an ordinary and common English meaning to “available” (from Webster’s Dictionary), then this provision essentially means “accessible or usable for dispatch.”

35. Entergy attempts to apply ordinary English usage to an industry-specific technical term of art that does not apply in this context. In any event, the Webster’s Dictionary primary definition of “available” it cites is: “capable of being used; usable.”¹⁶ That definition is certainly consistent with the Commission’s and Arkansas Electric’s interpretation. The Commission found that the use of “availability” in the Power Agreement was ambiguous and properly used the corresponding Redispatching Principle Nos. 6 and 7, and the “Outages” provision of Article III, section 5, to give full meaning to their associated billing provisions. Indeed, the types of transmission system operating constraints Entergy claims are occurring would not necessarily render Arkansas Electric’s plants unavailable for actual dispatch under Entergy’s own definition. A number of the examples its witness provided of transmission system operational constraints, such as purchases from QFs and IPP imbalances, do not involve physical operating constraints of a transmission system that physically bar access to the plants and do not affect the physical ability of the Entergy dispatcher to actually dispatch power from a generating unit. Rather, they simply reflect the Entergy dispatcher’s hourly operational decisions. The fact that the dispatcher decides that power from a particular generation unit may be unneeded or not desired in any given hour does not render that unit unavailable for dispatch. The unit is still “capable of being used; usable.”

36. In Opinion No. 488, at P 59, the Commission stated that the common industry definition of a generation unit’s “availability,” of which it took official notice, is the physical capacity or capability of the generation unit itself. Entergy alleges, at 25-26, that the Commission did not accurately quote the definition it cites. Entergy states that the complete definition to which the Commission refers states that “Availability” means: “[a] measure of time a generating unit, transmission line, or other facility is capable of providing service, whether or not it actually is in service. Typically, this measure is expressed as a percent available for the period under consideration.” On the other hand, according to Entergy, a common industry definition of “capability,” is: “[t]he maximum load which a generating unit, station, or other electrical apparatus can carry under specified conditions. The terms capability and capacity are used interchangeably.”

¹⁶ Rehearing Request at 24, *citing* Webster’s Dictionary of the English Language 128 (1977 ed.).

Entergy argues that the terms availability and capability cannot have the same meaning because one is represented as a unit of time and the other as a unit of power.

37. Entergy's logic is not altogether clear, but it appears that they are attempting to disengage the term "capability" from "availability" in this industry set of definitions despite the fact that the former is used to define the latter. Further, "availability" is defined in terms of "capability" of providing service, not actual service, and not merely in terms of time. In any event, we have explained that the requirement of the Power Agreement that the Entergy dispatcher consider the availability of Arkansas Electric generating units includes consideration of "Outages" beyond consideration of the maximum and minimum capacity of the units required by Principles Nos. 1 and 2.

38. Entergy argues that an AECC Resource is not "capable of providing service" (per the NERC definition relied upon by the Commission) in an hour (as required under the Redispatching Principles) if the Entergy dispatcher is unable to utilize it. Entergy contends that it is not its dispatcher's determination not to dispatch; rather, it asserts, the unit is *incapable* of dispatch because of transmission system operating constraints.

39. That begs the issue and is not accurate. For example, just because the Entergy dispatcher might be unable to utilize power generated from Arkansas Electric's units in a remote part of the Entergy system, such as in southern Louisiana, does not mean that it could not utilize that power in other parts of the Entergy system, such as in Arkansas. Further, as noted earlier, just because the Entergy dispatcher has decided not to dispatch power from Arkansas Electric's units, for example because Entergy has purchased sufficient power from other suppliers, such as QFs, to meet its system needs, does not render Arkansas Electric's generating units incapable of actual dispatch or otherwise render them unavailable.

40. Entergy asserts that it is unreasonable to use a technical glossary developed in 1996 to define "availability" as it is used in this 1977 agreement absent evidence that the term had the same meaning for the near 20-year interval. Further, Entergy argues that it is proper to look to contemporaneous definitions.¹⁷ Industry glossaries reflect long-standing, commonly-used terms and we have no reason to believe, nor has Entergy shown to the contrary, that the 1996 NERC definition did not accurately reflect the common industry use of the term "availability" when the Power Agreement was executed.

¹⁷ Rehearing Request at 25, citing *Union Pacific Rr. Co. v. St. Louis Marketplace, Ltd. P'ship*, 212 F.3d 386, 389 (8th Cir. 2000).

41. Entergy claims, at 26, that the Commission also erred in its reliance on NERC's Generating Availability Data System (GADS). In Opinion No. 488, the Commission observed, in footnote 50, that the Data Reporting Instructions that NERC has developed for its GADS expressly instructs reporting utilities that system dispatch requirements that require generating units to be operated at less than full capacity "are not relevant to unit availability."¹⁸ Entergy argues that the purpose of the GADS program is to "improv[e] the performance of electric generating *equipment*" and "to support *equipment* reliability and availability analyses and decision-making by GADS data users."¹⁹ Entergy claims that GADS' focus is on equipment reliability and availability and it excludes transmission system operating constraints, which GADS classifies as "Outside Management Control (OMC) Events." Moreover, Entergy argues that in addition to transmission system operating constraints, GADS categorizes events such as regulatory compliance; weather; natural disasters; and wet or frozen coal as OMC Events, which it excludes from the calculation because of the focus of the program.²⁰ It states that the GADS' instructions even recognize that excluding these conditions results in a "fictional summary of the unit's performance."

42. Entergy's claim regarding the limited "focus" of NERC's GADS is based on pure speculation on its part. Moreover, with the exception of its reference to "system operating conditions," the various conditions Entergy points to as OMC events, like natural disasters or wet coal, reasonably could fall into the types of events at Arkansas Electric's plants that could be defined as "Outages" under Article III, section 5 of the Power Agreement, which would result in Replacement Energy pricing. However, Entergy has not claimed "Outages" as the basis for seeking Replacement Energy pricing for one hundred percent of the power it supplies Arkansas Electric's customers.

43. Entergy, at 27-28, claims that the Commission has misunderstood the circumstances in which Replacement Energy is used in after-the-fact-redispatch. It asserts that this misunderstanding is illustrated by the Commission hypothetical at P 55 of Opinion No. 488, which Entergy claims "suggests" that any time an Arkansas Electric

¹⁸ Citing NERC Council GADS Data Reporting Instructions, effective January 2006, at p. III-16, available at <http://www.nerc.com>.

¹⁹ Citing North American Electric Reliability Council, GADS Services, at <http://www.nerc.com/~gads/> (emphasis added).

²⁰ Citing NERC GADS Data Reporting Instructions at K-4, available at ftp://www.nerc.com/pub/sys/all_updl/gads/dri/2007_GADS_DRI.pdf (effective January 2007).

unit is not dispatched at its rated capacity, and if Entergy is permitted to consider the effects of system operating constraints in determining availability of those resources, then Arkansas Electric must pay the Replacement Energy rate for the difference between actual output and its customers' requirements. Entergy observes that Arkansas Electric owns multiple units and if one unit's availability is insufficient to supply its customers' load, output of another unit is credited before Replacement Energy is contemplated. Entergy then argues that the Commission's interpretation is incorrect because, if it were true, then there would be a substantial increase in Replacement Energy but it did not substantially increase in June and July 2004 when it began considering transmission system constraints in billing.

44. At the outset, the Commission's hypothetical does not, in any way, suggest that one can interpret the provisions of the Power Agreement to provide any guidance or basis for billing based on Entergy transmission system operating constraints. The Commission used a hypothetical using sample numbers simply to explain how billing works under the provisions of Power Agreement, which do not factor in such operating constraints. Nor does the hypothetical suggest that output for billing purposes is limited to one unit's output. In any event, Entergy's arguments are completely irrelevant to the issue of whether the Power Agreement provides for Replacement Energy pricing due to transmission system operating constraints. Finally, Entergy's claim, at 28, that, based on June and July of 2004 alone, there was not a significant increase in Replacement Energy billing to reflect system operating constraints is belied by the record which shows that Entergy thereafter began billing Arkansas Electric for one hundred percent of delivered substitute energy at the expensive Replacement Energy rate resulting in increased charges of over \$6.4 million just for the period from July 2004 through May 2005 alone.²¹

45. Entergy alleges, at 29, that the Commission seems to imply that Entergy somehow "chooses" transmission system operating constraints. Also, Entergy asserts that the Commission seems to have adopted what Entergy claims is Arkansas Electric's position that virtually any impact on Arkansas Electric Resources is an Entergy election. In contrast, it contends that transmission system operating constraints dictate its dispatcher's actions. It states that it does not have the option of operating the Arkansas Electric units in such a way as to threaten safety and reliability. Thus, it claims, based on this alleged misunderstanding, the Commission believes that the discussion of "good utility practice" throughout the record is irrelevant. To the contrary, it proclaims, at 30, those issues are highly relevant, pointing to Entergy's duties under the Operating Agreements, and that

²¹ See Arkansas Electric Initial Brief at 9, 16-17; Arkansas Electric Brief Opposing Exceptions at 8.

the Commission has insulated Arkansas Electric from the effects of such regulatory requirements

46. Like the majority of its arguments, Entergy first miscasts the Commission's understanding or beliefs and, based on that strawman premise, claims that the Commission is in error. The Commission is fully aware of the obligations Entergy has to operate its system and dispatch power giving consideration to all physical operating circumstances. The Commission addressed a similar discussion in the Initial Decision and pointed out that it could be assumed for purposes of addressing the issues of the case that Entergy operates both its transmission system and Arkansas Electric's generation resources in accordance with "good utility practice."²² But, as the Commission noted, that only concerns how Entergy actually dispatches power; the issue in the case concerns billing, *i.e.*, redispatch, and there are only four factors that the Power Agreement considers in determining how much Arkansas Electric and Entergy owe the other when they purchase power when there is no Outage: actual output, rated capacity, the incremental cost of power, and Arkansas Electric customer demand. Transmission system operating constraints is not one of those factors. Thus, while Entergy may be unhappy with the course of events that preclude it from shifting cost consequences of transmission system constraints to Arkansas Electric, that is the deal it entered into under which it acquired over \$600 million of generating capacity at no cost to dispatch at its choosing.

47. Entergy, at 31, takes issue with the Commission's statement in Opinion No. 488, at P 58, that generally billing at the cheap "substitute energy" price, *i.e.*, the incremental fuel cost, "is exactly the situation contemplated where, but for the settled arrangement by which Entergy runs [Arkansas Electric]'s generators, [Arkansas Electric] would actually dispatch all the power from its own generators necessary to meet its own customers' needs, *i.e.*, economic dispatch." Entergy argues that, if Arkansas Electric were to operate its own control area and dispatch its own resources, by its own admission, it would be required to take system operating constraints into account.²³ It notes that Redispatching Principle No. 9 states that "[t]here are operating conditions where a jointly owned generating unit *must* be operated without regard to economic dispatch." Entergy points to Arkansas Electric's witness Bittle's testimony that "[t]he parties recognized that normal prudent utility practice would sometimes involve suboptimal dispatch of ISES and White Bluff."²⁴ It relies on section 1234(b) of the Energy Policy Act of 2005's definition of

²² Opinion No. 488, at P 68.

²³ *Citing* Tr. 368:20-25, 369:17-22, 195:8-10.

²⁴ Rehearing Request at 31, *citing* Ex. AEC-1 at 10:13-15.

“economic dispatch” as “the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and *transmission* facilities.”²⁵ Entergy argues, at 33, that the Power Agreement defines numerous factors with which Arkansas Electric would have to contend if it operated its own Control Area, *e.g.*, Ancillary Services, Automatic Generation Control, Contingency, Dispatchable Generation, Load Following, Operating Procedures, Reserves, and Schedules. It asserts that each of these may limit the output of units as described by Redispatching Principle No. 3. Entergy therefore asserts that in order to accurately mimic the dispatch of AECC Resources as if they were dispatched as a stand-alone system, one must account for transmission system operating constraints.

48. The Commission’s statement was made with the assumption that Arkansas Electric would choose to generate power from its lowest cost units if it had not turned over operation of its generation resources to Entergy for use of those resources for Entergy’s system purposes.²⁶ By its terms, billing under the Power Agreement was to replicate the cost to Arkansas Electric under that theoretical scenario, *i.e.*, power delivered to its customers would be at its lowest incremental fuel cost (coal) irrespective of whether the power is actually produced at its units. We did not intend to imply that actual physical operation of Arkansas Electric’s units would be replicated by the theoretical billing construct of the Power Agreement or that actual operations would always have reflected economic dispatch. Under the Power Agreement, Entergy may dispatch power differently than Arkansas Electric might have had it not turned over operation of its generation resources to Entergy for Entergy to use them as system resources. Thus, Entergy may dispatch power from Arkansas Electric’s plants as Entergy’s system needs require. It is the billing that occurs under theoretical redispatch that must assume an economic dispatch from those Arkansas Electric plants.

49. Entergy argues, at 34-35, that the effect of the Commission’s ruling is to hold Arkansas Electric harmless for the effects of system operating constraints, including

²⁵ Energy Policy Act of 2005, Pub. Law No. 109-58, § 1234(b), 119 Stat. 594, 960 (2005) (emphasis added).

²⁶ In Opinion No. 488, at P 2 n.4, the Commission explained that, for simplicity in dealing with the billing issues that Arkansas Electric raises in the instant proceeding, it would treat the “substitute energy” cost as generally being the cost of fuel at Arkansas Electric’s coal-fired units and take no position on the billing issues raised in another proceeding, Docket No. EL05-135-000, which the Commission deferred to the courts to resolve regarding whether and in what circumstances its more expensive gas-fired generation costs apply. *See Entergy Arkansas, Inc.*, 112 FERC ¶ 61,306 (2005).

those that Arkansas Electric causes. Entergy argues that Arkansas Electric's purchases, sales of energy to and from the Entergy Control Area, and load variations can cause system operating constraints. Entergy asserts that Arkansas Electric is a major source of operating limits on the output of the Arkansas Electric units, pointing to its service to Nucor, a steel mill operating an arc furnace that constitutes a large component of Arkansas Electric's load, which experiences rapid and unpredictable increases and decreases in load throughout the day and on a moment-to-moment basis. Entergy argues that its dispatcher must sometimes operate the subject units below their maximum output levels, asserting that it is impossible for Entergy to elect not to adjust generation in response to Nucor load and still operate in accordance with good utility practice. Entergy argues that, as a matter of fundamental fairness, Arkansas Electric's acceptance of the benefits of the Co-Owner Agreements should be conditioned on Arkansas Electric paying any increased costs that result from its contributions to system constraints, and seeks clarification of that from the Commission on rehearing.

50. Entergy is complaining about the normal operational considerations that its dispatcher must confront on its system, including load variations of Arkansas Electric's customers, such as Nucor, over whom Arkansas Electric has no control. Arkansas Electric does not "cause" those load variations.²⁷ Arkansas Electric's conduct is not at issue here; nor does the issue turn on equity. The issue turns on what the Power Agreement provides, not what Entergy believes it should provide in order to give Entergy a better deal. In return for obtaining over \$600 million in capacity from Arkansas Electric, Entergy agreed to charge Arkansas Electric at rates set by the Power Agreement. Entergy has no basis to charge on a basis not agreed to in the Power Agreement just because that deal may have gone sour in Entergy's view. Entergy's request is not for a clarification of the existing contract's rights and obligations. Entergy effectively requests a change in the Power Agreement, which is outside the scope of this proceeding. Accordingly, we reject its request that we grant rehearing to, in this proceeding, effectively modify the Power Agreement to permit Entergy to bill Arkansas Electric at a higher rate (presumably the expensive Replacement Energy rate) to somehow penalize Arkansas Electric for transmission system constraints Entergy claims Arkansas Electric causes.

51. In Opinion No. 488, at P 70-71, the Commission also relied on extrinsic evidence of Entergy's decades-long practice of charging the inexpensive substitute energy rate

²⁷ Moreover, Entergy never explains how something like moment-to-moment load variations on its transmission system, which it defines as transmission system operating constraints, can translate into specific changes in the amounts it bills Arkansas Electric under the Power Agreement.

irrespective of transmission system conditions. On rehearing, Entergy argues, at 39, that what it asserts are “the plain terms” of the Co-Owner Agreements obviate the Commission’s reliance on course of performance and other extrinsic evidence. Further, it states that where there is ambiguity, the Co-Owner Agreements control:

It is the intent of the Participants that each party will pay its proportionate share of all items of cost, other than those related to financing, and share in all obligations and liability, except as otherwise provided herein, incurred in connection with Independence SES, and not otherwise expressly provided for, in proportion to the Ownership Share of each, and *in the event of any doubt whether responsibility for a particular cost, obligation or liability is provided for in this agreement, such cost, obligation or liability shall be so shared.*²⁸

52. The allocation of costs of the Co-Owned generating units among the Co-Owners (such as fuel costs, operational expenses, maintenance costs, etc.) is irrelevant to the issue of how Entergy is to bill Arkansas Electric for the power Entergy delivers to Arkansas Electric's customers. The extrinsic evidence of Entergy’s decades-long practice of charging the inexpensive substitute energy rate irrespective of transmission system conditions is relevant to the interpretation of the Power Agreement, which is unclear at least as to the implication of the term “availability” in the sections of that agreement on which Entergy relies.

53. Entergy argues, at 40, that course of performance, even if relevant, is of no assistance in this dispute because there has been no consistent practice since 1977. It contends that the Commission’s conclusion otherwise is unsupported and conflicts with the record evidence in this proceeding. It asserts that the transmission system operating constraints that allegedly now affect the system have not existed historically to the same degree, claiming that this was acknowledged by Arkansas Electric’s witness, Mr. Fish. Entergy states that it did not waive its “rights” under the Power Agreement to include transmission system operating constraints in the after-the-fact redispatch billing.

54. The Commission found, at P 70-71, that Entergy conceded that some transmission system constraints occurred in the past (however infrequent or minor) and yet it never charged on that basis until 2000, some 23 years after the Power Agreement was executed,

²⁸ Rehearing Request at 39-40, *citing* Ex. AEC-7 at 20-21 (ISES OA, § 4.1) (emphasis added).

and then only over the objection of Arkansas Electric. Further, the Commission cited testimony that Entergy did not begin to regularly bill at the Replacement Energy rate until July 1, 2004. Even now in its rehearing request, at 42, Entergy concedes that system constraints (as it defines them) like SPP imbalances and QF purchases had “increased dramatically over the last 10 years” and had been occurring since the “mid-1990s,” despite its attempt elsewhere, at 42-44, to dismiss them as “small,” “not significant” or “*de minimis*.” Finally, in the absence of a “right” to reflect transmission system operating constraints in billing, Entergy had nothing to waive in the past.

55. Entergy claims, at 41, that the Commission fails to account for evidence that the application of the redispatch billing principles has evolved over the life of the agreements as circumstances changed or as new conditions arose. Entergy, also at 41, points to a letter dated March 4, 1997, that it claims memorializes a discussion between Entergy and Arkansas Electric representatives “regarding hour-to-hour schedule changes—one type of system operating constraint—that [Arkansas Electric] agreed to undertake at that time.” Entergy notes that Arkansas Electric did not file a complaint until the instant Complaint.

56. The possibility that Arkansas Electric may have been requested to change its scheduling practices relates to actual operation and dispatch and says nothing about how Entergy is to bill under the Power Agreement. Indeed, if anything, Entergy’s example shows that what it considers to be a source of system operating constraints, Arkansas Electric’s scheduling practices, was occurring in 1997, years before it began touting system operating constraints as a basis to exclusively charge the expensive Replacement Energy rate. Moreover, as noted above, the Commission found that Arkansas Electric had raised objections with Entergy to this change in pricing when it first began appearing in 2000. Delay in filing a formal complaint with the Commission does not constitute an agreement with Entergy’s interpretation of the Power Agreement.

57. Finally, at 43-44, Entergy takes issue with the Commission’s reference in Opinion No. 488, at P 69, to Entergy internal correspondence and documents discussing the “availability” of Arkansas Electric generation units to the Entergy Dispatcher when output of Arkansas Electric’s generation units is reduced in off-peak hours below full load or when problems at the plants, such as coal mill or feeder problems occur at the plant. One of the documents showed that the units were considered “available” and, therefore, Arkansas Electric would be entitled to its full share of its ownership interest, “unless a formal derate” were placed on the unit. Entergy challenges the Commission’s finding that the absence of any qualifiers in those documents regarding transmission system constraints conforms to the Commission’s interpretation of the term “availability.” Entergy argues that these documents also do not mention acts of God, hurricanes, flood, or any other force majeure events that would affect the share of capacity to which the Co-Owners are entitled, yet the Commission would not infer that those events are beyond consideration. It contends that the absence of any discussion

regarding system operating constraints simply means that system operating constraints were not the focus of that correspondence. It further states that these documents address internal plant problems affecting a plant's ability to achieve its rated capability.

58. While it may be true that the documents address plant problems, Entergy ignores the point being made. The documents show that Entergy representatives discussed Arkansas Electric's units as being "available" irrespective of actual output unless the units' capacity ratings are lowered. That is consistent with the Commission's finding that billing reflects the rated capacity of the units, *i.e.*, "capability." The lack of a reference to force majeure events at the plants does not support Entergy's case as they could be classified as "Outages" which are specifically provided for under Article III, section 5, of the Power Agreement. A lack of "availability" due to system operational constraints is nowhere mentioned in the Power Agreement. It is Entergy that claims an intent, not expressly drafted into the Power Agreement, to change the billing to account for such transmission system constraints. The absence of recognition of such a billing factor in its own personnel's correspondence dealing with the very matter of "availability" of Arkansas Electric's generating units carries more weight in that context than the absence of any discussion of matters like "Outages" that are already expressly provided for in the Power Agreement.

The Commission orders:

The Commission denies Energy's request for rehearing in this proceeding.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.