

146 FERC ¶ 61,152  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
Philip D. Moeller, John R. Norris,  
and Tony Clark.

Louisiana Public Service Commission

Docket No. EL01-88-009

v.

Entergy Services, Inc.

ORDER ON REHEARING

(Issued February 28, 2014)

1. This case is before the Commission on rehearing of a prior order<sup>1</sup> issued in response to a remand<sup>2</sup> from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The court remanded orders issued earlier in this proceeding, Opinion Nos. 480 and 480-A,<sup>3</sup> for further proceedings. At issue was (1) whether the Commission was empowered to order refunds under the specific circumstances presented in this case and (2) whether the Commission impermissibly delayed implementation of the bandwidth remedy. In the Order on Remand, the Commission invoked its equitable discretion not to order refunds and established June 1, 2005 as the date that Opinion No. 480's remedy would become effective. In this order,

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<sup>1</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 137 FERC ¶ 61,047 (2011) (Order on Remand).

<sup>2</sup> *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

<sup>3</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

as discussed below, we grant rehearing with regard to the issue of interest due on delayed remedy payments and otherwise deny the requests for rehearing.

**I. Background**

**A. The Entergy System**

2. Entergy Corporation is a public utility holding company that provides electric service at wholesale and retail in Arkansas, Louisiana, Mississippi and Texas. The Entergy System is governed by a System Agreement; the current System Agreement was filed in 1982. The System Agreement acts as an interconnection and pooling agreement, and provides for the joint planning, construction and operation of new generating capacity in the Entergy System.

**B. Prior Commission Orders and Court Remand**

3. The Commission has held that the System Agreement requires that production costs be “roughly equal” among the Operating Companies.<sup>4</sup> In Opinion Nos. 480 and 480-A, the Commission held that the Entergy System was no longer in rough production cost equalization and adopted a “bandwidth” remedy. This remedy achieves rough production cost equalization on Entergy’s System by not allowing any Operating Company to have production costs that are more than 11 percent above or below the system average production costs. Under the bandwidth remedy, each calendar year, the production costs of each Operating Company are calculated, with payments made by the low cost Operating Company(ies) to the high cost Operating Company(ies) such that, after reflecting the payments and receipts, no Operating Company would have production costs more than 11 percent above the Entergy System average or more than 11 percent below the Entergy System average. The Commission determined that a +/- 11 percent bandwidth would apply if the Entergy System exceeded historical cost disparities, but would otherwise allow the Entergy System to maintain the flexibility that it had traditionally enjoyed.<sup>5</sup>

4. The Commission held in Opinion Nos. 480 and 480-A that, *inter alia*, it was prohibited from ordering refunds in the narrow circumstances presented by this case because it had previously found that refunds among the Operating Companies are precluded by section 206(c) of the Federal Power Act (FPA).<sup>6</sup> The Commission held that

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<sup>4</sup> See, e.g., Opinion No. 480, 111 FERC ¶ 61,311 at P 136.

<sup>5</sup> *Id.* P 144.

<sup>6</sup> *Id.* P 145; Opinion No. 480-A, 113 FERC ¶ 61,282 at P 59. See also 16 U.S.C.

(continued...)

section 206(c) prohibited refunds among operating public utilities of a registered holding company to the extent one or more of the companies making refunds cannot surcharge its customers or otherwise obtain cost recovery. The Commission stated that it had addressed the same issue (i.e., the reallocation of costs among Entergy's Operating Companies) in another Entergy proceeding, the Opinion No. 468 proceeding,<sup>7</sup> and held unambiguously that refunds among the Operating Companies were prohibited.<sup>8</sup>

5. With regard to the effective date, the Commission found that the bandwidth remedy provided for in Opinion No. 480 – issued June 1, 2005 – should apply prospectively in calendar year 2006, with the first payments, based on calendar-year 2006 production costs, occurring in 2007.<sup>9</sup> In Opinion No. 480-A, the Commission elaborated that use of the first calendar year following issuance of Opinion No. 480 would be the most “appropriate and equitable” way to implement a remedy. The Commission added that adoption of a remedy that would involve prior years would necessarily result in refunds, and reiterated its belief that the Commission is prohibited from providing refunds under section 206(c).

6. In response to a petition for review of Opinion Nos. 480 and 480-A, the court issued an order remanding the matter to the Commission for further proceedings regarding refunds and the effective date. With regard to refunds, the court held that the Commission failed to offer a reasoned explanation for denying refunds. The court stated that the Commission had relied solely on the rationale presented in Opinion No. 468, but noted that the court had recently held that the Commission had failed in Opinion No. 468 to offer a reasoned explanation for why the cost of Commission-ordered refunds by one group of Entergy subsidiaries could not be recovered, and hence for why they are barred

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§ 824e(c) (2012).

<sup>7</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh'g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005), *Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, (D.C. Cir. 2007), *order on remand*, 120 FERC ¶ 61,241 (2007), *order on reh'g*, 124 FERC ¶ 61,275 (2008) (among other things, finding that interruptible load should not be included in the peak loads used to allocate production capacity costs in Service Schedule MSS-1 (Reserve Equalization) because Entergy can interrupt service for interruptible load customers at system peak and therefore avoid incurring production capacity costs to serve the interruptible loads).

<sup>8</sup> Opinion No. 480, 111 FERC ¶ 61,311 at P 145.

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

by section 206(c).<sup>10</sup> The court held that, because its earlier holding in *Louisiana Pub. Serv. Comm'n* rejected the only rationale upon which the Commission relied for denying refunds in the instant case, it was therefore remanding the issue for further proceedings.

7. The court also found that the Commission had not provided a reasonable explanation for the Commission's decision to delay implementation of the bandwidth remedy until 2006. The court noted that the Louisiana Public Service Commission (Louisiana Commission) had requested that the bandwidth remedy take effect June 1, 2005 forward. However, the court held that the Commission's argument that use of the first calendar year of data is "the most appropriate and equitable way" to implement the bandwidth remedy was a conclusion rather than a reason, and that the Commission had failed to explain why it believes that the first calendar year is the most equitable time having found on June 1, 2005 that the System Agreement's rates were unduly discriminatory.<sup>11</sup> The court ruled that in the absence of a reasonable explanation for the Commission's decision to delay implementation of the bandwidth remedy until 2006, it would remand the issue for further proceedings.

### **C. Order on Remand and Subsequent Pleadings**

8. In the Order on Remand, the Commission ruled that it would not invoke its equitable discretion to order refunds. The Commission noted that since the issuance of the court's remand, this specific issue of whether refunds were unwarranted due to section 206(c) has been addressed by the Commission in the orders that resulted from the paper hearing in the Opinion No. 468 proceeding.<sup>12</sup> The Commission noted that in the Opinion No. 468 Remand Rehearing Order, the Commission found that "section 206(c) gives the Commission the specific authority to order refunds prospectively from a set date, the refund effective date, for a fifteen month period."<sup>13</sup> The Commission ruled that this case – like the Opinion No. 468 proceeding – does not involve a utility that has been

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<sup>10</sup> *Louisiana Pub. Serv. Comm'n. v. FERC*, 522 F.3d at 399 (citing *Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007)).

<sup>11</sup> *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d at 400.

<sup>12</sup> *Louisiana Pub. Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp.*, 132 FERC ¶ 61,133 (2010) (Opinion No. 468 Amended Remand Order), *order granting reh'g in part and denying reh'g in part*, 135 FERC ¶ 61,218 (2011) (Opinion No. 468 Remand Rehearing Order).

<sup>13</sup> Order on Remand, 137 FERC ¶ 61,047 at P 31 (citing Opinion No. 468 Amended Remand Order, 132 FERC ¶ 61,133 at P 30).

unjustly enriched by over-collecting revenues. The Commission found that, instead, in a case involving the bandwidth remedy, the issue is whether production costs have been properly allocated among the various Entergy Operating Companies. The Commission ruled that it would accordingly invoke its equitable discretion not to order refunds, notwithstanding its authority to do so.<sup>14</sup> However, the Commission held this ruling in abeyance pending the outcome of a paper hearing in a separate proceeding that was further examining under what circumstances it is appropriate for the Commission to invoke its equitable discretion to deny refunds.<sup>15</sup>

9. With regard to the effective date, the Commission ruled that in response to the court's remand it would implement the bandwidth remedy on June 1, 2005, the date the Commission's order in Opinion No. 480 determined that the rates were unjust and unreasonable.<sup>16</sup> The Commission held that Entergy must calculate bandwidth payments for the seven-month period of June 1, 2005 through December 31, 2005, and show those calculations with supporting workpapers in a compliance filing.

10. Also, as pertinent here, the Commission denied a request for late intervention by Union Electric Company (Union Electric), finding that Union Electric had not met the higher burden of justifying late intervention in this proceeding.<sup>17</sup>

11. Subsequent to issuance of the Order on Remand, Union Electric, the Arkansas Public Service Commission (Arkansas Commission), and the Louisiana Commission filed requests for rehearing. The Arkansas Commission and the Louisiana Commission filed answers.

12. The Louisiana Commission filed a motion to lodge three Commission orders where the Commission ordered Entergy to pay refunds to the Louisiana Commission.

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

<sup>15</sup> *Id.* P 32.

<sup>16</sup> *Id.* P 34.

<sup>17</sup> *Id.* P 25.

## II. Discussion

### A. Procedural Matters

13. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2013), prohibits answers to requests for rehearing. We will, therefore, reject the answers filed by the Louisiana Commission and the Arkansas Commission.

The Louisiana Commission's motion to lodge is denied. Given the Commission's knowledge of its own holdings, we find a motion to lodge prior Commission orders to be unnecessary.

### B. Requests for Rehearing

#### 1. Motion to Intervene

##### a. Request for Rehearing

14. Union Electric argues that the Commission erred in finding that Union Electric did not meet the high burden for late intervention because granting late intervention would not prejudice any other party. It notes that, while the Commission liberally allows late interventions at the early stages of a proceeding, the Commission imposes a higher burden when intervention is sought after the issuance of dispositive orders.<sup>18</sup> Union Electric argues that Union Electric's only interest in intervening was limiting its potential exposure to additional bandwidth payments that Entergy Arkansas was improperly seeking to pass through to Union Electric under a 1999 service agreement (1999 Agreement) between the two companies. Union Electric explains that it wanted to ensure that it could take part in any further proceedings and present evidence like any other party if future proceedings were held. It contends that it was not requesting that the case be re-opened to submit evidence or to re-litigate its dispute with Entergy Arkansas in this proceeding. Union Electric argues that its unique interest in this case could not be represented by any other party.<sup>19</sup> Instead, Union Electric argues that it merely seeks to protect its interest against any retroactive refunds that could result from this proceeding.

15. Union Electric further argues that no party would be burdened by its late intervention because Union Electric has agreed to accept the record of the proceeding as it currently stands. It adds that the procedural status of the instant complaint proceeding

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<sup>18</sup> Union Electric Request for Rehearing at 8.

<sup>19</sup> *Id.* at 10.

has remained virtually unchanged since the case was remanded back to the Commission and Union Electric filed its request for late intervention. Union Electric notes that in the Order on Remand, the Commission ruled that it was appropriate to hold the current proceeding in abeyance until the newly-established paper hearing is resolved. Union Electric argues that, therefore, despite the fact that this has been underway for several years, this proceeding continues to stay on hold.

16. Union Electric disagrees with the Commission's finding that Union Electric lacked good cause for late intervention, and disputes the Commission's finding that Union Electric took a "wait and see" approach to intervening in this proceeding. It notes that the Commission relied on *Florida Power & Light Co.*,<sup>20</sup> in which the Commission rejected late intervention because the requesting party thought it was not necessary to intervene until after the Commission issued a dispositive order. Union Electric argues that unlike the party in that case, it did not take a "wait and see" approach. Union Electric argues that important to this understanding is the fact that Union Electric has consistently argued in this proceeding and in other bandwidth-related proceedings that Entergy Arkansas' recovery of its allocated portion of bandwidth payments pursuant to the bandwidth remedy did not constitute a "purchased energy expense, and therefore could not be passed through as part of the variable energy charge under Union Electric's 1999 contract with Entergy Arkansas." Union Electric notes that the Commission has affirmed Union Electric's interpretation of the 1999 Agreement in Opinion No. 505, finding that "it would be unreasonable to interpret the 1999 Agreement to allow Entergy Arkansas to include its total bandwidth payments as purchased energy expenses in the purchased energy variable in the 1999 Agreement."<sup>21</sup>

17. Union Electric argues that it was only after Union Electric received its first monthly invoice that contained an allocated portion of Entergy Arkansas' first annual bandwidth payment that Union Electric realized that Entergy would implement the bandwidth remedy in a manner inconsistent with Union Electric's 1999 Agreement with Entergy Arkansas. Union Electric notes that at that time Opinion Nos. 480 and 480-A were being argued on appeal. It contends that, accordingly, Union Electric had to wait

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<sup>20</sup> *Florida Power & Light Co.*, 99 FERC ¶ 61,318 (2002).

<sup>21</sup> Union Electric Request for Rehearing at 15 (citing *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at P 104 (2010), *order on reh'g*, Opinion No. 505-A, 139 FERC ¶ 61,103, *order on compliance*, 139 FERC ¶ 61,104 (2012)).

until the Commission regained jurisdiction on remand, which it contends was the first opportunity Union Electric had to intervene after it had notice of this proceeding.<sup>22</sup>

18. Union Electric argues that, unlike *Florida Power & Light Co.* and other “wait and see” precedent, Union Electric did not sit on the sidelines and wait for the Commission to issue a dispositive order and then seek to challenge the order on rehearing because it did not like the outcome. Union Electric contends that, rather, Union Electric did not know, nor should it have known, at an earlier stage of this proceeding that the complaint and the bandwidth remedy from Opinion Nos. 480 and 480-A could have any impact on Union Electric’s service under the 1999 Agreement and that intervention in this proceeding was necessary to preserve its interests.<sup>23</sup>

19. Union Electric argues that the Commission’s decision in *Black Oak Energy, LLC*<sup>24</sup> is more applicable to Union Electric’s request for late intervention. Union Electric notes that in that case late intervention was granted to a party arguing that it did not seek timely intervention because it could not have anticipated that the issue of paying refunds for certain transactions would have arisen based on the original complaint. Union Electric explains that the Commission found this to be good cause and requested the late intervention.<sup>25</sup>

20. Union Electric contends that the Commission erred in finding that the Federal Register notice for this proceeding should have put Union Electric on “notice” that its interests might be implicated. Union Electric explains that its 1999 Agreement with Entergy Arkansas makes no reference to the Entergy System Agreement. Union Electric contends that, therefore, it had no reason to anticipate that the complaint and the eventual changes directed by the Commission in Opinion No. 480 could lead to Entergy Arkansas attempting to pass through bandwidth payments to Union Electric under the 1999 Agreement. Union Electric adds that the Commission’s interpretation of the 1999 Agreement in Opinion No. 505 conflicts with the Commission’s finding in the Order on Remand that Union Electric had sufficient notice.<sup>26</sup>

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

<sup>23</sup> *Id.* at 16.

<sup>24</sup> *Black Oak Energy, LLC*, 136 FERC ¶ 61,040 (2011).

<sup>25</sup> Union Electric Request for Rehearing at 16 (citing *Black Oak Energy, LLC*, 136 FERC ¶ 61,040 at P 7).

<sup>26</sup> *Id.* at 17.

21. Lastly, Union Electric disputes the Commission's contention that it had notice because Arkansas Electric Cooperative Corporation and Arkansas Electric Energy Consumers, Inc. both filed timely interventions. Union Electric argues that it is not similarly situated to those two groups because Union Electric and Entergy Arkansas are the only parties to the 1999 Agreement. Union Electric explains that, consequently, its contractual interests are completely distinct from those of other Arkansas customers.<sup>27</sup>

**b. Commission Determination**

22. The request for rehearing is denied. When late intervention is sought after the issuance of a dispositive order, the prejudice to the other parties and burden upon the Commission of granting the late intervention may be substantial.<sup>28</sup> Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interests of any party. Therefore, the Commission is more willing to grant late intervention at the early stages of a proceeding, but is less willing as the proceeding nears its end.<sup>29</sup> In this case, Union Electric seeks late intervention at the remand stage of this proceeding, more than seven years after the complaint was filed and more than three years after an evidentiary hearing ended and Opinion No. 480 was issued. Thus, movants bear an extremely high burden to demonstrate good cause for the granting of such late intervention.

23. In addition, we find that *Black Oak Energy, LLC* provides little support for Union Electric's position. In *Black Oak Energy, LLC*, the Commission granted late intervention on rehearing of a compliance order. This proceeding, in contrast, follows a fully litigated evidentiary hearing, a Commission decision and a remand, placing an even higher burden on movants for late intervention.

24. As we stated in the Order on Remand, Union Electric had notice that a complaint raising the justness and reasonableness of charges under the System Agreement had been initiated in this docket against all of the Operating Companies, and that the proceeding concerned the System Agreement.<sup>30</sup> In fact, Entergy Arkansas, the counterparty to the

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<sup>27</sup> *Id.* at 18.

<sup>28</sup> *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

<sup>29</sup> *Transok, L.L.C.*, 89 FERC ¶ 61,055 (1999).

<sup>30</sup> Order on Remand, 136 FERC ¶ 61,047 at P 26.

1999 Agreement at issue with Union Electric, was in fact expressly listed in the notice.<sup>31</sup> Union Electric contends that it is unreasonable to find that it took a “wait and see” approach with regard to its interests because there was no way to know that the complaint that resulted in Opinion No. 480 could affect its interests. We disagree. As a sophisticated market participant, Union Electric should have reasonably been aware that its interest might well be at stake in a proceeding addressing rough production cost equalization among the Entergy Operating Companies.

25. Although Union Electric correctly notes that in Opinion No. 505 the Commission found that it would not be reasonable to allow Entergy Arkansas to flow bandwidth costs to Union Electric through the purchased energy variable in the 1999 Agreement, Union Electric should have reasonably known that a proceeding addressing rough production cost equalization on the Entergy System could lead to major changes that could affect entities, including Union Electric, that transact with the Entergy Operating Companies. Accordingly, we affirm our ruling that Union Electric has not met its burden to justify late intervention at this very late stage of this proceeding.

## 2. Implementation Date

### a. Request for Rehearing

26. The Arkansas Commission argues that the Commission erred in directing that the bandwidth remedy be implemented effective June 1, 2005, as opposed to the first full calendar year following Opinion No. 480. The Arkansas Commission argues that the Commission’s decision to follow the Opinion No. 468 proceeding ignores the fact that the bandwidth remedy differs in material respects from the interruptible load calculations at issue in that case.<sup>32</sup> It notes that in the Opinion No. 468 proceeding, unlike this proceeding, interruptible load calculations were solely based on the monthly Intra-System Bill.<sup>33</sup> The Arkansas Commission explains that the bandwidth remedy was developed as an annual remedy to be based on the full preceding year’s data. It contends that a partial-year implementation is entirely inconsistent with the annual nature of the bandwidth remedy, and will result in a skewed and inequitable bandwidth calculation. The Arkansas Commission contends that the Commission has consistently required that the annual-

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<sup>31</sup> 66 Fed. Reg. 33,242 (2011).

<sup>32</sup> Arkansas Commission Request for Rehearing at 6.

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

based methodology of Exhibits ETR-26 and ETR-28<sup>34</sup> be followed, as reflected in Service Schedule MSS-3, until changed by order of the Commission.

27. The Arkansas Commission argues that it is impossible and impermissible to implement the bandwidth remedy mid-year, per the Order on Remand's mandate, in a manner that is consistent with the lawful bandwidth formula. The Arkansas Commission explains that the bandwidth formula relies on annual FERC Form No. 1 data, including 221 of 381 pages of workpapers filed as support of Entergy's bandwidth calculations in Docket No. ER11-3658-000.<sup>35</sup> It notes that, for most of the cost items obtained from the FERC Form No. 1s, the data for a seven-month remedy would have to be obtained elsewhere in the accounting records, contrary to the bandwidth formula's requirements. The Arkansas Commission adds that in order to implement the remedy for June through December 2005, in excess of 300 production plant inputs would have to be pro-rated from the December 31, 2005 end-of-year values. It contends that such a partial year mandate is impermissible given the bandwidth formula's requirement that "Rate Base values shall be based on the actual balances on the Company's books as of December 31 of the previous year."

28. The Arkansas Commission argues that there are several equitable reasons not to establish a June 1, 2005 effective date along with the resulting seven-month 2005 bandwidth calculation. First, the Arkansas Commission notes that in Opinion No. 480-A, the Commission was concerned that a \$130 million impact would cause unacceptable rate shock.<sup>36</sup> It estimates that the bandwidth payment by Entergy Arkansas to Entergy Louisiana could be as high as \$300 million based on use of a seven-month bandwidth calculation from June 1 through December 31, 2005, due in part to the effects of Hurricane Katrina. Second, the Arkansas Commission argues that requiring Entergy Arkansas to pay for the Hurricane Katrina-induced effects on natural gas prices and load reductions would socialize the effects of Hurricane Katrina by exporting its impacts from Louisiana ratepayers to Arkansas ratepayers. Third, the Arkansas Commission reminds

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<sup>34</sup> Exhibits ETR-26 and ETR-28 are the exhibits submitted by Entergy during the hearing that resulted in Opinion No. 480 that formed the basis for the bandwidth formula. Exhibit ETR-26 compares historical production costs of the Operating Companies for years 1983-2001 and for the 12 months ending August 31, 2002. Exhibit ETR-28 is a production cost analysis for the Operating Companies for the 12 months ending August 31, 2002 and details the numbers supporting the 2002 data in Exhibit ETR-26.

<sup>35</sup> Arkansas Commission Request for Rehearing at 12.

<sup>36</sup> *Id.* at 15 (citing Opinion No. 480-A, 113 FERC ¶ 61,282 at P 40).

the Commission that its discretion is at its zenith when fashioning a remedy. Fourth, because the circumstances at hand do not involve the over-collection of revenues by a public utility, the Arkansas Commission argues that the same equitable considerations that led the Commission not to order refunds should persuade it not to establish a June 1, 2005 effective date.<sup>37</sup>

29. The Louisiana Commission argues that the Commission should clarify that it is providing a remedy for what the Louisiana Commission characterizes as “the entire period of delay,” from June 1, 2005, i.e., the date Opinion No. 480 was issued and the bandwidth remedy was established, until May 31, 2007 (Entergy filed its first annual bandwidth compliance filing on June 1, 2007 using data from calendar year 2006).<sup>38</sup> The Louisiana Commission contends that Service Schedule MSS-3 requires bandwidth payments beginning June 1, 2005 through December 31, 2005 based on the entire previous calendar-year, and beginning June 1, 2006 through December 31, 2006 based on the entire previous calendar-year.<sup>39</sup> It argues that various Commission orders find that the Commission cannot delay remedies for rates found to be unreasonable.<sup>40</sup> The Louisiana Commission explains that Opinion No. 480 makes clear that there was no remedy provided until June 1, 2007, because the payments and receipts that commenced then provided a prospective remedy for unjust and unreasonable rates.

30. The Louisiana Commission contends that, in the Order on Remand, the Commission was correct to move back the bandwidth remedy’s implementation date to June 1, 2005, the date on which Opinion No. 480 found that Entergy’s cost allocations were unjust, unreasonable and unduly discriminatory. However, the Louisiana Commission explains that, although Opinion No. 480 suggests that the Commission enacted a remedy to commence in 2006, the Commission later determined that the year 2006 would only operate as a test year, after which bandwidth payments and receipts would provide a prospective remedy.<sup>41</sup> The Louisiana Commission contends that this

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<sup>37</sup> *Id.* at 16-17.

<sup>38</sup> Louisiana Commission Request for Rehearing at 10.

<sup>39</sup> *Id.* at 14.

<sup>40</sup> *Id.* at 11 (citing Order on Remand, 120 FERC ¶ 61,241, at P 6 (2007); *Entergy Services, Inc.*, 125 FERC ¶ 61,128, at P 13 (2008); *Arizona Public Service Co.*, 27 FERC ¶ 61,174, at 61,320 (1984)).

<sup>41</sup> *Id.* at 13 (citing Opinion No. 480-A, 113 FERC ¶ 61,282 at P 54). It further argues that, in Opinion No. 514, the Commission reaffirmed its rulings concerning the

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approach was rejected on appeal by the D.C. Circuit.<sup>42</sup> It also states that payments have not been made for that year.

31. The Louisiana Commission states that the Order on Remand directs Entergy to use the bandwidth formula to calculate the payments and receipts for June 1, 2005 through December 31, 2005. The Louisiana Commission contends that this directive, if followed by Entergy, would use a full calendar year's data to calculate the payments and receipts as required by the bandwidth formula and would provide a one-year remedy. The Louisiana Commission states that, if Entergy uses only seven months of data, the remedy will only encompass seven months of what the Louisiana Commission characterizes as a 24-month delay. Accordingly, the Louisiana Commission argues that the Commission needs to clarify that Entergy must provide a two-year remedy, including a full remedy for June 1, 2005 through December 31, 2005 and a full remedy for June 1, 2006 through December 31, 2006 using the tariff approach of basing payments and receipts on the previous calendar year.<sup>43</sup>

32. The Louisiana Commission argues that the rough production cost equalization methodology that should be applied commencing June 1, 2005 is the methodology contained in Exhibits ETR-26 and ETR-28. It notes that in the Order on Remand the Commission ruled that Entergy must provide a remedy commencing on June 1, 2005 "based on the bandwidth formula accepted in EL01-88-004 and EL01-88-006."<sup>44</sup> The Louisiana Commission explains that this methodology cannot be applied for 2005, however, because it was not filed until April 10, 2006 and the Commission did not make it effective until June 9, 2006.<sup>45</sup> The Louisiana Commission adds that the Commission determined in Opinion No. 505 that Entergy's Opinion No. 480 compliance filing included certain changes to the methodology in Exhibits ETR-26 and ETR-28, specifically with respect to the inclusion of non-requirements sales in the calculation of net area loads and to the methodology for including Accumulated Deferred Income Taxes

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prospective, non-remedial nature of the bandwidth remedy. *Id.* (citing Opinion No. 514, 137 FERC ¶ 61,029 at P 157).

<sup>42</sup> *Id.* at 12 (citing *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d at 383).

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.* at 15 (citing Order on Remand, 137 FERC ¶ 61,047 at P 34 n.41).

<sup>45</sup> *Id.* (citing 117 FERC ¶ 61,203 at Ordering Paragraph (A)).

(ADIT).<sup>46</sup> The Louisiana Commission argues that these changes should not be applied to the remedy period because doing so would violate the rule against retroactive ratemaking.

**b. Commission Determination**

33. The requests for rehearing are denied. In the Order on Remand, the Commission ruled that the bandwidth remedy must be implemented on June 1, 2005, the date the Commission's order in Opinion No. 480 determined that the rates were unjust and unreasonable. The Commission ruled that a June 1, 2005 effective date is consistent with the court's direction that, absent a reasonable delay to implement the bandwidth remedy, it would be arbitrary and capricious to delay implementation of a just and reasonable rate.

34. The Arkansas Commission raises several reasons why the Commission should reconsider its ruling regarding the effective date, none of which persuade us to reconsider our prior ruling. First, with regard to the Arkansas Commission's contention that it is impermissible to implement the bandwidth remedy with a June 1 start date due to the bandwidth remedy's (heretofore) annual nature, the Arkansas Commission is correct that the bandwidth remedy has previously relied upon data contained in annual FERC Form No. 1s. However, due to our finding that the court's remand requires the Commission to implement the bandwidth remedy beginning June 1, 2005, it is now necessary to implement the bandwidth remedy on a partial-year basis for the seven months at issue in 2005. Although the Arkansas Commission argues that doing so violates the filed rate as approved by the Commission in Opinion No. 480, Opinion No. 480-A and the subsequent compliance filings, we find that implementing a partial-year bandwidth remedy for 2005 is necessary due to the court's finding that the Commission had failed to offer a reasoned explanation for its earlier decision on implementation of the bandwidth remedy. Although the Commission originally conceived the bandwidth remedy as an annual remedy, there is no reason it must *necessarily* be implemented on an annual basis. And, in an order on compliance being issued concurrently with this one, the Commission requires Entergy to implement the bandwidth remedy for the seven-month period using data for the seven individual months.<sup>47</sup>

35. The Arkansas Commission errs in claiming that the Order on Remand unduly relied on precedent from the Opinion No. 468 proceeding. The Commission did not consider the court's remand in the Opinion No. 468 proceeding as binding authority, but instead merely considered it as persuasive authority because, as the court noted in

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<sup>46</sup> *Id.* (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 37 and P 233).

<sup>47</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 146 FERC ¶ 61,153, at P 30 (2014).

its remand in *this* proceeding, the court confronted a “similar FERC decision” in the Opinion No. 468 proceeding.<sup>48</sup> Although the two proceedings have been considered together due to the similar issues raised, the Commission is well aware of the differences between the two cases. Accordingly, while the Commission finds that it is appropriate to consider the Opinion No. 468 proceeding as it considers this case, the Commission’s findings regarding the effective date in the Order on Remand were not mandated by any decision in the Opinion No. 468 proceeding.

36. Further, the equitable reasons raised by the Arkansas Commission do not persuade us to reconsider the effective date established in the Order on Remand. Because the bandwidth remedy does not provide for adjustments to remove the costs associated with extreme weather events that are, in fact, properly booked to accounts included in the bandwidth formula, it would be unfair to now provide in hindsight such an adjustment for the effects of Hurricanes Katrina and Rita during 2005. The bandwidth formula’s provisions allocate costs and benefits among Operating Companies based upon objective considerations. Thus, if circumstances were reversed and, for example, Arkansas were to have suffered catastrophic tornadoes that touched only in Arkansas but not in Louisiana, the same result should and would follow. In that circumstance, the bandwidth remedy would reflect Entergy Arkansas’ costs associated with such extreme weather events that are, in fact, properly booked to accounts included in the bandwidth formula, which would then result in payments in the opposite direction (all other things being equal, of course).

37. We also reject the Louisiana Commission’s argument that the Commission should implement the bandwidth remedy in a manner that would require payments for calendar years 2004 and 2005. There is nothing in the bandwidth formula or the D.C. Circuit’s remand that requires the Commission to provide a remedy for what the Louisiana Commission characterizes as a “two year delay.” As we have previously explained, the bandwidth remedy was made effective for calendar year 2006,<sup>49</sup> and Entergy’s first bandwidth filing reflecting calendar-year 2006 data was eventually addressed by the Commission in Opinion No. 505.<sup>50</sup> As the Order on Remand noted, the Commission found that the bandwidth remedy’s first payments, based on calendar-year 2006 production costs, would occur in 2007.<sup>51</sup> Thus, the 2006 calendar year’s data is accounted for under the bandwidth formula though payments the following year.

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<sup>48</sup> *Louisiana Pub. Serv. Comm’n v. FERC*, 522 F.3d at 400.

<sup>49</sup> Opinion No. 480, 111 FERC ¶ 61,311 at P 145.

<sup>50</sup> See Opinion No. 505, 130 FERC ¶ 61,023 at PP 6-12.

<sup>51</sup> Order on Remand, 137 FERC ¶ 61,047 at P 5.

Similarly, the 2007 calendar year's data is roughly equalized through payments commencing in 2008. But because the Commission was required to push back the effective date to June 1, 2005, the Commission must now also equalize production costs for the seven-month period of June 1, 2005 through December 31, 2005.

38. The Louisiana Commission argues that the Commission's ruling in the Order on Remand is inconsistent with the prospective nature of the bandwidth remedy, as established by statements in prior orders such as Opinion No. 514 and the D.C. Circuit's remand. However, the Louisiana Commission's arguments about the prospective nature of the bandwidth remedy have been squarely addressed by the Commission in a prior April 2007 order<sup>52</sup> in which the Commission stated that:

We disagree with the Louisiana Commission that the prospective nature of the rough equalization payments indicates that the remedy would not begin until the payments are made, and is thus counter to what we said in Opinion No. 480. We also disagree with the Louisiana Commission's argument that there is inconsistency between the requirement that payments resulting from 2006 are to be made in 2007 and the statement that payments would be prospective. This is entirely consistent with our prior orders. The Commission stated in Opinion No. 480 that the bandwidth would be implemented prospectively and would be effective for calendar year 2006, and we clarified in Opinion No. 480-A that any equalization payments would then be made in 2007 after a full calendar year of data became available. The Louisiana Commission's request is a collateral attack on Opinion Nos. 480 and 480-A and no further clarification is necessary.<sup>53</sup>

39. Our holding in the Order on Remand follows this approach and merely advances it seven months earlier, resulting in the need for the production costs from those seven months to be roughly equalized. There is no "two year delay" as argued by the Louisiana Commission. This approach is also not inconsistent with the D.C. Circuit's statement that a remedy was delayed until 2007. A reasonable interpretation of the

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<sup>52</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095 (2007) (April 2007 Compliance Order). The April 2007 Compliance Order was one of two orders that accepted the bandwidth formula as proposed by Entergy and ordered by Opinion No. 480.

<sup>53</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095, at P 25 (2007) (citations omitted).

court's statement that a remedy was delayed until 2007 is that it was merely an acknowledgement that initial bandwidth payments for calendar year 2006 would not be made until 2007. Accordingly, we reaffirm our ruling in the Order on Remand that the bandwidth remedy will be implemented on June 1, 2005, the date the Commission's order in Opinion No. 480 determined that the rates were unjust and unreasonable, and that Entergy must calculate bandwidth payments only for the seven-month period of June 1, 2005 through December 31, 2005.

40. The Louisiana Commission also argues that using the current bandwidth formula as contained in Service Schedule MSS-3 would be retroactive ratemaking because it was not made effective until June 9, 2006, after the Commission accepted Entergy's compliance filing. We disagree. In the Order on Remand, the Commission ruled that the bandwidth remedy established in Opinion Nos. 480 and 480-A must be implemented on June 1, 2005. The bandwidth remedy established in those two orders is the result of two compliance filings<sup>54</sup> made by Entergy that were subsequently accepted by the Commission and are now the lawful filed rate contained in Service Schedule MSS-3 of the Entergy System Agreement. The bandwidth remedy contained in Service Schedule MSS-3 is the only lawful bandwidth remedy on file with the Commission. Although the bandwidth remedy contained in the two compliance filings was originally intended to go into effect on January 1, 2006, not June 1, 2005, we are required by the findings of the court to implement the bandwidth remedy as of that earlier date. We therefore find that use of the bandwidth remedy contained in Service Schedule MSS-3 for the seven-month period cannot be considered impermissible retroactive ratemaking, as the Louisiana Commission alleges, and the request for rehearing is accordingly denied.

### **3. Interest on Remedy Payments**

#### **a. Request for Rehearing**

41. The Louisiana Commission argues that the Commission should clarify that interest is due on the delayed remedy payments for the period of delay, which the Louisiana Commission characterizes as the delay between June 1, 2005 and June 1, 2006, when, it contends, the remedy payments should have taken place, and when those remedy payments are actually made. The Louisiana Commission contends Commission policy has required the payment of interest on refunds, in recognition of the harm that would be caused if consumers did not receive the time value of funds required to make their rates

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<sup>54</sup> See *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006) and *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095 (2007).

just and reasonable for the applicable period. It also argues that the Commission's regulations require the payment of interest on refunds for rates suspended under section 205.<sup>55</sup> The Louisiana Commission adds that the Commission has required the payment of interest even when the regulations do not directly apply.<sup>56</sup> The Louisiana Commission further adds that interest should be calculated at the rate prescribed in the Commission's regulations.

**b. Commission Determination**

42. The request for rehearing is granted. Although the Commission stated in a prior order that interest would not be required on annual bandwidth payments,<sup>57</sup> in that order the Commission held that there was no need to require that interest be paid because settlements were being made in a reasonable time period once the calculations were completed (i.e., calculations are completed and settlements are made beginning June 1 for the previous calendar year, shortly after the company closes its books for that year). In the instant case, due to the length of time that has passed, we find that it is appropriate to follow our general policy and require interest to be paid on the bandwidth remedy payments for the seven-month period in 2005 to ensure full compensation.<sup>58</sup> As the court explained in *Anadarko Petroleum Corp. v. FERC*, "interest is simply a way of ensuring full compensation. This is why the delay between the time of the customers' injury and the granting of relief is a reason for awarding interest, not denying it ... ."<sup>59</sup> This finding is also consistent with our more recent orders regarding the bandwidth remedy.<sup>60</sup> Consistent with those orders, we will direct that interest be calculated on the payment/receipt amounts from June 1, 2006 until the date of the Entergy Intra-System

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<sup>55</sup> Louisiana Commission Request for Rehearing at 19 (citing 18 C.F.R. § 35.19a).

<sup>56</sup> *Id.* (citing *Public Service Co. of New Mexico*, 44 FERC ¶ 61,232 (1988)).

<sup>57</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095, at P 32 (2007).

<sup>58</sup> *See Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999) ("[t]he Commission's general policy, in effect for many years, requires interest to be paid on various kinds of overcharges.").

<sup>59</sup> *Id.* at 1268.

<sup>60</sup> *See, e.g., Entergy Services, Inc.*, 139 FERC ¶ 61,104 at Ordering Paragraph (C) (2012); *Entergy Services, Inc.*, 142 FERC ¶ 61,011, at P 21 (2013).

Bill that will reflect the bandwidth recalculation amounts for the seven-month 2005 period.<sup>61</sup>

**4. Refunds for the Refund-Effective Period**

**a. Request for Rehearing**

43. The Louisiana Commission argues that it is inappropriate for the Commission not to order refunds for the refund-effective period associated with its complaint<sup>62</sup> based on the Commission's ruling in the Opinion No. 468 Remand Rehearing Order. The Louisiana Commission explains that, in that case, the Commission relied on arguments that refunds should not be granted in rate design cases. The Louisiana Commission argues that this case, on the other hand, does not deal with an issue that could fall into the category of rate design. It contends that, while the instant case is a cost allocation case, it does not involve a retroactive change in cost allocation methodology or rate design. The Louisiana Commission argues that, instead, Opinion No. 480 imposed an entirely new remedy designed to achieve just and reasonable production cost allocation on the Entergy System.<sup>63</sup>

44. The Louisiana Commission further argues that this case involves equitable considerations not present in the Opinion No. 468 remand proceeding. It contends that the Commission here has explicitly determined that overall rates were unjust, unreasonable and unduly discriminatory by huge amounts during the entire refund

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<sup>61</sup> *Id.*

<sup>62</sup> The refund-effective period in this case is from September 13, 2001 through May 2, 2003. In the underlying proceeding, the parties agreed to a 20-week extension of the 15 month refund effective period otherwise provided for by section 206(b) of the FPA, 16 U.S.C. § 824e(b) (2012), as part of a negotiated compromise that included a motion to extend the dates of the procedural schedule and initial decision by 20 weeks. Entergy sought the extension to give it time to develop a new resources plan that it relied on as evidence in this proceeding. *Order of Chief Judge Extending Initial Decision*, Docket No. EL01-88-001 (Oct. 10, 2002). The issue of whether refunds should be ordered for this period is distinct from the issue of whether the bandwidth remedy should have been implemented beginning June 1, 2005 based on data for the full 2004 calendar year and whether interest is due on cost allocations for that period that have not yet been made.

<sup>63</sup> Louisiana Commission Request for Rehearing at 21.

period.<sup>64</sup> The Louisiana Commission also notes that the parties settled and agreed to the filing of a complaint to address the issue, knowing that a rough equalization remedy might be required. Second, the Louisiana Commission notes that, after agreeing to the complaint procedure, Entergy and the Arkansas Commission repeatedly requested and obtained delays in the process, setting back a Commission order by approximately six months. The Louisiana Commission adds that the parties also agreed to an extension of the refund period by 20 weeks as a tradeoff for the Louisiana Commission's agreement to one of the delays. Third, the Louisiana Commission notes that the presiding judge in the underlying initial decision granted refunds based on an evaluation of the equities. It notes that the presiding judge would have provided a remedy for 17 months preceding Opinion No. 480.<sup>65</sup>

45. The Louisiana Commission argues that, to the extent the Order on Remand determines aspects of the refund issue, it is erroneous and should be reconsidered.<sup>66</sup> The Louisiana Commission argues that the Commission has consistently linked its decisions not to order refunds in rate design cases to the inability of a utility to recover legitimate revenues that would have been obtained if the new rate design were in effect in the refund period, and notes that the factors justifying the refusal to grant refunds in the rate design cases are not applicable here.<sup>67</sup> The Louisiana Commission explains that the Entergy System will collect the same amount of revenues whether or not the Commission requires refunds. It states that "some Entergy operating companies -- the 'public utilities' subject to the Commission's jurisdiction -- did collect more than the legitimate cost level, and [Entergy Louisiana] paid more than its legitimate cost" and that "[t]hus, the revenues collected by the jurisdictional utilities subject to the Commission's rate regulation were not just and reasonable."<sup>68</sup> The Louisiana Commission further argues that the case does not involve a situation where the change in cost allocation triggers a change in rate design that customers could have responded to if it were imposed earlier. It contends that usage

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<sup>64</sup> *Id.* (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 31).

<sup>65</sup> *Id.* at 22 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 106 FERC ¶ 63,012, at P 43 (2004)).

<sup>66</sup> As noted above, the Order on Remand held in abeyance its ruling on refunds pending consideration of the paper hearing ordered in the Opinion No. 468 Remand Rehearing Order. *See supra* P 8.

<sup>67</sup> Louisiana Commission Request for Rehearing at 25 (citing, *e.g.*, *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,113, at 61,446 (1989)).

<sup>68</sup> *Id.* at 26.

patterns among customer classes served by the Operating Companies will not be affected by allowing refunds.

46. The Louisiana Commission argues that, in cases involving unjust and unreasonable allocations among affiliates, the Commission generally does require refunds. It notes that in *Nantahala Power & Light Co.*,<sup>69</sup> the Commission required refunds to correct the consequences of an unjust and unreasonable allocation of entitlement power between affiliated companies. The Louisiana Commission notes that in *Middle South Services, Inc.*,<sup>70</sup> the Commission required refunds after finding that Entergy failed to deduct accumulated deferred income taxes from the rate base of Operating Companies in the System Agreement cost allocations. The Louisiana Commission contends that in recent cases Entergy has granted refunds for the refund period. It notes that in *Louisiana Public Service Commission v. Entergy Corp.*,<sup>71</sup> the Commission held that the Entergy rate formula unreasonably excluded the costs of the Spindletop Regulatory Asset in determining cost allocations, and ruled that such costs should be reflected in the bandwidth formula beginning on the refund effective date.<sup>72</sup> The Louisiana Commission argues that the Commission has never had a “policy” against refunds, and notes that, in *Southern Company Services, Inc.*,<sup>73</sup> the Commission required refunds with regard to the unreasonable high return on equity included in cost allocations but exercised discretion to deny refunds on a separate cost allocation issue.<sup>74</sup> The Louisiana Commission notes that it has found no case involving a cost allocation among affiliated companies in which the Commission exercised discretion not to make refunds

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<sup>69</sup> *Nantahala Power & Light Co.*, Opinion No. 139, 19 FERC ¶ 61,152 (1982) (*Nantahala*).

<sup>70</sup> *Middle South Services, Inc.*, 16 FERC ¶ 61,101 (1981).

<sup>71</sup> *Louisiana Pub. Serv. Comm’n v. Entergy Corp.*, Opinion No. 509, 132 FERC ¶ 61,253 (2010).

<sup>72</sup> Louisiana Commission Request for Rehearing at 28 (citing *Louisiana Pub. Serv. Comm’n v. Entergy Corp.*, 132 FERC ¶ 61,253 at P 41).

<sup>73</sup> *Southern Company Services, Inc.*, Opinion No. 377-A, 64 FERC ¶ 61,033 (1993) (*Southern*).

<sup>74</sup> Louisiana Commission Request for Rehearing at 29 (citing *Southern Company Services, Inc.*, 64 FERC ¶ 61,033 at 61,306).

when the rates that might have been refunded were found unjust, unreasonable and unduly discriminatory.<sup>75</sup>

47. The Louisiana Commission argues that the denial of refunds conflicts with the FPA's core purposes of preventing a public utility from charging rates that are unjust and unreasonable and preventing undue discrimination.<sup>76</sup> It argues that, when the Commission exercises its discretion, it is required to do so in a way that accomplishes, rather than conflicts, with these purposes. Lastly, the Louisiana Commission argues that the Commission failed to explain why a denial of refunds is appropriate, as it was instructed to do by the court of appeals. The Louisiana Commission argues that the decision to follow the Opinion No. 468 Remand Rehearing Order is inadequate because the Order on Remand never explains how the circumstances in that case can dictate the outcome in this different case.<sup>77</sup>

**b. Commission Determination**

48. The Louisiana Commission's request for rehearing on the issue of refunds is denied. Our determination of whether refunds are appropriate in this case requires us to assess the nature of the problem the bandwidth remedy was designed to address. In Opinion No. 480, the Commission determined that rough production cost equalization on the Entergy system had been disrupted, and that a numerical bandwidth of +/- 11 percent was an appropriate remedy.<sup>78</sup> The remedy changes the allocation of production costs among the Operating Companies to maintain rough production cost equalization.

49. The Louisiana Commission claims that "some Entergy operating companies -- the 'public utilities' subject to the Commission's jurisdiction -- did collect more than the legitimate cost level, and [Entergy Louisiana] paid more than its legitimate cost" and that "[t]hus, the revenues collected by the jurisdictional utilities subject to the Commission's rate regulation were not just and reasonable." However, the unjust and unreasonable rate impacts, and potential refunds, at issue in this proceeding involve an improper allocation

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<sup>75</sup> *Id.* at 30.

<sup>76</sup> *Id.* at 31 (citing *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 133 (1990) ("[A]lthough we agree that the Commission may have discretion to craft appropriate remedies for violations of the statute ... the "remedy" articulated in the Negotiated Rates policy ... conflicts directly with the core purposes of the Act."))

<sup>77</sup> *Id.* at 35.

<sup>78</sup> Opinion No. 480, 111 FERC ¶ 61,311 at P 136.

of costs among the Entergy Operating Companies (i.e., some companies were allocated too much, and some too little, of the Entergy System production costs), not overcharges, as the Commission recognized in Opinion No. 480-A.<sup>79</sup>

50. As we discuss below, considerations relevant to our refund determination in this matter are similar to those presented in the Commission's recent order on rehearing regarding interruptible loads, where the Commission found refunds were not due in that analogous System Agreement cost allocation case.<sup>80</sup> As in the Interruptible Load Rehearing Order, the issue presented here is: where a rate is subject to refund in a section 205 or 206 proceeding and the Commission subsequently orders this rate changed, should the new rate run only prospectively or should the Commission also order refunds for the difference between the new rate and previously effective rate for the period these rates were subject to refund.

51. We determined in the Interruptible Load Rehearing Order that, for cases like this one, refunds should generally not be allowed:

We determine here that while we will continue to allow for, as discussed below, discretion in a particular case to determine whether refunds are appropriate, we find it appropriate under the circumstances presented in the instant proceeding to follow our general rule that new cost allocations or rate designs that do not reflect over-recoveries or other special circumstances will run prospectively from the date of the issuance of the order and that refunds will not lie.<sup>81</sup>

We noted that, in *Occidental*, the Commission explained that its general policy of denial of refunds applies equally to both disputes over rate design and over cost allocation in Commission actions under section 206 of the FPA:

The Commission's long-standing policy is that when a Commission action under section 206 of the FPA requires only a cost allocation

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<sup>79</sup> See Opinion No. 480-A, 113 FERC ¶ 61,282 at P 59 (“Unlike the more typical case that involves refunds of rates that were excessive, the instant case involves a reallocation of costs among the Operating Companies . . .”).

<sup>80</sup> *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 142 FERC ¶ 61,211, at P 51 (2013) (Interruptible Load Rehearing Order).

<sup>81</sup> Interruptible Load Rehearing Order, 142 FERC ¶ 61,211 at P 51.

change, or a rate design change, the Commission's order will take effect prospectively.<sup>[82]</sup>

52. The Commission further noted that, in the context of allocations among holding company system affiliates in particular, the Commission has similarly denied refunds where the matters disputed involved cost allocations rather than cost over-recoveries.<sup>83</sup>

53. The Louisiana Commission argues that the Commission's mandate under the FPA to protect consumers from unreasonable rates and charges requires that the Commission must order refunds, but, as we found in the Interruptible Load Rehearing Order, this general statutory mandate does not equate to an obligation to order refunds whenever a rate or practice is found to be unjust and unreasonable, and the Commission retains ample discretion.<sup>84</sup> We find that an equitable ground disfavoring refunds in this context is the fact that Entergy cannot review and revisit past decisions were we to order a refund, a rationale cited in numerous Commission decisions denying refunds.<sup>85</sup> In the affiliated holding company context, the Commission has noted that refunds may not be appropriate

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<sup>82</sup> *Id.* P 57 (citing *Occidental Chemical Corp.*, 110 FERC ¶ 61,378, at P 10 (2005)).

<sup>83</sup> *Id.* PP 58-61 (citing *Southern*, 64 FERC ¶ 61,033 at 61,328, 61,332); *American Electric Power Service Corp.*, 114 FERC ¶ 61,288, at 61,975 (2006) (“In the past, the Commission exercised discretion by not ordering refunds in analogous cases involving allocation of costs among the operating companies of holding company systems. AEP's proposal is consistent with this practice, and we find no reason to deviate from this here.”).

<sup>84</sup> *Id.* PP 52-53 (citing 16 U.S.C. § 824e(b) (emphasis added); *California Independent System Operator, Corp.*, 120 FERC ¶ 61,271, at P 24 (2007); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (the Commission's breadth of discretion is “at its zenith” when fashioning remedies)).

<sup>85</sup> *Id.* P 63, n.142 (citing *New York Independent System Operator, Inc.*, 92 FERC ¶ 61,073, at 61,307 (2000); *Union Electric Co.*, 58 FERC ¶ 61,247, at 61,818 (1992); *Ameren Services Co.*, 127 FERC ¶ 61,121, at P 155 (2009); *Connecticut Light & Power Co.*, 15 FERC ¶ 61,056 (1981), *aff'd sub nom. Second Tax Dist. of Norwalk v. FERC*, 683 F.3d 477, 790 (D.C. Cir. 1983) (“A rate design affects, to some degree, customers' consumption patterns. A change in that design by Commission order cannot affect that pattern retroactively since the customers' energy usage was based on the rate design in effect during the period.”); *Commonwealth Edison Co.*, 8 FERC ¶ 61,277 (1979) (noting that customers can only modify their consumption patterns prospectively)).

because system operating decisions cannot be revisited and redone. For example, in *Southern*, the Commission found that “operational decisions made while the operating companies' proposed cost classification was in effect, and thus made in reliance on that classification, cannot be undone.”<sup>86</sup>

54. The Louisiana Commission cites cases that it claims stand for a proposition to the contrary. For example, the Louisiana Commission cites *Nantahala* for the proposition that, in cases involving unjust and unreasonable allocations of costs among affiliates, the Commission generally requires refunds.<sup>87</sup> However, in *Nantahala*, the Commission authorized refunds to the extent that the utility had charged its customers an excessive amount under its filed purchase power adjustment clause. Thus, it represents a circumstance of cost over-recovery. In contrast, the issue at hand involves a dispute over cost allocation. We are also not persuaded by the other cases cited by the Louisiana Commission. For example, as we stated in the Interruptible Load Rehearing Order, we find no clear Commission statement of why, more than 30 years ago, refunds were ordered in *Middle South Services, Inc.*, and so do not accord it significant weight.<sup>88</sup> The Commission also rejected other precedent cited by the Louisiana Commission that the Louisiana Commission cited as demonstrating a Commission policy to award refunds on the bases that they lacked clarity as to the grounds for which the Louisiana Commission relies upon them, relied upon settlement proceedings that did not represent valid precedent, or were cases that involved over-recoveries or violations of a tariffed rate, rather than cost allocation or rate design matters.<sup>89</sup>

In the Interruptible Load Rehearing Order, the Commission also explained that several recent cases involving the bandwidth remedy in which refunds were granted, which the Louisiana Commission similarly includes in its motion to lodge here, did not contradict our outcome there, as they likewise do not here. We noted that some of the Commission orders cited by the Louisiana Commission pertain to Entergy's annual filings to

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<sup>86</sup> *Id.* (citing *Southern*, 64 FERC ¶ 61,033 at 61,332).

<sup>87</sup> *See Nantahala*, 727 F.2d 1342, 1349-50 (4<sup>th</sup> Cir. 1984).

<sup>88</sup> Moreover, as we further examine that earlier order in response to the arguments made on rehearing, we also note that the refunds in *Middle South Services, Inc.* were to correct Entergy's failure to deduct from rate base balances in Account 282 of the Uniform System of Accounts, Accumulated deferred income taxes—Other property, an issue of over-recovery rather than allocation or rate design, and accordingly the refund directive in that order is consistent with our general policy on refunds.

<sup>89</sup> Interruptible Load Rehearing Order, 142 FERC ¶ 61,211 at PP 65, 69, 70.

implement the bandwidth formula to calculate the annual bandwidth remedy payments and receipts<sup>90</sup> and explained that these implementation proceedings, which were intended to roughly equalize production costs among the Operating Companies, involved implementation of the filed formula rate and refunds were appropriate consistent with our policy of generally ordering refunds where a utility violates the filed rate.<sup>91</sup>

55. On the other hand, as the Commission noted, in cases involving filings by Entergy or complaints by third parties seeking to change elements of the bandwidth remedy formula itself, whether refunds should be ordered depends on whether the relief involves a change in allocation or rate design, in which case refunds generally *are not* provided, or whether it involves an over-recovery of costs, in which case refunds generally *are* provided, consistent with the discussion above.<sup>92</sup>

56. The Commission noted that some recent bandwidth remedy decisions involving complaints to change the formula had not followed this approach because, in light of the remand from the D.C. Circuit in the Opinion No. 468 interruptible load proceeding, the Commission had initially doubted its authority to deny refunds based on equitable considerations in matters involving registered holding company systems.<sup>93</sup> The Commission's June 2011 findings in the Amended Remand Order<sup>94</sup> in the Opinion No. 468 interruptible load proceeding clarified its approach in this regard. And while the Commission's decision in Docket No. EL07-52-001 (a more recent proceeding involving the treatment of interruptible load in bandwidth remedy calculations) came after the Amended Remand Order, the Commission noted that its policy in this area was still under consideration and evolving, as evidenced by the fact that the Commission sought further

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<sup>90</sup> The decision the Louisiana Commission cited in Docket No. ER07-956-000, *Entergy Services, Inc.*, 139 FERC ¶ 61,104, involved a filing to comply with Opinion No. 505, which addressed the first year implementation filing for the bandwidth formula, and logically falls into this category and has been treated consistent with this approach.

<sup>91</sup> Interruptible Load Rehearing Order, 142 FERC ¶ 61,211 at P 73 (citing *Entergy Services, Inc.*, 130 FERC ¶ 61,170, at P 20 (2010) (“the purpose of the annual bandwidth filings is to apply the specified formula using actual data to determine whether or not there was rough production cost equalization”)).

<sup>92</sup> *Id.* P 74.

<sup>93</sup> *Id.* P 75.

<sup>94</sup> *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 132 FERC ¶ 61,133 (2011) (Amended Remand Order).

input from the parties on this issue through a second paper hearing on the equitable discretion issue in the Opinion No. 468 interruptible load proceeding, which paper hearing was addressed in the Interruptible Load Rehearing Order.<sup>95</sup> Indeed, the Commission did not consider exercising its discretion and denying refunds in those recent orders on complaints involving the bandwidth remedy.<sup>96</sup>

57. The Louisiana Commission also argues that the Commission erred in following precedent in the Opinion No. 468 proceeding in making its determinations in this case. While we have considered our decisions in the Opinion No. 468 proceeding, we are well aware of the distinctions between the two cases. For example, while the Opinion No. 468 proceeding involves the removal of interruptible loads from the allocator used to allocate production planning reserves in Service Schedule MSS-1, this case involves the allocation of all production costs on the Entergy System.<sup>97</sup> Nevertheless, we find that our findings in the Opinion No. 468 proceeding are relevant when making our determinations here because both cases consider the issue of the appropriateness of refunds in a case involving changes to the allocation of costs among the Entergy Operating Companies.

58. We also find that the purported equitable decisions presented by the Louisiana Commission, such as a Commission determination that overall rates were unjust, unreasonable and unduly discriminatory by large amounts, should not vary our basic approach toward resolving matters of this nature discussed above. Nor are we persuaded that the procedural delays cited by the Louisiana Commission warrant a decision here other than the substantively appropriate decision, i.e., such delays do not warrant a departure from our general rule that new cost allocations or rate designs (in contrast with a circumstance of cost over-recovery or in contrast to where there may be present other special circumstances) will run prospectively from the date of issuance of the order and that refunds will not lie. While the Louisiana Commission also cites the fact that the Presiding Judge favored refunds as an equitable matter, we do not find a basis for doing so that trumps the distinctions we have presented above.

59. In sum, the Commission finds that the case law and equitable considerations cited by the Louisiana Commission do not support its position that refunds are required, and the request for rehearing on the issue of refunds is accordingly denied.

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<sup>95</sup> We also noted that none of the parties sought rehearing of our refund decisions in these complaint matters.

<sup>96</sup> Interruptible Load Rehearing Order, 142 FERC ¶ 61,211 at P 57.

<sup>97</sup> Louisiana Commission Request for Rehearing at 20.

The Commission orders:

The requests for rehearing are hereby denied in part and granted in part, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.