

154 FERC ¶ 61,173
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Tony Clark.

Entergy Services, Inc.

Docket No. ER13-432-002

OPINION NO. 547

ORDER ON INITIAL DECISION

(Issued March 4, 2016)

1. On November 20, 2012, pursuant to section 205 of the Federal Power Act (FPA),¹ Entergy Services, Inc., as agent for and on behalf of the Entergy Operating Companies (collectively, Entergy),² filed amendments to the Entergy System Agreement (System Agreement) to reflect the withdrawal of Entergy Arkansas. On December 18, 2013, the Commission established hearing and settlement judge procedures on the issue of allocating proceeds from a settlement agreement (Union Pacific Settlement or Settlement) between Entergy Arkansas and Union Pacific Corp. (Union Pacific).³ On

¹ 16 U.S.C. § 824d (2012).

² The Operating Companies are Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States), Entergy Louisiana, LLC (Entergy Louisiana), Entergy New Orleans (Entergy New Orleans), and Entergy Texas, Inc. (Entergy Texas). Entergy Arkansas, Inc. (Entergy Arkansas) withdrew from the System Agreement effective December 19, 2013. Entergy Mississippi, Inc. (Entergy Mississippi) withdrew effective November 7, 2015. On December 29, 2015, the Commission approved a settlement agreement terminating the System Agreement effective August 31, 2016. *Entergy Ark., Inc.*, 153 FERC ¶ 61,347 (2015).

³ *Entergy Servs., Inc.*, 145 FERC ¶ 61,247 (2013) (Order Establishing Hearing).

December 12, 2014, the presiding Administrative Law Judge (Presiding Judge) issued an Initial Decision.⁴ In this order, we affirm the Initial Decision, as discussed further below.

I. Background

A. System Agreement and Entergy Arkansas's Withdrawal

2. The System Agreement is an agreement among Entergy and certain of the Operating Companies governing the planning and operation of the Operating Companies' generation and transmission facilities under a coordinated and single system. The System Agreement also governs how the Operating Companies will compensate one another for use of facilities and the supply of capacity and energy.⁵

3. In 2009, the Commission accepted Entergy Arkansas's notice of withdrawal from the System Agreement. The Commission found that the System Agreement did not impose further conditions on a withdrawing entity, require a withdrawing entity to pay an exit fee or otherwise compensate the remaining Operating Companies, or place a continuing obligation on a withdrawing entity to share capacity or make bandwidth payments.⁶

4. However, the Commission found that an entity's withdrawal would be a significant change to the System Agreement, such that the Commission would need to review whether successor arrangements were just and reasonable. The Commission stated that concerns about the structure of the post-withdrawal system would be addressed when it considered Entergy's successor arrangement filing.⁷ The Commission also stated that the issue of the post-withdrawal settlement benefits, among other issues,

⁴ *Entergy Servs., Inc.*, 149 FERC ¶ 63,022 (2014) (Initial Decision).

⁵ Order Establishing Hearing, 145 FERC ¶ 61,247 at P 2.

⁶ *Entergy Servs., Inc.*, 129 FERC ¶ 61,143, at P 59 (2009) (Withdrawal Order), *reh'g denied*, 134 FERC ¶ 61,075 (2011) (Withdrawal Rehearing Order), *aff'd sub nom. Council of the City of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (*Council of the City of New Orleans*), *cert. denied sub nom. La. Pub. Serv. Comm'n v. FERC*, 133 S. Ct. 2382 (2013).

⁷ Withdrawal Rehearing Order, 134 FERC ¶ 61,075 at P 27 n.27.

would be more appropriately addressed in such a future proceeding regarding the structure of the post-withdrawal system.⁸

B. Union Pacific Settlement

5. The Union Pacific Settlement resolved a lawsuit brought by Entergy and Entergy Arkansas in Arkansas state court that alleged Union Pacific breached its contract to deliver coal to two Arkansas power plants—White Bluff Steam Electric Station (White Bluff Station) and Independence Steam Electric Station (Independence Station)—operated by Entergy Arkansas.⁹ According to the suit, Union Pacific failed to deliver coal between May 2005 and June 2006 as a result of a derailment and subsequent track problems. The lawsuit included claims for specific damages by each Operating Company, including Entergy Arkansas. Other parties intervened in the suit, as well.¹⁰

6. In 2008, the parties settled the lawsuit.¹¹ The Presiding Judge found that neither the parties nor the Union Pacific Settlement directly addressed the issue of how the settlement benefits would be allocated among the Operating Companies after Entergy Arkansas' withdrawal from the System Agreement.¹² In 2010, the Union Pacific Settlement was also the subject of a prudence investigation by the Arkansas Commission, but the Arkansas Commission ultimately did not rule on its prudence.¹³

⁸ *Id.* P 37.

⁹ Initial Decision, 149 FERC ¶ 63,022 at P 41. Entergy Arkansas operates the plants and owns one third of the output. The rest of the output is owned by a consortium that includes Entergy Mississippi. Entergy Arkansas sells a portion of the output to Entergy Louisiana and Entergy New Orleans under a power purchase agreement. *Id.*

¹⁰ East Texas Electric Cooperative, Inc., Arkansas Electric Cooperative Corporation, Arkansas Cities (Conway Corporation, West Memphis Utilities Commission, and City of Osceola, Arkansas), and City Water & Light Plant of Jonesboro, Arkansas, intervened.

¹¹ The Union Pacific Settlement and references to the monetary settlement benefit amounts were filed as confidential information, and the parties entered into a protective order. *See* Initial Decision, 149 FERC ¶ 63,022 at P 51 n.2.

¹² *Id.* P 279.

¹³ *See, e.g., id.* P 69. *See also* Entergy Brief on Exceptions at 44-46.

C. 2008 Annual Bandwidth Proceeding

7. In Entergy's 2008 annual bandwidth proceeding in Docket No. ER08-1056-000, the Louisiana Public Service Commission (Louisiana Commission) requested that the benefits that accrued to Entergy Arkansas from the Union Pacific Settlement be allocated among the other Operating Companies after Entergy Arkansas' withdrawal from the System Agreement. The Commission approved the resulting settlement in the 2008 annual bandwidth proceeding in which, among other things, the parties agreed that the issue of the post-withdrawal benefits from the Union Pacific Settlement would be withdrawn from the 2008 annual bandwidth proceeding without prejudice.¹⁴ Parties were, instead, allowed to raise the issue in a proceeding on Entergy's post-withdrawal successor arrangement or in a future FPA section 206 proceeding.¹⁵

D. Entergy's Successor Arrangement Proceeding

8. On November 20, 2012, in the instant proceeding, Entergy filed its post withdrawal successor arrangement. The filing included proposed revisions to the System Agreement to remove all references to Entergy Arkansas, effective December 19, 2013. The Louisiana Commission filed a protest raising numerous issues, including the issue of allocating the post-withdrawal benefits from the Union Pacific Settlement. On December 18, 2013, the Commission conditionally accepted Entergy's proposal for filing, subject to refund, and, as relevant here, established hearing and settlement judge procedures regarding the issue of the post-withdrawal settlement benefits.¹⁶ A hearing was held in September 2014 after the parties failed to settle on the issue.

II. Discussion

9. In the Initial Decision, the Presiding Judge addressed the following stipulated issues:

1. What amount of benefits, if any, from the Union Pacific Settlement did Entergy Arkansas realize after December 2013?
2. Is it appropriate for Entergy Arkansas to retain the benefits from the Union Pacific Settlement?

¹⁴ *Entergy Servs., Inc.*, 128 FERC ¶ 61,181 (2009).

¹⁵ *Entergy Servs., Inc.*, 127 FERC ¶ 63,027, at P 10 (2009).

¹⁶ Order Establishing Hearing, 145 FERC ¶ 61,247 at PP 26, 121.

3. If not, how should the settlement benefit amounts be allocated among the Operating Companies? What are the just and reasonable terms and conditions to implement such allocation?

Entergy and the Arkansas Commission also raised the following non-stipulated issue:

4. Does the Commission have legal authority to order that Entergy Arkansas share the settlement benefit amounts after its withdrawal?¹⁷

10. We address these issues below. To the extent not discussed in this order, the Commission affirms all other findings and conclusions of the Presiding Judge.

A. Does the Commission Have Legal Authority To Order that Entergy Arkansas Share the Settlement Benefit Amounts After its Withdrawal?

1. Initial Decision

11. With regard to the non-stipulated fourth issue, which was supported by Entergy and the Arkansas Commission but opposed by the Louisiana Commission, the Texas Commission, and the Mississippi Commission, the Presiding Judge stated he would not formally address it because he did not believe the Commission ordered this issue to be decided in this proceeding. The Presiding Judge stated that, presumably, the Commission inherently answered this issue when it ordered this case to hearing; otherwise, the Commission would have found it had no authority to hear and decide this case at that time.¹⁸ However, if he were to address it, he said he would find the Commission has the authority as this proceeding derives from Entergy and MISO tariffs, the System Agreement, the bandwidth proceeding, and other jurisdictional agreements. The Presiding Judge concluded that, although the underlying transaction has terminated (i.e., the System Agreement), the Commission reserved its authority in deciding the issue of allocating excess settlement benefits among the Operating Companies and that a “new filed rate” is thus not required. He added that the parties should have filed requests for

¹⁷ The Louisiana Commission, the Public Utility Commission of Texas (Texas Commission), and the Mississippi Public Service Commission (Mississippi Commission) contested inclusion of the fourth issue. Initial Decision, 149 FERC ¶ 63,022 at P 52.

¹⁸ *Id.* P 53.

rehearing on the Order Establishing Hearing had they believed the Commission did not have legal authority on the issue of settlement benefits.¹⁹

2. Briefs on Exceptions

12. Both the Arkansas Commission and Entergy generally take issue with the Presiding Judge's treatment of the fourth issue. According to the Arkansas Commission, the Presiding Judge decided the Commission already inherently answered this question in the Order Establishing Hearing, and the parties are barred from arguing otherwise because they did not request rehearing. The Arkansas Commission contends that the Presiding Judge's justifications for avoiding this threshold legal issue are problematic because: (i) administrative law judges are not limited to factual findings; (ii) nothing in the Order Establishing Hearing supports a determination that the Commission has authority; and (iii) the Order Establishing Hearing is not a final order that requires a request for rehearing.²⁰ The Arkansas Commission asserts that, because the Commission accepted Entergy Arkansas' withdrawal unconditionally, the Presiding Judge cannot rely on an equitable or transitional measures rationale to overcome the Commission's lack of contractual authority to subject Entergy Arkansas to the System Agreement after December 2013.²¹ The Arkansas Commission argues, for similar reasons as above, that the Presiding Judge's conclusion that no tariff or contractual authority is necessary to implement his remedy is unfounded.²²

13. Likewise, Entergy argues that the Presiding Judge erred in failing to address the fourth issue. According to Entergy, the Presiding Judge misunderstands why the Arkansas Commission and Entergy raised the fourth issue. It claims the issue deals with whether a remedy for the Union Pacific Settlement issue is appropriate, or whether it is an impermissible exit fee, given the unconditional language of the Withdrawal Order. Entergy contends that the post-withdrawal settlement benefits issue was set for evidentiary hearing because the Commission lacked a factual record to determine whether the requested payment is an exit fee. Entergy argues that, in refusing to address the threshold fourth issue yet making collateral findings that the Mississippi

¹⁹ *Id.* P 53 n.4 (citing *La. Power & Light Co.*, 49 FERC ¶ 61,060, at 61,239 n.7 (1989), *order on reh'g*, Opinion No. 366, 57 FERC ¶ 61,101 (1991)).

²⁰ Arkansas Commission Brief on Exceptions at 16-17.

²¹ *Id.* at 25-29.

²² *Id.* at 35-36.

Commission's proposed remedy is not an exit fee, the Initial Decision is arbitrary and capricious, with findings unsupported by record evidence.²³

3. Briefs Opposing Exceptions

14. According to Trial Staff and the Louisiana Commission, the Commission has the authority to require Entergy Arkansas to pay the remaining Operating Companies for any unrecovered damages, regardless of whether a tariff provision exists to effect such payments. Trial Staff argues that the Arkansas Commission provided no support for its position that the Commission is barred from providing a remedy based on the merits of the case and, indeed, notes that the filed rate doctrine is not a bar to equitable relief provided by the Commission.²⁴

15. Similarly, the Louisiana Commission argues that the Presiding Judge properly rejected Entergy's and the Arkansas Commission's prior arguments regarding the non-stipulated fourth issue, especially considering that the Commission has already rejected the same arguments.²⁵ The Louisiana Commission argues that the Commission explicitly recognized that it has the authority and obligation to review post-withdrawal agreements to ensure that they are just, reasonable, and not unduly discriminatory. The Louisiana Commission asserts, moreover, that no party raises any true factual issues in arguing that the remedy is a prohibited exit fee, and that the legal arguments raised were already answered in the Withdrawal Order and Order Establishing Hearing.²⁶

4. Commission Determination

16. We reject the challenge to the Commission's legal authority to grant a remedy in this proceeding. As the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) affirmed, the Commission has authority to review whether successor arrangements are just and reasonable, including reviewing matters arising from the instant proceeding.²⁷ In reviewing successor arrangements, the Commission also has authority to develop

²³ Entergy Brief on Exceptions at 19-22.

²⁴ Trial Staff Brief Opposing Exceptions at 15-17.

²⁵ Louisiana Commission Brief Opposing Exceptions at 30-34.

²⁶ *Id.*

²⁷ *See Council of the City of New Orleans*, 692 F.3d at 176.

remedies as necessary to ensure that such arrangements are just and reasonable.²⁸ In the Withdrawal Order, the Commission found that the System Agreement did not place a continuing obligation on a withdrawing entity with respect to sharing capacity or making bandwidth payments. However, the Commission found that withdrawal would result in a significant change to the System Agreement, such that the Commission would need to review successor arrangements.²⁹ In the Withdrawal Order and the Order Establishing Hearing, the Commission explicitly left open the issue of the settlement benefits so it could be addressed in this successor arrangement proceeding.³⁰ The Commission timely exercised its suspension authority to preserve this issue, meaning that the issue may still be addressed although the System Agreement no longer applies.³¹ The parties additionally stipulated, in Entergy's 2008 annual bandwidth proceeding in Docket No. ER08-1056-000, that this issue would be dealt with in a future successor arrangement proceeding.³²

17. Moreover, we find that there is ultimately no filed rate issue. As explained, the Commission has authority to review whether successor arrangements are just and reasonable, and this authority extends to addressing issues that arose when Entergy Arkansas was a party to the System Agreement. Entergy Arkansas' obligation to share the post-withdrawal settlement benefits with the other Entergy Operating Companies is within our authority based on the parties' relationship while they were participants in the System Agreement. We are not imposing an obligation to continue to broadly share costs as if Entergy Arkansas continued to remain a participant in the System Agreement;

²⁸ See *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

²⁹ Withdrawal Order, 129 FERC ¶ 61,143 at P 63.

³⁰ Order Establishing Hearing, 145 FERC ¶ 61,247 at P 26. See also Withdrawal Order, 129 FERC ¶ 61,143 at P 63.

³¹ Order Establishing Hearing, 145 FERC ¶ 61,247 at P 26.

³² *Entergy Servs., Inc.*, 127 FERC ¶ 63,027 at P 10. In addition, as the Presiding Judge noted, the Union Pacific Settlement issue was before the Commission in Docket No. ER08-1056-000, and was settled by the parties who all agreed to defer it to the instant proceeding. As a result, we agree with the Presiding Judge that the Arkansas Commission and Entergy should have filed a request for rehearing on the Order Establishing Hearing if they believed the Commission lacked such authority. See *Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 545 (D.C. Cir. 2003) (finding that appellant waived an argument by not raising it on rehearing).

rather, we are requiring that Entergy Arkansas share this discrete set of benefits despite its withdrawal. Sharing the settlement benefits is different from the continuing obligations normally involved in exit obligations, which typically involve sharing of costs for future periods for service that would have been provided absent the withdrawal.³³ In contrast, the benefits here are associated with a situation that arose during the May 2005-June 2006 period during which the coal deliveries were interrupted, a period during which all the Entergy Operating Companies were participants in the System Agreement, and which continued to impact the Operating Companies after the withdrawal of Entergy Arkansas (i.e., through June 2015), and the sharing of those benefits adopted herein is necessary to equitably allocate the costs and benefits associated with that limited situation, to ensure that the successor arrangements among the Operating Companies are just and reasonable. For these reasons, we find that the Commission has the legal authority to allocate the settlement benefits.

B. What Amount of Benefits, if any, from the Union Pacific Settlement did Entergy Arkansas Realize After December 2013?

1. Initial Decision

18. The Presiding Judge found, overall, that Entergy Arkansas realized substantial benefits from the Union Pacific Settlement after its withdrawal.³⁴ The Presiding Judge noted that all experts agreed that the benefits from White Bluff and Independence Stations flow via plant ownership shares. The Presiding Judge found that Entergy Arkansas' shares provided more energy than it needed to meet load, and the benefits from such excess energy flowed to other Operating Companies. The Presiding Judge concluded that Mr. Cain, a Mississippi Commission witness, conservatively calculated

³³ Withdrawal Order, 129 FERC ¶ 61,143 at P 60 (“We contrast the terms in the System Agreement with the exit provisions in other operating agreements, such as those governing RTO membership, which explicitly condition withdrawal upon the meeting of certain requirements, including exit fees.”). *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,255, at P 18 (2011) (“The purpose of exit fees is to hold the loads of MISO’s remaining members harmless from increased responsibility for the financial obligations of MISO’s balance sheet at the time of a transmission owner’s withdrawal.”).

³⁴ Initial Decision, 149 FERC ¶ 63,022 at PP 242, 247.

the amount of the settlement benefits, which were then provided to the other Operating Companies through Service Schedule MSS-3 under the System Agreement.³⁵

19. According to the Presiding Judge, valuing the settlement benefits required looking at the payments Entergy Arkansas made for coal under the Union Pacific Settlement and comparing those payments to what it would have paid absent the Settlement. The Presiding Judge agreed with Mr. Cain's valuation assumptions to estimate benefits based on 2013 coal usage rates and to cap delivery volumes at the allowed maximum under the Settlement, and noted that no party questioned this methodology.³⁶

20. Regarding what Entergy would have paid, absent the Settlement, the Presiding Judge concluded that a 2010 study (2010 Crowley Study) by Mr. Crowley, Entergy's witness, is most probative. The Presiding Judge noted that, despite arguments to the contrary, Entergy used the 2010 Crowley Study to justify the prudence of the Union Pacific Settlement before the Arkansas Commission. The Presiding Judge stated that, in the 2010 Crowley Study, Mr. Crowley compared the Union Pacific Settlement benefits to a 2009 bid by BNSF Railway (2009 BNSF bid) as a proxy to market prices Entergy would have faced, absent the Settlement. The Presiding Judge explained that, in a Surface Transportation Board proceeding, Mr. Crowley testified that Entergy would have needed to enter into the market in advance of July 2012 to secure a multi-year contract for July 2012 to July 2015.³⁷

21. The Presiding Judge concluded that the 2009 BSNF bid fits Entergy's contracting practices as a proxy. According to the Presiding Judge, Entergy's argument that it would have entered into a one-year agreement for 2012-2013, followed by a three-year agreement for 2013-2016 that would not have been negotiated until 2012, is speculative, runs counter to the assumptions used in the 2010 Crowley Study, and suffers from hindsight bias. The Presiding Judge determined that only with hindsight could Entergy conclude gross domestic product would grow marginally in 2011 and that coal transportation rates started to moderate thereafter. The Presiding Judge also determined that subsequent changes in natural gas prices were irrelevant to what Entergy expected in 2011 and that no party presented evidence that Entergy anticipated that coal transportation rates would fall.³⁸

³⁵ *Id.* PP 236-238.

³⁶ *Id.* PP 252-254.

³⁷ *Id.* PP 255-263.

³⁸ *Id.* PP 264-268.

22. The Presiding Judge also found that Entergy had a relevant history of long-term contracts. In particular, the Presiding Judge noted that Entergy sought commitments for multi-year contracts in six requests for proposals, where the average contract duration requested three years and Entergy sought proposals on average six months in advance of the start of the contract. The Presiding Judge even noted that, in 2014, Entergy entered the market a year in advance, seeking multi-year terms.³⁹

23. The Presiding Judge rejected a 2014 (2014 Crowley Study) and a 2008 (2008 Crowley Study) study completed by Mr. Crowley for Entergy. The Presiding Judge explained that the 2010 Crowley Study was used by Entergy, after expending significant resources, to convince the Arkansas Commission of the Union Pacific Settlement's prudence, and no party contested its relevance and results. The Presiding Judge stated that all parties indicated that the passage of time would not lead to further reliable information, other than a true-up to actual coal usage values, and after a certain point, any analysis would suffer from hindsight bias. In that regard, the Presiding Judge found that the 2014 Crowley Study erroneously used a short-term one-year contract followed by a lower-priced three-year contract, which results in an under-representative benefits analysis. The Presiding Judge noted that Mr. Sammon, a Commission Trial Staff (Trial Staff) witness, criticized the 2014 Crowley Study for using that structure and 2012 coal transportation rates not known at the time of the Union Pacific Settlement or in 2010. The Presiding Judge concluded that the 2008 Crowley Study is ultimately immaterial at this point.⁴⁰

2. Briefs on Exceptions

24. The Arkansas Commission, Trial Staff, and Entergy assert that the Presiding Judge erred in adopting the 2010 Crowley Study. The Arkansas Commission and Entergy argue that the "but for" analysis in support of the 2010 Crowley Study is misplaced, as such an analysis applies only in prudence cases.⁴¹ According to Entergy, a "but for" analysis is too speculative because it relies on what Entergy would have done, rather than what

³⁹ *Id.* PP 268-274.

⁴⁰ *Id.* PP 285-90, 293-94. *See also id.* n.11.

⁴¹ Arkansas Commission Brief on Exceptions at 40-42; Entergy Brief on Exceptions at 44-46.

actually occurred. Entergy contends that the 2010 Crowley Study is outdated,⁴² and Trial Staff notes that Mr. Crowley, in fact, disavowed the 2010 Crowley Study.⁴³

25. Regarding Entergy's contracting practices, Trial Staff and Entergy claim that Entergy would have reentered the market for another contract absent the Union Pacific Settlement. Trial Staff argues that any hypothetical contract would have been renegotiated in 2012, following moderated coal transportation rates, to ensure that Union Pacific could continue its coal deliveries to the two plants in light of decreased natural gas prices.⁴⁴ According to Entergy, absent the Settlement, Entergy would not have paid the high 2014-2015 coal transportation rates presumed under the 2010 Crowley Study because Entergy would have, instead, entered into the market again for lower rates in mid-2013.⁴⁵ More generally, Entergy argues that its contracting history is not probative of what Entergy Arkansas would have done, absent the Settlement, because coal transportation prices were anomalous in 2010-2011 and each contract depended upon consideration of various specific factors. Additionally, Entergy contends that the Initial Decision wrongly concluded that there was no evidence that Entergy could have anticipated coal transportation prices would decrease.⁴⁶

26. The Arkansas Commission, Trial Staff, and Entergy contend that, instead, the 2014 Crowley Study more accurately reflects the value of the settlement benefits. The Arkansas Commission argues that the 2014 Crowley Study, with updated coal transportation conditions and decreased natural gas prices, best values the settlement benefits, and ultimately shows negative benefits because the benefits arise only if transportation rates in the Settlement are below market-driven rates.⁴⁷ Trial Staff argues that the 2010 Crowley Study and the 2014 Crowley Study use the same "but for" methodology, except the 2014 Crowley Study employs updated actual market data and shows no benefits.⁴⁸ In addition, Entergy claims that the Initial Decision incorrectly

⁴² Entergy Brief on Exceptions at 39-42.

⁴³ Trial Staff Brief on Exceptions at 23-25.

⁴⁴ *Id.* at 25-30.

⁴⁵ Entergy Brief on Exceptions at 42-44.

⁴⁶ *Id.* at 49-57.

⁴⁷ Arkansas Commission Brief on Exceptions at 42-47.

⁴⁸ Trial Staff Brief on Exceptions at 30-31.

concludes that Entergy Arkansas discredits previous assumptions used in the 2010 Crowley Study by relying on the 2014 Crowley Study; Mr. Crowley testified that the proper valuation was to compare Entergy Arkansas' settlement benefits to available market rates without a "but for" analysis. Entergy additionally claims that Mr. Sammon's "severe criticisms" of the 2014 Crowley Study are unsupported by the record.⁴⁹ Entergy argues that the Presiding Judge, in rejecting the 2014 Crowley Study, ultimately disregards the fundamental realities of utility resource management.⁵⁰

27. The Arkansas Commission and Entergy both argue that, if the Commission rejects the 2014 Crowley Study, the 2008 Crowley Study should be used in the alternative. The Arkansas Commission asserts that the 2008 Crowley Study is preferable to the 2010 Crowley Study because it was created contemporaneously with the Union Pacific Settlement and more accurately reflects the intent of the parties.⁵¹ Entergy asserts that the 2010 Crowley Study ultimately suffers from the same hindsight concerns the Presiding Judge raised with the 2014 Crowley Study, so the 2008 Crowley Study, as a result, must be the most proper valuation.⁵²

3. Briefs Opposing Exceptions

28. Entergy asserts that, according to Mr. Baron, a Louisiana Commission witness, there are two principles of cost allocation—cost causation and benefits and burdens. Entergy argues that, under the principle of cost causation, Entergy Arkansas should receive any settlement benefits, determined according to the 2014 Crowley study that uses actual costs and coal amounts, because Entergy Arkansas is responsible for the costs of White Bluff and Independence Stations. Likewise, Entergy asserts that, with respect to the principle of benefits and burdens, the settlement benefits depend on the amount of coal delivered to White Bluff and Independence Stations for generation, and thus, any

⁴⁹ Entergy claims that Mr. Sammon's sole criticism of the 2014 Crowley Study was one question in his direct testimony, which was later answered, and that in his direct testimony, Mr. Sammon called the 2014 Crowley Study the "most reliable" valuation. Entergy Brief on Exceptions at 57-58. Entergy asserts that the 2012 amendment to the new delivery contract (2012 Amendment) addressed Mr. Sammon's concerns and, in fact, supported Entergy's arguments that Union Pacific agreed to the 2012 Amendment to incent Entergy Arkansas to continue to burn coal. *Id.*

⁵⁰ *Id.* at 46-47, 57-60.

⁵¹ Arkansas Commission Brief on Exceptions at 47.

⁵² Entergy Brief on Exceptions at 47-48.

allocation of benefits or burdens different from the ownership and Commission-approved entitlement ratios for generation violates these cost allocation principles. Entergy contends, as a result, that the Louisiana Commission's allocation methodology is inconsistent with and contrary to well-accepted principles of cost allocation.⁵³

29. The Louisiana Commission and the Mississippi Commission assert that the Presiding Judge correctly adopted the 2010 Crowley Study. According to the Louisiana Commission, the 2010 Crowley Study, offered by Entergy in its Arkansas Commission prudence proceedings and stipulated to by all parties in that case, uses appropriate and contemporaneous market data.⁵⁴ The Louisiana Commission and the Mississippi Commission assert that the 2010 Crowley Study conservatively estimated benefits, using appropriate and contemporaneous market data, but had no need to account for displaced coal usage as a result of decreased natural gas prices, contrary to Entergy's argument and the Arkansas Commission's reliance on recent natural gas forecasts, as neither party made a showing that gas reached such a low price.⁵⁵

30. Similarly, the Louisiana Commission asserts that attempts to show that the 2010 Crowley Study is inaccurate were fully refuted at the hearing and are not credible because the attempts relied on "hindsight market data."⁵⁶ The Mississippi Commission claims that Entergy's argument against using the 2010 Crowley Study as the "appropriate valuation standard" is incorrect because the study reflects the most plausible market conditions under which Entergy would have acquired coal deliveries, absent the Union Pacific Settlement.⁵⁷

31. Regarding arguments against a "but for" analysis, the Louisiana Commission contends that they are red herrings because the settlement benefits must be evaluated by a hypothetical construct; the issue, instead, is which hypothetical construct most accurately measures the benefits in January 2011. The Louisiana Commission asserts that Entergy's attack on its own study as an inapplicable "prudence" analysis is a diversion because Entergy suggests replacing the 2010 Crowley Study with another study prepared with hindsight market data; likewise, the 2008 Crowley Study is irrelevant because it was

⁵³ Entergy Brief Opposing Exceptions at 9-14.

⁵⁴ Louisiana Commission Brief Opposing Exceptions at 60-71.

⁵⁵ *Id.* at 89; Mississippi Commission Brief Opposing Exceptions at 25-31.

⁵⁶ Louisiana Commission Brief Opposing Exceptions at 71-78.

⁵⁷ Mississippi Commission Brief Opposing Exceptions at 19-21.

replaced and updated by Entergy with contemporaneous information.⁵⁸ The Mississippi Commission asserts, similarly, that “but for” analyses apply in more than simply prudence cases, and the 2010 Crowley Study is far from speculative as it accurately represents market conditions when Entergy would have sought another longer term contract in 2010.⁵⁹

32. With respect to Entergy’s contracting practices, both the Louisiana Commission and the Mississippi Commission reject Entergy’s arguments because the Presiding Judge made multiple findings regarding Entergy’s contracting practices that should be taken as a whole and Entergy did not show any proof to substantiate use of the 2014 Crowley Study, except through a change in testimony.⁶⁰ The Louisiana Commission and the Mississippi Commission also claim that Entergy’s argument suffers from hindsight bias because declining gas prices alone could not have motivated Entergy to seek a short-term contract in late 2010 or early 2011.⁶¹ Likewise, the Louisiana Commission and the Mississippi Commission assert that Entergy and Trial Staff’s renegotiation argument lacks a rational economic basis because Union Pacific, in renegotiation, ensured that the net effect of the pricing adjustments did not change the economics of the original deal and would not voluntarily reduce rates without any compensation.⁶²

4. Commission Determination

33. We affirm the Presiding Judge’s finding that Entergy Arkansas realized substantial benefits from the Union Pacific Settlement, provided in the updated 2010 Crowley Study. As the Presiding Judge noted, the 2010 Crowley Study appropriately uses Entergy Arkansas’ contemporaneous evaluation of the benefits it expected to receive from the Union Pacific Settlement in 2008, and also considers Entergy’s actual contracting

⁵⁸ Louisiana Commission Brief Opposing Exceptions at 80-85, 88.

⁵⁹ Mississippi Commission Brief Opposing Exceptions at 15-19.

⁶⁰ Louisiana Commission Brief Opposing Exceptions at 82-84. *See also* Mississippi Commission Brief Opposing Exceptions at 24-25.

⁶¹ The Louisiana Commission also argues that Entergy’s “habit” argument is without merit as no character evidence is involved and, indeed, Entergy failed to object to evidence on its contracting practices. Louisiana Commission Brief Opposing Exceptions at 85-88. *See also* Mississippi Commission Brief Opposing Exceptions at 21-24.

⁶² Louisiana Commission Brief Opposing Exceptions at 78-80; Mississippi Commission Brief Opposing Exceptions at 31-33.

practices and market conditions at the time Entergy would have sought a new contract, absent the Settlement.

34. We note several reasons to support using the 2010 Crowley Study over the 2014 Crowley Study or the 2008 Crowley Study. First, the Union Pacific Settlement locked in transportation rates for 2011-2015 at below market rates. Second, absent the Settlement, Entergy Arkansas would have been in the market for a multi-year contract before rates fell in July 2012 and would have faced rates similar to those assumed in the 2009 BNSF bid, making the bid a reasonable proxy.⁶³ Third, based on the evidence presented, the Presiding Judge reasonably found that Entergy typically seeks multi-year contracts for coal transportation negotiated in advance.⁶⁴ Indeed, the Presiding Judge noted six requests for proposals from Entergy with average contract duration of three years and where Entergy sought proposals on average six months in advance of the start of the contract.⁶⁵ Thus, we find that the 2010 Crowley Study fairly represents the amount of benefits received by Entergy Arkansas from the Union Pacific Settlement during 2012-2015.

35. We disagree with the arguments of the Arkansas Commission and Entergy with respect to use of the 2010 Crowley Study. We agree with the Presiding Judge that the 2014 Crowley Study and 2008 Crowley Study suffer from internal problems. Substantial evidence was presented that the 2014 Crowley Study results in an under-representative benefits analysis by relying on contracting practices different than Entergy's usual practices. As the Presiding Judge found, the 2014 Crowley Study places undue reliance on market data only known in hindsight. The Louisiana Commission, the Mississippi Commission, and Trial Staff's witness, Mr. Sammon, also opposed use of the 2014 Crowley Study.⁶⁶ We also agree with the Presiding Judge that the 2008 Crowley Study is immaterial at this point, given the available updated information used and provided in the 2010 Crowley Study.

⁶³ Initial Decision, 149 FERC ¶ 63,022 at PP 260, 265.

⁶⁴ *Id.* PP 266-272.

⁶⁵ *Id.* PP 285-294. As noted above, the specific amounts are confidential.

⁶⁶ In reviewing Mr. Sammon's privileged testimony, we note that Mr. Sammon, in fact, criticized use of the 2014 Crowley Study, as the Presiding Judge found. We are not persuaded by Entergy's argument that his criticisms were addressed.

C. Is it Appropriate for Entergy Arkansas to Retain the Benefits From the Union Pacific Settlement?

1. Initial Decision

36. The Presiding Judge found that it is just and reasonable for Entergy Arkansas to share the post-withdrawal settlement benefits with the other Operating Companies. The Presiding Judge reasoned that, otherwise, Entergy Arkansas would receive benefits that were intended to be shared, which would be unduly discriminatory and preferential.⁶⁷

37. The Presiding Judge concluded that sharing the post-withdrawal settlement benefits does not constitute an exit fee or compensation scheme for Entergy Arkansas's withdrawal from the System Agreement. The Presiding Judge stated that no party rebutted the assertion that Entergy and Entergy Arkansas negotiated the Union Pacific Settlement to benefit all of the Operating Companies.⁶⁸ Moreover, the Presiding Judge noted that continuing to share the benefits after Entergy Arkansas's withdrawal enforces the Union Pacific Settlement, and that the Settlement itself is silent on whether the other Operating Companies would not receive benefits if Entergy Arkansas withdraws from the System Agreement.⁶⁹ As a result, according to the Presiding Judge, nothing in the Union Pacific Settlement bars Entergy Arkansas from continuing to share the benefits after withdrawal from the System Agreement.⁷⁰ The Presiding Judge added that, at the time of the Settlement, the parties knew Entergy Arkansas would withdraw in December 2013. The Presiding Judge explained that, nonetheless, the parties agreed to extend the benefits of the Union Pacific Settlement to the end of June 2015, without adding a provision stipulating that, after withdrawal, benefits would only accrue to Entergy Arkansas.⁷¹

38. In addition, the Presiding Judge noted that the parties deliberately allowed settlement benefits to exceed the damages incurred by the Operating Companies. According to the Presiding Judge, the parties agreed to this outcome because Union Pacific wished to avoid litigation and the potential for unfavorable precedent and to avoid

⁶⁷ *Id.* P 277.

⁶⁸ *Id.*

⁶⁹ *Id.* PP 277, 280.

⁷⁰ *Id.* P 296.

⁷¹ *Id.* P 279.

paying more direct damages.⁷² The Presiding Judge also pointed to substantial evidence that two Operating Companies—Entergy Gulf States and Entergy Texas—would not recover damages from the alleged breach unless they receive an allocation of the post-withdrawal settlement benefits, as provided in the 2010 Crowley Study.⁷³

2. Briefs on Exceptions

39. The Arkansas Commission, Trial Staff, and Entergy argue that the Presiding Judge's decision to allocate benefits results in an impermissible exit fee. The Arkansas Commission and Trial Staff contend that, because the Commission previously held that Entergy Arkansas' withdrawal required no conditions or transition measures and no party has a reasonable expectation of payment after a party's withdrawal under the System Agreement, no payment is required by Entergy Arkansas, especially considering Entergy Arkansas has not burdened any other Operating Company with any costs.⁷⁴ Similarly, Trial Staff and Entergy assert that the D.C. Circuit affirmed the Commission's interpretation of the System Agreement to only impose a notice requirement on withdrawing Operating Companies and rejected a similar arrangement to the Mississippi Commission's remedy. Trial Staff and Entergy contend, therefore, that any payments by Entergy Arkansas after withdrawal constitute an impermissible exit fee as neither the System Agreement nor the Union Pacific Settlement provides for continued sharing.⁷⁵

40. Both the Arkansas Commission and Entergy contend that the proposed remedy relies on a continuing obligation under the System Agreement. The Arkansas Commission argues that the Presiding Judge failed to consider that the filed rate doctrine barred adopting the Mississippi Commission's remedy, considering that the System Agreement provides no basis or authority for allocating benefits.⁷⁶ The Arkansas Commission also claims that the Presiding Judge ignores the fact that Mr. Cain's

⁷² *Id.* P 281.

⁷³ *Id.* PP 284, 296.

⁷⁴ Arkansas Commission Brief on Exceptions at 17-21; Trial Staff Brief on Exceptions at 10-13 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,255, at P 18 (2011)).

⁷⁵ Trial Staff Brief on Exceptions at 17-19; Entergy Brief on Exceptions at 22-24. *See also Council of the City of New Orleans*, 692 F.3d at 175.

⁷⁶ Arkansas Commission Brief on Exceptions at 33-34.

methodology cannot be detached from the System Agreement, which no longer applies.⁷⁷ Similarly, Entergy argues that the Mississippi Commission relies on the existence of a continuing obligation under the System Agreement for its proposed remedy, despite the fact that the Operating Companies have been made whole.⁷⁸ Entergy argues that, now, the Mississippi Commission seeks to impose additional withdrawal conditions on Entergy Arkansas, as if it were still part of the System Agreement, to support its proposed remedy. Entergy asserts that the Louisiana Commission made a failed argument for a continuing payment in an earlier proceeding, and now attempts to distinguish between an impermissible exit fee and its own proposed remedy, the only difference being that the latter is smaller in magnitude. Entergy contends that both an exit fee and the Mississippi Commission's remedy are based on an erroneous presumption about resource planning and operation within the Entergy system.⁷⁹

41. The Arkansas Commission, Trial Staff, and Entergy also argue that the Order Establishing Hearing bars the Initial Decision's proposed remedy. The Arkansas Commission asserts that the Presiding Judge's conclusion that the Order Establishing Hearing is dispositive on the exit fee issue is ultimately unfounded because the Order Establishing Hearing merely set the matter for hearing to gather further evidence on the Union Pacific Settlement. The Arkansas Commission contends, as a result, that the Presiding Judge's adopted remedy is barred as an impermissible exit fee because the Order Establishing Hearing merely requested more evidence to determine whether to treat the settlement benefits differently from the withdrawal issue.⁸⁰ Similarly, Trial Staff notes that this proceeding was set for hearing not to determine the legal arguments surrounding the definition of an exit fee, but instead was an opportunity for the Operating Companies to advocate sharing and why such sharing is not a prohibited exit fee. Entergy and Trial Staff contend that the Louisiana Commission and the Mississippi Commission failed to satisfy their burden of proof and explain why their remedies were not exit fee arrangements.⁸¹

⁷⁷ *Id.* at 21-25.

⁷⁸ Entergy Brief on Exceptions at 2; *see also id.* at 63-66 (asserting that, if the Commission imposes a remedy, any allocation of settlement benefits should be capped at actual damages incurred by the Operating Companies).

⁷⁹ *Id.* at 24-32 (citing Tr. 152: 14-19, 153: 2-5, 12-25 (Baron Cross)).

⁸⁰ Arkansas Commission Brief on Exceptions at 34-35.

⁸¹ Entergy Brief on Exceptions at 32-34; Trial Staff Brief on Exceptions at 13-17.

42. The Arkansas Commission and Entergy also claim that the Presiding Judge misinterprets the Union Pacific Settlement to form intent to continue the System Agreement. The Arkansas Commission asserts that, because the parties entered into the Union Pacific Settlement with the intent to fully comply with the now-inapplicable System Agreement, the Presiding Judge's denial of Entergy Arkansas' retention of its lawful share of post-withdrawal benefits should be dismissed. The Arkansas Commission claims the Presiding Judge relies on equitable grounds to find that the Union Pacific Settlement controls and that the parties intended to distribute settlement benefits. The Arkansas Commission claims that Entergy Arkansas pays for the costs of the White Bluff and Independence Stations, the Union Pacific Settlement is silent on benefits flowing to other Operating Companies, and the System Agreement never conveyed entitlement from another Operating Company's generating resources.⁸² The Arkansas Commission and Entergy assert that, because the Union Pacific Settlement is silent on the benefits issue and, indeed, record evidence shows that the parties anticipated Entergy Arkansas' benefits would increase upon withdrawal, the Commission should conclude that the benefits should flow with the filed rates, not principles of equity.⁸³

3. Briefs Opposing Exceptions

43. The Louisiana Commission and the Mississippi Commission support the Presiding Judge's finding that the settlement benefits should be shared. According to the Louisiana Commission, the FPA requires a focus on equity and, as a result, sharing the settlement benefits is the only proper equitable remedy under the FPA that ensures a just and reasonable successor arrangement. Both the Louisiana Commission and the Mississippi Commission argue that, regardless of Entergy Arkansas' withdrawal, settlement benefits stem from claims brought and settled on behalf of all the Operating Companies, and their retail customers who actually paid higher costs.⁸⁴ In particular, the Louisiana Commission contends that Entergy Arkansas only incurred approximately 26 percent of the damages, after which operation of the bandwidth tariff reduced those damages to less than 21 percent. The Louisiana Commission asserts that, without sharing, Entergy Arkansas would specifically retain 66 percent of the benefits, although it incurred only

⁸² Arkansas Commission Brief on Exceptions at 36-40.

⁸³ *Id.* at 29-33; Entergy Brief on Exceptions at 34-38.

⁸⁴ Louisiana Commission Brief Opposing Exceptions at 22-25; Mississippi Commission Brief Opposing Exceptions at 12-13.

21 percent of the damages, and would receive a windfall and an undue preference at the expense of the other Operating Companies.⁸⁵

44. Similarly, the Louisiana Commission claims that the Arkansas Commission's arguments that a remedy may not be provided, absent a voluntary agreement to a "filed rate," have no validity. As noted above, the Louisiana Commission contends that the Commission has broad equitable powers under the FPA; however, according to the Arkansas Commission's argument, any remedy involved would violate the filed rate doctrine, which is an illogical result according to the Louisiana Commission. The Louisiana Commission argues that the Commission has already dismissed this argument.⁸⁶

45. The Louisiana Commission and the Mississippi Commission also assert that Entergy's arguments regarding the intent of the parties are meritless but nonetheless underscore the need for a sharing remedy here. According to the Mississippi Commission, there is no reason to expect that a contract with Union Pacific would expressly specify how Entergy would internally allocate the settlement benefits. The Mississippi Commission argues, therefore, that the Initial Decision's discussion of "intent" is, instead, a reference to the logic of the Settlement that the Operating Companies continue to share the benefits proportionately.⁸⁷ The Louisiana Commission notes that the real parties harmed by the denial of post-withdrawal benefits are the retail customers, who did not participate in the Settlement; as a result, their only recourse is a remedy here that shares the benefits.⁸⁸

46. According to the Louisiana Commission and the Mississippi Commission, the Commission left open the issue of transition measures and the distinction between an exit fee and sharing settlement benefits. The Louisiana Commission and the Mississippi Commission contend that a reasonable transition measure to share benefits realized under the Union Pacific Settlement is not prohibited by the Withdrawal Order, and is not rooted

⁸⁵ The Louisiana Commission acknowledges that one witness contested these damages figures, but claims that the witness was ultimately in error. Louisiana Commission Brief Opposing Exceptions at 26-30.

⁸⁶ *Id.* at 55-57 (citing Order Establishing Hearing, 145 FERC ¶ 61,247 at P 62).

⁸⁷ Mississippi Commission Brief Opposing Exceptions at 13-15.

⁸⁸ Louisiana Commission Brief Opposing Exceptions at 48-52.

in the System Agreement but through an independent obligation, which the Commission must ensure is just and reasonable.⁸⁹

47. Entergy reiterates that both the Louisiana Commission's and the Mississippi Commission's remedy constitute a prohibited exit fee. Entergy asserts that the Commission only allows exit fees to hold harmless remaining system members from an increased financial burden after a member's withdrawal, but no financial burden exists here and, indeed, the D.C. Circuit and the Commission rejected a similar request by the Louisiana Commission for a continuing obligation by Entergy Arkansas.⁹⁰

4. Commission Determination

48. We affirm the Presiding Judge's finding that the settlement benefits accruing to Entergy Arkansas should be shared with the other Operating Companies. As the Presiding Judge noted, no party rebutted the assertion that the Union Pacific Settlement was entered into for the benefit of all the Operating Companies. Moreover, Entergy Arkansas was not the only party to the Union Pacific Settlement. Entergy Services, Inc. was also a party, as were other entities who were not a party to the original contract but who nonetheless intervened in the state court litigation.⁹¹ In the state court litigation, the other Operating Companies claimed specific damages from Union Pacific's alleged

⁸⁹ *Id.* at 38-43. *See also* Mississippi Commission Brief Opposing Exceptions at 4-12 (citing *La. Power & Light Co.*, 49 FERC ¶ 61,060 at 61,239 n.7). The Louisiana Commission also addresses Entergy's and Trial Staff's treatment of testimony. In particular, the Louisiana Commission claims that Entergy offers a misinterpretation of Mr. Baron's testimony in an effort to support its contention that the remedy is a prohibited exit fee. The Louisiana Commission asserts, instead, that Mr. Baron's testimony shows that the Mississippi Commission's remedy is not a prohibited exit fee because it does not involve a continuing obligation to the other Operating Companies for planning of generation resources. Louisiana Commission Brief Opposing Exceptions at 43-45. Additionally, the Louisiana Commission asserts that the Presiding Judge properly disregarded Trial Staff's argument regarding whether the remedy is a prohibited exit fee because the arguments contradict each other and the testimony of Trial Staff's expert witness. *Id.* at 52-55.

⁹⁰ Entergy Brief Opposing Exceptions at 7-9 (citing *Council of the City of New Orleans*, 692 F.3d 172).

⁹¹ *See supra* note 11.

breach.⁹² Benefits and damages prior to Entergy Arkansas' withdrawal flowed to the Operating Companies under Service Schedule MSS-3 of the System Agreement, based on ownership shares of White Bluff and Independence Stations. A consortium of the Operating Companies, including Entergy Mississippi, owned two-thirds of the White Bluff and Independence Stations' output, and Entergy Arkansas sold a further portion of the output to Entergy Louisiana and Entergy New Orleans under a power purchase agreement. Indirectly, the Operating Companies shared the plants' output through the System Agreement's Exchange provision in Service Schedule MSS-3.⁹³

49. Entergy argues that any sharing of the Union Pacific Settlement benefits after Entergy Arkansas' exit from the System Agreement would constitute an exit fee, and would thus conflict with the Commission's earlier finding that no exit fee was required. We disagree. By its very terms, an exit fee is a fee imposed upon a party because of its exit from a contract or agreement, as compensation for or a penalty for its departure. As noted above, an exit fee typically involves a continuing obligation to share costs for future periods for service that would have been provided absent the withdrawal.⁹⁴ We are not subjecting Entergy Arkansas to such a continuing obligation to share costs by ordering that it share the post-withdrawal settlement benefits with the other Operating Companies. Rather, as discussed above, Entergy Arkansas will share a discrete set of benefits associated with circumstances that arose during the May 2005-June 2006 period when all the Operating Companies were participants in the System Agreement and which continued to impact the Operating Companies after Entergy Arkansas' withdrawal from the System Agreement (i.e., through June 2015).

50. The Union Pacific Settlement was an arrangement reached for a situation that arose prior to the exit of Entergy Arkansas from the System Agreement, and the sharing of benefits here merely effectuates that arrangement. A Commission finding that no exit fee is required upon exit from the System Agreement does not mean that Operating Companies who exit abandon all contractual or other arrangements with other Operating Companies.⁹⁵ When Entergy Arkansas participated in the System Agreement, the

⁹² See Initial Decision, 149 FERC ¶ 63,022 at P 63.

⁹³ *Id.* PP 41, 277.

⁹⁴ See *supra* P 17.

⁹⁵ See *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 153 FERC ¶ 61,032, at P 20 (2015) (finding that the ruling that no exit fee was required did not excuse Entergy Arkansas from obligations sustained during the time it was a part of the System Agreement).

benefits of the Union Pacific Settlement were shared through the System Agreement; now that Entergy Arkansas has exited the System Agreement, there must be a new way to share those benefits as determined here.

51. Indeed, the parties knew at the time of the Union Pacific Settlement that Entergy Arkansas would withdraw from the System Agreement in December 2013, yet the parties agreed to a settlement term that extended past that date (i.e., through June 2015).⁹⁶ The Presiding Judge noted that no party involved in the Union Pacific Settlement specified that benefits would flow only to Entergy Arkansas or that the Operating Companies could no longer receive benefits after Entergy Arkansas' withdrawal. The Presiding Judge also found that it is probative that the Union Pacific Settlement contains no express provision limiting or curtailing benefits to Entergy Arkansas, or otherwise limits the rights of the other Operating Companies. As a result, we agree with the Presiding Judge that the logical result is that the Union Pacific Settlement intended the other Operating Companies to continue to share the benefits as originally envisioned.⁹⁷ As such, our decision to require Entergy Arkansas to share these benefits stems not from an obligation under the System Agreement but from effectuating the Union Pacific Settlement through a just and reasonable successor arrangement.⁹⁸

D. If not, How Should the Settlement Benefit Amounts Be Allocated Among the Operating Companies? What are the Just and Reasonable Terms and Conditions to Implement Such Allocation?

1. Initial Decision

52. The Presiding Judge adopted the Mississippi Commission's methodology, including its analysis and benefits amounts, as the just and reasonable allocation method, and found that the amounts should be trued-up to actual coal usage volumes.⁹⁹ According to the Presiding Judge, the alternative methods of allocating benefits are unduly preferential and discriminatory. The Presiding Judge explained that a cap limit based on actual damages, such as what Trial Staff and the Louisiana Commission advocate, would not allow the other Operating Companies to share in the benefits, despite the fact that the parties clearly knew during Settlement negotiations that Entergy

⁹⁶ Initial Decision, 149 FERC ¶ 63,022 at P 279.

⁹⁷ *Id.* P 280.

⁹⁸ *See supra* PP 16-17.

⁹⁹ Initial Decision, 149 FERC ¶ 63,022 at PP 245, 249-251.

Arkansas would withdraw before settlement benefits would expire in June 2015.¹⁰⁰ Indeed, the Presiding Judge stated that Mr. Sammon opines that the exact monetary value of the benefits may never be known, but the Mississippi Commission's methodology produces the most reasonable numbers on which to value the benefits.¹⁰¹

53. The Presiding Judge found, overall, that the Mississippi Commission's methodology mirrors the intent of the parties to distribute the settlement benefits as if Entergy Arkansas remained a part of the System Agreement. The Presiding Judge noted that, because this methodology ultimately distributes benefits as the parties agreed upon in the Union Pacific Settlement, it is insignificant that Entergy Arkansas has left the System Agreement. The Presiding Judge repeated that no provision in the Union Pacific Settlement specifies that only Entergy Arkansas would receive benefits after its withdrawal or that the other Operating Companies would have their benefits cut off.¹⁰² In fact, he explained that Entergy negotiated the Union Pacific Settlement to recover direct damages as well as indirect damages from reduced sales, and that Union Pacific was aware that it faced exposure to claims for damages that flowed through to the other Operating Companies.¹⁰³ The Presiding Judge also stated that Trial Staff endorses this methodology in the alternative.¹⁰⁴ As a result, the Presiding Judge determined that this remedy encompasses the most fair and accurate allocation of benefits and prevents unduly discriminatory treatment of other Operating Companies, in accordance with the intent of the parties and the Union Pacific Settlement.¹⁰⁵

¹⁰⁰ *Id.* PP 279-281. The Presiding Judge also states that Trial Staff's witness, Mr. Sammon, supports the Mississippi Commission's remedy over the alternatives to Trial Staff's remedy. *Id.* PP 274-276 (stating that Trial Staff's position changed throughout the proceeding, seems to contradict Mr. Sammon's testimony, and is unsupported by substantial evidence).

¹⁰¹ *Id.* PP 293.

¹⁰² *Id.* PP 295-296.

¹⁰³ *Id.* P 240.

¹⁰⁴ *See supra* note 100.

¹⁰⁵ Initial Decision, 149 FERC ¶ 63,022 at PP 297-298.

2. Briefs on Exceptions

54. According to the Arkansas Commission, the Mississippi Commission's remedy relies on inaccurate assumptions and contravenes the filed rate because nothing in the 2014 Crowley Study, the System Agreement, or the Union Pacific Settlement provides for allocating the settlement benefits. Additionally, the Arkansas Commission argues that the Presiding Judge fails to specify any terms or conditions to implement the proposed allocation and, instead, requires a future compliance filing that relates to no tariff or agreement on file with the Commission.¹⁰⁶

55. Trial Staff contends that, if the Commission determines that the settlement benefits should be shared, such sharing should be limited to the damages the Operating Companies actually suffered. Trial Staff argues that the Presiding Judge is incorrect when he finds that capping sharing to actual damages would be unduly discriminatory because no provision in the Union Pacific Settlement provides for sharing of the settlement benefits and the parties knew Entergy Arkansas would withdraw from the System Agreement in December 2013. According to Trial Staff, any sharing in excess of actual damages would be a windfall to the other Operating Companies and unjust and unreasonable because the Operating Companies would be in a better position than if Entergy Arkansas had not withdrawn.¹⁰⁷

56. Entergy argues that the Presiding Judge erred because he failed to make findings regarding damages yet found that any allocation of the settlement benefits should not be capped at actual damages incurred by the Operating Companies. Entergy contends that the allocation recommended by Trial Staff¹⁰⁸ is consistent with what the Operating

¹⁰⁶ Arkansas Commission Brief on Exceptions at 47-52.

¹⁰⁷ Trial Staff Brief on Exceptions at 19-23.

¹⁰⁸ Entergy explains that Trial Staff witnesses recommended that, if Entergy Arkansas is ordered to make a payment to the other Operating Companies, such payment should be capped at the benefits the other Operating Companies would have received if Entergy Arkansas had remained in the System Agreement until the Operating Companies are made whole for their damages. According to Entergy, Trial Staff witnesses suggested that this would "help ensure that the remaining Operating Companies would not be better off by having [Entergy Arkansas] pay an amount greater than it would have otherwise paid simply because it left the System Agreement." Entergy Brief on Exceptions at 63 (citing Ex. S-15C at 13 (Kimbrough Direct and Answering); EX S1C at 15 (Sammon Direct and Answering)).

Companies would have been limited to in state court—i.e., being made whole—had Entergy Arkansas and Entergy Services not entered into the Union Pacific Settlement. According to Entergy, the parties presented substantial evidence on what damages were incurred by the Operating Companies, including the residual effects of bandwidth payments, and the Arkansas state court reduced the damages that could be claimed in the case by concluding that lost opportunity costs and replacement power costs were too speculative to be considered. Entergy asserts that, in using the 2010 Crowley Study to quantify the settlement benefits, the Presiding Judge ultimately ignored those previous allocation disputes.¹⁰⁹ Entergy argues, furthermore, that under the 2010 Crowley Study, the Operating Companies in total have already been fully compensated for the damages prior to Entergy Arkansas' withdrawal.¹¹⁰

57. Entergy argues, moreover, that Commission precedent does not require that all parties be made whole where non-cash benefits result from an otherwise reasonable settlement. Entergy contends that the Commission has rejected attempts to “fine tune” allocated settlement amounts under an overall settlement that included non-cash benefits, when parties had received “very substantial” benefits. According to Entergy, therefore, if the Commission adopts the recommendation to use the 2010 Crowley Study, the Commission should find that the Operating Companies have already been made whole.¹¹¹

58. Additionally, Entergy also contends that the Presiding Judge incorrectly interpreted his role to include a determination of whether the Union Pacific Settlement is nondiscriminatory and non-preferential. Entergy asserts that these issues are beyond the scope of this docket and have not been raised by any party.¹¹² Lastly, Entergy argues that

¹⁰⁹ *Id.* at 64.

¹¹⁰ Trial Staff contends that Entergy has not fully supported its claim that there are no unrecovered damages under the 2010 Crowley Study. Trial Staff notes that, under the 2010 Crowley Study, all Operating Companies except Entergy Gulf States have recovered their damages, while under the 2014 Crowley Study, no Operating Company would have recovered damages and Entergy Arkansas would have no remaining benefits to compensate them. Trial Staff Brief on Exceptions at 12-15.

¹¹¹ Entergy Brief on Exceptions at 65-66 (citing *La. Power & Light Co.*, 23 FERC ¶ 61,376 (1983) (*Louisiana Power & Light*)).

¹¹² *Id.* at 38-39.

the Presiding Judge's finding that a just and reasonable allocation of the settlement benefits includes a true-up of actual coal deliveries is not supported by the evidence.¹¹³

59. The Louisiana Commission supports the Presiding Judge's findings, but suggests a damages-based remedy. The Louisiana Commission argues that the damages claims of all the companies produced the Union Pacific Settlement, and the benefits, therefore, should be allocated in proportion to those damages, according to *Oglethorpe Power Co. v. FERC*¹¹⁴ and *Central Illinois Public Service Co. v. FERC*.¹¹⁵ The Louisiana Commission asserts that, because Entergy Arkansas is no longer part of the System Agreement, the damages incurred by each Operating Company should be the terms that control the benefits. The Louisiana Commission further contends that two witnesses supported linking benefits to damages and that allocating benefits according to damages is consistent with precedent. The Louisiana Commission argues, however, that allocating benefits as energy under Service Schedule MSS-3 is not appropriate, even if Entergy Arkansas were still a party to the System Agreement, because Service Schedule MSS-3 was not designed to allocate the benefits of litigation.¹¹⁶

60. Additionally, the Louisiana Commission contends that the determination of each Operating Company's damages-based allocation should include the bandwidth payments made under Service Schedule MSS-3 of the System Agreement. Specifically, the Louisiana Commission argues that receipt of the Union Pacific Settlement benefits effectively lowered the damages borne by Entergy Arkansas, and this change in damages resulted in higher bandwidth payments for the other Operating Companies for 2005 and 2006. The Louisiana Commission argues that the annual bandwidth payments transferred the Union Pacific Settlement damages among the Operating Companies according to the extent an Operating Company was subject to bandwidth payments under the annual bandwidth calculation.¹¹⁷

¹¹³ *Id.* at 60-63.

¹¹⁴ Louisiana Commission Brief on Exceptions at 7 (citing *Oglethorpe Power Co. v. FERC*, 84 F.3d 1447 (D.C. Cir. 1996) (*Oglethorpe*)).

¹¹⁵ *Id.* at 7-8 (citing *Cent. Ill. Pub. Serv. Co. v. FERC*, 941 F.2d 622 (7th Cir. 1991) (*Central Illinois*)).

¹¹⁶ *Id.* at 5-8.

¹¹⁷ *Id.* at 8-9.

61. The Louisiana Commission also asserts that interest should be applied to the settlement benefit amounts to be paid to the other Operating Companies. The Louisiana Commission argues that the Initial Decision assumes this, but an exception should be granted to explicitly provide for interest.¹¹⁸

3. Briefs Opposing Exceptions

62. The Arkansas Commission and Entergy claim that the Louisiana Commission's reliance on *Central Illinois* and *Oglethorpe*, by arguing that settlement benefit allocation is consistent with the alleged damages, is misplaced where non-cash settlement benefits are at issue.¹¹⁹ Entergy claims that Commission precedent instead shows that distribution is not required, particularly where non-cash settlement benefits are at issue, and that the proper standard to evaluate disposition of proceeds is whether the disposition "lies within a zone of reasonableness."¹²⁰

63. The Arkansas Commission also asserts that the Louisiana Commission's remedy does not comport with the Union Pacific Settlement's structure, in which benefits vary in value and magnitude depending on the difference between settlement rail transportation rates and market-driven transportation rates. The Arkansas Commission argues, moreover, that the Operating Companies knew the structure of the Union Pacific Settlement and were aware at the time of the Settlement that Entergy Arkansas would withdraw from the System Agreement at the end of 2013. The Arkansas Commission also claims that the Louisiana Commission's remedy suffers from other problems: (i) it violates the filed rate doctrine; (ii) it would be a penalty on Entergy Arkansas for leaving the System Agreement; and (iii) it would result in a windfall to the other Operating Companies.¹²¹ In addition, the Arkansas Commission argues that effects of the bandwidth calculation are correctly excluded here. The Arkansas Commission asserts that the Louisiana Commission, in suggesting including the effects of the bandwidth calculation, seeks to impute greater-than-actual bandwidth payments by Entergy

¹¹⁸ *Id.* at 10.

¹¹⁹ Arkansas Commission Brief Opposing Exceptions at 5-11; Entergy Brief Opposing Exceptions at 34-37. *See also Oglethorpe*, 84 F.3d 1447; *Central Illinois*, 941 F.2d 622.

¹²⁰ Entergy Brief Opposing Exceptions at 34-37.

¹²¹ Arkansas Commission Brief Opposing Exceptions at 11-15 (citing *Council of the City of New Orleans*, 692 F.3d at 175).

Arkansas to increase its damage calculation, which is tantamount to imputing new bandwidth payments retroactively.¹²²

64. Similarly, Trial Staff argues that the Louisiana Commission's proposed remedy and its rationale are flawed. Trial Staff asserts that the Louisiana Commission mistakenly relied upon the testimony of Trial Staff's witness, Mr. Sammon, to support its proposed remedy; instead, Trial Staff contends that Mr. Sammon opposed the Louisiana Commission's remedy, as does Trial Staff. Additionally, Trial Staff argues that the Louisiana Commission wrongly concludes that settlement benefits should not be allocated according to Service Schedule MSS-3; before Entergy Arkansas withdrew, its share of the settlement benefits passed through the Exchange and bandwidth provisions under Service Schedule MSS-3.¹²³

65. Likewise, according to Entergy, enacting the Louisiana Commission's proposed allocation method would be unduly discriminatory and preferential. Entergy argues that the Louisiana Commission's proposed allocation methodology results in similarly-situated Operating Companies paying different rates for the same service. Entergy asserts, specifically, that coal transportation costs borne by Entergy Arkansas would be at a rate higher than the contract rate, while the opposite is true for other Operating Companies. Entergy argues that, under the Louisiana Commission's proposed allocation methodology, Entergy Arkansas would be the only Operating Company required to disgorge its "excess" settlement benefits and, indeed, would be one of two Operating Companies incurring a deficit in benefits. Entergy asserts that enacting the Louisiana Commission's proposed remedy would have the result of making the other Operating Companies better off than had Entergy Arkansas remained in the System Agreement and bears no relation to how benefits would have been allocated under the System Agreement.¹²⁴

66. Additionally, Entergy argues that the Louisiana Commission misallocates damages and benefits. Entergy contends that the Louisiana Commission's remedy under-allocates damages to Entergy Arkansas and over-allocates damages to other Operating Companies for the following reasons: (i) by assuming that 75 percent of on-peak replacement energy was allocated to the other Operating Companies via the Exchange provisions in Service Schedule MSS-3; (ii) by assuming that the lost opportunity cost

¹²² *Id.* at 15-16.

¹²³ Trial Staff Brief Opposing Exceptions at 8-12.

¹²⁴ Entergy Brief Opposing Exceptions at 14-21.

damages are allocable to the other Operating Companies; and (iii) via misapplication of the specific terms of the bandwidth provision in Service Schedule MSS-3. Second, Entergy asserts that the Louisiana Commission's calculation of the amount of damages and allocation of damages are based on estimates and continually change, rendering the Louisiana Commission's proposed remedy unstable and speculative. Third, Entergy claims that the amount of Union Pacific Settlement benefits is also based on estimates. Finally, Entergy contends that regardless of the Louisiana Commission's miscalculations, the Entergy system has been made whole. Entergy argues that, in fact, most Operating Companies will have been more than made whole or, if Mr. Baron's application of the allocation factor is corrected, each Operating Company has already been made whole; and if not, that is acceptable because it is the result of the filed rate.¹²⁵

67. Both the Arkansas Commission and Entergy also take issue with the payment of interest on benefit amounts. The Arkansas Commission contends that: (i) a determination on whether to order interest is within the Commission's discretion; (ii) if the Commission does order additional sharing of settlement benefits, such sharing would be a reallocation of future, prospective benefits, not a refund of over-collected amounts; and (iii) while the Commission accepted Entergy's filing to revise the System Agreement to reflect Entergy Arkansas' withdrawal, no party nor the Presiding Judge proposed changes or actions under the System Agreement.¹²⁶ Entergy argues, similarly, that interest should not be imputed because, as a matter of equity, allowing interest is within the Commission's discretion and here, the benefits are speculative and not based on actual data.¹²⁷

68. The Louisiana Commission, on the other hand, asserts that a just and reasonable transition measure requiring sharing of the settlement benefits is authorized and necessary under the FPA. The Louisiana Commission maintains that sharing the benefits here is no different from other transition measures, such as measures dealing with the Ouachita transmission upgrades or Entergy Arkansas' auction revenue right entitlements, which are in place to ensure just and reasonable rates after Entergy Arkansas'

¹²⁵ *Id.* at 21-34.

¹²⁶ Arkansas Commission Brief Opposing Exceptions at 17-18.

¹²⁷ Entergy Brief Opposing Exceptions at 38-39.

withdrawal.¹²⁸ The Louisiana Commission additionally argues that there is no error in ordering a true-up procedure, as the Commission commonly requires one.¹²⁹

69. The Mississippi Commission agrees, and asserts that it would be unduly preferential for Entergy Arkansas, alone, to retain the difference between the amount of damages and the amount of settlement benefits. According to the Mississippi Commission, Commission precedent recognizes the equity in distributing the benefits according to harms, but the Mississippi Commission contends that Service Schedule MSS-3 did not allocate the settlement benefits in direct proportion, even in 2011-2013. As a result, the Mississippi Commission suggests that allocating the settlement benefits as they would have been allocated under the System Agreement, regardless of Entergy Arkansas' participation in the Agreement, is most appropriate.¹³⁰

70. In addition, the Mississippi Commission notes that the Arkansas Commission and Entergy were the first parties to argue for a true-up, contrary to their arguments against a true-up. The Mississippi Commission also supports the Louisiana Commission's request to add interest and claims that, overall, it would approve of setting the remedial principal at the lesser of the disbursement amount or its true-up equivalent.¹³¹

4. Commission Determination

71. We affirm the Presiding Judge's adoption of the Mississippi Commission's benefits-based allocation methodology rather than the damages-based allocation methodology advocated in various forms by Entergy, Trial Staff, and the Louisiana Commission. We also affirm the Presiding Judge's adoption of the Mississippi Commission's recommended true-up.¹³² The Presiding Judge found, after review of the record, that the Mississippi Commission's methodology would allow all of the Operating Companies to get the benefit of the bargain of the Union Pacific Settlement. He also found that a cap on damages would be unduly discriminatory and preferential, as Entergy Arkansas would receive benefits in excess of its damages while the other Operating

¹²⁸ Louisiana Commission Brief Opposing Exceptions at 45-48.

¹²⁹ *Id.* at 57-59.

¹³⁰ Mississippi Commission Brief Opposing Exceptions at 33-38.

¹³¹ *Id.* at 31-33.

¹³² Initial Decision, 149 FERC ¶ 63,022 at PP 244-245.

Companies would not.¹³³ Entergy is directed to make a compliance filing within 60 days of the issuance of this order calculating the appropriate refunds in accordance with the terms established in the Initial Decision.

72. The Louisiana Commission cites two cases—*Oglethorpe* and *Central Illinois*—in support of its claim that a damages-based remedy is appropriate given that Entergy Arkansas has withdrawn from the System Agreement.¹³⁴ However, neither case applies to the settlement benefits at issue here. In both *Oglethorpe* and *Central Illinois*, the settlement benefits were damages and could easily be allocated to each damaged party. In addition, as the Presiding Judge found, based on the review of the methodologies, a damages-based allocation would leave Entergy Arkansas with an unsustainable preference and would unduly discriminate against the other Operating Companies.¹³⁵ The benefits-based allocation is consistent with the analysis used in the 2010 Crowley Study to value the benefits, gives all Operating Companies the benefit of the bargain from the Union Pacific Settlement, and does not unduly discriminate against the other Operating Companies.¹³⁶

73. In support of its argument that the damages were established and the Operating Companies have already been made whole, Entergy cites *Louisiana Power & Light*, a case involving an allocation of settlement benefits to wholesale customers.¹³⁷ Louisiana Power & Light Co. (Louisiana Power & Light) provided a refund methodology for wholesale and retail customers, which was reviewed and adopted by the Louisiana Commission for retail customer refunds. However, the refund methodology left the wholesale customers without a small portion of the refunds. The Commission found, through independent review, no reason to “fine tune” Louisiana Power & Light’s refund methodology and the Louisiana Commission’s approval, given that the wholesale customers had received a substantial benefit and that the allocation was reasonable and fair overall.¹³⁸

¹³³ *Id.* PP 278, 282.

¹³⁴ Louisiana Commission Brief on Exceptions at 7.

¹³⁵ Initial Decision, 149 FERC ¶ 63,022 at P 282.

¹³⁶ *Id.* PP 277, 282.

¹³⁷ *Louisiana Power & Light*, 23 FERC at 61,791.

¹³⁸ *Id.* at 61,794.

74. In a subsequent order denying rehearing of the approval of the settlement proposal, the Commission reaffirmed its decision to exercise discretion on questions such as whether Louisiana Power & Light's past customers should be made completely whole in cash at the expense of its future customers, when both have suffered damages. The Commission concluded that no hard and fast rules exist that would have enabled it to precisely calculate the refund due to each customer under these circumstances, and therefore, it must judge to see if a proposed settlement plan falls within a "zone of reasonableness."¹³⁹

75. We disagree with Entergy's reading of *Louisiana Power & Light*. In *Louisiana Power & Light*, the refunds at issue for wholesale customers were a minute portion of the overall refunds, and reallocation would have clearly amounted to "fine tuning."¹⁴⁰ Here, however, the benefits at issue are all of the settlement benefits from January 2014 to June 2015, and their allocation to the Operating Companies would result in more than a "fine tuning." Moreover, at issue is how all of the settlement benefits for the period of January 2014 to June 2015 should be allocated, not whether the parties received a "substantial benefit." Indeed, the Presiding Judge noted that Entergy Gulf States and Entergy Texas would not even fully recover their damages without allocation of the post-withdrawal settlement benefits.¹⁴¹

76. As to the Louisiana Commission's claim that bandwidth payments should be included in the calculation of settlement benefits, we conclude that bandwidth payments should not be included. The Louisiana Commission's argument that receipt of the Union Pacific Settlement benefits effectively lowered the damages borne by Entergy Arkansas, resulting in higher bandwidth payments for 2005 and 2006, is contingent upon adoption of the Louisiana Commission's damages-based methodology. Neither the methodology adopted by the Presiding Judge nor the Union Pacific Settlement relies purely on a damages-based approach. As such, the Louisiana Commission's argument for including bandwidth payments is inapplicable.

¹³⁹ *La. Power & Light Co.*, 24 FERC ¶ 61,301, at 61,652 (1983).

¹⁴⁰ We would like to note that the total cash payments from the settlement in *Louisiana Power & Light* amounted to approximately \$1.09 billion, with an additional potential \$585 million cash payment if a further condition was not met. The refunds at issue for wholesale customers totaled \$9,582,730. *Louisiana Power & Light*, 23 FERC at 61,792-93.

¹⁴¹ Initial Decision, 149 FERC ¶ 63,022 at P 284.

77. We also disagree with the Louisiana Commission that interest should be applied to payments from the time they are due to the time of payment. Commission precedent provides that interest, while ultimately up to the discretion of the Commission, is more appropriate with overcharges or where substantial time has passed.¹⁴² Neither circumstance applies here, nor are we convinced that interest is otherwise merited.

The Commission orders:

(A) The Initial Decision is hereby affirmed, as discussed in the body of this order.

(B) Entergy is hereby directed to file a compliance filing within 60 days of the date of the issuance of this order, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁴² See, e.g., *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,152, at P 42 (2014); *Entergy Servs., Inc.*, 142 FERC ¶ 61,011, at P 21 (2013); *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095 (2007). See also *Comm'n of State of Okla. v. Am. Elec. Power Co., Inc.*, 125 FERC ¶ 61,237, at P 33 (2008).