

155 FERC ¶ 61,120  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation      Docket Nos. EL00-66-019

Louisiana Public Service Commission v. Entergy Services, Inc.      EL95-33-013

ORDER ON REMAND

(Issued April 29, 2016)

1. In response to a petition for review of a Commission order issued on March 21, 2013 in this proceeding,<sup>1</sup> the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an order on December 5, 2014 remanding the matter, in part, to the Commission for further proceedings.<sup>2</sup> At issue is the Commission's reasoning in denying refunds in the March 2013 Order. The court found that the line of precedent that the Commission relied on in denying refunds involved rationales that the Commission concluded were not present here. The court also found that the existence of the equitable factor that the Commission identified in denying refunds is unclear and that the Commission inadequately explained its relevance. The court instructed the Commission to consider on remand the relevant factors for ruling on the question of refunds, to weigh the relevant factors against one another, and to strike a reasonable accommodation among them.<sup>3</sup> In this order, we clarify our policy on refunds and find that refunds should be denied in this case.

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<sup>1</sup> *La. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,211 (2013) (March 2013 Order).

<sup>2</sup> *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014).

<sup>3</sup> *Id.* at 1306.

## I. Background

2. This proceeding began on March 15, 1995, when the Louisiana Public Service Commission (Louisiana Commission) filed a complaint alleging that certain cost allocation calculations by Entergy Services, Inc. (Entergy) under the Entergy System Agreement (System Agreement) were unjust and unreasonable and seeking revision of the System Agreement to exclude interruptible load from the calculation of peak load responsibility.<sup>4</sup> The Commission issued an order finding that including interruptible load in such calculations was reasonable, noting that the System Agreement had included interruptible load in the calculation of peak load responsibility since the parties entered into the System Agreement in 1951.<sup>5</sup>

3. However, on appeal, the D.C. Circuit found that the Commission had failed to explain its departure from certain Commission precedent, including, in particular, *Kentucky Utilities Company*.<sup>6</sup> *Kentucky Utilities* involved the Commission's rejection of the inclusion of interruptible load in allocating capacity costs since the utility, by interrupting supply, could keep the interruptible customer from imposing demand on the system during peak periods and could thus control its capacity costs. The court directed the Commission either to adhere to the principles that it had articulated in *Kentucky Utilities* or to provide a reason for including interruptible load in the allocation of capacity costs.<sup>7</sup>

4. On remand, the Commission held in Opinion No. 468 that Entergy must exclude interruptible load from its computation of peak load responsibility used to allocate certain

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<sup>4</sup> Under the System Agreement, Entergy had included interruptible load when calculating an Operating Company's (Operating Company) peak load responsibility if the Operating Company was serving interruptible load at the time of the Entergy System peak. The bulk of the interruptible load on the Entergy System is located in Louisiana, and the inclusion of interruptible load in the calculation of peak load responsibility therefore tended to increase the share of costs allocated to Louisiana's customers.

<sup>5</sup> *La. Pub. Serv. Comm'n v. Entergy Serv., Inc.*, 76 FERC ¶ 61,168, at 61,955 (1996), *reh'g denied*, 80 FERC ¶ 61,282 (1997).

<sup>6</sup> Opinion No. 116, 15 FERC ¶ 61,002, *reh'g denied*, Opinion No. 116-A, 15 FERC ¶ 61,222 (1981) (*Kentucky Utilities*).

<sup>7</sup> *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897, 900 (D.C. Cir. 1999).

costs among the Operating Companies under the System Agreement.<sup>8</sup> The Commission also held that the new allocation method could be phased in over 12 months and that while the existing cost allocation had resulted in unjust and unreasonable rates, section 206(c) of the Federal Power Act (FPA) precluded refunds for the 15-month period following the filing of the complaint (refund period).<sup>9</sup>

5. On appeal of Opinion No. 468, the D.C. Circuit held, *inter alia*, that the Commission had failed to explain sufficiently why FPA section 206(c) barred refunds in this case, and remanded that issue “for a more considered determination.”<sup>10</sup> In its subsequent order, the Commission determined that refunds were both legal and appropriate, and it ordered that they be paid.<sup>11</sup>

6. The Arkansas Public Service Commission (Arkansas Commission) and Entergy appealed this decision to the D.C. Circuit.<sup>12</sup> However, on June 24, 2009, in response to a Commission motion, the court remanded the refund issue so that the agency could address it more fully.

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<sup>8</sup> *La. 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).

<sup>9</sup> The refund period runs from May 14, 1995 through August 13, 1996. 16 U.S.C. § 824e(c) (2012). Section 206(c) provides that in a proceeding under section 206 involving two or more electric utility companies of a registered holding company system

refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission’s order.

Entergy was a registered holding company during the refund period.

<sup>10</sup> *La. Pub. Serv. Comm’n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007).

<sup>11</sup> *La. Pub. Serv. Comm’n v. Entergy Corp.*, 120 FERC ¶ 61,241, at P 8 (2007), *reh’g denied*, 124 FERC ¶ 61,275 (2008).

<sup>12</sup> *Ark. Pub. Serv. Comm’n v. FERC*, Nos. 08-1330, *et al.* (D.C. Cir. October 14, 2008).

7. On August 13, 2010, the Commission issued an amended order on remand holding that: (1) the Commission was authorized to order refunds in this case in spite of the strictures of section 206(c) of the FPA; and (2) the Commission was ordering refunds pursuant to its discretionary remedial authority.<sup>13</sup> In ordering refunds, the Commission explained that it has a policy of granting full refunds to correct unjust and unreasonable rates and that “[t]he only issue is whether Arkansas/Mississippi and Entergy have demonstrated any reason here for the Commission to deviate from its policy of granting full refunds.”<sup>14</sup> The Commission held that they had not demonstrated such a reason, and it further explained that “there is no doubt that Entergy’s inclusion of interruptible load affected the Operating Companies’ cost of service, led to an overcharge to Louisiana customers, and resulted in unjust and unreasonable rates.”<sup>15</sup> In addition, the Commission held that this was not a rate design case where customer usage patterns are relevant, but rather involved misallocation of costs, so that one group of customers was paying too much, while others paid too little. The Commission found that, under the facts of the case, it did not consider the length of time since the complaint was filed to be a relevant factor “one way or the other” in whether refunds were warranted.<sup>16</sup>

8. On June 9, 2011, the Commission issued an order granting, in part, rehearing of the August 2010 Remand Order, affirming its interpretation of FPA section 206(c), but now invoking its equitable discretion to deny refunds in accordance with Commission precedent denying refunds in cost allocation and rate design cases.<sup>17</sup> The Commission determined that the Entergy system as a whole collected the proper level of revenue, but that Entergy incorrectly allocated peak load responsibility among the various Entergy Operating Companies, and that Entergy therefore did not engage in an over-collection of revenue that would justify refunds.<sup>18</sup> The Commission explained that it would therefore “apply here our usual practice in such cases, invoking our equitable discretion to not

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<sup>13</sup> *La. Pub. Serv. Comm’n v. Entergy Corp.*, 132 FERC ¶ 61,133 (2010) (August 2010 Remand Order).

<sup>14</sup> *Id.* P 31.

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

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

<sup>17</sup> *La Pub Serv. Comm’n v. Entergy Corp.*, 135 FERC ¶ 61,218, at P 25 (2011).

<sup>18</sup> *Id.* P 24.

order refunds, notwithstanding our authority to do so.”<sup>19</sup> As a result, the amounts previously refunded were reversed on July 5, 2011.<sup>20</sup>

9. On July 11, 2011, the Louisiana Commission filed a request for rehearing that challenged the Commission’s finding that refunds were not warranted. On March 21, 2013, the Commission issued an order denying rehearing and upholding its decision to deny refunds. The Commission stated that all parties recognized that this case involves an improper allocation of costs among the Operating Companies. In addition, the Entergy System as a whole did not recover an amount in excess of its cost of service, and there had been no violation of a tariff or filed rate.<sup>21</sup> The Commission thus found that it was appropriate to follow its general practice of finding 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 as a result it would not order refunds.<sup>22</sup>

10. The Commission stated that it has broad equitable discretion in determining whether and how to apply remedies,<sup>23</sup> and that in exercising this discretion it had drawn a distinction between rate design and cost allocation cases, on the one hand, for which refunds are generally not ordered, and cases involving over-recovery, for which refunds are generally ordered.<sup>24</sup>

11. The Commission stated that refunds are not ordered in rate design and cost allocation cases for two reasons. First, refunds would potentially result in under-recovery in such cases, and second, a different allocation would have resulted in a different decision by consumers or the utility had it been instituted at the time of the facts at issue,

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

<sup>20</sup> See July 20, 2011 Amended/Corrected Refund Report of Entergy Services, Inc. in Docket No. EL00-66-012 at p. 2.

<sup>21</sup> March 2013 Order, 142 FERC ¶ 61,211 at P 50.

<sup>22</sup> *Id.* P 51.

<sup>23</sup> *Id.* P 53 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (noting that the Commission’s breadth of discretion is “at its zenith” when fashioning remedies)).

<sup>24</sup> *Id.* P 54 (citing *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040, at P 25 (2011) (*Black Oak*), *reh’g denied*, 139 FERC ¶ 61,111 (2012)).

but it is simply too late to alter the result. The Commission stated that these considerations do not exist in over-recovery cases.<sup>25</sup>

12. The Commission concluded that its precedent denying refunds in rate design and cost allocation cases should apply in this proceeding. It stated:

. . . we view the issues of inclusion or exclusion of interruptible load in allocating costs as a demand allocation dispute, rather than a case of cost over-recovery. And the allocation of demand-related reserve costs under [the applicable System Agreement provision] is a zero-sum game in which the Entergy System receives no excess revenues. There is no dispute as to the appropriate level of production capacity costs and revenues subject to the demand allocator at issue in this proceeding, only their apportionment among the Operating Companies.<sup>26</sup>

13. The Commission stated that the danger of under-recovery of costs is not present in this case based on the Commission's earlier finding that state retail proceedings would not block recovery of the costs of surcharges at the retail level.<sup>27</sup> However, the Commission also found that an equitable ground disfavoring refunds is the fact that Entergy cannot review and revisit past decisions were the Commission to order a refund. The Commission noted that it had previously found that when dealing with affiliated operating companies within a holding company context, refunds may not be appropriate because system operating decisions cannot be revisited and redone.<sup>28</sup>

14. The Louisiana Commission petitioned the D.C. Circuit for review of the March 2013 Order, and the D.C. Circuit remanded the matter to the Commission for further proceedings on the issue of refunds. In its remand order, the court agreed with the Louisiana Commission that "the Commission 'did not reasonably explain the departure' from its 'general policy' of ordering refunds when consumers have paid unjust and unreasonable rates."<sup>29</sup> The court stated that while the Commission had argued that it had

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<sup>25</sup> *Id.* P 55.

<sup>26</sup> *Id.* P 61 (internal citations omitted).

<sup>27</sup> March 2013 Order, 142 FERC ¶ 61,211 at PP 62-63 (citing August 2010 Remand Order, 132 FERC ¶ 61,133 at P 26).

<sup>28</sup> *Id.* P 63 (citing *Southern Co. Servs., Inc.*, 64 FERC ¶ 61,033, at 61,332 (1993) (*Southern Co.*)).

<sup>29</sup> *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1303 (internal citations omitted).

relied on a different “general policy” in which refunds are denied in both cost allocation and rate design cases, “[i]n fact, the Commission’s decisions have relied on specific factors rather than such a broad policy.”<sup>30</sup> The court noted that the Commission had awarded refunds in cost allocation decisions where the utility had over-recovered or had violated the filed rate.<sup>31</sup> The court stated that decisions denying refunds have generally involved the possibility of under-recovery.<sup>32</sup>

15. The court stated that a further problem with the Commission’s reasoning is that the equitable factors it relied on in previous refund denials were largely absent in this case. The court stated that the Commission had not mentioned here many of the reasons for denying refunds it had given in the past.<sup>33</sup> The court noted that the Commission based its denial of refunds in this case on two considerations: the lack of over-recovery by Entergy and Entergy’s inability to review and revisit past decisions, but the court ruled that neither consideration carries the Commission’s burden of reasoned explanation or ties this case to the long-standing refund policy.<sup>34</sup> The court stated that the Commission did not explain why the absence of over-recovery “should automatically negate refunds,” and the Commission neither identified any specific past decisions that Entergy could not revisit, nor explained why that fact was more significant in this case than in other decisions in which the Commission orders refunds.<sup>35</sup> The court stated that invoking Commission policy on refunds did not eliminate the need to consider the fact that an unjust and unreasonable cost allocation had caused consumers in Louisiana to pay their

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<sup>30</sup> *Id.* at 1303.

<sup>31</sup> *Id.* at 1303-1304 (citing March 2013 Order, 142 FERC ¶ 61,211 at PP 65, 69, 73 (citing *Nantahala Power and Light Co.*, 19 FERC ¶ 61,152, at 61,280 (1982) (over-recovery); *Blue Ridge Power Agency v. Appalachian Power Co.*, 58 FERC ¶ 61,193, at 61,603 (1992) (filed rate violation))).

<sup>32</sup> *Id.* at 1304 (citing *Black Oak*, 136 FERC ¶ 61,040 at P 28; *Occidental Chemical Corp. v. PJM Interconnection, LLC*, 110 FERC ¶ 61,378, at P 10 (2005) (*Occidental*)).

<sup>33</sup> *Id.* (noting that the Commission had given as possible reasons for denying refunds consumers’ inability to revisit past decisions, detrimental effects on organized markets, different generations of consumers paying the surcharges and receiving the past benefits, and the complication and cost of rerunning markets, but the Commission did not apply them here).

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

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

utility companies too much and consumers in other states to pay too little and that refunds, if ordered, would transfer a subset of the total overpayment to Entergy's Louisiana operating companies from its other operating companies.<sup>36</sup>

16. Finally, the court criticized the Commission's conclusion that Entergy's inability to review and revisit past decisions made in reliance on pricing in effect at the time constituted "an equitable ground disfavoring refunds."<sup>37</sup> The court stated that some amount of reliance will likely be present every time the Commission considers ordering refunds, and therefore "'past decisions' in the abstract cannot be the *only* factor against refunds," as "the same factor is present whenever the Commission *does* order refunds."<sup>38</sup> The court stated that the Commission did not identify any particular decisions that Entergy made "in reliance on the inclusion of interruptible load in its cost allocation that in some way particularly weakened the case for refunds."<sup>39</sup>

## II. Discussion

17. In remanding this case to the Commission, the court agreed with the Louisiana Commission that "the Commission 'did not reasonably explain the departure' from its 'general policy' of ordering refunds when consumers have paid unjust and unreasonable rates."<sup>40</sup> However, as explained further below, this description of the Commission's refund policy under the FPA is based on statements made by the Commission in this proceeding that do not accurately represent that policy as both the Commission and the courts have described it in the past. Thus to fulfill the task the court has set for us on remand, it is necessary first to explain why this description of Commission policy under the FPA is inaccurate and then to explain the Commission's long-established approach to refunds under the FPA.

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<sup>36</sup> *Id.* at 1305.

<sup>37</sup> *Id.* (quoting March 2013 Order, 142 FERC ¶ 61,211 at P 63).

<sup>38</sup> *Id.* at 1305-1306 (emphasis in original).

<sup>39</sup> *Id.* at 1306.

<sup>40</sup> *Id.* at 1303 (quoting Petitioner's Brief at 48).

18. On reflection, certain references to the Commission’s “general policy” on refunds in this proceeding fail to accurately describe the scope of that policy. In fact, only two Commission orders, both of which have been issued in this proceeding, refer to a general policy of ordering refunds when consumers have paid unjust and unreasonable rates.<sup>41</sup> Moreover, the Commission described its refund policy – in hindsight imprecisely – in these terms in only one of these orders, with the cases it cited in doing so all referring, in fact, to a narrower policy of awarding refunds as a remedy for utility overcharges that result in the over-collection of revenue.<sup>42</sup> In the other order, the Commission only noted that the Louisiana Commission had stated that “Commission and D.C. Circuit decisions have recognized that the Commission has a general policy requiring refunds for unjust and unreasonable rates.”<sup>43</sup> The Commission did not accept this description, however, and it went on in the order to describe in considerable detail how its approach to refunds was made up of two separate lines of precedent, each of which applies to different types of fact patterns.<sup>44</sup>

19. The situation is the same with the courts. With the exception of the statement by the court in remanding this matter quoted above, no court has ascribed to the Commission a general policy of ordering refunds whenever consumers have paid unjust and unreasonable rates. Descriptions of the Commission’s refund policy under the FPA by the courts have generally referred to specific types of fact patterns, with refunds being ordered or not ordered in a particular case depending on the fact pattern presented in that case. Indeed, in remanding this matter, the court stated that in dealing with refunds, “the

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<sup>41</sup> August 2010 Remand Order, 132 FERC ¶ 61,133 at P 31; March 2013 Order, 142 FERC ¶ 61,211 at P 34.

<sup>42</sup> August 2010 Remand Order, 132 FERC ¶ 61,133 at P 31, n.62. The Commission does refer at this point in the August 2010 Remand Order to *Westar Energy, Inc. v. FERC*, 568 F.3d 985 (2009) (*Westar*) as supporting a “policy,” although not a “general policy,” of refunds in cases of unjust and unreasonable rates. However, *Westar* concerns refunds on sales by two wholesale sellers who possessed market power at the point of sale. An exercise of market power allows the entity exercising that power to receive a higher price than would prevail under competitive market conditions. As a result, *Westar* should be viewed as a variant of the Commission’s policy on refunds in over-collection cases.

<sup>43</sup> March 2013 Order, 142 FERC ¶ 61,211 at P 34; *see also id.* P 39.

<sup>44</sup> *Id.* PP 54-60.

Commission's decisions have relied on specific factors rather than such a broad policy,"<sup>45</sup> an observation that correctly captures Commission practice.

20. In short, notwithstanding the statements made by the Commission in this proceeding that indicated to the contrary, the Commission has never enunciated a single, general policy on refunds that applies to all instances where it has found rates to be unjust and unreasonable under the FPA. The Commission's approach to refunds has instead been shaped by the way certain equitable considerations are typically associated with certain specific fact patterns. The term "general policy" does appear in Commission discussions of refunds, but it has not been used to refer to a broad policy that applies to refunds generally. Instead, it is a term that has always been associated with one specific factor that the Commission has considered when dealing with refunds, i.e., the presence or absence of overcharges that result in over-collection of revenue by the utility.<sup>46</sup> This can be seen by examining the origin of references to a Commission "general policy" on refunds.

21. The earliest reference to a general policy on refunds appears to be *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*.<sup>47</sup> In that case, the court refers to "[t]he Commission's general policy of granting full refunds."<sup>48</sup> However, the statement, by itself, is incomplete, as it does not indicate when or how the policy is applied. The court in *Towns of Concord* supports its reference to a general policy by citing *Illinois Power Co.*,<sup>49</sup> and to ascertain the content of the policy the court was referring to, one must consider that case.

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<sup>45</sup> *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1303.

<sup>46</sup> See *Consol. Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (stating that the Commission has a "general policy of granting full refunds for overcharges" (internal citations omitted); *Entergy Serv., Inc.*, 82 FERC ¶ 61,098, at 61,369 (1998) (stating that "the Commission's general policy is to order refunds to remedy overcharges"), *aff'd*, 174 F.3d 218 (D.C. Cir. 1999) (stating that "the Commission's self-described general policy is to provide refunds to remedy overcharges"); *Corporation Comm'n of the State of Oklahoma v. American Electric Power Co. Inc.*, 125 FERC ¶ 61,237, at P 33 (2008) (stating that "the Commission's general policy is to order refunds for overcharges").

<sup>47</sup> 955 F.2d 67, 75 (D.C. Cir. 1992) (*Towns of Concord*).

<sup>48</sup> *Id.* at 76.

<sup>49</sup> *Illinois Power Co.*, 52 FERC ¶ 61,162, at 61,625 (1990) (*Illinois Power*).

22. In *Illinois Power*, Illinois Power Company (Illinois Power) sought approval to recover, through its fuel adjustment clause, amounts that it had paid to obtain releases from certain coal supply and transportation contracts. The Commission's regulations specified the types of costs or charges that were eligible for recovery through a fuel adjustment clause, and the regulations also specified that a waiver was required to recover any other costs in this way. The Commission found that a waiver was required to pass contract buyout costs through a fuel adjustment clause, and Illinois Power had not obtained one.<sup>50</sup> The Commission found that as a result, Illinois Power had overcharged its customers, i.e., collected unauthorized charges, and the Commission thus directed it to refund to customers the contract buyout costs it had recovered.<sup>51</sup>

23. *Towns of Concord* also dealt with costs passed through a fuel adjustment clause, in that instance costs associated with the disposal of spent nuclear fuel. The Commission had sought to address confusion that changes in national policy on spent nuclear fuel had created concerning recovery of disposal costs for such fuel through fuel adjustment clauses.<sup>52</sup> In connection with these efforts, the Commission had urged utilities that had improperly collected spent nuclear fuel disposal costs through their fuel adjustment clauses to come forward. As part of this process, the Commission promised that any utility that did come forward would not have to make refunds if it could satisfy a four-part test designed to ensure that the company was not "unjustly enriched by the improper collection" and if denying refunds would not otherwise be contrary to the public interest.<sup>53</sup> Boston Edison Company had met these requirements, and some of its customers objected to the absence of refunds.<sup>54</sup> On appeal, the court held that the Commission's authority to award refunds was discretionary, that the Commission had appropriately justified its discretionary action of withholding refunds in this case, and that otherwise "[t]he Commission's general policy of granting full refunds" as stated in *Illinois Power*, "remains in effect."<sup>55</sup>

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<sup>50</sup> *Id.* at 61,623.

<sup>51</sup> *Id.* at 61,621.

<sup>52</sup> *Towns of Concord*, 955 F.3d at 69-70.

<sup>53</sup> *Id.* at 70.

<sup>54</sup> *Id.* at 72.

<sup>55</sup> *Id.* at 76 (citing *Illinois Power*, 52 FERC ¶ 61,162, at 61,625).

24. The policy in question has, of course, not been limited to cases involving fuel adjustment clauses, but it has been limited to cases involving utility over-collection.<sup>56</sup> It is described as a “general policy” because it is a policy that applies generally to cases of utility over-collection, but the Commission has never treated it as a policy that encompasses *all* cases involving unjust and unreasonable rates.<sup>57</sup>

25. The Commission takes a different approach when addressing refund requests in cases where a cost allocation or rate design has been found to be unjust and unreasonable. Specifically, “in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.”<sup>58</sup>

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<sup>56</sup> See, e.g., *Consol. Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 972 (stating that the Commission has a “‘general policy of granting full refunds’ for overcharges” and citing as support *Towns of Concord*, 955 F.2d at 76) (*Con. Ed.*); *Corporation Comm’n of the State of Oklahoma v. Am. Elec. Power Co.*, 125 FERC ¶ 61,237 at P 33 (stating that “the Commission’s general policy is to order refunds for overcharges” and citing to language in *Con. Ed.* supported by *Towns of Concord*); see also *Central Power and Light Co.*, 97 FERC ¶ 61,157, at 61,698, n.24 (2001); *Ameren Corp.*, 147 FERC ¶ 61,225, at P 28, n.39 (2014).

<sup>57</sup> *Black Oak*, 136 FERC ¶ 61,040 at P 25 (stating that “[w]hen a case involves a company overcollecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers”).

<sup>58</sup> *Id.*; see also *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193, at P 5 (2004) (accepting rate design change on a prospective basis); *Consumers Energy Co.*, 89 FERC ¶ 61,138, at 61,397 (1999) (same); *Union Elec. Co.*, 58 FERC ¶ 61,247, at 61,818 (1992) (*Union Elec.*) (same); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983) (*Comm. Ed.*); accord *Second Taxing Dist. of City of Norwalk v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (*Norwalk*) (affirming determination to make rate design changes prospective only); *Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982) (*Batavia*) (same)); *Occidental*, 110 FERC ¶ 61,378 at P 10 (stating that the “Commission’s long-standing policy is that when a Commission action under Section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission’s order will take effect prospectively”); *Commonwealth Edison Co.*, 8 FERC ¶ 61,277, at 61,844 (1979) (stating that “any change of rate form due to modification in the demand ratchet or in the form of energy charging . . . should not be given effect in computing refunds, if any, due under this decision” because the utility “cannot retroactively collect more from any

(continued...)

26. To explain why this distinction exists, it is necessary to consider briefly the nature of the Commission's refund authority. This authority is discretionary, and refund decisions are to be guided by equitable principles. The courts have held that

[c]ustomer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.<sup>59</sup>

27. In short, the basic consideration in ruling on refunds is one of fairness. From this perspective, the Commission's practice of awarding refunds in over-collection cases is readily explainable. If a utility has collected revenues from its customers that it is not entitled to under its tariff, fairness dictates that the excess revenues should be refunded to customers. On the other hand, in cases where a cost allocation or rate design has been found unjust and unreasonable, but where no over-collection of revenue has occurred, other factors come into play.

28. If the utility collected no more than it was entitled to, refunds would potentially result in under-recovery. This "would be unfair because it would result in a loss of revenue from the reallocation when the utility would not have the opportunity to file a new rate case to recover those revenues."<sup>60</sup> In addition, in cost allocation and rate design cases, a different cost allocation or rate design could have led to different decisions by consumers or a utility, including utility operating companies within a holding company system,<sup>61</sup> but it is now too late to alter the decisions that were in fact made.<sup>62</sup> In other

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customer than has already been collected subject to refund, even though a redesigned rate presumably would show some customers should be charged more and others less than under the rates in effect subject to refund").

<sup>59</sup> *Towns of Concord*, 955 F.3d at 75 (internal quotation marks omitted).

<sup>60</sup> *Black Oak*, 136 FERC ¶ 61,040 at P 26; *see also Occidental*, 110 FERC ¶ 61,378 at P 10; *Union Elec.*, 58 FERC ¶ 61,247 at 61,818.

<sup>61</sup> *See Southern Co.*, 64 FERC ¶ 61,033 at 61,332 (denying refunds in part because "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>62</sup> *Comm. Ed.*, 25 FERC ¶ 61,323 at 61,732.

words, retroactive implementation of the new rate may be unfair to utilities or customers who cannot alter their past purchase or sale decisions in light of that new rate.<sup>63</sup>

29. We now turn to the application of these considerations to this proceeding. We begin with the Commission's finding in the March 2013 Order that "we view the issues of inclusion or exclusion of interruptible load in allocating costs as a demand allocation dispute, rather than a case of cost over-recovery."<sup>64</sup> The Commission went on to say that there "is no dispute as to the appropriate level of production capacity costs and revenues subject to the demand allocator at issue in this proceeding, only their apportionment among the Operating Companies."<sup>65</sup> Indeed, the Louisiana Commission initiated this proceeding by arguing that changed circumstances had made the cost allocation under the Entergy System Agreement unjust and unreasonable and that the System Agreement should be modified as a result. Specifically, the Louisiana Commission stated that its

Complaint seeks revision of the Entergy System Agreement, because due to changed circumstances, the terms of that agreement are unjust and unreasonable, and because the rough equalization previously established . . . for the Entergy System has been upset. Specifically, the absence of any provision excluding curtailable load from the determination of a company's load responsibility under the System Agreement results in an unjust and unreasonable cost allocation . . . . The inclusion of curtailable loads in calculating load responsibilities artificially penalizes individual companies

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<sup>63</sup> See, e.g., *Union Elec. Co.*, 64 FERC ¶ 61,355, at 63,468 (1993).

<sup>64</sup> March 2013 Order, 142 FERC ¶ 61,211 at P 61.

<sup>65</sup> *Id.*; see also *id.* P 50. In response to the court's comments on the significance the Commission attributed to the absence of over-recovery, see *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1304, we note that the absence of over-recovery is not an independent reason for denying refunds. It is, however, a precondition for applying Commission precedent on refunds in cost allocation cases. As the court noted, the Commission has awarded refunds in cost allocation cases where the utility did over-recover revenues, *id.* at 1303-04, as the presence of over-recovery eliminates the primary grounds for denying refunds in cost allocation and rate design cases, namely the possibility of under-recovery and unfairness resulting from retroactive implementation of a new rate. If over-recovery has occurred, refunds of the excess amounts will not cause under-recovery, and fairness dictates that the excess amounts be refunded.

for engaging in sales that benefit the System as a whole, creating an unreasonable disincentive to economic transactions.<sup>66</sup>

30. Given that this is a cost allocation case, the “general policy” of awarding refunds in over-collection cases does not apply here, and the question becomes whether the facts presented support following here the Commission’s established practice of not awarding refunds in cost allocation cases. We conclude that they do. The facts presented here evidence the two primary grounds the Commission has cited in denying refunds in cost allocation cases, the potential for under-recovery and the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past actions in light of that new rate.

31. Both Commission and court precedent refer to a potential for, or possibility of, under-recovery as a reason for denying refunds,<sup>67</sup> and that possibility arises here from two sources. First, there is a significant possibility that Entergy could not recover the portion of necessary surcharges that would be attributed to wholesale customers during the refund period. As Entergy previously explained in this proceeding, 15 percent of Entergy Arkansas’ peak load during the refund period was made up of wholesale customers, but none of those entities are currently Entergy Arkansas customers. In addition, at the time Entergy provided these facts, Entergy Arkansas had only one wholesale customer, which made up .002 percent of its load. This customer was not a wholesale customer during the refund period.<sup>68</sup> Given this situation, the source of surcharges is unclear, and if these surcharges cannot be assessed, refunds would lead to under-recovery to that extent. There is no basis to conclude that these surcharges could be assessed on retail customers. In addition, as the court found in *City of Anaheim, Cal. v. FERC*,<sup>69</sup> “§ 206(b) authorizes only retroactive refunds (rate decreases), not retroactive rate increases” such as those that Entergy would have to assess on any wholesale customers subject to surcharges needed to cover the refunds.

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<sup>66</sup> Louisiana Public Service Commission, Third Amended Complaint, Docket No. EL95-33-000, at 2 (filed October 27, 1999) (Third Amended Complaint).

<sup>67</sup> *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d at 1304 (citing March 2013 Order, 142 FERC ¶ 61,211, at P 55 & n.127); *Norwalk*, 683 F.2d at 490; *Occidental*, 110 FERC ¶ 61,378 at P 10.

<sup>68</sup> See Entergy Services, Inc., Initial Brief on Remanded Refund Issues, Docket Nos. EL00-66-013 and EL95-33-009, at 14-15 (filed Jan. 19, 2010).

<sup>69</sup> 558 F.3d 521 (D.C. Cir. 2009) (*City of Anaheim*).

32. Second, there is a possibility of under-recovery based on potential litigation, as demonstrated by proceedings before the Arkansas Commission in which Entergy has sought approval to collect surcharges to pay for the refunds the Commission previously imposed in this case. The Arkansas Commission rejected Entergy's request to recover surcharges from its retail customers, concluding that the surcharges would violate the filed rate doctrine and rule against retroactive ratemaking under Arkansas law and that federal preemption does not require the Arkansas Commission to pass-through those costs to Arkansas retail customers.<sup>70</sup> The ultimate outcome of this decision, of course, remains uncertain, but it represents a second potential risk of under-recovery.

33. These facts also bring FPA section 206(c) to bear in this proceeding. As noted above,<sup>71</sup> section 206(c) provides that in a proceeding under section 206 involving two or more electric utility companies of a registered holding company system, the Commission may order refunds only if it determines that the refunds would not cause the registered holding company to experience any reduction in revenues resulting from an inability of an electric utility company in the system to recover the resulting increase in costs. Entergy Corporation was a registered holding company during the refund period, and the inability of an Entergy Operating Company to recover surcharges for one or more of the reasons described above would trigger the prohibition on refunds set forth in section 206(c). We are not able to find that the Entergy system would not experience a reduction in revenues if refunds were awarded here. This is because of the impediments to assessing the surcharges that would be necessary to prevent reduction of the holding company's revenues, i.e., the absence of wholesale customers in the proportion that existed during the refund period, litigation challenging surcharges, and the prohibition on retroactive rate increases under section 206(b) identified in *City of Anaheim*.

34. This case also presents past decisions that cannot be undone and this represents an equitable basis for denying refunds. Specifically, the complaint in this proceeding indicates that the tariff provision challenged here created incentives for the Entergy Operating Companies that resulted in decisions that cannot now be undone. Specifically, the Louisiana Commission argues that the Entergy Operating Companies, in particular Entergy Louisiana, "have engaged in sales to curtailable customers at extremely low prices," and these sales "provide system benefits" and "avoid the need for generating capacity." However, "by assigning generation and transmission costs to a company for its curtailable load, the System Agreement allocates *additional* costs to an individual company for entering curtailable contracts, which may render the sales uneconomic from

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<sup>70</sup> Entergy Services, Inc., Brief Opposing Refunds, Docket Nos. EL00-66-017 and EL95-33-0011, at 18-19 (filed November 7, 2011).

<sup>71</sup> See *supra* note 9.

an individual company perspective.”<sup>72</sup> As a result, “the System Agreement provides an artificial disincentive – one that is not cost justified – for an individual company to make curtailable sales.”<sup>73</sup> The Louisiana Commission asserted that the “imposition of a penalty on a company that reacts to competitive forces by lowering rates to a customer through tariffs that permit curtailment is inconsistent with economic reality and an undue deterrent to competitive conduct.”<sup>74</sup>

35. These points address the court’s statement in remanding this matter that “[t]he Commission did not identify any particular decisions made by Entergy in reliance on the inclusion of interruptible load in its cost allocation that in some way particularly weakened the case for refunds.”<sup>75</sup> The incentives that the System Agreement created produced a disincentive to make curtailable sales because those sales created a penalty in terms of costs to an Operating Company that lowered rates to make those sales. Refunds would serve to impose potentially unrecoverable costs on Operating Companies that, based on the incentives that the System Agreement created, chose to engage in firm sales that cannot now be undone instead of curtailable sales that the System Agreement discouraged from their perspective. It is well recognized that the Commission may

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<sup>72</sup> Third Amended Complaint at 6 (emphasis in original).

<sup>73</sup> *Id.* at 6-7.

<sup>74</sup> *Id.* at 7. These points address the court’s statement that the contention that the Entergy Operating Companies’ decision “not to shave their peak load,” which they might have done under a different cost allocation, was “a generic possibility of reliance” on the challenged cost allocation, and once the complaint was filed, “Entergy was on notice that interruptible load could be ordered removed from the calculation of peak load.” *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d at 1306. Entergy was indeed on notice that the cost allocation could change. However, the presence of notice does not alter the fact that to avoid a possible refund requirement in this situation, the Entergy Operating Companies would have had to enter into uneconomic transactions – i.e., curtailable sales that impose additional costs under the System Agreement – that the System Agreement did not require and, in fact, discouraged through its cost allocation provisions. The existence of notice does not override the equities involved in requiring refunds for transactions that were authorized under the System Agreement. This conclusion is consistent with the court’s observation in remanding this matter that in *Am. Elec. Power Serv. Corp.*, 114 FERC ¶ 61,288 (2006), “the Commission unsurprisingly did not award refunds with respect to the lawful rates previously in effect.” *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d at 1304.

<sup>75</sup> *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d at 1306.

conclude that this disincentive that the filed rate created has resulted in decisions not to enter into transactions without specific findings concerning individual actions.<sup>76</sup> In addition, the Commission has previously found that reliance on curtailed loads can create disincentives of the type discussed here,<sup>77</sup> and it has denied refunds after removing interruptible load from an allocation of transmission costs, in part, on the grounds that it would not permit the utilities in question to alter their decisions made in reliance on the rate in effect at the time.<sup>78</sup>

36. We are mindful of the court's statement, in remanding this case, that invoking a Commission policy on refunds does not eliminate the need to consider the fact that an unjust and unreasonable cost allocation caused consumers in Louisiana to pay too much and consumers in other states to pay too little and that refunds, if ordered, would transfer monies to Entergy's Louisiana operating companies from its other operating companies.<sup>79</sup> We agree that this is an important consideration in determining whether refunds are warranted, and one the Commission has considered as part of its refund precedent. However, refunds in cost allocation cases where over-recovery has not occurred must be implemented through surcharges, which create a zero sum game in which customers, not regulated public utilities, are the source of refunds made to other customers. While it may be inequitable that some customers paid too much under the filed rate, the Commission also considers the equities involved in assessing additional charges on other customers who were not responsible for the misallocation but who would be required to make additional payments for past purchases they reasonably concluded were final and

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<sup>76</sup> *Batavia*, 672 F.2d at 83-84 (accepting Commission inferences about the effect of demand ratchets on ratepayer conduct); *Norwalk*, 683 F.2d 477 (finding generalizations regarding customer conduct sufficient to support a determination that a rate ratchet would prove useful in encouraging reductions in demand at the time of the system peak); *see also Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008-09 (D.C. Cir. 1987) (stating that “[a]gencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall”).

<sup>77</sup> *Occidental*, 110 FERC ¶ 61,378 at P 3 n.3 (stating that “relying on curtailed loads to allocate PJM’s access charge costs may create a disincentive for load serving entities (LSEs) to implement load response programs on their own systems, since LSEs would be charged for system costs regardless of whether they curtail load during system peaks”).

<sup>78</sup> *Id.* P 12.

<sup>79</sup> *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d at 1305.

cannot revisit. In balancing these equities, the Commission has traditionally denied refunds and made the new, corrected rate applicable prospectively.

37. Therefore, upon consideration of the refund issue remanded to the Commission, we affirm our finding that refunds should be denied in this proceeding.

The Commission orders:

The Commission hereby finds that refunds should be denied in this proceeding, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.