156 FERC ¶ 61,221
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. EL00-66-020
Louisiana Public Service Commission v. Entergy Services, Inc.	EL95-33-014

ORDER DENYING REHEARING

(Issued September 26, 2016)

1. The Louisiana Public Service Commission seeks rehearing of the Commission's April 29, 2016 order[1] issued in response to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remand in *La. Pub. Serv. Comm'n v. FERC*.[2] At issue was the Commission's reasoning in denying refunds in an order issued on March 21, 2013,[3] and the Order on Remand provides reasoning that responds to the points that the D.C. Circuit raised. In this order, we deny rehearing.

I. **Background**

2. This proceeding has a lengthy and complex history which is summarized in the Order on Remand.[4] We note here only that in its Remand Order, the D.C. Circuit found that the Commission did not reasonably explain in the March 2013 Order its departure

[1] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120 (2016) (Order on Remand).

[2] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014) (Remand Order).

[3] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,211 (2013) (March 2013 Order).

[4] Order on Remand, 155 FERC ¶ 61,120 at PP 2-16.

from the Commission's general policy of ordering refunds when consumers have paid unjust and unreasonable rates.[5] The court also found that the equitable factors the Commission relied on in previous cases to deny refunds were largely absent in this case.[6] 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.[7]

3. In the Order on Remand, the Commission explained how, historically, references to a Commission "general policy" of awarding refunds for unjust and reasonable rates pertained to a policy that typically applied in a specific set of circumstances, i.e., where a public utility had collected revenues in excess of what it was entitled to under its tariff. The Commission went on to explain that it had a separate policy of denying refunds where overcollection of revenues had not occurred and other equitable considerations were present.[8] In short, the Commission explained that it had never adopted a single, general policy that applied to all cases where rates had been found to be unjust and unreasonable.

4. In the Order on Remand, the Commission went on to explain how certain equitable considerations justified applying in this proceeding the Commission's policy of denying refunds in cases where overcollection of revenues has not occurred.[9] The Commission found there was a significant possibility that Entergy "could not recover the portion of necessary surcharges that would be attributed to wholesale customers during the refund period."[10] The Commission found that litigation before the Arkansas Commission regarding Entergy's ability collect surcharges constituted a second potential risk of under-recovery.[11] The Commission also determined that refunds pursuant to section 206(c) of the FPA were inappropriate. Under that section, the Commission may only order refunds if it determines that the affected registered holding company (here, Entergy Corporation) would "not experience any reduction in revenues which results

[5] Remand Order, 772 F.3d at 1303.

[6] *Id.* at 1303, 1305.

[7] *Id.* at 1305.

[8] Order on Remand, 155 FERC ¶ 61,120 at PP 18-28.

[9] *Id.* PP 30-36.

[10] *Id*. P 31.

[11] *Id*. P 32.

from an inability of an electric utility company of the holding company to recover such increase in costs."[12] Moreover, the Commission found that decisions made by the Entergy Operating Companies based on the prior rate could not be undone.

II. Discussion

A. Procedural Issues

5. On March 16, 2016, Entergy Services, Inc. submitted a motion to establish a briefing schedule on remand in this proceeding and an initial brief on remand. The Commission took no action on this motion. On rehearing, the Louisiana Commission maintains that the Commission improperly relied on Entergy's brief in the Order on Remand. We reject this contention. The Order on Remand is based on the record as developed up to the time of the Remand Order.

6. We also reject the Louisiana Commission's allegation that Entergy's brief constituted an *ex parte* communication.[13] An *ex parte* communication is an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.[14] No such communication occurred here. Entergy's brief was a public filing, and it was served on each person on the service list for this proceeding, which includes the Louisiana Commission. We also reject the Louisiana Commission's contention that the Commission committed procedural error by failing to provide all parties the opportunity to present arguments on pending issues.[15] In response to Entergy's filing, the Louisiana Commission submitted a motion strenuously objecting to any further briefing in this proceeding.[16] As the Louisiana Commission itself explained in response to Entergy's proposed schedule for briefing on remand, Entergy's brief primarily recycled old arguments that had been previously rejected. To the extent a new argument had been raised, the Louisiana Commission disputed it as "specious."[17]

[12] 16 U.S.C. § 824e(c) (2012).

[13] Rehearing Request at 4-9.

[14] 5 U.S.C. § 551(14) (2012).

[15] Rehearing Request at 9.

[16] Louisiana Public Service Commission, March 26, 2016 Opposition of the Louisiana Public Service Commission to Motion on Behalf of Entergy Services, Inc. for, Incredibly, *Still Another Round of Briefing* (emphasis in original) (Opposition Motion).

[17] *Id.* at 3.

The Louisiana Commission also stated that the refund issue had been briefed 14 times in this case, and further briefing would only provide a forum for additional frivolous or recycled arguments.[18] We therefore reject the suggestion that the parties did not have a full opportunity to present their views to the Commission.

7. The Louisiana Commission describes its objections as raising a matter of procedural error, and it states that the Commission should give full consideration to its arguments on rehearing. We reject these objections, and the full consideration we give to the Louisiana Commission's arguments in the following is the same consideration that we give to all rehearing requests.

B. The Louisiana Commission's Challenges To The Order On Remand

8. In remanding this proceeding to the Commission, the court did not fundamentally challenge the legitimacy of the Commission's policy of not ordering refunds in rate design and cost allocation cases. Instead, the court questioned whether the Commission had established that the factors for applying this policy existed in this proceeding, i.e., factors such as: potential under-recovery by the utility; consumers' and utilities' inability to revisit past decisions; a "detrimental effect upon an organized market"; different generations of consumers paying the surcharges and receiving the past benefits; and the "complication and cost of rerunning markets."[19]

9. The Louisiana Commission addresses the factors identified by the Commission as supporting the no-refund policy in this proceeding, but the bulk of its arguments on rehearing take issue with the legal basis for the Commission's policy. We turn first to those arguments.

1. Challenges to the Commission's Description of its Refund Policy

10. In the Order on Remand, the Commission provided a summary of the two main strands of its refund policy under the FPA. The Commission explained that it generally does not impose refunds in cost allocation and rate design cases where the public utility has not overcollected recovered revenues, but it generally awards refunds where there have been overcharges that result in overcollection of revenue.[20] The Commission also explained how references to a "general policy" of paying refunds have been confined to

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[18] *Id.* at 1-2.

[19] Remand Order, 772. F.3d at 1304.

[20] Order on Remand, 155 FERC ¶ 61,120 at PP 17-28.

the class of cases in which the utility is found to have overcollected its revenue requirement.[21]

11. The Louisiana Commission describes the Commission's explanation of its refund policy in the Order on Remand as "revisionist," and it disputes the assertion that the presence or absence of overcharges that result in overcollection of utility revenue is a long-standing element of Commission policy.[22] This is incorrect. The Order on Remand creates no new Commission policy on refunds. Indeed, on two previous occasions in this proceeding, the Commission has described its refund policy in terms that are identical in all material respects to the description provided in the Order on Remand.

12. Thus in an order issued in this proceeding on June 9, 2011, the Commission stated

> On the question of refunds, the Commission has two lines of precedent, each dealing with a different situation. When a case involves a company over collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers. By contrast, 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.[23]

13. The Commission expanded on this observation in great detail in an order denying rehearing in this proceeding issued on March 21, 2013.[24] That expanded discussion is entirely consistent with the discussion of Commission policy in the Order on Remand.[25]

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[21] *Id.* PP 18-28.

[22] Rehearing Request at 14.

[23] *La. Pub. Serv. Comm'n v. Entergy Corp.,* 135 FERC ¶ 61,218 (2011) (internal citations omitted).

[24] March 2013 Order, 142 FERC ¶ 61,211 at PP 54-60.

[25] *See, e.g., id.* P 54 (stating that "[o]ne distinction that the Commission has drawn . . . is 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").

In addition, the Commission stated in the March 2013 Order that the same description of Commission policy had been provided in its recent *Black Oak* order.[26]

14. The Order on Remand goes beyond these earlier discussions only in explaining the `origin of references to a Commission "general policy" on refunds and how these references can be traced to *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC,*[27] one of the seminal cases on the Commission's refund authority. The Commission explained that the court in *Towns of Concord* used the term to refer to a policy of awarding refunds in cases where a utility had overcollected revenues, i.e., the court used it to refer to one of the Commission's two lines of precedent. The Commission also explained how the term "general policy" had subsequently been limited to overcollection cases.[28] This discussion simply serves to clarify the apparent discrepancy between the assertion that the Commission has two lines of precedent on refunds and references to a Commission "general policy" on refunds. Taken out of the context in which it was used in *Towns of Concord*, the term "general policy" could be read to refer to a policy that applies in all cases. This clarification in the Order on Remand does not result in any revision to established Commission refund policy, and it therefore cannot be described as "revisionist."

15. We thus reject the Louisiana Commission's assertion that the Order on Remand presents "a drastic revision of policy that eliminates undue discrimination as a Commission concern."[29] The Louisiana Commission argues that "if refunds cannot be granted for unduly discriminatory cost allocations, the Commission will have eliminated any mechanism to enforce the statutory requirements."[30] The mechanism for enforcing the statutory requirement that rates not be unduly discriminatory is Commission action requiring that the rates be revised to eliminate such discrimination. The Louisiana Commission confuses the Commission's statutory obligation to ensure that rates are not unduly discriminatory with its discretionary authority to require refunds where circumstances warrant them. A finding that a rate is unduly discriminatory does not, by itself, mandate that refunds should be awarded. The Commission's policy of not

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[26] *Id.* (citing *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040, at P 25 (*Black Oak*), *reh'g denied*, 139 FERC ¶ 61,111 (2012)).

[27] 955 F.2d 67, 75 (D.C. Cir. 1992) (*Towns of Concord*).

[28] Order on Remand, 155 FERC ¶ 61,120 at PP 21-24.

[29] Rehearing Request at 34.

[30] *Id.* at 33-34.

awarding refunds in cost allocation cases that meet certain criteria does not inherently conflict with or undermine the Commission's obligation to correct unduly discriminatory rates on a prospective basis.

16. The Louisiana Commission argues that Commission policy on refunds in cost allocation and rate design cases is inconsistent with the purpose of the FPA, which is "'the protection of consumers from excessive rates or charges.'"[31] This is a correct description of the purpose of the statute, but the Commission policy in question is not inconsistent with it.

17. The Louisiana Commission points out that when interpreting the parallel purpose of the Natural Gas Act (NGA), the Supreme Court stated that this statute was intended "'to protect consumers against exploitation at the hands of natural gas companies . . . .'"[32] The essential question is thus what is meant by the protection of consumers from "exploitation." The answer is the protection of consumers from the exercise of monopoly power. The Supreme Court has stated that "public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation."[33] To exploit through the exercise of monopoly power means to charge excessive rates that the absence of competition permits. Indeed, the "very reason for the regulation of private utility rates – by state bodies and by the Commission – is the inevitability of a monopoly that requires price control to take the place of price competition."[34]

18. This fact illuminates the Commission's distinction in its refund policy between instances of utility overcollection of revenues, on the one hand, and cost allocation and rate design cases where no overcollection has occurred, on the other. Collection of revenues above what the Commission has determined to be just and reasonable is tantamount to collection of revenues that could be received through the exercise of monopoly power in the absence of regulation. As explained in the Order on Remand, this

[31] Rehearing Request at 15 (quoting *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971)).

[32] *Id.* at 16 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944)).

[33] *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-96 (1976).

[34] *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 389 (1973) (Stewart, J., dissenting).

is precisely the type of situation in which the Commission has exercised its equitable discretion to award refunds.[35]

19. On the other hand, in cases where a cost allocation or rate design has been found to be unjust and unreasonable, but the utility has not collected more revenue than allowed under its tariff, one cannot say that exploitation in this sense has occurred. An unjust and unreasonable cost allocation or rate design is, of course, a problem that the statute requires be corrected, but if it has not resulted in what can be classified as unjust enrichment;[36] it does not, for purposes of refund policy, fall in the same category as the exploitation to which the Louisiana Commission refers. We thus disagree with the Louisiana Commission when it states that "[i]f refunds cannot be made for unduly discriminatory rates[] because a holding company or utility did not have an 'overcollection of revenue,' the purpose of the [FPA] is disserved."[37]

2. **Analysis of Legal Precedent**

20. The Louisiana Commission cites numerous cases that it contends conflict with the description of Commission refund policy in the Order on Remand, and we address these cases in the following discussion. The cases are instructive, as they serve to highlight the nature and scope of the policy in question. As previously indicated in this proceeding, the Commission's policy on refunds in cost allocation cases does not apply where there has been a tariff violation or in situations where past charges are corrected after review to ensure proper implementation of the tariff.[38] Such cases do not involve a finding that the cost allocation or rate design itself is not just and reasonable. Many of the cases that the Louisiana Commission cites fall into one of these categories. Other cases that the Louisiana Commission cites involve other factors that distinguish them from cases that apply here.

21. One such case is *FPC v. Tennessee Gas Transmission Co.*,[39] which the Louisiana Commission cites as contradicting the Order on Remand.[40] But *Tennessee Gas* concerns

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[35] Order on Remand, 155 FERC ¶ 61,120 at P 27.

[36] *Towns of Concord*, 955 F.2d at 75.

[37] Rehearing Request at 16.

[38] March 2013 Order, 142 FERC ¶ 61,211 at PP 69, 73.

[39] 371 U.S. 145 (1962) (*Tennessee Gas*).

[40] Rehearing Request at 17.

refunds under the Natural Gas Act, not the FPA. The Commission's approach to refunds under the two statutes differs.

22. The Supreme Court held in *Tennessee Gas* that in a rate filing under section 4 of the NGA, a pipeline is at risk of having to pay refunds in a rate design or cost allocation case. The Court stated:

> . . . an analysis of the policy of the [NGA] clearly indicates that a natural gas company initiating an increase in rates under [section] 4(d) assumes the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being 'just and reasonable.' In addition, the company can never recoup the income lost when the five-month suspension power of the Commission is exercised under [section] 4(e). The company is also required to refund any sums thereafter collected should it not sustain its burden of proving the reasonableness of an increased rate, and it may suffer further loss when the Commission upon a finding of excessiveness makes adjustments in the rate detail of the company's filing.[41]

23. Applied to a cost allocation case, this holding provides for refunds where some customers have been overcharged, but it treats recoupment of those refunded overcharges through surcharges to other customers as impermissible retroactive rate increases. In short, the holding authorizes refunds notwithstanding an inability to recoup the refunds and the resulting under-recovery.

24. Since *Tennessee Gas*, the Commission has taken different approaches to granting refunds under NGA section 4 and the corresponding FPA provision, section 205, in cases involving proposed changes in rate design and cost allocation. Under the NGA, the Commission generally has taken the position that, if a pipeline files a rate case involving rate design or cost allocation, and chooses to implement the proposed rate design or cost allocation, the pipeline will be at risk for refunds if the Commission ultimately determines that the proposed approach is unjust and unreasonable. As a result of this policy, pipelines usually propose rate design and cost allocation changes in *pro forma* tariff records, separate from the actual records reflecting any proposed increase in their cost of service. This allows the pipeline to begin collecting the proposed cost of service increase as soon as the suspension period ends, while waiting to implement rate design

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[41] *Tennessee Gas*, 371 U.S. at 152.

and cost allocation changes until after the Commission ultimately rules, so the pipeline is not at risk of undercollection.[42]

25. In contrast, under the FPA, the Commission has declined to order refunds in cases involving proposed changes in rate design and cost allocation, ruling that a change in rate design is, for example, appropriate only on a prospective basis. The Commission has explained:

> Our general policy has been to deny refunds when ordering a change in rate design because retroactive implementation may result in undercollections by the company and may be unfair to the customers who cannot alter their past demands in light of the new rate design.[43]

26. In addition, the approach that pipelines use in NGA section 4 cases of making *pro forma* tariff filings is unavailable in FPA section 206 proceedings, such as this case. In section 206 proceedings, the utility has no choice as to whether to subject itself to the potential for refunds. Where the utility's pre-existing rate is the target of a complaint, the utility cannot choose to make the challenged rate design or cost allocation effective prospectively from the date of the Commission order, which would obviate the potential for undercollection. Rather, the utility must continue to charge the filed rate until a new and superseding rate is adopted. Thus the question traditionally posed in FPA section 206 cases is whether, if the Commission determines that refunds are appropriate in proceedings involving rate design or cost allocation, the utility is at risk for those refunds, as in *Tennessee Gas*, or if it can surcharge other customers to avoid undercollection. The fact that *Tennessee Gas* permits undercollection as a legal matter does not alter the balancing of equitable considerations that is central to the Commission determination in electric proceedings not to order refunds in rate design and cost allocation cases. The Court affirmed this policy in *Cities of Batavia v. FERC*, finding reasonable the Commission's consideration of the "practical consequences" of ordering refunds in rate design and cost allocation proceedings.[44]

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[42] *See Arkla Energy Resources*, 48 FERC ¶ 61,305, at 61,980 (1989) (finding that "any rate changes required by applying the Commission's rate design policy statement will be implemented prospectively"); *National Fuel Gas Supply Corp.*, 140 FERC ¶ 61,114 (2012).

[43] *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983).

[44] 672 F.2d 64, 85 (D.C. Cir. 1982) (*Cities of Batavia*).

27. In any event, the *Tennessee Gas* approach is not applicable to complaints against holding companies, such as Entergy. *Tennessee Gas* finds that pipelines (utilities) can be required to pay refunds in cost allocation or rate design cases and that any undercollection of costs will be borne by the company and its shareholders. But Congress directed in FPA section 206(c) that the Commission cannot order refunds unless it can find the holding company"[will] 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."

28. The Louisiana Commission criticizes the use of *City of Anaheim v. FERC*[45] in the Order on Remand. The Commission stated there that "the court found in *Anaheim* that '§ 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."[46] The Louisiana Commission states that the Commission failed to reconcile this statement with the Commission's earlier finding that *Anaheim* did not prevent the awarding of refunds in this case. There is no conflict to reconcile. *Anaheim* does not prevent the Commission from ordering refunds. Rather, the Order on Remand explained that *Anaheim* identified a prohibition on retroactive rate increases under section 206(b).[47] The Commission's established policy of not awarding refunds in rate design and cost allocation cases is predicated, in part, on the potential for under-recovery if rates cannot be retroactively increased for those customers who paid too little under the unjust and unreasonable rate design. Section 206(c) of the FPA evidences a similar concern and conditions the Commission's refund authority upon a finding that refunds would not cause the registered holding company to experience any reduction in revenus resulting from an inability of an electric utility in the system to recovery the resulting increase in costs.

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[45] 558 F.3d 521, 524 (D.C. Cir. 2009) (*Anaheim*).

[46] Order on Remand, 155 FERC ¶ 61,120 at P 31 (quoting *Anaheim*, 558 F. 3d at 524).

[47] *See Order on Remand*, 155 FERC ¶ 61,120 at P 33. We thus disagree with the Louisiana Commission when it says "if cost reallocations, with refunds and surcharges, could not be awarded under Section 206(b) in holding company cases, there would have been no need to provide in Section 206(c) for situations in which the holding company undercollects." Rehearing Request at 46. Section 206(b) authorizes, but does not require, refunds even if they lead to undercollection. Section 206(c) creates an exception by prohibiting refunds that lead to undercollection in the case of registered holding companies. *But see* PP 33, 71.

29. The Louisiana Commission argues that *Nantahala Power and Light Co.*[48] represents a cost allocation case in which the Commission required refunds. This is incorrect. *Nantahala* is not a traditional cost allocation case involving the allocation of costs among different classes of utility system customers.[49] Instead it involved an apportionment of power between two subsidiaries of the Aluminum Company of America (Alcoa), and the ultimate finding was that Alcoa had used its power over both subsidiaries to benefit its interests as an industrial manufacturing company.

30. One of these subsidiaries, Tapoco, Inc. (Tapoco), was engaged in providing power to Alcoa for private use in its smelting operations. The other subsidiary, Nantahala Power and Light Company (Nantahala), supplied power for public service. The Commission found that the Tapoco and Nantahala systems could not be treated as a single system,[50] and the only jurisdictional rates at issue were Nantahala's rates for certain wholesale customers. The matter in dispute was not cost allocation under these rates, but rather the effects of an agreement between Tapoco and Nantahala (Apportionment Agreement) that apportioned between them entitlements to power received from the Tennessee Valley Authority (TVA).

31. The Apportionment Agreement had not been filed with the Commission, and it was treated as a contract affecting jurisdictional rates.[51] It had been modified in 1971 to reduce Nantahala's entitlement to TVA power, and the Commission determined that the 1971 agreement did not fairly represent the interests of Nantahala's customers because there was not sufficient evidence to show that Nantahala had received any consideration for entering into a less favorable agreement. The Louisiana Commission states that Nantahala's "customers were overcharged because Nantahala was allocated too much expensive power,"[52] but this was not the case. Instead, the modification of the Apportionment Agreement in 1971 required Nantahala to make "unnecessary energy purchases . . . from TVA,"[53] of power not included in the original entitlement and thus not subject to the Apportionment Agreement. This was not a situation involving an

[48] 19 FERC ¶ 61,152 (1982) (*Nantahala*).

[49] *See*, e.g., *Louisiana Power & Light Co.*, 14 FERC ¶ 61,075, at 61,126 (1981).

[50] *Id.* at 61,276.

[51] *Id.* at 61,279

[52] Rehearing Request at 20.

[53] Nantahala Commission order at 61,280.

improper allocation of costs among different classes of utility customers. It was a situation in which Nantahala's owner, Alcoa, unfairly imposed additional costs on Nantahala's jurisdictional wholesale customers by diverting for its own private use power to which Nantahala had previously been entitled. Thus, this case is similar to those in which the utility overcollected its just and reasonable revenue requirement to the benefit of the corporation as a whole.

32. Indeed, the court of appeals characterized the case in precisely these terms. It saw the case as involving a conflict between shareholders and utility customers, which is precisely the type of conflict involved in an overcollection case, i.e., a conflict involving shareholders' ability to profit from the exercise of monopoly power. The court stated that

> [u]nder the Nantahala framework, the utility's shareholder (Alcoa) can unfairly benefit vis-a-vis its customers not just directly through excessive rates, but also indirectly, by shifting resources from Nantahala to Alcoa, through Nantahala's sister corporation, Tapoco. The Commission's role is the same under these circumstances: to ensure that the customers are treated fairly.[54]

33. The Louisiana Commission points to a number of cases involving holding companies in which the Commission "has rejected the contention that 'no overcollections' is a basis to deny refunds."[55] We first note that the absence of overcollection is not, in and of itself, the basis for the Commission policy of denying refunds in cost allocation and rate design cases where overcollection has not occurred. Rather, the absence of overcollection leads to equitable considerations that do not arise where overcollection is present, i.e., the inability to revisit past decisions and potential undercollection, and the Commission has held that these considerations generally preclude refunds. The holding company cases that the Louisiana Commission cites are not relevant here because either they in fact involve overcollections of revenue requirements, tariff violations,[56] or other considerations that place them outside the Commission policy that is applicable in this case.

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[54] *Nantahala Power and Light Co. v. FERC*, 727 F.2d 1342, 1348 (4th Cir. 1984).

[55] Rehearing Request at 27.

[56] In cases of tariff violations, the Commission can require the payment of both refunds and surcharges to ensure that all customers pay the rate on file. *See DC Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 (2012) (the Commission can require retroactive billing to correct a filed rate violation). *See generally, Maislin Indus.*,

(continued ...)

34. The Louisiana Commission argues that *Blue Ridge Power Agency v. Appalachian Power Co.*[57] is a cost allocation case where the Commission awarded refunds in the absence of overcollection. However, *Blue Ridge* did not involve a question of whether refunds should be awarded after a cost allocation had been found to be unjust and unreasonable. *Blue Ridge* instead dealt with whether a cost allocation that had not been found to be unjust and unreasonable had been implemented correctly. The Commission found that it had not. Specifically, the Commission found that one subsidiary of American Electric Power Service Corporation (AEP) had failed to credit to its ratepayers, as it was required to do, its entire share of the gain on a sale/leaseback transaction undertaken by other AEP subsidiaries. Indeed, when the AEP subsidiary required to pay refunds argued that refunds could result in trapped costs, i.e., under-recovery, in violation of FPA section 206(c), the Commission replied that

> [a]ny "trapped costs"' which may be created have not been created by the Commission. Rather, they are created by a failure to abide by the relevant filed rate as well as Commission precedent. Consequently, they are not "trapped costs" for which refunds are barred by [FPA section 206(c)].[58]

U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) (holding under Interstate Commerce Act, the filed rate doctrine permits recovery from customers paying less than the filed rate); *IDACORP Energy L.P. v. FERC*, 433 F.3d 879, 883 (D.C. Cir. 2006) (stating that "[t]he ban on retroactive ratemaking, however, imposes no obstacle to amending invoices; in fact, the prohibition on retroactive ratemaking may well require an amended invoice if the original invoice deviated from the tariff")*; Exelon Corp. v. PPL Elec. Utils. Corp.*, 114 FERC ¶ 61,298, at P 14 (2006) (stating that "[c]orrecting improperly billed invoices does not violate the ban on retroactive ratemaking . . . because it does not result in a change to a prior rate, but rather is enforcing the filed rate").

[57] 58 FERC ¶ 61,193 (1992) (*Blue Ridge*).

[58] *Blue Ridge*, 58 FERC ¶ 61,193 at 61,603.

35. The refund policy described in the Order on Remand does not apply where ratepayers have been adversely affected by a tariff violation.[59] No such violation has been alleged in this case, and therefore *Blue Ridge* is not on point.[60]

36. The Louisiana Commission also contends that the Order on Remand is inconsistent with cases involving Entergy filings or related complaints concerning the bandwidth remedy ordered in Opinion No. 480,[61] where the Louisiana Commission states the Commission granted refunds for unjust and unreasonable rates even though the holding company did not overcollect revenues. However, some of the Commission orders that the Louisiana Commission cites pertain to Entergy's annual filings to implement the bandwidth formula and calculate annual bandwidth remedy payments and receipts.[62] These implementation proceedings, which the Commission required to achieve rough equalization of production costs between the Entergy Operating Companies, involve implementation of the filed formula rate. Refunds in such cases are consistent with the Commission's policy of generally ordering refunds and surcharges where a utility violates the filed rate.[63] They can be viewed as a true-up process that

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[59] *See supra* note 63.

[60] A similar conclusion applies to *Middle South Services, Inc.*, 16 FERC ¶ 61,101 (1981), which the Louisiana Commission cites in this connection. The Louisiana Commission also cites *Middle South Energy, Inc.*, 31 FERC ¶ 61,305 (1985*), aff'd and vacated in part on another issue*, *Mississippi Indus. v. FERC*, 808 F.2d 1525 (1987) but fails to explain how it relates to the Commission's refund policy. Apart from a mention in an ordering clause, the case contains no discussion of refunds.

[61] In Opinion Nos. 480 and 480-A, the Commission established a bandwidth remedy to ensure rough production cost equalization among the Entergy Operating Companies under the System Agreement. *See La. Pub. Servs. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on* compliance, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance,* 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part, sub nom. Louisiana Public Service Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047 (2011).

[62] *Entergy Servs., Inc.*, 139 FERC ¶ 61,104 (2012); *Entergy Servs., Inc.*, 142 FERC ¶ 61,011 (2013).

[63] *See Gas Transmission Northwest Corp. v. FERC*, 504 F. 3d 1318, 1320 (D.C. Cir. 2007) (stating that the Commission's acceptance of unchallenged tariff provisions does not convert such provisions into "policy" or "precedent"); *Entergy Services, Inc.*, 130 FERC ¶ 61,170, at P 20 (2010) (stating that "the purpose of the annual bandwidth

(continued ...)

ensures that the filed rate is complied with. With one exception,[64] the other bandwidth cases that the Louisiana Commission cites as contradicting the conclusions in the Order on Remand fall into this category.[65] They thus can be distinguished from the present proceeding, where the filed rate was complied with, but it was subsequently found to be unjust and unreasonable.

37. The Louisiana Commission cites to a number of uncontested settlements involving Entergy that provided for refunds, and the Louisiana Commission asserts that these settlements contradict the Commission policy described in the Order on Remand.[66] However, Commission approval of uncontested settlements does not constitute binding Commission precedent,[67] and orders approving uncontested settlements where the parties have agreed to refunds for their own reasons do not reflect Commission policy on refunds.

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filings is to apply the specified formula using actual data to determine whether or not there was rough production cost equalization").

[64] This exception is cited *infra* note 73 below and is not on point for other reasons.

[65] These cases, cited in the Rehearing Request at 28-29 are: *Entergy Servs., Inc.*, 139 FERC ¶ 61,104 (involving a compliance filing to implement an opinion addressing the first year implementation filing for the bandwidth formula); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,253 (2010) (finding that an asset had been improperly excluded from the bandwidth calculation); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010 (2008) (finding that the bandwidth formula erroneously included certain capital lease amounts in production costs).

[66] Rehearing Request at 29-30 (citing *Entergy Mississippi, Inc.*, 149 FERC ¶ 61,170 (2014); *Entergy Servs., Inc.*, 127 FERC ¶ 63,027, *approved*, 128 FERC ¶ 61,181 (2009)).

[67] *Florida Power Corp.*, 70 FERC ¶ 61,321, at 61,980 (1995). *See* also *Westar Energy, Inc.*, 125 FERC ¶ 61,252, at P 3 (2008) (stating that "Commission approval of the settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings."); *Oklahoma Gas and Electric Co.*, 127 FERC ¶ 61,296, at P 3 (2009) (same*); Southern Company Services, Inc.*, 61 FERC ¶ 61,339, at 62,335 n.59 (1992), *reh'g denied*, 63 FERC ¶ 61,217 (1993); *Old Dominion Elec. Coop. v. Va. Elec. and Power Co.*, 139 FERC ¶ 61,137, at P 12 (2012).

38. The Louisiana Commission also points to *Southern Company Services, Inc.*,[68] which involved a section 206 investigation into the return on equity payable from some companies to others under the Southern Company Intercompany Interchange Contract. The Louisiana Commission states that the return on equity ultimately was modified from 14 percent to 13.25 percent, requiring payments by some companies to other companies. The Louisiana Commission states that the Commission required refunds even though Southern Company as a whole did not overcollect revenues.[69] However, the relevant portions of *Southern* involve a settlement in which the parties stipulated to the modification of the return on equity from 14 percent to 13.25 percent.[70] As a result, the refunds were part of a voluntary settlement and, as with the other settlement cases that the Louisiana Commission cites, they have no precedential effect.

39. The Louisiana Commission cites *Corporation Comm'n of the State of Oklahoma v. American Elec. Power Co.*[71] as a case involving a holding company in which the Commission ordered refunds where the "rates did not produce an 'overcollection.'"[72] This case involved a tariff violation that misallocated costs under the AEP System Agreement, and this "violation . . . provided AEP shareholders with a net gain."[73] This unauthorized benefit for shareholders is precisely the type of overcollection of revenues that justifies refunds under Commission policy. The Louisiana Commission argues that the Commission action in *Oklahoma* should apply here because the net gain to AEP shareholders was a result of rate freezes in certain retail jurisdictions, and Entergy faced annual rate cases in Louisiana in the 1990s, while retail rate cases were rare in the other Entergy jurisdictions.[74] However, neither a violation of the Entergy System Agreement

[68] 61 FERC ¶ 61,075 (1992) (*Southern*), *reh'g denied in part and granted in part*, 64 FERC ¶ 61,033 (1993).

[69] The Louisiana Commission also cites to an initial decision in Docket No. EL10-49-005 as supporting its arguments. Rehearing Request at 33 (citing *Old Dominion Elec. Coop. v. Va. Elec. and Power Co.*, 154 FERC ¶ 63,014, at P 68 (2016)). However, initial decisions by Commission administrative law judges do not constitute binding Commission precedent.

[70] *Southern*, 61 FERC ¶ 61,075 n.6.

[71] 125 FERC ¶ 61,237 (2008) (*Oklahoma*).

[72] Rehearing Request at 30.

[73] *Oklahoma*, 125 FERC ¶ 61,237 at P 33.

[74] Rehearing Request at 30.

nor a net gain to Entergy shareholders has been alleged, let alone found, in this case. As result, the grounds for awarding refunds in *Oklahoma* are not present here.

40. The Louisiana Commission incorrectly describes *Central Power and Light Co.*[75] as a case where the Commission awarded refunds in the absence of overcollection.[76] *Central Pow. & Light* deals with Central and South West Corporation's (CSW) open access transmission tariff. The CSW system was made up of four separate utility operating companies, two of which operated within the Electric Reliability Council of Texas (ERCOT), which is not subject to Commission jurisdiction, and two of which operated in the Southwest Power Pool (SPP), which is subject to our jurisdiction. All of the companies were, nevertheless, interconnected to form a single integrated utility system, and the Commission had determined that while CSW could have separate rates for wholly intra-ERCOT service and wholly intra-SPP service, it also required that there be a single system-wide rate for transmission through both ERCOT and SPP.[77]

41. The Commission found in *Central Pow. & Light* that the CSW operating companies did not propose in their compliance filing a single-system rate in place of, or in addition to, separate intra-ERCOT and intra-SPP rates, as had been required. Instead, "they kept the intra-ERCOT rate and removed the intra-SPP rate in favor of a rate [i.e., the single-system rate] that *inflates* transmission rates for SPP-only customers, and that over-charges SPP-only customers."[78] The Louisiana Commission argues that the CSW "tariff had the effect of overcharging SPP-only customers, although it produced the proper level of revenues on a total System basis,"[79] but the Commission made no such finding. *Central Pow. & Light* involves inflated charges for SPP-only customers that resulted from a failure to satisfy compliance requirements.[80] The fact that a rate was inflated for these customers in this situation does not imply that there was a corresponding deflation elsewhere. These facts distinguish *Central Pow. & Light* from this proceeding, where no violations of Commission requirements by Entergy have been alleged.

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[75] 97 FERC ¶ 61,157 (2001) (*Central Pow. & Light*).

[76] Rehearing Request at 32.

[77] *Central Pow. & Light*, 97 FERC ¶ 61,157 at 61,696.

[78] *Id.* at 61,698 (emphasis supplied).

[79] Rehearing Request at 32.

[80] *Central Pow. & Light*, 97 FERC ¶ 61,157 at 61,698.

42. The Louisiana Commission is also incorrect in its assertion that the award of refunds in *Public Serv. Comm'n of Wisconsin v. Midcontinent Indep. Sys. Operator, Inc.*[81] supports a similar award here. An order on rehearing and clarification has recently been issued in that proceeding,[82] and we distinguish our decision here from our reasoning in that proceeding based on this recent order. In *Wisconsin*, the Commission found that the two primary grounds for the Commission's general denial of refunds in cost allocation cases were not present. First, the Commission found that, unlike in the instant case, the parties had not identified any particular decisions made in reliance on the challenged cost allocation methodology.[83] Second, the Commission found that, unlike in the instant case, there was no potential under-recovery of revenues, nor was there any concern that refunds would be charged to persons without any connection to these proceedings, because surcharges would be assessed on the persons who had paid too little under the previous cost allocation methodology to fund refunds to those persons who paid too much.[84] The Commission also found that the costs in the *Wisconsin* proceeding were out-of-market; thus, subsequent changes to the allocation of such costs would not undermine confidence in the settlements produced by any markets.[85] In addition, *Wisconsin* did not present notice issues of the type we describe below.[86] Finally, *Wisconsin* concerned mandatory, short-term agreements, and the Commission found that, if relief were granted only on a prospective basis, the customers that had been allocated unjust and unreasonable costs under those agreements would likely receive no compensation.[87] Under those factual circumstances, when considered as a whole, the Commission in *Wisconsin* found that the equitable considerations warranted refunds.[88]

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[81] 150 FERC ¶ 61,104 (2015) (*Wisconsin*).

[82] *Public Serv. Comm'n of Wisconsin v. Midcontinent Ind. Sys. Op., Inc.*, 156 FERC ¶ 61,205 (2016) (*Wisconsin*).

[83] *Id.* P 45.

[84] *Id.* PP 47, 51.

[85] *Id.* P 54.

[86] *Id.* P 51; *see infra* P 58.

[87] *Wisconsin*, 156 FERC ¶ 61,205 at P 53.

[88] *Id.* PP 51, 56.

43. The Louisiana Commission maintains that seven cases under FPA section 205 cited in the Order on Remand do not support the refund policy described there. It states that six of the seven cases do not provide support because "there was no *prior notice* that the rates might be changed so as to justify applying the rate change retroactively."[89]

44. However, in all six of these cases, the Commission applied the same policy it is applying here and denied refunds because the cases involved cost allocation and rate design. The Commission did not deny refunds based on a lack of notice. In fact, under FPA section 205(d) proper notice of the filing was made and the Commission accepted and suspended the rates in question subject to refund.[90] The Commission did not impose refunds because to do so would have resulted in the utility being unable to collect its just and reasonable revenue requirement. As the Commission has explained, the refund provisions of FPA sections 205 and 206 do not permit the utility retroactively to surcharge those customers paying rates lower than the just and reasonable rate ultimately determined. The Louisiana Commission is thus incorrect in arguing that an absence of notice justified a denial of refunds in these six cases.

45. The Louisiana Commission contends that in the seventh case[91] the Commission "simply allowed [the rate] to take effect pursuant to the statutory requirement,"[92] implying the case does not support the Commission' s policy of not ordering refunds in rate design and cost allocation cases. In this case, an intervenor requested waiver of the prior notice requirement, contending that earlier implementation of the cost allocation filing would reduce its rates. The Commission properly denied the request, because only the utility itself can request such a waiver under section 205(d). In the order, however,

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[89] Rehearing Request at 35. These cases are *Consumers Energy Co.*, 89 FERC ¶ 61,138 (1999) (*Consumers*); *Union Elec. Co.*, 58 FERC ¶ 61,247 (1992) (*Union Elec.*); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323 (1983) (*Commonwealth 2*); *Second Taxing Dist. of Norwalk v. FERC*, 683 F.2d 477 (D.C. Cir. 1982) (*Second Taxing Dist.*); *Cities of Batavia*, 672 F2d 64; *Commonwealth Edison Co.*, 8 FERC ¶ 61,277 (1979) (*Commonwealth 1*).

[90] *See Consumers Energy Co.*, 85 FERC ¶ 61,100, at 61,359 (1998) (relating to *Consumers*); *Union Elec.*, 58 FERC ¶ 61,247 at 61,817-8; *Commonwealth Edison Co.*, 23 FERC ¶ 61,219, at 61,464 (1983) (relating to *Commonwealth 2*); *Connecticut Light and Power Co.*, 13 FERC ¶ 61,155, at 61,330-31 (1980) (relating to *Second Taxing Dist.*); *Cities of Batavia*, 672 F.2d at 68; *Commonwealth 1*, 8 FERC ¶ 61,277 at 61,837.

[91] *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193 (2004) (*Portland*).

[92] Rehearing Request at 35.

the Commission noted that, in any event, under its policy, any changed rates in cost allocation proceedings would be prospective only.[93] This statement of Commission policy is consistent with the description of Commission policy set forth in the Order on Remand.

46. The Louisiana Commission appears to conclude that the Commission cited these cases to argue that the absence of overcollection by itself was a justification for denying refunds.[94] In fact, the Commission cited them to support its long-standing policy of denying refunds in cost allocation and rate design cases where overcollection had not occurred. The Commission went on to explain why this was the case, i.e., refunds could lead to under-recovery by the utility in such cases or it was too late for the utility or customers to alter decisions they had made under the prior cost allocation.[95] All of the cases in question deny refunds for such reasons, not because of the mere absence of overcollection.[96]

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[93] *Portland*, 106 FERC ¶ 61,193 at PP 4-5.

[94] *See* Rehearing Request at 34-35.

[95] Order on Remand, 155 FERC ¶ 61,120 at P 28.

[96] *Consumers Energy Company*, 85 FERC ¶ 61,100 at 61,359 and *Consumers Power Co.*, 89 FERC ¶ 61,138, at 61,397 (denying refunds on the grounds that customers cannot revisit past decisions); *Union Elec.*, 58 FERC ¶ 61,247 at 61,818 (stating that refunds would lead to under-collection by the utility and customers could not revisit their past economic decisions); *Commonwealth 2*, 25 FERC ¶ 61,323 at 61,732 (denying refunds on the grounds that they could lead to undercollection by the utility, customers cannot alter past demand in light of new rate, and the existing rate was long-standing) ; *Second Taxing Dist.*, 683 F.2d at 490 (stating that refunds were denied because they could lead to undercolletion by the utility and retroactive changes in rates cannot affect customer demand); *Cities of Batavia*, 672 F.2d at 85 (refunds denied because of potential undercollection and customer usage can be affected only prospectively); *Commonwealth 1*, 8 FERC ¶ 61,277 at 61,844 (refunds denied because of potential undercollection and customer usage can be affected only prospectively); *Portland*, 106 FERC ¶ 61,193 at P 5 (citing *Consumers*, 89 FERC ¶ 61,138 at 61,397 and *Commonwealth 2,* 25 FERC ¶ 61,323 at 61,732).

47. The Louisiana Commission acknowledges in its rehearing request that the Commission has denied refunds for the reasons described here,[97] but it maintains that the Commission has done this only in rate design, and not in cost allocation, cases.[98] This is incorrect. In fact, one of the cases that the Louisiana Commission cites as expressing the policy in question specifically notes that the policy applies in both cost-allocation and rate design cases.[99]

48. The Louisiana Commission bases its argument that the policy does not apply in cost allocation cases on *Entergy Services, Inc. v. FERC*. This case involved the allocation of the output of qualifying facilities (QFs) that provided power to a host industrial facility. In instances where a QF scheduled a wholesale sale, i.e., a sale other than to the industrial facility, Entergy would deem the QF's output to go first to the scheduled transaction, with the remainder deemed to serve the host load. To the extent there was insufficient QF power to serve the host in these situations, Entergy would supply the host at much higher retail rates. The Commission found this to be unduly discriminatory, imposed a "host loads first" allocation methodology for QF power, and ordered refunds.[100]

49. On rehearing, Entergy argued that the host loads first allocation methodology constituted a change in rate design, and the Commission had failed to explain its departure from its policy of not awarding refunds in such cases. The Commission responded that there had been no change in rate design; Entergy had simply "billed the wrong customers at the wrong rates."[101] "In other words," the court explained "there were no rate design changes in this case."[102] In short, this case involved a tariff violation – billing the wrong customers at the wrong rates – and as such it does not speak to the Commission's refund policy in cost allocation and rate design cases that applies when a tariff violation has not occurred.

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[97] *See* Rehearing Request at 36 (citing *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,378 (2005) (*Occidental*); *Black Oak*, 136 FERC ¶ 61,040).

[98] Rehearing Request at 36.

[99] *Black Oak*, 136 FERC ¶ 61,040 at P 10.

[100] *Entergy Servs., Inc. v. FERC*, 400 F.3d 5, 7 (D.C. Cir. 2005).

[101] *Id.* at 8 (quoting *Entergy Servs., Inc.*, 104 FERC ¶ 61,061, at 61,212 (2003)).

[102] *Id.*

3. Legislative History

50. The Louisiana Commission argues that the refund policy described in the Order on Remand conflicts with testimony by Commission Chairman Martha O. Hesse and one of her advisors before Congress in 1988 concerning the Regulatory Fairness Act (RFA), which revised FPA section 206 to include its current refund provisions. We disagree.

51. The only statement in this testimony cited by the Louisiana Commission that is relevant here comes from Chairman Hesse. When asked about the applicability of FPA section 206 to interconnection, power-pooling, intra-system, coordination, or joint ownership agreements, a class of agreements that would include the Entergy System Agreement, she stated:

> If a complaint is filed which alleges that *excessive revenues are being collected* pursuant to a coordination transaction or power pooling arrangement, the same arguments that would support the imposition of section 206 refund protection to traditional wholesale electric power relationships also appears to support the imposition of section 206 refund protection for non-traditional, interchange transactions. Moreover, when a coordination or power pooling arrangement is originally filed under section 205, refund protection attaches. If the intent of the proposed legislation is to parallel the refund protection accorded under section 205, then refund protection should also attach to section 206 complaints involving interchange transactions. Under section 205 or [the proposed legislation], the Commission would retain ultimate discretion as to whether refunds would be in the public interest.[103]

52. Situations in which "excessive revenues are being collected" are precisely the situations in which it is Commission policy to award refunds. Chairman Hesse's remarks do not support the Louisiana Commission's position. In fact, one could read them to imply that the Commission could have a different policy where excessive revenues have not been collected.[104]

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[103] S. Rep. No. 100-491, at 154 (1988) (emphasis added).

[104] The Louisiana Commission also quotes remarks by Chairman Hesse's assistant, Cynthia A. Marlette, stating that "[u]nder section 205 the commission normally orders refunds where rates are found to be unjust and unreasonable," and the Louisiana Commission interprets this statement as inconsistent with the refund policy described in

(continued ...)

53. Indeed, Congress recognized that cost allocation presents special problems that may require different approaches to refunds. The Senate Report on the RFA stated:

> The Committee is aware that there may be challenges to power pooling and system integration agreements brought under section 206 of the Federal Power Act in which refunds might not be appropriate, for example, where the issue relates to cost allocation among utilities, and the bill as reported by the Committee is intended to provide the Commission with the discretion needed to deal with individual instances in which refunds would not be in the public interest.[105]

54. This proceeding involves cost allocation among utilities, and the Commission's decision regarding that cost allocation is consistent with the expectations expressed in the legislative history. Indeed, the Senate Committee stated that with respect to power pooling, it expected, among other things, "the Commission to consider whether, and the extent to which, a refund would adversely affect decisions made on the basis of energy pricing provisions of such pooling agreements."[106] This is precisely the type of consideration the Commission has incorporated into its refund policy.

55. Finally, the Louisiana Commission states that the legislative history shows that Congress took the position that the absence of overcollection by a holding company would not be an equitable consideration justifying the denial of refunds.[107] However, as noted above, the Commission did not say in the Order on Remand that the absence of overcollection was a justification for denying refunds. It stated that "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."[108] The Commission

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the Order on Remand. Rehearing Request at 24 (quoting S. Rep. No. 100-491 at 17). However, this statement was made after section 205 cases such as *Commonwealth 2*; *Second Taxing Dist.*; *Cities of Batavia*; and *Commonwealth 1*, where refunds were not awarded. The precise meaning that this statement has for this proceeding is thus unclear.

[105] S. Rep. No. 100-491 at 6.

[106] *Id.*

[107] Rehearing Request at 27 (citing S. Rep. No. 100-491 at 7).

[108] Order on Remand, 155 FERC ¶ 61,120 at P 27 (emphasis supplied).

explained those other factors in the Order on Remand,[109] and, as discussed above, those factors are consistent with Congressional expectations.

4. Notice Issues

56. The Louisiana Commission argues that the Commission's reliance in the Order on Remand on possible undercollection of revenues and the inability of Entergy to revisit past decisions as equitable reasons for denying refunds is arbitrary because it fails to recognize the notice provided in the complaint. The Louisiana Commission states that "[n]otice eliminates concerns that refunds would violate the rule against retroactive ratemaking and that the utility or customers may have relied on the prior rate."[110]

57. We disagree that notice resulting from the filing of the complaint warrants providing refunds here. As the Commission found in the Order on Remand, the facts of this case show that there is some likelihood that Energy Arkansas would not be able to recover any refunds paid to Entergy Louisiana. This finding is sufficient for the Commission to deny refunds under section 206(c), since the Commission cannot determine that Entergy, the registered holding company, "[will] 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."[111]

58. Moreover, whatever notice is provided to wholesale customers from the filing of the complaint, would not necessarily provide notice to retail customers sufficient to permit Entergy Arkansas to recover through surcharges the refunds it would pay to Entergy Louisiana. The Commission made clear in the Order on Remand that reliance by these ratepayers was an important concern.[112] None of the cases the Louisiana Commission cites on the issue of notice find that the notice provided by filing of a complaint is sufficient for the Commission to retroactively raise the rates of customers under FPA section 206(b). For instance, the Louisiana Commission cites *Oxy USA, Inc. v. FERC*,[113] for the proposition that "'[t]he goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is

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[109] *Id.*

[110] Rehearing Request at 38.

[111] 16 U.S.C. § 824e(c).

[112] Order on Remand, 155 FERC ¶ 61,120 at P 36.

[113] 64 F.3d 679 (D.C. Cir. 1995) (*Oxy USA*).

only tentative and might be disallowed.'"[114] However, the Louisiana Commission omits reference to the immediately preceding statement by the court finding that "[t]he rule against retroactive ratemaking, however, 'does not extend to cases in which [customers] are on *adequate* notice that resolution of some *specific* issue may cause a later adjustment to the rate being collected at the time of service.'"[115] We have inadequate basis on this record to conclude that the complaint in this case gave the retail customers who would be assessed surcharges adequate notice that the resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.

59. The Louisiana Commission cites *Transcontinental Gas Pipe Line Corp. v. FERC* for the proposition that "after notice, '[t]he expectations of those who act in anticipation of the right rate are protected, and they would seem presumptively the most deserving,'"[116] but *Transcontinental* was a case in which the court found the Commission had committed legal error. In such a circumstance, the courts have permitted the Commission to require both refunds and surcharges to correct that legal error.[117] The Louisiana Commission cites *Westar Energy, Inc. v. FERC*[118] as supporting its position on notice, but that case involved a section 205 rate filing, which the Commission rejected and required the payment of refunds as permitted under section 205. However, that case does not establish that the Commission has authority to authorize retroactive rate increases under either section 205 or 206(b). In *NSTAR Elec. & Gas Corp. v. FERC*,[119] which the Louisiana Commission cites, the court found that a market rule gave actual market participants adequate notice that a rate was subject to change,[120] but that case

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[114] Rehearing Request at 38 (quoting *Oxy USA*, 64 F.3d at 699).

[115] *Oxy USA Inc.*, 64 F.3d at 699 (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) (*Natural Gas Clearinghouse*)) (emphasis supplied).

[116] Rehearing Request at 38-39 (quoting *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 899 899 (D.C. Cir. 1995) (*Transcontinental*)).

[117] *See, e.g.*, *Pub. Utils. Comm'n of Cal.v. FERC*, 988 F.2d 154, 162 (D.C.Cir.1993) (*CAPUC*) (stating "[t]his court has previously recognized FERC's authority to order retroactive rate adjustments when its earlier order disallowing a rate is reversed on appeal") .

[118] 568 F.3d 985 (D.C. Cir. 2009).

[119] 481 F.3d 794 (D.C. Cir. 2007).

[120] *Id.* at 801.

again is not applicable to the issue of authorizing retroactive rate increases under section 206(b). None of these cases present facts regarding notice and customer expectations that resemble the facts of this case.

5. **Revisiting Past Decisions**

60. The Commission has noted in this proceeding that consumers and utilities are unable to revisit decisions based on cost allocations or rate designs in effect in the past,[121] and the Commission has held that this inability to revisit past decisions is an equitable reason for denying refunds.[122] The court noted this fact in its Remand Order, but it also stated that, nonetheless, "[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."[123] The Commission explained in the Order on Remand that the Entergy Operating Companies acted in accordance with standard economic principles and avoided transactions that would raise their costs. Specifically, their decisions were designed to avoid the additional costs that the inclusion of interruptible load in the cost allocation created for companies that made interruptible sales.[124] This is a necessary conclusion because the central premise of the argument that the cost allocation was unjust and unreasonable was that it discouraged sales of interruptible service.

61. The Louisiana Commission maintains that the Commission's conclusion regarding Entergy's inability to revisit past decisions constitutes a "generic possibility," and that the D.C. Circuit has taken issue with such reasoning.[125] However, in criticizing the Commission for reliance on generic possibilities, the court's central point was that "'past decisions' in the abstract cannot be the *only* factor against refunds," as "some amount of reliance [on a rate] is likely to be present every time the Commission considers ordering refunds."[126] To be clear, we do not make past decisions the only factor counseling

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[121] Order on Remand, 155 FERC ¶ 61,120 at P 28; March 2013 Order, 142 FERC ¶ 61,211 at P 63, n.142.

[122] *Id.*

[123] Remand Order, 772 F.3d at 1306.

[124] Order on Remand, 155 FERC ¶ 61,120 at PP 34-35.

[125] Rehearing Request at 41 (quoting Remand Order, 772 F.3d at 1306).

[126] Remand Order, 772 F.3d at 1305-1306 (emphasis in original).

against refunds. As discussed in this order, we also rely on other factors in finding that the equities of this case do not support refunds, including a possibility of underrecovery.

62. There is nothing generic about the Commission's finding that Entergy operating companies made decisions to avoid the additional costs that the inclusion of interruptible load in the cost allocation created for companies that made interruptible sales. The Louisiana Commission contends that there is no evidence that the Entergy operating companies acted based on the incentive described and that it "never attempted to prove that Entergy ever acted, or did not act, based on the disincentive."[127] However, the Commission may reasonably assume that parties do act on the basis of economic incentives.[128] In fact, the Louisiana Commission argued, and the Commission found, that the Entergy cost allocation was unjust and unreasonable precisely because the operating companies would act on the basis of economic incentives and including curtailable load as part of the cost allocation sent improper incentives. The conclusion that the rate was unjust and unreasonable necessarily relies on generally accepted principles regarding economic decision making, i.e., principles rooted in assumptions about how persons and companies can be expected to act when presented with certain facts. Such reasoning is no less appropriate for explaining decisions by Entergy operating companies that cannot be revisited.

63. The Louisiana Commission states that "[t]he Commission finds that Entergy blithely imposed an uneconomic, artificial disincentive upon itself so that it would not enter sales that would avoid the need to build generation that would have lowered rates."[129] There is no basis for such a conclusion. At the time the initial complaint was filed in this proceeding on March 15, 1995, the System Agreement had included interruptible loads in the calculation of peak load responsibility for 44 years.[130] The complaint alleged that changed circumstances had caused this aspect of the System Agreement to become unjust and unreasonable, and the Commission initially dismissed the complaint on the grounds that this had not been shown.[131] The subsequent complex

[127] Rehearing Request at 42.

[128] *Associated Gas Distributors v. FERC*, 824 F. 2d 981, 1009 (D.C. Cir. 1987) (agencies need not prove the "prediction that an unsupported stone will fall").

[129] Rehearing Request at 41.

[130] *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinioin No. 468, 106 FERC ¶ 61,228, at P 6 (2004).

[131] *Id.*

proceedings in this matter constitute, in part, a process for determining what the implications of the provision complained of were. There is nothing in the record to support the Louisiana Commission's claim that this Commission has found that that Entergy blithely imposed an uneconomic, artificial disincentive upon itself. That an action was done in response to economic incentives that are subsequently shown to be less than optimal does not imply that the action was done in bad faith. Indeed, it was not uncommon in the electric power industry to require transmission payment for interruptible load on the assumption that the system should be designed to support both firm and interruptible load.[132] The treatment of interruptible load in the calculation of peak load, therefore, was a matter on which reasonable persons could disagree.[133] These facts apply equally to the Louisiana Commission's argument that "Entergy at all times had the power to change its own uneconomic tariff to remove any disincentive to acting in the public interest" through a FPA section 205 filing.[134] This argument assumes what had yet to be proven, i.e., that the provision was not in the public interest.

6. <u>Under-Recovery of Revenues and Source of Refunds</u>

64. The Louisiana Commission states that the Commission erred in the Order on Remand in finding that potential litigation at the state level could prevent surcharges and lead to under-recovery in this case. The Louisiana Commission argues that the finding is in error because in making it the Commission failed to explain its departure from its prior finding that the Supremacy Clause of the U.S. Constitution would require pass-through of Commission-ordered refunds to retail rates.[135] However, the Commission has not departed from that finding. The issue here is whether the Commission should apply its general policy of not ordering refunds in cost allocation and rate design cases. As discussed earlier, this policy is based on the Commission's inability to order surcharges under FPA section 206(b) to ensure that the utility does not underrecover its revenue requirement. We continue to find that, as a result, the Entergy system would not be made whole if the Commission were to require refunds.

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[132] *Occidental*, 110 FERC ¶ 61,378 (finding PJM's add-back of interruptible load to determine charges based on coincident peak was unjust and unreasonable).

[133] Opinion No. 468, 106 FERC ¶ 61,228 at PP 60-77.

[134] Rehearing Request at 41.

[135] *Id.* at 45-46 (citing *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,133, at PP 22, 24 (2011)).

65. Moreover, as the Commission discussed in the Order on Remand, there is some question as to whether Entergy would be able retroactively to recover the cost of any refunds from departing load. Commission precedent on under-recovery refers to a possibility, not a certainty, of under-recovery as a basis for denying refunds.[136]

66. The Louisiana Commission argues that the Commission was incorrect in finding that the source of refunds in this case is unclear given the disappearance of wholesale load that would have been a source of surcharges. The Louisiana Commission states the source of refunds is clear, i.e., it is current customers. It states that this is standard ratemaking practice and that it has been applied in the Entergy bandwidth cases, as well as refunds and surcharges that Entergy imposes itself for error corrections.[137]

67. Generally, when the Commission is authorized to require surcharges, for example when the Commission is found to have committed legal error or the utility violates the rate on file, the utility seeks those funds from the customers who paid too little under the prior rate design or cost allocation.[138] While the examples used by the Louisiana Commission may be used in some cases with respect to retail load, that fact does not indicate that retail load in Arkansas needs to subsidize refunds being paid to Louisiana retail load. Indeed, the Commission has previously found that a requirement that current load would have to pay for charges incurred by past customers, or a prior generation of customers, is an equitable consideration that supports denial of refunds in such cases.[139]

C. Request to Consider New Argument

68. On rehearing, the Louisiana Commission argues for the first time that the Commission should order four years of refunds on the grounds that the Commission erred

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[136] *Occidental*, 110 FERC ¶ 61,378 at P 10 (stating that “retroactive implementation of such a rate design might result in an under-recovery of legitimate costs”); *Black Oak*, 136 FERC ¶ 61,040 at P 26 (same).

[137] Rehearing Request at 47-48.

[138] *Panhandle Eastern Pipe Line Co. v. FERC*, 95 F.3d 62, 73-74 (D.C. Cir. 1996) (*Panhandle*).

[139] *Am. Elec. Power Serv. Corp.*, Opinion No. 311-B, 46 FERC ¶ 61,382, at 62,195 (1989).

in dismissing its complaint in 1996.[140] The Louisiana Commission states that when a court of appeals remands a case, the Commission has the authority to reconsider the whole of its original decision.[141] The Louisiana Commission goes on to state that, given this authority, the Commission has "an equitable obligation to correct the harm caused" by its error in dismissing the complaint in 1996.[142] The Louisiana Commission maintains the Commission should "order that Entergy provide refunds for the period from April 1, 2000 to March 31, 2004," the date the Commission's order in this proceeding became effective.[143]

69. We deny this request. While the Commission does have the authority to reconsider its original decision on remand, the Louisiana Commission failed to make a filing seeking to broaden the remanded issue to include four years of potential refunds due to the Commission's legal error in dismissing the initial complaint until its rehearing of the third remand order.[144] This case has been in process for 16 years, through

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[140] *See La. Pub. Serv. Comm'n v. FERC*, 522 F. 3d 378, 398 (D.C. Cir. 2008) (considering refunds under section 206(b) of the FPA); *La. Pub. Serv. Comm'n v. FERC*, 772 F. 3d 1297, 1299 (D.C. Cir. 2014) (same).

[141] Rehearing Request at 10 (citing *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289, at P 22 (2008); *Southeastern Mich. Gas Co. v. FERC*, 133 F.3d 34, 38 (D.C. Cir. 1998) (*Southeastern Mich.*); *Process Gas Consumers Group v. FERC*, 292 F.3d 831, 834 (D.C. Cir. 2002)).

[142] Rehearing Request at 11, 13 (*citing Tennessee Valley Municipal Gas Assoc. v. FPC*, 470 F.2d 446 (D.C. Cir. 1972) (*Tennessee Valley*); *Exxon Co. U.S.A. v. FERC*, 182 F.3d 30 (D.C. Cir. 1999); *CAPUC*, 988 F.2d 154; *Natural Gas Clearinghouse*, 965 F.2d 1066; *Southeastern Mich. Gas Co. v. FERC*, 133 F.3d 34 (1998).

[143] Rehearing Request at 11. The Louisiana Commission computes the four year delay based on the period from August 5, 1996, the date on which the Commission dismissed the complaint, and August 22, 2000, the date on which the Commission set the matter for hearing.

[144] We reject rehearing requests based on new issues that could properly have been raised at an earlier stage of the proceeding. *Dominion Transmission, Inc*., 155 FERC ¶ 61,234, at P 10 (2016) (stating "we reject requests for rehearing that raise a new issue, unless we find that the issue could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances"); *Texas Gas Transmission, LLC*, 155 FERC ¶ 61,099, at P 23 (2016) (same); 18 C.F.R. § 385.713 (c)(3) (requiring justification that matters were not available for consideration at the time of the final decision). *See also NO Gas Pipeline v.*

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two prior court remands, and the Louisiana Commission has failed to raise this argument when it had the opportunity. Indeed, the Louisiana Commission points out that the section 206(b) refund issue has been briefed 14 times in the case,[145] and rejected the suggestion of further briefing on this remand, asking the Commission act promptly and issue an order requiring refunds.[146] We, therefore, conclude that the Louisiana Commission has failed to preserve this issue, and we decline to re-open the record to consider the issue now.

70. Even if the Louisiana Commission's request were appropriate at this time, we deny it on the merits. When the Commission commits legal error, however, it can seek to correct that legal error by requiring refunds and authorizing the utility to seek surcharges to place the parties in the position in which they would have been if the error had not occurred.[147] The courts have found that the correction of legal error, including the retroactive collection of higher rates from some customers, is justified because the parties would be on notice from the rehearing petition that the Commission's order might change.[148] The issue here is whether the Commission should order refunds for the four year delay occasioned by the Commission's initial order dismissing the complaint.

71. FPA section 206 does not permit the Commission to adjust rates retroactively, which the exception of the 15 month refund period provided for in section 206(b). The statute requires that any action of the Commission must be prospective from the date on

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FERC, 756 F.3d 764, 770 (D.C. Cir. 2014) (stating that "FERC regularly rejects requests for rehearing that raise issues not previously presented where there is no showing that the issue is 'based on matters not available for consideration ... at the time of the final decision'") .

[145] Opposition Motion at 1-2

[146] *Id.* at 1.

[147] *Southwest Power Pool, Inc.*, 156 FERC ¶ 61,057 (2016); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,231 (2015). *See Panhandle*, 95 F.3d 62, 73-74 (D.C. Cir. 1996); *Panhandle Eastern Pipe Line Co. v. Mich. Consol. Gas Co*., 937 F. Supp. 641, 646 (E.D. Michigan 1996) (finding an obligation to pay based on the parties' contractual relationship and 15 U.S.C. § 717u providing courts with jurisdiction over "... all suits ... brought to enforce any liability or duty created by ... any ... order thereunder"); *Panhandle Eastern Pipe Line Co. v. Utilicorp United Inc*., 928 F. Supp. 466, 472 (D. Delaware 1996) (finding an obligation under 15 U.SC. § 717u).

[148] *Transcontinental*, 54 F.3d at 899.

which the Commission establishes the rate "to be thereafter observed and enforced."[149] Moreover, in passing section 206(b), Congress found that any refund under section 206 be limited to 15 months; Congress made no distinction based on the length of the proceeding.

72. The Louisiana Commission argues that *Tennessee Valley* governs this situation and requires the Commission to reach back four years from the date of the order making the revised rate effective and require refunds for the delay that the Commission's initial order dismissing the complaint caused. In *Tennessee Valley*, the Federal Power Commission dismissed a complaint under section 5(a) of the NGA claiming that existing rates for natural gas were excessive on the grounds that the record was too stale to form the basis for a prospective ruling, and also because it appeared highly conjectural that initiation of a new section 5 proceeding at that time would be in the public interest. One hundred twelve days later, the Commission vacated the dismissal, reopened the proceedings, and established a hearing to update the record and compile figures for a more recent test period.[150]

73. The court found that the Commission had come "very close to an admission that it did err in refusing to order reopening and updating, of an admittedly stale record." Based on what the court found to be the Commission's illegal action,[151] it "command[ed]" that the Commission provide retroactive relief to put the complainant in the same position it would have occupied if the Commission had acted 112 days earlier.[152] The court essentially required that the Commission assume that all stages of the proceeding remained constant, so that the resulting order would have occurred 112 days earlier without the legal error.

74. This proceeding is not similar to *Tennessee Valley*. Here, the Commission did not itself recognize relatively quickly that it committed error. The court's initial remand found only that the Commission had failed to justify its order dismissing the complaint in light of precedent, and it permitted the Commission to provide an alternate dismissal of the complaint based on a reasoned explanation. The fact that the Commission instead chose to establish a section 206 hearing does not reveal a legal error of the type the court found dispositive in *Tennessee Valley*. Moreover, there is a vast difference between the

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[149] 16 U.S.C. § 824e(a).

[150] *Tennessee Valley*, 470 F.2d at 449-450.

[151] *Id.* at 452.

[152] *Id.* at 453.

Commission's correction of its own error in 112 days and the 1,460 days of retroactive relief requested here. With a four-year time delay, it is difficult to assume that the case timing would have remained constant and that the proceeding would have taken the same path and reached the same conclusion that it would have if it had begun four years earlier. The additional four years provides an opportunity for parties to update the record and Commission jurisprudence itself can change, and has sometimes dramatically changed, over a four-year period. All of this may influence the outcome of the Commission order on remand.[153]

75. While the Commission's initial dismissal of the complaint contributed to the delay, section 206(b) proceedings can and often do last for extended periods of time due to a variety of factors, and customers are not protected from excessive charges during that period, with the potential exception of the 15-month refund period provided for in section 206(b).[154] In addition, while one could argue that parties had notice that the Commission's dismissal of the complaint might be overturned, there was no notice as to when during the period of appeal and remand their transactions might be subject to correction. As the court in *CAPUC* recognized, at some point the notice required to correct legal error becomes "more atmospheric than explicit."[155]

[153] *See*Opinion No. 468, 106 FERC ¶ 61,228, at P 69 (relying on data from the year 2000). The Commission's precedent also changed during this time period. For example, in 2002, prior to Opinion No. 468, the Commission found that adding back curtailed interruptible load to a system peak was unjust and unreasonable because adding interruptible load is inconsistent with the underlying rationale for allocating costs based on a system peak, and it would create a disincentive for customers to implement a load response program on their own systems because they will be charged for system costs regardless of whether they curtail load during system peaks. *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,005 (2002), *reh'g denied*, 102 FERC ¶ 61,275 (2003). After a voluntary remand, however, the Commission determined, as it did here, that retroactive refunds should not be permitted because ordering refunds would result in the transmission owners being unable to recover their legitimately incurred costs and because they could not alter decisions made in reliance on the previously accepted rate design. *Occidental*, 110 FERC ¶ 61,378.

[154] *Cf. Atlantic Refining Co. v. Public Service Commission of NY*, 360 U.S. 378, 389 (1959) (stating that purchasers "have no protection from excessive charges collected during the pendency of a § 5 proceeding").

[155] *CAPUC*, 988 F.2d at 164. In other cases involving correction of legal error, the determination of the period over which refunds, and particularly surcharges, would be owed is not so indeterminate. In cases under NGA section 4 or FPA section 205, parties

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76. While other cases cite *Tennessee Valley* for the proposition that the Commission can act retroactively to correct its legal error, none of the other cases that the Louisiana Commission cites utilize a hypothetically created effective date, much less one that is four years earlier. Other decisions indicate that for a remedy to be prospective, the starting date for the remedy must be determined by the date on which the Commission has found the rate or practice to be unjust and unreasonable. In *Office of Consumers' Counsel v. FERC*,[156] the court affirmed the Commission's finding that certain pipeline practices were imprudent under NGA section 5, but it found that the Commission erred in failing to impose a remedy for these violations. On remand, the Commission did not impose a retroactive remedy, contending that because NGA section 5 is prospective, the Commission could not determine what remedies to impose for the pipeline's section 5 violations until it first held a hearing to determine whether those violations continue at the present time. The court, however, determined that the Commission had misinterpreted the statutory language and that the prospective nature of the act would be honored as long as the Commission imposed remedies for the section 5 violations it had found as of the date of its opinion finding the violation.[157] In contrast, in this proceeding, it was not until Opinion No. 468, i.e., March 8, 2004, that the Commission ruled Entergy's inclusion of interruptible service in allocating costs was unjust and unreasonable.

77. Moreover, the courts have recognized that, in correcting legal error, the Commission not only can authorize refunds to customers that paid too much, but also authorize the pipeline or public utility to surcharge those customers that may have paid too little.[158] While the Louisiana Commission requests four years of refunds, it does not

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have clear notice when the disputed rate design or cost allocation takes effect. *See Transcontinental*, 54 F.3d 893 (date on which the pipeline initiated service); *Natural Gas Clearinghouse*, 965 F.2d 1066 (date on which rate took effect subject to notice). *CAPUC*, 988 F.2d at 164.

[156] 826 F.2d 1136 (D.C. Cir. 1987).

[157] *Id.* at 1139 (agreeing with the interpretation that a remedy imposed as of the date of the Commission opinion finding a violation is a prospective remedy within the meaning of section 5).

[158] *See Panhandle*, 95 F.3d 62, 73-74 (authorizing the Commission to surcharge customers that no longer shipped on the pipeline); *Transcontinental*, 54 F.3d at 899 (finding that the Commission could correct its legal error by allowing the pipeline to retroactively put into effect a rate design resulting in refunds to some customers and surcharges to others).

address whether the cost of those refunds could be recovered through retroactive surcharges and to whom. As discussed earlier, the ability of Entergy Arkansas retroactively to recover through surcharges the 15 months' worth of refunds is in question. Collection of over four years would be even more problematic, as are the customers' inability to revisit their past decisions.

78. In exercising our discretion as to whether to order refunds, we find for all the foregoing reasons that, under the facts of this case, refunds should not be paid for the hypothetical period starting four years earlier than the Commission's decision in Opinion No. 468.

The Commission orders:

The Louisiana Commission's requests for rehearing and for consideration of a new argument are denied, 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.