

123 FERC ¶ 61,188
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

Docket No. EL06-78-000

v.

Entergy Corporation and
Entergy Services, Inc.

ORDER ON COMPLAINT

(Issued May 20, 2008)

1. On May 31, 2006, the Louisiana Public Service Commission¹ (Louisiana Commission) filed a complaint, pursuant to section 206 of the Federal Power Act (FPA),² against Entergy Corporation³ and Entergy Services, Inc.⁴ (collectively, Entergy)

¹ The Louisiana Commission regulates public utilities operating in Louisiana (outside of Orleans Parish), the retail rates and services of Entergy Louisiana LLC (Entergy Louisiana), and the Louisiana operations of Entergy Gulf States, Inc.

² 16 U.S.C. § 824e (2000).

³ Entergy Corporation is a public utility holding company headquartered in New Orleans, Louisiana. At the beginning of this proceeding, its wholly-owned operating company subsidiaries were Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Louisiana, Entergy Gulf States, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (Operating Companies). It delivers electricity to approximately 2.6 million customers in portions of Texas, Arkansas, Louisiana and Mississippi. Effective January 1, 2008 Entergy Gulf States divided into Entergy Texas and Entergy Gulf States Louisiana.

⁴ Entergy Services, Inc. is a subsidiary of Entergy Corporation that provides various accounting, computer, legal and other services to the subsidiaries of the Entergy system. It acts as an agent for Entergy Corporation and for the Operating Companies,

(continued)

requesting that the Commission disallow the inclusion of incremental replacement costs of any sulfur dioxide (SO₂) emissions allowances that are currently provided for by the operations and maintenance (O&M) adder in the Entergy System Agreement's (System Agreement) Service Schedule MSS-3.⁵ In this order, we deny the complaint, finding that the Louisiana Commission has failed to demonstrate that Entergy's inclusion of SO₂ emissions allowances is no longer just and reasonable.

I. Background

2. In 1999, Entergy filed an amendment (SO₂ Amendment) to revise the O&M adder set forth in section 30.08(f) of Service Schedule MSS-3 of the System Agreement to include the incremental costs of any SO₂ emissions allowances used to generate energy exchanged among the Operating Companies.⁶ The purpose of the SO₂ Amendment was to provide for the recovery of SO₂ emissions allowance costs incurred in compliance with Title IV (the acid rain control title) of the Clean Air Act Amendments of 1990 (CAAA).⁷ Title IV of the CAAA established a regulatory mechanism designed to control acid rain by providing for the issuance of emissions allowances as a means of reducing SO₂ emissions levels by electric utilities.

3. The Environmental Protection Agency (EPA) issued emissions allowances, equal to the number of tons of SO₂ emissions authorized by the CAAA, to the owners of generating units. The EPA does not charge for the allowances that it issues. Allowances are not unit-specific and can be sold or traded. Congress created the allowance trading system in Title IV of the CAAA to enable SO₂ emissions reductions to occur at the lowest cost, by creating a national market for emissions allowances. Utilities have incentives to reduce SO₂ emissions so that they can use allowances to cover load growth, make additional off-system sales, or sell or trade allowances on the open market.

which are parties with Entergy to the System Agreement, in matters related to the System Agreement before the Commission.

⁵ The Entergy system has operated over 50 years under the System Agreement and its predecessor agreements, which acts as an interconnection and pooling agreement, provides for joint planning, construction and operation of the Operating Companies' facilities, allocates costs among the Operating Companies and maintains a coordinated power pool among the five companies.

⁶ See Entergy Application, Docket No. ER00-432-000 (Nov. 1, 1999).

⁷ Pub. L. No. 101-549, Title IV, 104 Stat. 2399, 2584, 42 U.S.C.A. § 7651, *et seq.*

Whatever steps a utility takes to comply with the CAAA will affect the cost of electric service. For example, if a utility installs new equipment, its capital costs will change; if a utility purchases low sulfur fuel, its energy costs will change; and if it buys emissions allowances, its operating costs will change.

4. On December 15, 1994, the Commission issued a policy statement⁸ to address the potential for utilities to recover the cost of emissions allowances through their wholesale rates. In the Policy Statement, the Commission explained that it would allow the recovery of incremental costs of emissions allowances in coordination rates whenever the coordination rate also provides for recovery of other variable costs on an incremental basis.⁹ The Commission also found that the cost to replace an allowance is an appropriate basis upon which to establish incremental cost.¹⁰ The Commission added that if a utility uses up an allowance for the benefit of an off-system customer, the utility can charge the customer for the replacement cost of the allowance even though it paid nothing for the allowance.

5. As noted, subsequent to the Commission's issuance of the Policy Statement allowing for the recovery of incremental costs of emissions allowances in coordination rates, Entergy filed in Docket No. ER00-432-000 the SO₂ Amendment to its System Agreement to provide that each Operating Company would be compensated for emissions allowances used to generate energy exchanged among them. Service Schedule MSS-3 sets forth the provisions governing the exchange and pricing of energy among the Operating Companies, and provides that the Operating Company that supplies energy to the pool is reimbursed for the current estimated cost of fuel plus an adder as determined

⁸ See *Policy Statement and Interim Rule Regarding Ratemaking Treatment of the Cost of Emissions Allowances in Coordination Rates*, 59 Fed. Reg. 65,930, FERC Stats. & Regs. ¶ 31,009 (1994) (Policy Statement).

⁹ Policy Statement, FERC Stats. & Regs. ¶ 31,009 at 31,207. The Commission defined coordination transactions as sales or exchanges of specialized electricity services that allow buyers to realize cost savings or reliability gains that are not attainable if they rely solely on their own resources. For sellers, these transactions provide opportunities to earn additional revenue, and to lower customer rates, from capacity that is temporarily excess to native load capacity requirements. Policy Statement, FERC Stats. & Regs. ¶ 31,009 at n.28.

¹⁰ *Id.*

by the formula set forth in section 30.08(f) of the System Agreement.¹¹ Service Schedule MSS-3 includes a methodology for pricing energy exchanged among the Operating Companies and provides for an after-the-fact, hour-by-hour allocation of the cost of energy from an Operating Company whose generation provided energy in excess of that company's load to an Operating Company that produced less than its load. The O&M adder is designed to reimburse the producing company for the incremental O&M costs associated with the generation of additional energy. In the SO2 Amendment, Entergy revised the formula so that incremental replacement costs of SO2 emissions allowances would be recovered through the adder.¹²

6. On December 28, 1999, the Commission accepted Entergy's SO2 Amendment filed in Docket No. ER00-432-000,¹³ finding that the amendment satisfied the requirements of the Policy Statement on the calculation and recovery of SO2 emissions allowance costs. In the SO2 Order the Commission stated that the Louisiana Commission did not allege that Entergy's SO2 Amendment violated the requirements of the Policy Statement, but rather that the System Agreement could not be amended at all, absent a showing that the "rough equalization" of costs among the Operating Companies has been upset.¹⁴ Because that issue was already before the Commission in a different proceeding, the Commission made its acceptance of the amended tariff subject to the outcome of the Louisiana Commission's complaint in Docket No. EL95-33-000, in which the rough equalization issue was being decided, and subject to refund. No party requested rehearing of the SO2 Order.

¹¹ *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305, at 62,660 (1995), *reh'g denied*, 32 FERC ¶ 61,425 (1985).

¹² The SO2 Amendment included in the O&M adder a weekly calculation of the incremental SO2 emission allowance replacement cost.

¹³ *Entergy Servs., Inc.*, 89 FERC ¶ 61,331, at 62,004 (1999) (SO2 Order).

¹⁴ SO2 Order, 89 FERC ¶ 61,331 at 62,205.

7. In April 2001, in Docket No. EL95-33-000, which was consolidated¹⁵ with Docket No. EL00-66-000 (Docket No. EL00-66 proceeding),¹⁶ parties did not pursue the “rough equalization” argument in their post-trial briefs, and agreed that Entergy was not required to show a disruption of rough production cost equalization among the Operating Companies.¹⁷ In the resulting order, Opinion No. 468,¹⁸ the Commission rejected the argument that the merits of the SO₂ issue were before the presiding judge and found that the parties had agreed to defer the SO₂ issue to Docket No. EL01-88-000.¹⁹ However, on rehearing in Opinion No. 468-A, the Commission held that because the Louisiana Commission did not raise the SO₂ issue in Docket No. EL01-88-000 until after an initial decision in that proceeding had been issued, thus foreclosing consideration of the issue at hearing, Docket No. EL01-88-000 was no longer a suitable forum to resolve the issue.²⁰ The Commission added that the Louisiana Commission could renew the issue in the next case Entergy filed regarding the System Agreement, or could file a complaint raising the

¹⁵ *Louisiana Pub. Serv. Comm’n v. Entergy Services, Inc.*, 93 FERC ¶ 61,013 (2000) (order consolidating dockets).

¹⁶ Docket No. EL00-66-000 was a case involving a complaint by the Louisiana Commission concerning amendments to the System Agreement to accommodate retail competition.

¹⁷ Staff April 5, 2001 Post-Trial Br. at 80, Docket No. EL00-66-000; Entergy April 12 Reply Brief at 34, Docket No. EL00-66-000; Louisiana Commission April 5 Post-Trial Brief at 68-69, Docket No. EL00-66-000 (arguing that a just and reasonable, not a disruption, standard, applies).

¹⁸ *Louisiana Pub. Serv. Comm’n v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004) (Opinion No. 468), *reh’g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005) (Opinion No. 468-A).

¹⁹ On June 14, 2001, the Louisiana Commission had filed a complaint in Docket No. EL01-88-000, claiming that the Entergy System Agreement no longer provides rough equalization of costs among the Operating Companies. The complaint resulted in Opinion Nos. 480 and 480-A. *Louisiana Pub. Serv. Comm’n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005) (Opinion No. 480), *aff’d*, *Louisiana Pub. Serv. Comm’n v. Entergy Services, Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005) (Opinion No. 480-A).

²⁰ Opinion No. 468-A, 111 FERC ¶ 61,080 at P 26.

issue.²¹ Shortly after the issuance of Opinion No. 468-A, in April 2005, the Louisiana Commission attempted to raise the SO₂ issue in a pending case in Docket No. ER05-696-000 wherein Entergy was proposing several modifications to Service Schedule MSS-1. The Commission stated that that proceeding was not the proper forum for the Louisiana Commission to raise the SO₂ issue and stated that the Louisiana Commission may file a complaint, as provided in Opinion 468-A.²²

8. The Louisiana Commission next filed its complaint in Docket No. EL01-88-004, arguing that it was the next case involving the System Agreement. The Commission disagreed and re-docketed the complaint in the instant docket.

II. Complaint

9. The Louisiana Commission argues that Service Schedule MSS-3 provides only for the recovery of actual costs, and that Entergy's SO₂ Amendment bills for allowances that have no actual cost. The Louisiana Commission argues that the System Agreement is an actual cost tariff, asserting that, in *Louisiana Pub. Serv. Comm'n v. FERC*, the court justified its approval of the automatic adjustment clause on the premise that under that clause ratepayers would be assured they were paying only for actual increases and decreases in costs.²³ The Louisiana Commission states that the Commission's approval of the automatic adjustment clause was premised on the cost-based nature of the formulas.²⁴

10. The Louisiana Commission further argues that Entergy, through the SO₂ Amendment, bills for incremental replacement costs of any SO₂ emissions allowances used to generate energy exchanged among the Operating Companies, even though these

²¹ *Id.*

²² *Entergy Services, Inc.*, 111 FERC ¶ 61,198, at P 18 (2005). The Louisiana Commission argued on appeal before the D.C. Circuit that the court should require the Commission – in the docket underlying its appeal – to pass judgment on the Louisiana Commission's arguments regarding SO₂ emissions allowances. The court held that the Commission had the discretion to defer consideration of the SO₂ issue to another proceeding. *Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 513 (2007).

²³ Louisiana Commission Complaint at 6 (citing *Louisiana Pub. Serv. Comm'n v. FERC*, 688 F.2d 357, 361 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983)).

²⁴ *Id.* (citing *Middle South Servs., Inc.*, 16 FERC ¶ 61,101 (1981)).

allowances have no actual cost.²⁵ The Louisiana Commission points to exhibits from previous proceedings to demonstrate that Entergy representatives have previously stated that the SO2 Amendment seeks to compensate sellers into the Service Schedule MSS-3 pool for a lost “opportunity” to sell the allowances, which have no cost, into the open market.²⁶ The Louisiana Commission further argues that Entergy has confirmed that, under the SO2 Amendment, the selling operating company would bill for emissions allowances replacement costs even if the seller does not need to purchase any allowances.²⁷

11. The Louisiana Commission further argues that no allowance costs should be recovered from Service Schedule MSS-3 customers unless and until the energy taken from the pool by those customers causes Entergy to exceed the allowances allocated to it under the CAAA. The Louisiana Commission argues that Entergy was allocated sufficient allowances to produce the energy that will be utilized by the Operating Companies from the MSS-3 pool. It contends that Entergy’s original application did not allege or demonstrate how the Operating Companies could cause Entergy to incur excess allowance costs, and that the principle of cost-causation should preclude Entergy’s SO2 Amendment until Entergy makes such proof.

12. The Louisiana Commission also argues that Entergy selectively reflects SO2 allowance lost payments and receipts in its retail jurisdictions in order to maximize profits to shareholders. The Louisiana Commission argues that Entergy Arkansas, which sends bills for its SO2 allowance costs through Service Schedule MSS-3 and receives bills for relatively little of this cost, does not reflect the net revenues as a credit to retail rates.²⁸ The Louisiana Commission contends that the fact that it must permit recovery of the SO2 allowance costs billed through Service Schedule MSS-3 in Louisiana, which are not in turn credited to retail rates in Arkansas, accomplishes an unjust and unreasonable enrichment of Entergy shareholders. The Louisiana Commission adds that Entergy’s inconsistent treatment of SO2 allowance cost payments and receipts in its retail jurisdictions permits Entergy to maximize profits by charging certain ratepayers for a non-existent cost and retaining the net revenues received for these costs in certain jurisdictions, including Arkansas.

²⁵ Louisiana Commission Complaint at 7.

²⁶ *Id.* (citing Docket No. EL95-33-000, Ex. 235 at 114-15).

²⁷ *Id.*

²⁸ *Id.* at 10.

13. The Louisiana Commission also seeks refunds, arguing that in the SO₂ Order the Commission conditionally accepted the SO₂ Amendment subject to refund.

III. Notice of Filings and Responsive Pleadings

14. The Louisiana Commission's complaint was initially filed in Docket No. EL01-88-004, and was re-docketed in Docket No. EL06-78-000. On June 7, 2006, Entergy filed a request for an extension of time to file a response. On June 13, 2006, the Commission granted the extension of time, with protests and interventions due on or before July 10, 2006. Notices of intervention were filed by the Arkansas Public Service Commission (Arkansas Commission) and the Mississippi Public Service Commission. Occidental Chemical Corporation, Arkansas Electric Energy Consumers, Inc., the Attorney General of the State of Arkansas and the Louisiana Energy Users Group filed timely motions to intervene. Entergy and the Arkansas Commission filed answers to the complaint. The Louisiana Commission and Entergy filed answers to the answers.

A. Answers to the Complaint

15. Entergy responds that the Commission ruled on the merits of the SO₂ Amendment in the SO₂ Order, finding that the SO₂ Amendment was just and reasonable, the SO₂ Amendment satisfied the Policy Statement, and no circumstances exist that would change the Commission's finding.²⁹ Entergy argues that the Commission cannot depart from its prior orders without explaining the reasons for its departure. Further, Entergy contends that if the Commission were to change its finding with respect to the SO₂ Amendment to Service Schedule MSS-3 at this time, its decision would have an industry-wide effect upon the treatment of the cost of all SO₂ emissions allowances in Commission tariffs.

16. Entergy argues that the Louisiana Commission's argument that Service Schedule MSS-3 is designed to recover actual costs ignores longstanding Commission policy. Entergy argues that, in the Policy Statement, the Commission specifically allows recovery of the incremental costs of emissions allowances in coordination rates whenever the coordination rate also provides for recovery of other variable costs on an incremental basis.³⁰

²⁹ SO₂ Order, 89 FERC ¶ 61,331 at 62,005.

³⁰ Entergy Answer at 12 (citing Policy Statement, FERC Stats. & Regs. ¶ 31,009, at 31,207).

17. Entergy disputes the Louisiana Commission's contention that the O&M adder is based on actual cost. Entergy contends that the O&M adder is designed to reimburse the supplying company for the incremental O&M costs associated with the production of additional energy. Entergy further argues that the Louisiana Commission's argument that SO2 emissions allowances costs are non-existent opportunity costs conflicts with the history of SO2 emissions allowances rate treatment. Entergy argues that the Commission has allowed the accounting treatment and recovery of replacement costs of the SO2 emissions allowances, even though the EPA's initial allocations of SO2 allowances were at no charge.³¹

18. In response to the Louisiana Commission's arguments about retail rate impacts, Entergy argues that SO2 emissions allowances do not have a non-existent cost. Entergy states that the Commission considered in the Policy Statement and subsequent orders the argument that emissions allowances spent generating electricity for others must be replaced and that the cost of replacement can be based on the index price. Entergy contends that the fact that SO2 emissions allowance revenues are not reflected as credits in retail rates does not mean that a utility can maximize profits for its shareholders. Entergy states that replacement allowances may have to be purchased from the market at a higher cost than that reflected in the Service Schedule MSS-3 price. Entergy argues that the Louisiana Commission, however, assumes that the difference between the replacement cost and the Service Schedule MSS-3 price will always be positive.

19. Entergy argues that the Commission should not provide refunds as requested by the Louisiana Commission. Entergy argues that the Louisiana Commission's claim is unsupported in its pleading. Entergy further argues that refunds back to the SO2 Order are inappropriate because the Louisiana Commission has filed a new complaint under section 206, which does not permit a refund effective date earlier than the date a complaint is filed.

20. Entergy also argues that the Commission should deny the complaint without a hearing, arguing that the Louisiana Commission has raised no issues of material fact. Entergy argues that the sole arguments raised by the Louisiana Commission are legal issues concerning whether the SO2 Amendment violates the FPA, despite the Commission's findings in the SO2 Order.

21. The Arkansas Commission also filed an answer, arguing that because the Commission has already found that the SO2 Amendment meets the requirements of the

³¹ Entergy Answer at 14 (citing *Southern Co. Services, Inc.*, 69 FERC ¶ 61,437 at 62,555 (1994) (*Southern*)).

Policy Statement and is therefore just and reasonable, the complaint should be dismissed.³²

B. Answers to Answers

22. In its answer, the Louisiana Commission states that the SO₂ issue has not been decided already by the Commission. It argues that the Commission made clear in Opinion No. 468 that the matter had not been decided, and instead referred the matter to a new docket. The Louisiana Commission states that the Commission denied relief to the Louisiana Commission “without prejudice,” so that the matter could be raised again.

23. The Louisiana Commission also argues that Service Schedule MSS-3, like other service schedules, is designed to collect actual average costs. It contends that that schedule is not an incremental cost tariff, but instead provides recovery of the weighted average cost per kWh of electricity. The Louisiana Commission contends that the fact that the tariff includes an adder to collect incremental O&M costs along with average fuel cost does not make it a rate that is priced on incremental cost. It further argues that in *Southern*,³³ the Commission approved the billing of SO₂ emissions allowances replacement costs in tariffs that bill for variable costs on an incremental basis, which, the Louisiana Commission contends, is not the case here.

24. The Louisiana Commission argues that Entergy does not contend that it has ever purchased SO₂ emissions allowances. The Louisiana Commission contends that Entergy does not dispute the allegation that the allowances are allocated to Entergy at zero cost, a proposition conceded by the company at the hearing in Docket No. EL95-33-000.

25. The Louisiana Commission reiterates that the Commission made its finding in the SO₂ Order subject to the outcome of Docket No. EL95-33-000, and subject to refund. It argues that in Opinion No. 468, the Commission declined to hold that the issue had been decided. The Louisiana Commission notes that in Opinion No. 468-A, the Commission reserved the issue “without prejudice,” and contends that removal of the refund condition would prejudice the Louisiana Commission.³⁴ The Louisiana Commission argues that the refund condition did not expire when the Commission ruled that the issue should be

³² Arkansas Commission Answer at 3.

³³ *Southern*, 69 FERC ¶ 61,437 (1994).

³⁴ Louisiana Commission Answer at 13 (citing Opinion No. 468-A at P 26).

decided in a new docket, because the Commission stated that the Louisiana Commission could renew the issue and did not remove the refund condition.

26. Entergy filed a response requesting that the Louisiana Commission's answer be disregarded.

IV. Discussion

A. Procedural Matters

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they provided information that assisted us in our decision-making process.

B. Commission Determination

28. In the SO₂ Order, the Commission found that the SO₂ Amendment satisfied the Policy Statement, and stated that it was making its acceptance subject to one issue:

We find that Entergy's amendment to its System Agreement satisfies the requirements of the Policy Statement and seeks only to allocate emissions allowance costs among its affiliated companies. Moreover, the Louisiana Commission does not allege that Entergy's amendment violates the requirements of the Policy Statement, *but rather argues that the System Agreement cannot be amended at all, absent a showing that the "rough equalization" of costs among the operating companies has been upset*. As discussed above, this issue is currently before the Commission and therefore, we will accept Entergy's emissions allowance amendment for filing, subject to the outcome of Docket No. EL95-33-000 insofar as the amendment satisfies the requirements of the Policy Statement.³⁵

29. In other words, the Commission made the SO₂ Order subject to the outcome of another proceeding – Docket No. EL95-33-000 (which, as noted above, was later consolidated with Docket No. EL00-66) – only with respect to the issue of whether the

³⁵ SO₂ Order, 89 FERC ¶ 61,331 at 62,004 (emphasis added).

System Agreement can be amended absent a showing that rough equalization has been disrupted. However, in the Docket No. EL00-66 proceeding, the parties did not pursue that issue. In fact, in their post-trial briefs in the Docket No. EL00-66-000 proceeding, the parties agreed that Entergy is not required to show a disruption of rough production cost equalization before it can amend the System Agreement under section 205.³⁶ Thus, the conditional acceptance in the SO2 Order became unconditional following the end of the Docket No. EL00-66-000 proceeding.³⁷

30. In addition, neither the Louisiana Commission nor any other party sought rehearing of the SO2 Order, with respect to any issue, including whether the SO2 Amendment satisfied the requirements of the Policy Statement. Thus, contrary to any implication by the Louisiana Commission, the Commission's determination that Entergy's SO2 Amendment to its System Agreement satisfied the requirements of the Policy Statement was final.

31. The Commission later found, in a subsequent proceeding in Docket No. ER05-696-000, that the Louisiana Commission was free to file a complaint regarding the SO2 issue as provided in Opinion No. 468-A, resulting in the instant docket.³⁸ We find that the Louisiana Commission has failed to demonstrate in its complaint that the SO2 Amendment is now unjust and unreasonable or unduly discriminatory or preferential. Under section 206 of the FPA, the party advocating a change to existing rates must demonstrate that the existing rate is unjust, unreasonable, unduly discriminatory or preferential, and that the proposed alternate rate is just and reasonable.³⁹ The Louisiana Commission has failed to make the required showing. Rather, the Louisiana Commission's arguments all go to its assertion that the Commission should not have allowed the SO2 Amendment in the first place. In essence, their arguments are an inappropriate collateral attack on the Commission's SO2 Order. However, even if the SO2 Amendment issue had not been resolved in the SO2 Order and we were to address the Louisiana Commission's arguments, we would find, contrary to the Louisiana

³⁶ See supra note 17.

³⁷ *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004) (Opinion No. 468), *reh'g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005) (Opinion No. 468-A).

³⁸ *Entergy Services, Inc.*, 111 FERC ¶ 61,198, at P 18 (2005).

³⁹ See *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002), *aff'd*, 329 F.3d 856 (D.C. Cir. 2003).

Commission's argument, that it would be appropriate to recover the costs of SO₂ emissions allowances under the System Agreement. The Commission has explained that the O&M adder of Service Schedule MSS-3 provides for recovery of incremental costs. In fact, in Opinion No. 234, with respect to the O&M adder of Service Schedule MSS-3, the Commission explained that: "The MSS-3 adder is designed to reimburse the producing company for the incremental O&M costs associated with the production of additional energy."⁴⁰

32. Because the O&M adder is an incremental cost tariff, it meets the criteria specified in the Policy Statement for recovery of emissions allowance costs. In the Policy Statement, the Commission explained that it would allow the recovery of incremental costs of emissions allowances in coordination rates whenever the coordination rate also provides for recovery of other variable costs on an incremental basis. We note that transactions under Service Schedule MSS-3 meet the Commission-specified criteria for coordination service. For sellers, these transactions provide opportunities to earn additional revenue, and to lower customer rates, from capacity that is temporarily excess to native load capacity requirements.⁴¹ Service Schedule MSS-3 prices energy exchanged among the Operating Companies, allocating the cost of energy hour-by-hour that is provided by an Operating Company whose generation provided energy in excess of that company's load to an Operating Company that produced less than its load. Transactions under Service Schedule MSS-3 are thus coordination service, and the SO₂ Amendment was properly included as part of the Service Schedule MSS-3 formula that was designed to recover incremental O&M costs.

33. In addition to mischaracterizing the nature of the System Agreement, the Louisiana Commission also mischaracterizes the way the System Agreement treats SO₂ emissions allowances costs. Contrary to the Louisiana Commission's contention that

⁴⁰ In Opinion No. 234, the Commission explained that Service Schedule MSS-3 contains provisions governing the exchange and pricing of energy among the Operating Companies. Energy is allocated on an hourly basis from the lowest cost sources, first to the loads of the companies owning the sources and second to the pool. Section 30.08 of Service Schedule MSS-3 provides for hourly payments to an Operating Company for energy produced in excess of its load requirements. The Operating Company is to be reimbursed for the cost of fuel plus, in some instances, the O&M adder. Incremental energy cost rates generally include fuel costs with a fixed adder and are frequently set on an hourly basis, as in the case of Service Schedule MSS-3. Opinion No. 234, 31 FERC ¶ 61,305 at 61,660.

⁴¹ Policy Statement, FERC Stats. & Regs. ¶ 31,009 at n.28.

SO2 emissions allowances are “opportunity costs” that should not be recovered under the System Agreement, the Commission in the Policy Statement allowed the accounting treatment and recovery of replacement costs of SO2 emissions allowances, even though the CAAA made it clear that the EPA’s initial allocations of SO2 allowances would be at no charge.⁴² The Commission also found that whatever steps a utility takes to comply with the CAAA, including the purchase of emissions allowances, will affect the cost of electric service and the utility’s operating expenses will change.⁴³ Thus, the purchase of emissions allowances represents actual operating expenses that should be recovered. In *Southern*, which is analogous to the instant case because it involves a pooling agreement and the use of incremental costs to replace an allowance, the Commission, in accepting an SO2 amendment similar to Entergy’s, stated that the replacement of allowances in the future represents another cost of providing electric service. In that order, the Commission stated that if a utility uses an allowance for the benefit of one of its wholesale customers, the utility can charge that customer for the replacement costs of the allowance even though it paid nothing for the allowance.⁴⁴

34. The Louisiana Commission also argues that the SO2 Amendment has an unjust impact on retail ratemaking. This contention appears related to the Louisiana Commission’s view that SO2 costs are not actual costs and, accordingly, should not be passed on to consumers through fuel adjustment clauses at the state level. However, the Commission has determined that actions taken by utilities to comply with the CAAA are legitimate costs of service that can be recovered from customers.⁴⁵ Pursuant to the CAAA, emissions allowances are a resource necessary for the generation of power and, thus, contrary to the Louisiana Commission’s claims, the replacement costs of emissions allowances are an actual cost of service. The Louisiana Commission’s argument on retail impact, in essence, is an argument over the costs and revenues that are passed through fuel adjustment clauses at the state level. However, how the Arkansas Commission passes through costs and revenue credits to retail customers is not an issue subject to this Commission’s jurisdiction. Accordingly, we reject the Louisiana Commission’s argument that the Commission should disallow the recovery of SO2 emissions allowance replacement costs due to alleged unjust impacts on retail ratepayers.

⁴² *Id.* at 31,201, 31,207.

⁴³ *Id.* at 31,202.

⁴⁴ *Southern*, 69 FERC at 62,560-61.

⁴⁵ Policy Statement, FERC Stats. & Regs. ¶ 31,009 at 31,207.

35. The Louisiana Commission also requests refunds back to December 28, 1999, the date of the SO2 Order. As we explained above, that proceeding has ended, and no refund obligation remains in effect from that proceeding. Thus, we reject the Louisiana Commission's argument for retroactive refunds. Moreover, even if we were to find in this proceeding in favor of the Louisiana Commission on the merits, which we do not, the earliest refund date that we would have been able to establish would have been May 31, 2006, the date the complaint in this proceeding was filed.⁴⁶

The Commission orders:

The Louisiana Commission's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁶ See section 206(b) of the FPA. In addition, given the outcome of this order, we find that the Louisiana Commission's request that the Commission conduct a hearing is now moot.