

139 FERC ¶ 61,240
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

v.

Docket No. EL09-61-001

Entergy Corporation,
Entergy Services, Inc.,
Entergy Louisiana, L.L.C.,
Entergy Arkansas, Inc.,
Entergy Mississippi, Inc.,
Entergy New Orleans, Inc.,
Entergy Gulf States Louisiana, LLC, and
Entergy Texas, Inc.

OPINION NO. 521

ORDER AFFIRMING IN PART AND REVERSING IN PART INITIAL DECISION
AND ESTABLISHING FURTHER HEARING PROCEDURES

(Issued June 21, 2012)

1. This case is before the Commission on exceptions to an Initial Decision issued on December 9, 2010.¹ At issue is whether Entergy Corporation (Entergy) and its affiliates violated Entergy's Commission-approved generation and transmission pooling arrangement, the Entergy System Agreement (System Agreement), when affiliate Entergy Arkansas, Inc. (Entergy Arkansas) sold excess electric energy to third-party power marketers and others that are not members of the System Agreement.

¹ *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 133 FERC ¶ 63,008 (2010) (Initial Decision).

2. On December 7, 2009, the Commission issued an order setting a complaint filed by the Louisiana Public Service Commission (Louisiana Commission) for hearing and settlement judge procedures.² The Louisiana Commission's complaint, filed pursuant to section 206 of the Federal Power Act (FPA),³ alleges that Entergy and its affiliates⁴ violated the System Agreement and engaged in imprudent utility conduct when Entergy Arkansas sold excess electric energy to third-party power marketers and others that are not members of the System Agreement for the benefit of its shareholders over the period 2000 through 2009 (the Opportunity Sales).⁵ The Louisiana Commission requests that the Commission order refunds and prospectively bar similar opportunity sales. The Presiding Administrative Law Judge's (Presiding Judge's) Initial Decision held that the Opportunity Sales and related cost allocations violated the System Agreement and ordered refunds. As discussed below, we affirm in part and reverse in part the Initial Decision and establish further hearing procedures to determine refunds.

3. Specifically, we find that while the System Agreement is ambiguous, section 4.05 provides authority for individual Operating Companies to make opportunity sales for their own account. We also find that section 30.03 does not provide authority for individual Operating Companies to allocate the energy associated with such opportunity sales as part of their load, and that, rather, section 30.04 provides the allocation authority for individual Operating Companies to make opportunity sales for their own account. Because the Entergy Operating Companies allocated lower cost energy to the

² *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 129 FERC ¶ 61,205 (2009) (Hearing Order).

³ 16 U.S.C. § 824e (2006).

⁴ Entergy is a registered public utility holding company. The Complaint also names as respondents an Entergy services affiliate, Energy Services, Inc. (Entergy Services), and six Entergy affiliates that are public utility operating companies: Entergy Arkansas; Entergy Louisiana, L.L.C. (Entergy Louisiana); Entergy Mississippi, Inc.; Entergy New Orleans, Inc. (Entergy New Orleans); Entergy Texas, Inc.; and Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana) (collectively, Operating Companies).

⁵ In this order, the capitalized phrase "Opportunity Sales," refers to the disputed off-system sales of energy by Entergy Arkansas to third-party power marketers and others that are not members of the System Agreement for its shareholders' behalf from 2000 through 2009. The phrase "opportunity sales" in lower case in this order refers to the general practice of public utilities making off-system sales of energy for their own behalf.

Opportunity Sales pursuant to section 30.03, rather than relatively higher cost energy pursuant to section 30.04, we find that Entergy violated the System Agreement. We establish further hearing procedures to determine refunds.

I. Background

4. Entergy and its affiliates are a multi-state, affiliated group of companies that share the costs and benefits of power generation and bulk transmission. Many aspects of this relationship are governed by the System Agreement, a 1982 contract between the Operating Companies and Entergy Services that provides the contractual basis for planning and operating the Operating Companies' generation and bulk transmission facilities on a coordinated, single-system basis. The System Agreement contains six articles with numerous provisions that govern, *inter alia*, objectives, obligations, and key terms under the System Agreement. The System Agreement is appended by seven Service Schedules, numbered as Service Schedule MSS-1 through MSS-7, that govern the basis for compensation for the use of facilities and for the capacity and energy provided or supplied by one or more Operating Companies under the System Agreement. The Service Schedules contain formulas that provide for the allocation of costs and revenues among the Operating Companies.

5. In Opinion Nos. 485 and 485-A in Docket No. ER03-583-000,⁶ the Commission largely approved an Entergy proposal to improve production cost equalization between the Operating Companies through adoption of new power purchase agreements. In the course of that proceeding, the Louisiana Commission discovered that Entergy Arkansas had been selling some excess electric energy generated by its low-cost, owned-and-operated generation facilities to a variety of third parties that were neither members of the System Agreement nor native load customers for the benefit of Entergy Arkansas shareholders (that is, the Opportunity Sales). The Opportunity Sales were allegedly made through a series of short-term transactions of durations generally between one week and one month and without first offering the energy to the other Operating Companies.⁷

6. In Docket No. ER03-583-000, the Louisiana Commission argued that the Opportunity Sales violated section 3.05 of the System Agreement.⁸ The presiding judge

⁶ *Entergy Services Inc. and EWO Marketing, L.P.*, Opinion No. 485, 116 FERC ¶ 61,296 (2006), *aff'd*, Opinion No. 485-A, 119 FERC ¶ 61,019 (2007), *aff'd in relevant part sub nom. Louisiana Public Service Comm'n v. FERC*, 551 F.3d 1042 (2008).

⁷ See Complaint at 10-12, Att. C.

⁸ See Louisiana Commission Post-Hearing Brief in Docket No. ER03-583-000 at 52-82 (February 18, 2005). Section 3.05 states:

(continued...)

in that proceeding found that the Opportunity Sales did not trigger application of section 3.05.⁹ The Commission affirmed this decision in Opinion Nos. 485 and 485-A, finding that section 3.05 did not apply to the short-term sales at issue.¹⁰ On appeal, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) ruled that the issue of the propriety of the Opportunity Sales had not been properly set for hearing and that the presiding judge's and the Commission's rulings dismissing the Louisiana Commission's challenges to the sales were therefore non-binding *dicta*.¹¹ The D.C. Circuit stated that the Louisiana Commission was free to pursue its section 3.05 violation claim in a new proceeding at the Commission. On June 29, 2009, the Louisiana Commission filed a formal complaint that commenced the instant proceeding.

7. In its complaint, the Louisiana Commission sought a ruling that sales of electric energy by Entergy Arkansas to third-party power marketers and others that are not members of the System Agreement: (1) violated the provision of the System Agreement that prohibits sales of excess capacity and energy to third parties by individual Operating Companies absent an offer of a right of first refusal to the other Operating Companies; (2) violated the provisions of the System Agreement that allocate the energy generated by System resources; (3) imprudently denied the System and its ultimate customers the benefits of low-cost System generating capacity; and (4) imprudently impaired a Commission-ordered remedy to ensure rough equalization of production costs among the Operating Companies.¹²

It is the long term goal of the Companies that each Company have its proportionate share of Base Generating Units available to serve its customers either by ownership or purchase. Any Company which has generating capacity above its requirements, which desires to sell all or any portion of such excess generating capacity and associated energy, shall offer the right of first refusal for this capacity and associated energy to the other Companies under Service Schedule MSS-4 Unit Power Purchase.

⁹ *Entergy Services, Inc. and EWO Marketing, L.P.*, 111 FERC ¶ 63,077, at PP 181-182 (2005).

¹⁰ *See* Opinion No. 485, 116 FERC ¶ 61,296 at P 134, *aff'd*, Opinion No. 485-A, 119 FERC ¶ 61,019 at P 41.

¹¹ *Louisiana Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008).

¹² For a more detailed description of the complaint, *see* Hearing Order, 129 FERC ¶ 61,205 at PP 5-13.

8. The Louisiana Commission alleged that prior to the year 2000, individual Operating Companies generally sold excess energy for the joint account of all the Operating Companies at the System's incremental cost. The Louisiana Commission argued that Entergy Arkansas subsequently engaged in Opportunity Sales from Entergy Arkansas generation resources to third-party non-requirements customers at Entergy Arkansas's average cost for the benefit of Entergy Arkansas's shareholders. These sales were alleged to have derived from two primary sources: (1) sales from Entergy Arkansas's share of the Grand Gulf nuclear facility; and (2) sales from capacity made available when Entergy Arkansas lost wholesale requirements customers in the early 2000s due to competition. The Louisiana Commission contends that Entergy Arkansas made 5.5 million MWh of Opportunity Sales during the 2000 to 2009 period.¹³

II. Initial Decision

9. The Presiding Judge begins his discussion by addressing the purpose and methodology behind the System Agreement. The Presiding Judge explains that the System Agreement makes clear that the System was designed to realize economies of scale for the benefit of native load customers, not for off-system opportunity sales customers.¹⁴ The Presiding Judge further explains that those economies include lower prices for energy than the prices that the Operating Companies could achieve without cooperation throughout the System.¹⁵ The Presiding Judge states that section 3.09 of the System Agreement calls for the Operating Companies to "share in the benefits" of coordinated operations. He states such benefits include the availability of the lowest-cost energy on the System for use in supplying the needs of the customers who paid for the System's assets.

10. The Presiding Judge states that the parties agree upon a definition of "off-system" sale as "a sale out of the utility's control area" and define "control area" as "the area in which the utility controls the flow of energy and is responsible for it."¹⁶ The Presiding Judge further states that the Commission has defined opportunity sales as sales of excess generation not already committed to native load customers, made outside of the seller's home area, and which are made for an immediate economic benefit.¹⁷ The Presiding

¹³ Exh. LC-35 at 16.

¹⁴ Initial Decision, 133 FERC ¶ 63,008 at P 345.

¹⁵ *Id.* P 345 (citing Exh. LC-3 at 13, 44).

¹⁶ *Id.* P 346 (citing Tr. 479-80).

¹⁷ *Id.* (citing *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, Opinion No. 501, 123 FERC ¶ 61,047, at P 39 (2008) (*Golden Spread*)).

Judge adopts the Commission definition, and rejects Entergy's alternate definition for "opportunity sales,"¹⁸ and also adopts the parties' definition of "off-system sales" and "control area" for the purpose of the Initial Decision.

11. The Presiding Judge states that Entergy argues that section 4.05 of the System Agreement provides the authority for an Operating Company to make individual Operating Company off-system opportunity sales. Section 4.05 provides:

4.05 Sales to Others for the Joint Account of All the Companies

Sales of capacity and energy to others for which any Company does not wish to assume sole responsibility, shall, with the consent of or under conditions specified by the Operating Committee, be made by the Company having direct connection with such others, for the joint account of all the Companies, and the net balance derived from such sales shall be divided among the Companies as provided in the applicable Service Schedule.

12. The Presiding Judge states that Entergy believes that the phrase "does not wish to assume sole responsibility" provides all the authority Entergy needs to make the sales in question, and that such sales do not have to be for the joint account.¹⁹ The Presiding Judge states that "[t]his is illogical, and this initial faulty premise necessarily leads to further mischief, examined *infra*."²⁰ He further explains that Entergy's interpretation is incorrect because the title of the provision states that its subject matter is joint account sales, and the directive that such sales be made for the joint account of all the Operating Companies follows closely upon the phrase that Entergy believes to provide its sales authority.

¹⁸ Entergy defines opportunity sales to be "a sale to a third party for which there was not a preexisting obligation, and which is undertaken at a negotiated price that is perceived to be beneficial by both the buyer and seller." Exh. ESI-14 at 9:16-20.

¹⁹ Initial Decision, 133 FERC ¶ 63,008 at P 348 (citing Exh. ESI-14 at 31; Tr. 650).

²⁰ *Id.*

13. The Presiding Judge states that in the process of allocating resources to sales in the after-the-fact accounting process,²¹ the highest-cost dispatchable resources are allocated to joint account sales first, and the energy generated by those resources are sold off-system.²² The Presiding Judge states that he can fathom no rationale for treating the Opportunity Sales any differently than joint account sales in the allocation process and does not believe that they should be accorded preferential pricing treatment through allocation of low-cost resources, when compared to joint account sales.

14. The Presiding Judge notes, however, that the System Agreement affords protection for the System's pricing concerns for retaining the lowest cost resources for the potential use of native load customers whenever individual Operating Company off-system *firm* opportunity sales are at issue through section 3.05 of the System Agreement. Before an Operating Company can make firm off-system opportunity sales, it first must offer a right-of-first refusal to all of the Operating Companies. The Presiding Judge argues that this ensures that if the sale price is below the marginal cost of any "short companies," the capacity and energy will stay on the System rather than be used to meet the needs of an opportunity sale. The Presiding Judge maintains that section 3.05 is clear about this requirement, and finds that Entergy's Operating Committee, which administers the System Agreement, may not avoid it by adopting a blanket waiver of the offer of the right-of-first refusal. He argues that an offer must be given for each proposed firm sale. The Presiding Judge also finds that joint account sales of energy are not authorized by the System Agreement,²³ concluding in particular that section 30.04 (Energy for Sale to Others) "says nothing about joint account sales, and it takes a leap of faith to conclude that authority for such sales resides in this provision."²⁴

15. The Presiding Judge explains that section 4.05 concerns the "[s]ales of capacity and energy...." The Presiding Judge further explains that this phrase is accepted in the

²¹ Entergy witness Rainer explained that after the Entergy System is economically dispatched, and after all load has been served, "the resources and the responsibility for the cost of those resources, are allocated to the Operating Companies whose loads were actually served. An energy accounting process is conducted to, in effect, have the Operating Companies that are 'short' on energy in an hour compensate the 'long' Companies for the energy that was used to meet the short Companies' requirements. This Exchange Energy accounting is set out in Section 30.03 of Service Schedule MSS-3." Exh. ESI-1 at 7:16-22.

²² Initial Decision, 133 FERC ¶ 63,008 at P 353 (citing Tr. 592, 609).

²³ *Id.* PP 352-54.

²⁴ *Id.* P 352.

electric generation and distribution industry as referring to firm sales only.²⁵ The Presiding Judge notes that both Entergy and Trial Staff construe the term “capacity and energy” to allow energy-only joint account sales. The Presiding Judge states that although the System Agreement contains no authority for such sales in section 4.05 or anywhere else, the parties to the Agreement might want to consider amending the System Agreement to allow joint account sales because of their value to the System.

16. The Presiding Judge states that he finds that section 30.04 of Service Schedule MSS-3 of the System Agreement, and that section only, clearly contemplates the Operating Companies making off-system opportunity energy-only sales on their own behalf, and authorizes such sales.²⁶ The Presiding Judge states that section 30.04 provides the authority for the sales in question in this case, “in accordance with rate schedules on file with the Federal Energy Regulatory Commission.”²⁷ He adds that Rate Schedule SP is Entergy’s market-based rate authority and has been in effect since 1992. Amended in 1996, Rate Schedule SP now allows energy-only sales at negotiated prices outside of the Operating Companies’ control area.²⁸

17. However, the Presiding Judge finds that sections 3.02 and 3.09 make clear that the System is designed to reserve the lowest cost energy for the requirements customers of the individual Operating Companies.²⁹

18. Furthermore, the Presiding Judge states that although section 30.04 allows individual company off-system opportunity sales, the availability of low-cost energy to supply such sales is restricted by the requirements of section 30.03, “Allocation of

²⁵ *Id.* P 356 (citing Tr. 100; LC-47 at 6).

²⁶ *Id.* P 355. Section 30.04 (Energy for Sales to Others) states:

Energy used to supply others will be provided in accordance with rate schedules on file with the Federal Energy Regulatory Commission. A Company will be reimbursed for the current estimated cost of fuel used by the specific unit or units supplying the energy together with the adder determined in Section 30.08(f) on an hour by hour basis.

²⁷ *Id.* P 360 (citing Exh. LC-3 at 45).

²⁸ *Id.* (citing Exh. LC-47 at 73-74). *See* Entergy Services, Inc., FERC Electric Tariff, Fourth Revised Volume No. 4, Market-Based Rate Tariff 2.0.0 (July 14, 2010).

²⁹ *Id.* (citing Exh. LC-3 at 13 and 15).

Energy,” which establishes which sales take priority in the assignment of supply. Section 30.03 provides:

The energy from the lowest cost source available and scheduled as in section 30.02 above shall be allocated on an hourly basis, in the order of the following priorities: (a) first to the loads of the Company having such sources available . . . (b) second to supply the requirements of the other Companies’ Loads (Pool Energy).³⁰

19. The Presiding Judge further states that Service Schedule MSS-3, which contains section 30.03, provides for scheduling and controlling the System at the lowest reasonable cost of energy to all the Operating Companies. It requires least cost economic dispatch. The Presiding Judge states that he finds that once energy is allocated pursuant to section 30.03, any energy remaining is available for opportunity sales under section 30.04. The Presiding Judge adds that Entergy made the Opportunity Sales without regard to the requirements of section 30.03, thereby violating the System Agreement. Essentially, he explains, sections 30.03 and 30.04 should be read together so that under section 30.03, the lowest cost energy goes first to the Operating Companies that generate that energy, second to the pool, and third to sales to “others,” pursuant to section 30.04, at negotiated rates.³¹

20. The Presiding Judge states that he disagrees with Entergy’s position that section 30.03 provides authority for it to convert off-system opportunity sales to requirements sales, thereby allowing a “slice of the resources” at the Operating Company’s average cost to be assigned as the sale price. The Presiding Judge states that no such conversion is proper, as opportunity sales are not made to meet the System’s requirements, nor are they part of the System’s requirements.

21. The Presiding Judge states that Entergy acknowledges that the native load customers were not served using the cheapest power before opportunity sales were considered.³² The Presiding Judge states that while individual Operating Companies can and do make off-system opportunity sales, as were the sales in question, and while Entergy’s assertions as to all individual Operating Company sales being on-system sales

³⁰ *Id.* (Exh. LC-3 at 44-45).

³¹ *Id.* P 361.

³² *Id.* P 363 (citing Tr. 697 (emphasis added)).

“may be the reality of the Intra-System Billing accounting protocol,” nonetheless “it is not reality for the purposes of real-world dispatch, or for the Initial Decision.”³³

22. The Presiding Judge states that load responsibility is the Operating Company’s load that is used in the System Agreement to allocate costs. The Presiding Judge explains that Entergy thinks that if it includes load associated with off-system opportunity sales in its load responsibility, then these non-requirements opportunity sales are converted into requirement sales that are no different than a sale to a retail or wholesale requirements customer.³⁴ This is because, following Entergy’s logic, that sale becomes an on-system sale. The Presiding Judge states that requirements customers are those whom the Operating Companies have an obligation to serve. Both Entergy and the Louisiana Commission agree on a definition of “requirements sales” as “wholesale sales for which there is a tariff requirement.”³⁵ The Presiding Judge states that he agrees with this definition and that since there is no tariff requirement to serve off-system opportunity sales customers, it follows that sales to them cannot be considered requirements sales.³⁶

23. The Presiding Judge notes that Trial Staff argues that the term “requirements,” as used in the System Agreement, does not mean “native load.”³⁷ He adds that Trial Staff notes that section 4.01, which addresses obligations related to production facilities, uses the phrase “requirements of its own customers,” while section 30.03(b) uses the term “requirements” without the subsequent phrase “of its own customers.”³⁸ He also notes that Trial Staff alleges that the Commission in Opinion No. 234 “therein referred to an Operating Company’s obligation to meet ‘the requirements *of its own customers*,’ and not simply to its ‘requirements,’ to identify the needs of the class of ratepayers to which the obligation to serve attached.”³⁹ Unfortunately for Trial Staff’s argument, the Presiding Judge states, the Commission used the term “of its own customers” in Opinion No. 234 only in quoting section 4.01 of the System Agreement and did not use that phrase outside of the context of a quotation. It is clear, the Presiding Judge finds, that in Opinion

³³ *Id.*

³⁴ *Id.* P 364 (citing Exh. ESI-24 at 6).

³⁵ *Id.* (citing Tr. 419).

³⁶ *Id.*

³⁷ *Id.* P 365 (citing Trial Staff Reply Brief at 20).

³⁸ *Id.* (citing Exh. LC-3 at 16 and 44).

³⁹ *Id.* (citing Trial Staff Reply Brief at 21).

No. 234 the Commission did *not* draw a distinction between “requirements,” and “requirements of its own customers.”⁴⁰ Section 30.03(b), the Presiding Judge argues, uses the term “requirements” without “of its own customers” not to distinguish between native load and non-native load customers, but simply because of a drafting preference. The Presiding Judge finds that the provision, based on the context and the overall purpose of the System Agreement, clearly addresses native load requirements.⁴¹

24. The Presiding Judge states that section 2.20 of the System Agreement also uses the term “requirements.” He adds that the provision defines “Pool Energy” as “energy generated by a Company in excess of its own requirements . . . that goes to supply requirements of other Companies.”⁴² The Presiding Judge states that only through the context of the use of the term “Pool Energy” in section 30.03(b) does the definition become obvious. He adds that the “requirements” as used in section 2.20 can only mean requirements customers who are native load customers, and the terms “loads” in section 30.03(a) and “requirements” in section 30.03(b) must also refer to such requirements customers. Interpreting these terms to refer to non-requirements customers would allow cheap pool energy to leave the System through opportunity sales, to be replaced at higher incremental cost. The Presiding Judge states that this cannot be correct because the central purposes of the Agreement are to achieve economies for the benefit of the entire System and to preserve the cheapest resources for the benefit of native load customers.⁴³

25. The Presiding Judge states that Entergy began including opportunity sales in Entergy Arkansas’s responsibility ratio calculations following an April 27, 2001 meeting of the Operating Committee and that it is by Operating Committee fiat that Entergy’s accountants began including Opportunity Sales in Entergy Arkansas’s responsibility load. The Presiding Judge argues that this suggests that prior to 2001, the System accounts had been able to balance Entergy System resources and load without converting non-requirement sales to requirement sales.⁴⁴

⁴⁰ *Id.* (citing *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305, at 61,650 (1985)).

⁴¹ *Id.*

⁴² *Id.* P 366 (citing Exh. LC-3 at 11).

⁴³ *Id.*

⁴⁴ *Id.* P 369.

26. The Presiding Judge states that Entergy argues that the authority to add off-system opportunity sales to the load shape of the selling Operating Company is found in section 2.16 of the System Agreement, "Company Load Responsibility."⁴⁵ He adds that this provision is used to allocate fixed costs among the Operating Companies, and Entergy Arkansas increased its fixed costs by including its Opportunity Sales in the section 2.16 calculations.⁴⁶ The Presiding Judge says that this provision says nothing about Entergy's practice of adding Opportunity Sales loads to an Operating Company's load shape, nor does it explain why joint account sales should be treated any differently than Opportunity Sales in calculating System load or the load of individual Operating Companies. The Presiding Judge views the exclusion of interruptible sales in calculating Operating Company load responsibility in the System Agreement as a clarification in acknowledgment of the Commission's 2004 decision in Opinion No. 468, which settled a controversy over including interruptible load in company load responsibility.⁴⁷ The Presiding Judge states that Entergy's conversion of interruptible off-system opportunity sales to firm native load violates the System Agreement and contravenes Opinion No. 468.⁴⁸

27. The Presiding Judge states that if Entergy's interpretation of these System Agreement provisions is correct, which the Presiding Judge states that it is not, an Operating Company would be able to assign its average cost resource to an off-system opportunity sale and in so doing, that load would become requirements load.⁴⁹ The Presiding Judge states that, in generating the energy for such a sale, the System likely will use resources that are more expensive than the sale price.⁵⁰ The Presiding Judge finds that it is unjust and unreasonable and contrary to the System Agreement and Commission precedent for an Operating Company to sell low-cost energy off-system if such a sale forces the rest of the System to replace that energy with higher-cost resources, and that therefore, the Opportunity Sales were unjust and unreasonable.

⁴⁵ *Id.* P 370 (citing Exh. LC-1 at 61-63).

⁴⁶ *Id.* (citing Exh. S-1 at 12-13).

⁴⁷ *Id.* P 371 (citing Exh. LC-3 at 11; *Louisiana Pub. Comm'n, et al. v. Entergy Corp., et al.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004)).

⁴⁸ *Id.*

⁴⁹ *Id.* P 372 (citing Exh. LC-1 at 60).

⁵⁰ *Id.* (citing Exh. LC-47 at 55-6).

28. The Presiding Judge states that reserving the lowest cost energy first for the use of the Operating Companies generating that energy, and second for the pool, allows individual company opportunity sales under section 30.04 to be priced in a manner consistent with Commission precedent. In *Minnesota Power & Light Company*,⁵¹ the Commission faced similar issues, noting that “Minnesota had begun pricing off-system sales on the basis of low-cost spot market coal while assigning higher-cost contract coal to requirements customers.” The Commission stated that off-system sales generally are priced at the cost of incremental fuel used to meet the off-system load, since “[p]ricing an off-system sale by reference to the incremental fuel cost assures that the requirements customers pay no more than they would have paid had the off-system sale never occurred.”⁵²

29. The Presiding Judge also points out that in *Golden Spread*, the Commission stated its policy of preventing the “subsidization of shareholders at the expense of captive customers,” and observed that “[p]reventing such subsidization was the original reason for requiring that utilities price opportunity sales at a price that, at a minimum, made wholesale requirements customers economically indifferent to the sales.”⁵³

30. The Presiding Judge states that in contrast to Commission policy and precedent, Entergy allows the Operating Companies to sell into the off-system opportunity market without regard to the System’s requirements customers’ right to the low-cost energy on the System. The Presiding Judge states that Entergy interprets the System Agreement as allowing Operating Companies to engage in uneconomic behavior, relative to the economic welfare of the System.⁵⁴ The Presiding Judge contends that the Opportunity Sales have harmed the other Operating Companies by causing them to absorb the difference between the sale price of energy and a price that approximates replacement incremental cost.

31. The Presiding Judge states that Entergy acknowledges that the impact of the Opportunity Sales is to cause the System to have higher total production costs than the System would have without the sales, causing the System average cost to increase.⁵⁵ He

⁵¹ 47 FERC ¶ 61,064 (1989) (*Minnesota Power*).

⁵² Initial Decision, 133 FERC ¶ 63,008 at P 379 (citing *Minnesota Power*, 47 FERC at 61,183 n.2).

⁵³ *Id.* P 380 (citing *Golden Spread*, 123 FERC ¶ 61,047 at P 41).

⁵⁴ *Id.* P 381 (citing Tr. 791-792).

⁵⁵ *Id.* P 382 (citing Tr. 776).

explains that Entergy argues that this also is the result of the addition of native load when the new load is served through discounted rates.⁵⁶ However, argues the Presiding Judge, new native load also contributes to the fixed System costs through payment of demand charges, thereby providing a net benefit to the System, unlike the addition of the Opportunity Sales.⁵⁷

32. The Presiding Judge states that Entergy Arkansas has violated the principles underlying the System Agreement by assigning to Opportunity Sales the average energy cost associated with resources planned and built for requirements customers, without first assuring that requirements customers of the other Operating Companies have the System's low-cost energy available through the section 30.03 prioritization. The requirements customers on the System are supplied by a "slice of the resources," a pro-rata share of all of Entergy Arkansas's generation and purchases that is comprised primarily of low-cost baseload coal and nuclear generation.⁵⁸ The Presiding Judge states that the Opportunity Sales removed such generation from the pool energy, forcing the System to acquire higher cost replacement energy to serve requirements customers.

33. The Presiding Judge rejects Entergy's Intra-System Billing-related explanation for why off-system Opportunity Sales load automatically converts to requirements load.⁵⁹ Entergy asserts that the Intra-System Billing ledgers will not balance unless all off-system sales are deemed to be requirements sales. The Presiding Judge explains that adding back off-system Opportunity Sales to an Operating Company's requirements load for purposes of the Intra-System Bill is an accounting practice, and in no way drives the characteristics of an energy sale as a requirements or non-requirements sale. He states that an accounting definition cannot be used as justification for considering Entergy's off-system Opportunity Sales as requirements sales for any purpose other than calculating the Intra-System Billing.⁶⁰

34. The Presiding Judge states that Commission precedent belies the validity of Entergy's practice of concluding from its Intra-System Billing computations that load

⁵⁶ *Id.* (citing Entergy Initial Brief at 38-39).

⁵⁷ *Id.* (citing Louisiana Commission Reply Brief at 10).

⁵⁸ *Id.* P 383 (citing Exh. LC-1 at 52).

⁵⁹ The System allocates costs through the Intra-System Billing, which determines the "cost of the exchanges of energy among the companies and the cost of resources that are sold to joint account sales." *Id.* P 385 (citing Tr. 552).

⁶⁰ *Id.* P 389.

equals requirements load. The Presiding Judge states that the Commission has stated that individual Operating Company off-system Opportunity Sales are non-requirements sales.⁶¹ As such, they could not be included in a company's requirements load. The Presiding Judge states that the Commission has approved accounting treatment for accounting purposes only, which recognizes that accounting treatment is not necessarily related to operational realities or other components of ratemaking.⁶² The Presiding Judge states that during the hearing, Entergy acknowledged that non-requirement sales include the individual Operating Company off-system opportunity sales and that removing them from load is "appropriate and done routinely."⁶³

35. The Presiding Judge notes that Entergy argues that the appropriate burden for the Louisiana Commission is "clear and convincing evidence."⁶⁴ In response, the Louisiana Commission observes that the Commission has applied the "preponderance of the evidence" test in all prior cases except for the one cited by Entergy, in which the Commission stated only: "NRG, as complainant, bears the burden of proof in this case, but failed to demonstrate with clear and convincing evidence that it met that burden."⁶⁵ The Presiding Judge states that the established burden of proof prior to *Astoria* has been the "preponderance" test, and without more to suggest that the Commission intended to announce a policy change in that case, he concludes that the Commission's reference to "clear and convincing evidence" was inadvertent error. The Presiding Judge states that the Louisiana Commission also has met the more stringent standard, should the Commission find that it is applicable.⁶⁶

36. After determining that the Opportunity Sales violated the System Agreement, the Presiding Judge then addressed the issue of damages. The Presiding Judge finds that, because the Opportunity Sales and associated energy and cost allocations violated the System Agreement, shareholders should be ordered to make refunds of damages to the Operating Companies.

⁶¹ *Id.* P 390 (citing *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at P 137 n.172 (2010)).

⁶² *Id.* (citing *Northern Natural Gas Co.*, 127 FERC ¶ 61,133, at P 23 (2009)).

⁶³ *Id.* (citing Tr. 417).

⁶⁴ *Id.* P 391 (citing Entergy Initial Brief at 8).

⁶⁵ *Astoria Gas Turbine Power LLC v. New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,205, at P 19 (2010) (*Astoria*); Entergy Initial Brief at 8.

⁶⁶ Initial Decision, 133 FERC ¶ 63,008 at P 391.

37. The Presiding Judge states that Entergy raises four defenses to the imposition of damages. Entergy's first defense to the imposition of damages is the possible existence of unloaded coal in Entergy Arkansas's supply inventory, which may have been used in making the Opportunity Sales. The Presiding Judge agrees that the Intra-System Bill "may not be able to capture precisely what happened during a sales transaction" and states that "the parties have agreed to determine damages by re-running the [Intra-System Bill], with full knowledge that the results may be imperfect."⁶⁷ The Presiding Judge also states that the arguments by Trial Staff and Entergy regarding how meeting Opportunity Sales demand by using unloaded coal units could lessen the damage caused to the other Operating Companies are purely speculative and that Entergy failed to quantify any use of unloaded coal to meet the Opportunity Sales. The Presiding Judge therefore dismisses this defense.

38. Entergy's second defense to the imposition of damages is unclean hands. The Presiding Judge notes that the Louisiana Commission failed to approve an Entergy Arkansas power purchase agreement (Entergy Louisiana PPA) for Entergy Louisiana for 28 months, between the time that Entergy Louisiana filed its application with the Louisiana Commission and this Commission, and the Louisiana Commission's approval of the Entergy Louisiana PPA (January 2003 to May 2005). The Presiding Judge compares the complexity of the Louisiana Commission's determination of the justness and reasonableness of the Entergy Louisiana contract to a Track III "highly complex" FERC hearing case, which allows 63 weeks from the time such cases are docketed until an Initial Decision is rendered, rounding to 16 months. Finding no reason why the Louisiana Commission could not have acted upon the Entergy Louisiana contract within the same period, the Presiding Judge finds that the last 12 months of this period constituted unreasonable delay, and thus the Louisiana Commission should receive no refunds associated with the Entergy Louisiana PPA for that 12-month period.

39. Entergy's third defense to the imposition of damages is unsupported capacity. The Presiding Judge uses the term "unsupported capacity" to refer to Entergy's justification for the Opportunity Sales based upon the loss of a wholesale requirements customer, North Little Rock, and the inability to shift the costs related to that wholesale capacity to retail rate base based upon a stipulation entered into between Entergy Arkansas and the Arkansas Public Service Commission (Arkansas Commission).⁶⁸ The Presiding Judge notes that Entergy also asserted that 91 MW of Entergy Arkansas' allocation of the

⁶⁷ Initial Decision, 133 FERC ¶ 63,008 at PP 394, 396.

⁶⁸ *Id.* P 399.

Grand Gulf nuclear facility was similarly unsupported as a result of a retail commission settlement excluding that capacity from retail rate base.⁶⁹

40. The Presiding Judge finds that Entergy Arkansas had no unsupported capacity during the period in question. He states that the question of whether there was unsupported capacity turns on the composition of any such capacity. The Presiding Judge argues that if the unsupported capacity includes only wholesale capacity, then unsupported capacity existed during the period in question; if it includes wholesale and retail load, then there was no unsupported capacity. The Presiding Judge notes that retail load increased by 14.7 percent from 1995 to 2006⁷⁰ and that the Intra-System Bill shows that Entergy Arkansas's supply went from "long" to "short" between 1995 and the early 2000s, and that Entergy Arkansas's total load rose relative to total System load.⁷¹ The Presiding Judge reasons that since available capacity may be used to serve both wholesale and retail customers, there is no reason for excluding retail load from the definition. The Presiding Judge maintains that both Entergy and Trial Staff erroneously quantify the unsupported capacity by reference to the change in wholesale load only.⁷² The Presiding Judge finds that even if there was unsupported capacity, that argument is irrelevant to the determination and award of damages, given that the opportunity sales represented an impermissible remedial mechanism, because the alleged unsupported capacity was caused by retail ratemaking, and because the loss of the North Little Rock wholesale load has no relevance to the interpretation of the System Agreement.⁷³

41. Entergy's fourth defense to the imposition of damages is laches.⁷⁴ The Presiding Judge found that the Louisiana Commission did not delay in filing the complaint in the case, so laches is not available to Entergy as a defense.⁷⁵

⁶⁹ *Id.* PP 104-05 (citing Exh. ESI-5 at 40-43)).

⁷⁰ *Id.* P 400 (citing Tr. 516-517; Exh. LC-107 and LC-108).

⁷¹ *Id.* (Tr. 521-522).

⁷² *Id.*

⁷³ *Id.* PP 402, 405-06.

⁷⁴ *Id.* P 393. "Under the doctrine of laches, a claim in equity can be barred if the person bringing the claim has delayed for such a time that permitting it to prosecute the claim would be inequitable." *Jack J. Grynberg*, 90 FERC ¶ 61,247, at 61,826, *reh'g denied*, 93 FERC ¶ 61,180 (2000).

⁷⁵ *Id.* PP 407-409.

42. The Presiding Judge finds that the harm to the System, and therefore the damages awarded in the case, should be measured by re-running the Intra-System Bill to treat the Opportunity Sales as if they had been joint account sales; that is, by using the Intra-System Bill to determine the difference between the incremental cost of each sale, which is the cost incurred by the System, and the cost that Entergy allocated to each sale, which is Entergy Arkansas's average fuel cost.⁷⁶ To this, the Presiding Judge would add interest on damages, consistent with the Commission's published interest rates.⁷⁷ The Presiding Judge finds that the resulting refund amount should be allocated to the Operating Companies, including Entergy Arkansas, relative to each company's load responsibility ratio as computed under section 2.16(a) of the System Agreement.⁷⁸

III. Exceptions

A. Briefs on Exceptions

43. Entergy and Trial Staff contend that the Presiding Judge misinterprets the provisions of the System Agreement. Entergy and Trial Staff state that section 4.05 grants the System the right to make joint account sales for the benefit of all the Operating Companies if "any Company does not wish to assume sole responsibility" for them.⁷⁹ It therefore plainly contemplates that an individual Operating Company can, in fact, "assume sole responsibility" for a particular sale. Entergy states that this interpretation is strengthened by the lack of any requirement in section 4.05 for Operating Committee approval of such sales. This is in contrast to section 4.02, the companion provision that governs Operating Company wholesale purchases and permits them only "with the consent" of the Operating Committee. Entergy rejects the Presiding Judge's view that such an interpretation is illogical. Trial Staff reasons that this interpretation is supported because the language in section 4.05 implies a scenario in which an Operating Company *does* wish to assume sole responsibility for a sale of capacity and energy to others and because no other provision of the System Agreement directly addresses sales to others by individual Operating Companies.⁸⁰

⁷⁶ *Id.* P 413.

⁷⁷ 18 C.F.R. § 35.19(a)(2)(iii)(A) and (B) (2011).

⁷⁸ Initial Decision, 133 FERC ¶ 63,008 at P 413.

⁷⁹ Entergy Brief on Exceptions at 45-46 (citing System Agreement, section 4.05); Trial Staff Brief on Exceptions at 24, 29-30.

⁸⁰ Trial Staff Brief on Exceptions at 29-30.

44. Entergy states that its interpretation of section 4.05 is consistent with the Commission's prior decisions "which allow the Companies, to the greatest extent possible, . . . to retain the benefits of units which they have been responsible for constructing."⁸¹

45. Trial Staff and Entergy reject the Presiding Judge's interpretation of the words "capacity and energy" as used in section 4.05 to connote only "firm" sales, which they contend would preclude even the System from making non-firm sales, including Opportunity Sales.⁸² Entergy contends that as a practical matter, this interpretation makes no sense because it would prohibit the System from making the very hourly and daily opportunity sales that are a necessary incident to its centralized unit commitment and dispatch function. Entergy and Trial Staff point to other uses of the words "capacity" and "energy" in proximity elsewhere in the System Agreement for transactions involving either or both to suggest that the words in section 4.05 should be read disjunctively.⁸³ Entergy also contends that the Presiding Judge's interpretation of these words conflicts with several maxims of contractual interpretation: that words of a contract be given their natural and ordinary meaning; that a contract is read to be consistent with its purpose, as that purpose is expressed through the language of the agreement; and that a contract is to be construed consistent with its course of performance.⁸⁴

46. Entergy argues that the Initial Decision's finding that revenues from Entergy Arkansas's sales should have been credited to other Operating Companies conflicts with ratemaking principles that revenues associated with an asset are credited to those who bear cost responsibility for the asset.⁸⁵ Entergy contends that Entergy Arkansas's shareholders bore such cost responsibility as a result of two decisions by the Arkansas Commission to exclude two tranches of capacity from Entergy Arkansas's retail base: 644 MWs of slice-of-system capacity and 91 MWs of Grand Gulf nuclear capacity.⁸⁶ Entergy claims that the Opportunity Sales were sourced from capacity that had been excluded from the cost responsibility of retail ratepayers, resulting in the costs of this

⁸¹ Entergy Brief on Exceptions at 44 (citing *Middle South Energy, Inc.*, Opinion No. 234-A, 32 FERC ¶ 61,425, at 61,955 (1985)).

⁸² Entergy Brief on Exceptions at 45; Trial Staff Brief on Exceptions at 33-34.

⁸³ Entergy Brief on Exceptions at 46; Trial Staff Brief on Exceptions at 34-35.

⁸⁴ Entergy Brief on Exceptions at 46-48.

⁸⁵ *Id.* at 20-21.

⁸⁶ *Id.* at 2.

capacity falling upon Entergy Arkansas's shareholders and necessitating that the disputed sales be made to allow shareholders to recoup their investment costs.

47. Entergy states that it sought to recoup shareholder costs for the unsupported capacity through mechanisms other than the Opportunity Sales, including sales of base load capacity to Entergy Louisiana and Entergy New Orleans. Entergy states that the Louisiana Commission's delay in approving a power purchase agreement with Entergy Louisiana contributed to Entergy's decision to make the Opportunity Sales.⁸⁷

48. Entergy states that the Presiding Judge erred in dismissing Entergy's unsupported capacity arguments based upon his determination that retail load grew into the wholesale capacity excluded from rate base. Entergy contends that any such load growth is irrelevant because decisions by the Arkansas Commission withdrew such capacity from rate base, making it impossible for Entergy Arkansas to sell the capacity to serve this load and recoup investment costs because the Arkansas Commission never placed the excluded capacity back into rate base. Entergy cites various Commission and court cases for the principle that the right to recover costs is afforded the party who bears responsibility for those costs. It contends that precedents relied upon by the Initial Decision stand only for the proposition that opportunity sales are normally credited to native load customers, a policy inapplicable in cases where such native load customers do not bear cost responsibility for the related capacity.⁸⁸

49. Entergy states that the Presiding Judge errs in suggesting the Operating Companies should receive revenue credits from the Opportunity Sales because they bear cost responsibility for Entergy Arkansas's generation assets through System Agreement cost allocations, through the Grand Gulf Unit Power Sales Agreements, and through annual bandwidth payments. Entergy states that the Commission in approving the System Agreement and the allocation of the Grand Gulf generation capacity to each Operating Company emphasized that the Operating Companies are autonomous and remain responsible for recovering their generation costs from their own native load ratepayers.⁸⁹

50. Entergy states that contrary to the Louisiana Commission's assertions and the Presiding Judge's findings, the Operating Companies do not support the generation revenue requirement of other Operating Companies. The Commission has made no suggestion that proportionate sharing of costs constituted cost support between the

⁸⁷ *Id.* at 23.

⁸⁸ *Id.* at 24-27.

⁸⁹ *Id.* at 30-31.

Operating Companies or that the benefit extended to an entitlement to generation owned by the other Operating Companies. Entergy argues that such support obligations are not provided for in Service Schedule MSS-1, which simply equalizes reserves, or Service Schedule MSS-4, which only provides for payments to compensate an Operating Company for a specific amount of specific capacity for a specific time period.⁹⁰

51. Entergy contends that the Opportunity Sales were consistent with previous practices by the other Operating Companies, such as when Entergy New Orleans mitigated losses through opportunity sales in the wholesale market after it lost the majority of its load following Hurricane Katrina.⁹¹

52. Entergy claims that the Presiding Judge's criticisms of the Opportunity Sales as being sales of energy and not capacity and not including demand charges are anachronistic and irrelevant to the sales' propriety. Entergy claims that the Presiding Judge's findings that on-system requirements customers should have been favored over Opportunity Sales customers would "introduce a bias in the wholesale market skewed toward 'local' sales, thereby turning the Commission's regional open access policies on their head."⁹² Entergy also claims such findings would run counter to Order No. 888's determination of no tariffed obligation to serve wholesale load once such contracts expire, contending that after Order No. 888, there is no "tariffed requirement to serve" any wholesale load once its contract expires.⁹³

53. Entergy criticizes assertions that it should have negotiated an increase in Service Schedule MSS-1 payments instead of making the Opportunity Sales, contending that the purpose of this schedule is narrow and inapplicable to the purpose suggested. Entergy rejects the Presiding Judge's criticisms that Entergy offered a blanket waiver that

⁹⁰ *Id.* at 32-33.

⁹¹ *Id.* at 31. Entergy provided two other examples it contends were consistent with the Opportunity Sales, including the "experimental as-available power service" (EAPS) program in Louisiana and Texas, and the "deregulated asset plan" (DAP) associated with the River Bend nuclear facility. *Id.* at 34.

⁹² *Id.* at 36.

⁹³ *Id.* (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,391 (1997) ("We decided not to impose a regulatory obligation on wholesale requirements suppliers to continue to serve the power needs of their existing requirements beyond the end of the contract term.")).

circumvented section 3.05 of the System Agreement, stating that Entergy Arkansas offered its baseload capacity to the other Operating Companies and that they declined this offer. It also asserts that the Commission in Opinion No. 485 found section 3.05 inapplicable to the short-term sales at issue, though Entergy concedes that this finding of Opinion No. 485 was deemed *dicta* by the D.C. Circuit.⁹⁴

54. Trial Staff also challenges the Presiding Judge’s dismissal of Entergy and Trial Staff arguments that the fact that the vast majority of Entergy’s joint account transactions have historically been non-firm suggests that section 4.05 contemplates non-firm, as well as firm, transactions.⁹⁵ Trial Staff contends that the Entergy System’s established practice of engaging in non-firm joint account transactions clearly supports the view that these transactions were properly undertaken.⁹⁶ Trial Staff also argues that the reference to “capacity and energy” in section 4.05 must be read disjunctively to allow joint account sales of capacity and associated energy as well as energy-only joint account sales, since section 30.04 establishes the cost priority for sales of energy standing alone.⁹⁷

55. Entergy and Trial Staff contend that section 30.03 requires that sales by an individual Operating Company be placed in its “load shape” and are entitled to least cost energy.⁹⁸ They contend that there is no differential treatment required for “requirements sales” or “firm sales” or “opportunity sales,” or any other sale by an Operating Company. Trial Staff contends that “load” as used in the System Agreement should be interpreted consistent with industry practice, which includes all demand placed on an electric system, not just native load and not just load within a certain geographical area.⁹⁹ In addition, Trial Staff notes that witness Sammon concluded that Entergy Arkansas’s Opportunity Sales fell within section 30.03(a) because otherwise a mismatch would exist between the energy generated by the System and the loads to which that energy was being allocated.¹⁰⁰

⁹⁴ *Id.* at 37-39.

⁹⁵ Trial Staff Brief on Exceptions at 35.

⁹⁶ *Id.* at 35-36.

⁹⁷ *Id.* at 36.

⁹⁸ Entergy Brief on Exceptions at 42; Trial Staff Brief on Exceptions at 26.

⁹⁹ Trial Staff Brief on Exceptions at 44-45.

¹⁰⁰ *Id.* at 45.

56. Entergy and Trial Staff state that the Presiding Judge misinterpreted the System Agreement because he failed to understand that the substantive provisions that determine the scope of acceptable Operating Company transactions are contained in the body of the agreement, whereas the service schedules govern after-the-fact accounting.¹⁰¹

57. Entergy and Trial Staff find the Presiding Judge erred by finding that the substantive provision governing individual Operating Company energy sales reside in section 30.04, when this provision instead governed cost allocations for joint account sales.¹⁰² Entergy states that, by reading joint account sales out of section 30.04, the Presiding Judge leaves no provision to govern the allocation of energy from joint account sales.¹⁰³ Trial Staff contends that the reference in section 30.04 to an Operating Company's right to reimbursement for fuel used to supply energy for sales to others clearly demonstrates that section 30.04 refers to joint account sales and not individual Operating Company sales, since only joint account sales would require reimbursement.¹⁰⁴ Trial Staff also contends that a reference in section 50.02 that requires a deduction from the gross sales proceeds of the cost of energy determined under section 30.04 suggests that the latter provision refers to joint account sales because nowhere in the System Agreement is there a specifically described procedure for deducting the cost of fuel for individual Operating Company sales.¹⁰⁵

58. Entergy rejects the Presiding Judge's decision that Operating Companies can only sell to "native load customers" or "requirement customers." It notes the terms "native load" and "requirements load" are not found in the System Agreement.¹⁰⁶ It contends that the Presiding Judge's definitional construct is incompatible with the purpose of Service Schedule MSS-3, which allocates energy and loads on an after-the-fact basis, and would be impractical because it would force accountants to examine individual rate schedules every month to determine whether a particular sale was a true "requirements load" sale.

¹⁰¹ Entergy Brief on Exceptions at 51; Trial Staff Brief on Exceptions at 30.

¹⁰² Entergy Brief on Exceptions at 51-53; Trial Staff Brief on Exceptions at 30.

¹⁰³ Entergy Brief on Exceptions at 54.

¹⁰⁴ Trial Staff Brief on Exceptions at 30.

¹⁰⁵ *Id.* at 32.

¹⁰⁶ Entergy Brief on Exceptions at 62.

59. Trial Staff rejects the Presiding Judge's suggestion that the terms "requirements" and "loads" as used in sections 2.20 and 30.03, are ambiguous and contends, rather, that they should be interpreted according to their standard industry meaning, with language of the agreement alone determining such meaning.¹⁰⁷ Trial Staff also contends that Opportunity Sales should be included under an individual Operating Company's load because otherwise making Opportunity Sales under the contract would be impracticable because there would be no way of knowing beforehand whether a transaction would be profitable. Entergy contends that the fact that the load served was "outside" the Entergy Arkansas area does not change the requirement in section 30.03(a) that it be allocated to Entergy Arkansas, as the energy produced to serve that load still must be accounted for.¹⁰⁸

60. Entergy contends that section 2.16, addressing the Operating Company load calculation to determine Operating Companies' load responsibility ratios, and section 4.05 must be read in harmony to allow an Operating Company to assume sole responsibility for a sale by including the sale in the Operating Company's load.¹⁰⁹ Trial Staff contends that section 30.03(a)'s failure to provide an exclusion of interruptible load supports the inference that this provision intended to include interruptible load in the stacking priority it establishes.¹¹⁰

61. Trial Staff states that in the case of a conflict between general provisions of a contract, such as those in the System Agreement setting forth its overarching general purpose and goals, and more specific provisions intended to establish the actual procedures to be used in executing the Entergy System's operations, it is the specific provisions which control rather than the more general ones. Trial Staff states that the Presiding Judge either paid insufficient heed to this basic rule of contract interpretation when evaluating relevant provisions of the System Agreement or he misinterpreted them. The specific provisions of the System Agreement, including those authorizing individual Operating Companies to engage in opportunity transactions and how the energy used to complete them is accounted for, are part of an approved tariff and must be deemed lawful, even if they appear to conflict with other provisions of the same tariff.¹¹¹

¹⁰⁷ Trial Staff Brief on Exceptions at 48-49.

¹⁰⁸ Entergy Brief on Exceptions at 59.

¹⁰⁹ *Id.* at 61.

¹¹⁰ Trial Staff Brief on Exceptions at 52.

¹¹¹ *Id.* at 47-48.

62. Trial Staff disagrees with the Presiding Judge that Commission ratemaking policy concerning opportunity sales in decisions such as *Golden Spread* and *Minnesota Power* are determinative of whether the Opportunity Sales should be deemed to violate the System Agreement.¹¹² Trial Staff contends that any conflict the Opportunity Sales may have with the overall purpose of the tariff or with the Commission's ratemaking policies that would otherwise apply must be eliminated by modifying the tariff which sanctions them, and not by improperly relying on the conflict itself as the controlling rule of contractual interpretation.

63. Entergy states that the Initial Decision's conclusion that the Opportunity Sales cannot be included in Entergy Arkansas's load in the energy allocation process conflicts with Opinion No. 505.¹¹³ It contends that the premise of that opinion is that Opportunity Sales were properly included in Entergy Arkansas's load in the first instance as part of the energy allocation process and that the Initial Decision is in conflict with that finding.¹¹⁴

64. Entergy disputes the Louisiana Commission's arguments that other proceedings govern the propriety of the Opportunity Sales at issue.¹¹⁵ Entergy contends that the Louisiana Commission misinterprets various statements made by Entergy executives in the *Delaney* proceeding and disagrees that such statements established that Entergy did not permit opportunity sales, noting that that proceeding did not involve a matter in which the propriety of individual Operating Company opportunity sales was at issue.¹¹⁶ Entergy also contends that the Commission's consideration of an early version of the System's Rate Schedule SP, wherein the Commission addressed pricing for joint account sales, was not relevant because the Opportunity Sales fact pattern was not at issue.¹¹⁷ Entergy also contends that the Louisiana Commission and the Presiding Judge also

¹¹² *Id.* at 54.

¹¹³ *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010).

¹¹⁴ Entergy Brief on Exceptions at 61-62.

¹¹⁵ *Id.* at 62-64.

¹¹⁶ *Id.* at 62 (citing *Linda Delaney v. Entergy Louisiana, Inc.*, Docket No. U-23366 (La. P.S.C. 2000) (*Delaney*)).

¹¹⁷ *Entergy Servs., Inc.*, 58 FERC ¶ 61,234, at 61,737 (*Entergy Services*), order on reh'g, 60 FERC ¶ 61,168 (1992), rev'd & remanded, *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173 (D.C. Cir. 1994).

misinterpret prior Commission cases in concluding that the term “requirements” must mean “native load.”

65. With respect to the calculation of damages, if refunds are ordered and damages must be calculated, Entergy and Trial Staff agree with the Initial Decision’s recommendation to do so by rerunning the Intra-System Bill for the period at issue, but disagree with the approach the Initial Decision would employ to perform that Intra-System Bill re-calculation.¹¹⁸ In particular, Entergy and Trial Staff urge the Commission to establish a compliance proceeding to determine the appropriate level of damages. Specifically, they argue that the Presiding Judge fails to consider various factors that affected the level of damages incurred and should do so rather than assuming that 100 percent of Entergy Arkansas’s Opportunity Sales were served at System incremental cost, which the Initial Decision recognized did not occur and would necessarily overstate the actual level of damages.¹¹⁹ Trial Staff and Entergy stated this was the case because the Presiding Judge conceded that the Intra-System Bill might not accurately model the actual generation units that provided energy used to complete the Opportunity Sales given that less expensive unloaded coal capacity¹²⁰ might have been used by Entergy Arkansas as the fuel source for those sales.¹²¹

66. Entergy also argues that the Intra-System Bill would need to be revised to reclassify sales that were initially included as load obligations of a single Operating Company as joint account sales including revisions to: the responsibility ratio,¹²² effects to Service Schedule MSS-1 calculations,¹²³ effects to Service Schedule MSS-2

¹¹⁸ Entergy Brief on Exceptions at 80-82; Trial Staff Brief on Exceptions at 56-59.

¹¹⁹ Entergy Brief on Exceptions at 80; Trial Staff Brief on Exceptions at 62.

¹²⁰ Entergy defines “unloaded coal” as coal capacity that is not being utilized. Initial Decision, 133 FERC ¶ 63,008 at P 394 (citing Tr. 824).

¹²¹ Trial Staff Brief on Exceptions at 59 (citing Initial Decision, 133 FERC ¶ 63,008 at P 394-96); Entergy Brief on Exceptions at 81.

¹²² The responsibility ratio is an allocator developed based on an Operating Company’s load and is used to allocate System Agreement costs, revenues, and reserves. Entergy explains that a higher responsibility ratio translates into a greater responsibility for system costs. Entergy Brief on Exceptions at 84.

¹²³ Service Schedule MSS-1 provides for the equalization of the costs of reserves among the Operating Companies and, in particular, the gas and oil-fired generating units. Entergy explains that as the Operating Companies’ relative load responsibilities change due to the recharacterization of the wholesale sales, their respective share of costs under

(continued...)

calculations,¹²⁴ effects to Service Schedule MSS-3 energy exchange calculations,¹²⁵ purchased power,¹²⁶ effects to Service Schedule MSS-5 calculations,¹²⁷ bandwidth

MSS-1 will change for the period at issue. Entergy further explains that if Entergy Arkansas no longer retains the margins from those sales, and is no longer solely responsible for those sales, it is not consistent with the overarching principles of the System Agreement to require Entergy Arkansas to bear the increases in reserve equalization expense associated with those sales. Entergy Brief on Exceptions at 84-85.

¹²⁴ Service Schedule MSS-2 provides the basis for equalizing the ownership costs of transmission among the Operating Companies. Entergy explains that each Operating Company's cost responsibility is determined based on its load responsibility ratio. Entergy further explains that recharacterizing Entergy Arkansas's opportunity sales as joint account sales will necessarily change each Operating Company's Responsibility Ratio for each month of the period, and thus will change Service Schedule MSS-2 obligations for the period at issue. Entergy Brief on Exceptions at 85.

¹²⁵ Service Schedule MSS-3 provides the method of pricing energy exchanged among the Operating Companies. Entergy explains that recharacterizing Entergy Arkansas's opportunity sales as joint account sales will necessarily affect both the volume of energy sold to the Exchange by each of the Operating Companies (e.g., Entergy Arkansas's decreased load will mean that it sells more energy to the exchange) and the volume of energy each Company purchases from the exchange (e.g., Entergy Arkansas's decreased load will mean that it purchases less from the exchange). Entergy further explains that the MSS-3 costs and revenues for all Operating Companies will change for the entire period at issue. Entergy Brief on Exceptions at 85.

¹²⁶ Entergy notes that all of the System's Joint Account Purchases of wholesale power (including purchases from one of the co-owners of Entergy's coal plants in Arkansas) are allocated among the Operating Companies on a Responsibility Ratio basis. Entergy states that reducing Entergy Arkansas's load will necessarily reduce its share of joint account purchases, including purchases of capacity as well as energy, and will increase the volume and cost of Joint Account Purchases allocated to each of the other Operating Companies during the period at issue. Entergy Brief on Exceptions at 86.

¹²⁷ Service Schedule MSS-5 provides the basis for allocating the net balance of joint account sales among the Operating Companies. Entergy explains that the allocation is also based on the Responsibility Ratios of the Operating Companies and will have to be adjusted for the period at issue. Entergy Brief on Exceptions at 86.

payment impacts,¹²⁸ accounting for the Entergy Louisiana PPA as required by the Presiding Judge,¹²⁹ fuel base and rate impacts before retail regulators,¹³⁰ and changes in how the Intra-System Bill was performed and how its data base was maintained.¹³¹ Entergy explains that revising the Intra-System Bill to reclassify sales that were initially included as load obligations of a single Operating Company as joint account sales will

¹²⁸ Payments for rough production cost equalization pursuant to the Commission's Opinions No. 480 and 480-A have occurred for calendar years 2006-2009 pursuant to Service Schedule MSS-3. Each Operating Company's production costs for those years will be affected by the recharacterization of opportunity sales as joint account sales as described above. Moreover, the allocator used to allocate fixed production costs (variable DR) would be affected. Entergy states that it may therefore be necessary to adjust the levels of bandwidth payments that Entergy Arkansas has made and the receipts of the other Operating Companies for those years.

¹²⁹ Entergy notes that the Presiding Judge would require Entergy Louisiana to forfeit its share of refunds for the period of May 1, 2004 to May 1, 2005 due to the Louisiana Commission's unreasonable delay in approving the Entergy Louisiana PPA. Entergy notes that the forfeited amount would need to be allocated to the other Operating Companies in some manner. Entergy Brief on Exceptions at 87.

¹³⁰ Entergy explains that the various costs and revenues incurred by the Operating Companies under the System Agreement are passed through to their customers through the fuel and base rates approved by their respective retail regulators. For the most part, costs and revenues for the period 2000-2009 have been addressed in retail rates. Entergy further explains that if the Operating Companies' share of the costs and revenues listed above are adjusted through a recalculation of the Intra-System Bills for those years, each retail jurisdiction will have to determine whether and how to adjust the levels of costs and revenues that have been passed through to retail customers. Entergy Brief on Exceptions at 87.

¹³¹ Entergy explains that the manner in which the Intra-System Bill is performed and the manner in which the database for the Intra-System Bill is maintained have changed over the course of the period at issue. Entergy further explains that prior to 2006 the Intra-System Bill was performed on a mainframe computer system. Entergy explains that, in January 2006, the Intra-System Bill was moved from that mainframe platform to a Unix-based server and PC system. Entergy notes that although that process improvement means that modifications to the billing algorithms for the post-2006 period are more feasible to implement than was previously the case, dealing with refunds that include the pre-2006 period present a unique set of challenges. Entergy Brief on Exceptions at 87-88.

require a host of assumptions and create a ripple effect that will result in changes to a wide variety of inter-related costs and values throughout the Intra-System Bill.

67. Entergy also argues that the Presiding Judge fails to examine equitable considerations and asks the Commission to decline to order refunds. Specifically, Entergy argues that there was no windfall or unjust enrichment from the Opportunity Sales; nor did they result in harm to any customers. Entergy further argues that refunds would be inequitable in light of Entergy Arkansas's good faith adherence to the plain language of the System Agreement. Entergy maintains that Entergy Arkansas's reading of the System Agreement is consistent with the Commission's implicit findings in Opinion Nos. 485 and 485-A. In addition, Entergy argues that the Louisiana Commission failed to lodge a timely objection to the Opportunity Sales and, notwithstanding the Presiding Judge's findings, failed to articulate a coherent objection to the Opportunity Sales. Entergy further argues that if the Commission believes that the Opportunity Sales should not have been allowed, the appropriate course is to adopt a prospective amendment under FPA section 206, not to impose refunds in a punitive manner for conduct undertaken in good faith.

68. Trial Staff argues that the Initial Decision failed to address its argument that damages to Entergy Arkansas should be ignored in any future proceeding to determine damages.

69. The Louisiana Commission largely restates its earlier arguments in support of the Presiding Judge's holdings. It argues that the Presiding Judge correctly held that Entergy redirected low-cost energy from native load customers to Entergy Arkansas's off-system sales on behalf of shareholders and correctly found that Entergy should make refunds and calculate damages by rerunning the Intra-System Bill with Opportunity Sales reclassified as joint account sales. However, the Louisiana Commission faults the Initial Decision for not explicitly requiring a crediting of the margins for the benefit of native load.¹³² The Louisiana Commission argues that the Commission should clarify or correct the Presiding Judge to ensure that Entergy Arkansas's and Entergy's shareholders are not permitted to retain margins earned on sales from resources supported by native load customers.¹³³ The Louisiana Commission also disputes the Presiding Judge's ruling on unclean hands. It argues that the Initial Decision makes no finding that the Louisiana Commission's hands were unclean, that there was any improper motive in handling of the case, or that the Louisiana Commission acted to maximize damages in the case. The Louisiana Commission maintains that any alleged delay in the proceeding was caused by,

¹³² Louisiana Commission Brief on Exceptions at 7.

¹³³ *Id.*

or agreed to by, Entergy. It also faults as incorrect and *dicta* the Presiding Judge's conclusion that the System Agreement does not authorize opportunity sales of energy for the joint account of all the Operating Companies.

B. Briefs Opposing Exceptions

70. The Louisiana Commission states that there is no provision in the System Agreement authorizing an Operating Company to make off-system opportunity sales of energy.¹³⁴ The Louisiana Commission states that Entergy's interpretation of section 4.05 was apparently conceived in or after 2001, and contradicts decades of consistent practice by Entergy. It argues that Entergy made opportunity sales for more than a quarter century only on a joint account basis,¹³⁵ represented to the Commission that native customers are served using the cheapest power before off-system sales are considered, and stated in a state commission proceeding that an individual Operating Company sale of energy "will not happen."¹³⁶ The Louisiana Commission contends that Entergy Arkansas improperly accounted for its Opportunity Sales in a manner that benefitted shareholders instead of flowing through the credits to the other wholesale customers.¹³⁷ The Louisiana Commission contends that in making sales on behalf of Entergy Arkansas at prices below the incremental cost of energy on the System, Entergy engaged in uneconomic behavior and raised System costs.¹³⁸ The Louisiana Commission states that Entergy's testimony conceded that the Opportunity Sales raised System costs and that Entergy was indifferent to this effect.¹³⁹

71. The Louisiana Commission contends that the cost-minimization and single-System requirements of the System Agreement prohibit single Operating Company opportunity

¹³⁴ Louisiana Commission Brief Opposing Exceptions at 6.

¹³⁵ *Id.* at 7.

¹³⁶ *Id.* at 6 (citing Exh. LC-54 at 22 in *Delaney*).

¹³⁷ *Id.* at 7-8.

¹³⁸ *Id.* at 9-11.

¹³⁹ *Id.* at 11-12 (citing Tr. 433-44, 615, LC-9 at 128-129, Tr. 792). The Louisiana Commission also contends that Trial Staff witness Sammon agreed that Entergy's actions resulted in cheaper energy that was redirected to the off-system market for Entergy Arkansas's stockholders, resulting in artificial costs that allowed the stockholders to make money in the wholesale market competing with others who could not similarly subsidize their sales.

sales that divert the System's cheaper energy from serving native load.¹⁴⁰ The Operating Companies and their native load customers share the costs of generating facilities on a roughly equal basis, and these facilities are supposed to be used for the mutual benefit of all the companies.¹⁴¹ In this case, however, Entergy made Opportunity Sales on behalf of Entergy Arkansas that benefitted only Entergy Arkansas and Entergy stockholders and caused a large detriment to the other Operating Companies. The Louisiana Commission asserts that these sales violated the System Agreement because they conflict with provisions requiring Entergy to minimize costs for the mutual benefit of all, not to maximize the benefit to a single Operating Company.¹⁴²

72. The Louisiana Commission states that although Trial Staff attempts to distinguish the overarching purpose of the System Agreement from provisions that are allegedly "more specific," the truth is that the purpose is stated and restated in explicit, specific terms throughout the agreement.¹⁴³ Trial Staff, in contrast, relies on a single provision, section 4.05, which it tortures to interpret a reference to "capacity and energy" sales to mean energy-only sales. Similarly, Entergy places its reliance on a disjunctive interpretation of "and" in "capacity and energy." But, argues the Louisiana Commission, giving effect to the plain meaning of "and" is consistent with the purpose of the System Agreement. Reading it "disjunctively," and contrary to the purpose of the System Agreement, has no logical basis. The interpretation that permits opportunity sales to be made only as joint account sales from the System's incremental resources is also necessary given the single-System operation of Entergy's electrical facilities. The Louisiana Commission argues that allowing individual Operating Companies to make opportunity sales for their own benefit at their discretion would lead to inter-Operating Company competition, "dooming single-System operation."¹⁴⁴

73. The Louisiana Commission contends that the energy allocations to Entergy Arkansas Opportunity Sales diverted cheap energy from System resources in a manner that violated explicit energy allocation requirements of the System Agreement.¹⁴⁵ This

¹⁴⁰ *Id.* at 13 (citing System Agreement, sections 3.01 and 30.02).

¹⁴¹ *Id.*

¹⁴² *Id.* at 13-14 (citing System Agreement provisions including sections 0.05, 3.01 and 30.02).

¹⁴³ *Id.* at 16 (citing System Agreement, sections 0.05, 3.01, 5.06(o), 6.02(d), 30.02, 30.03, 30.04).

¹⁴⁴ *Id.* at 17.

¹⁴⁵ *Id.* at 19.

misallocation permitted the attribution of an “artificial” cost to the Entergy Arkansas-only sales and caused native load customers to cross-subsidize sales into the competitive market for the benefit of stockholders. The Louisiana Commission states that this was contrary to the energy allocation provisions of the System Agreement that establish that low-cost energy goes first to serve the native requirements of the Operating Company having the resources available, second to serve the native requirements of the other Operating Companies, and only then, with remaining higher-cost energy, to making off-system opportunity sales.¹⁴⁶ The Louisiana Commission states that System Agreement sections 2.20 and 30.03 require that the System’s native load customers be served with the cheaper energy before sales are made off system to “others.”¹⁴⁷

74. The Louisiana Commission argues that when Entergy Arkansas added the Opportunity Sales to Entergy Arkansas’s load for purposes of the System Agreement energy allocations,¹⁴⁸ it acted contrary to section 2.16’s definition of load, contrary to industry and previous Entergy representations regarding how to calculate load, and in a manner that violated the energy allocation priorities in sections 2.20, 30.03, and 30.04 of the System Agreement.¹⁴⁹ The Louisiana Commission contends that its interpretation is consistent with Commission use of the word “requirements” in the context of proceedings involving Entergy and its predecessor, with FERC Form 1’s definition for “Requirements Service,” and with a U.S. Energy Information Agency definition for “requirements power.”¹⁵⁰ It contends Entergy implicitly concedes that the term “requirements” means “native load” in some parts of the System Agreement, but inconsistently argues that planning “requirements” are different from energy allocation “requirements” in the System Agreement.¹⁵¹

75. The Louisiana Commission states that Entergy essentially concedes that the addition of off-system sales loads to the Entergy Arkansas load conflicts with section 2.16 by creating a mismatch between sources and sinks because it treats the off-system

¹⁴⁶ *Id.* at 20-21.

¹⁴⁷ *Id.* at 21.

¹⁴⁸ *Id.* at 23.

¹⁴⁹ *Id.* at 22-23.

¹⁵⁰ *Id.* at 24-25 (citing Exh. LC-1 at 33; Exh. LC-47 at 34; Exh. LC-60 at 3; FERC Form 1, p. 310).

¹⁵¹ *Id.* at 25 (citing Entergy Brief on Exceptions at 64).

“sink” as if the energy were consumed within Entergy Arkansas’s area.¹⁵² The Louisiana Commission also rejects Entergy’s assertion that related adjustments to area load data are permissible under the System Agreement.¹⁵³ The Louisiana Commission also rejects a comparison by Entergy to certain adjustments accepted by the Louisiana Commission given that they are different in nature and, unlike those adjustments, the Opportunity Sales adjustments harm the System and native load.¹⁵⁴

76. The Louisiana Commission contends that there is no basis for Entergy’s attempts to redefine “native load” to include Operating Company opportunity sales.¹⁵⁵ It also rejects Entergy’s testimony that a sale to a customer outside the Entergy System is an “off-system” sale only if it is made on a joint account basis and that an Entergy Arkansas sale to a distant wholesale customer or power marketer is not “off-system.”¹⁵⁶ The Louisiana Commission contends that Entergy’s cite to Opinion No. 234-A for the proposition that each Operating Company should retain as fully as possible the benefits of units they have planned and constructed, ignores that the Commission in that decision made that statement in the context of a related obligation of each Operating Company to “own or purchase capacity to meet native load.”¹⁵⁷ The Louisiana Commission also rejects Entergy’s statement that the EAPS tariff of Entergy Gulf States Louisiana allows sales similar to opportunity sales, claiming any sales pursuant to that tariff were not comparable because they contained protections to insure that they could only be made at rates above incremental cost.

77. The Louisiana Commission contends that Trial Staff wrongly attempts to explain away section 30.04 by asserting that there would be no need to reimburse an Operating Company that generated the electricity for an Operating Company sale, since the individual Operating Company would incur fuel costs and reimburse itself for the fuel from the sale proceeds.¹⁵⁸ However, the Louisiana Commission contends that this is an

¹⁵² *Id.* at 28-29.

¹⁵³ *Id.* at 29 (citing Entergy Brief on Exceptions at 60).

¹⁵⁴ *Id.* at 29-30.

¹⁵⁵ *Id.* at 30-31.

¹⁵⁶ *Id.* at 31.

¹⁵⁷ *Id.* at 33 (citing *Middle South Entergy, Inc.*, Opinion No. 234-A, 32 FERC ¶ 61,425, at 61,955 (1985)).

¹⁵⁸ *Id.* at 34 (citing Trial Staff Brief on Exceptions at 30-31).

argument that simply assumes the correctness of this unjust and unreasonable cross-subsidy, given that other Operating Companies generally produced the electricity for Entergy Arkansas's opportunity sales.¹⁵⁹

78. The Louisiana Commission contends that Entergy's post-2000 interpretation of the System Agreement also conflicts with its interpretation for the previous quarter century, arguing that Entergy until 2000 interpreted the System Agreement to prohibit individual Operating Company opportunity sales.¹⁶⁰ The Louisiana Commission contends that such a changed interpretation runs contrary to a recent Commission ruling that Entergy's own prior conduct and representations constitute powerful evidence that its advocacy of a new and different contract interpretation is unfounded¹⁶¹ and contrary to prior representations to the Commission, as well as to its representations to the Louisiana Commission in the *Delaney* case.¹⁶² The Louisiana Commission states that in *Delaney*, Entergy asserted that individual Operating Company purchases and sales were prohibited by the System Agreement.¹⁶³ The Louisiana Commission states that minutes of the Operating Committee from 1976 describe an Entergy policy that individual Operating Companies were prohibited from engaging in individual non-firm energy transactions in the wholesale market,¹⁶⁴ a policy Entergy followed through 2000. It states that in an application for authority to engage in market-based sales transactions in 1991, Entergy represented that opportunity sales by the regulated companies would benefit native load customers and that the Commission stated in its resulting order that "[s]ales are second in priority to the requirements of the native load customers of the Entergy companies."¹⁶⁵ The Louisiana Commission states that sales pursuant to Rate Schedule SP were to be joint account sales by the Operating Companies and that although Entergy altered its

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 35 (citing Entergy Brief on Exceptions at 48).

¹⁶¹ *Id.* at 36 (citing *Arkansas Electric Coop. Corp. v. Entergy Services, Inc.*, 117 FERC ¶ 61,099 (2006)).

¹⁶² *Id.* at 37-39.

¹⁶³ *Id.* at 39 (citing Exh. LC-51, LC-54, and LC-62).

¹⁶⁴ *Id.* at 37.

¹⁶⁵ *Entergy Services*, 58 FERC ¶ at 61,740.

market-based rate tariff in 1996, it did not alter provisions indicating that sales were to be made on behalf of all the Operating Companies.¹⁶⁶

79. The Louisiana Commission contests Trial Staff's and Entergy's position that section 4.05 "[c]ontemplates" that an Operating Company may make an opportunity sale,¹⁶⁷ stating that this contention has no merit. Similarly, Entergy's contention that the phrase "capacity and energy" in section 4.05 should be reinterpreted as "energy only" has no logical basis.¹⁶⁸ The Louisiana Commission contends that Trial Staff witness Sammon conceded at hearing that section 4.05 was intended to refer to firm wholesale sales.¹⁶⁹ The Louisiana Commission also finds no basis for Entergy's and Trial Staff's contentions that the language of section 4.05 refers to sales of either capacity *or* energy, assertions that ask the Commission to read non-existent language into the agreement.¹⁷⁰

80. The Louisiana Commission also disputes Entergy's and Trial Staff's reliance on various other System Agreement provisions, including sections 4.02 and 50.02 of the System Agreement, to allow the Opportunity Sales. The Louisiana Commission also contends that Trial Staff's interpretation arguments run counter to its contention that individual Operating Company sales are inconsistent with the stated purpose of the System Agreement and Commission precedent.¹⁷¹

81. The Louisiana Commission contends that contractual interpretation principles mandate the rejection of Entergy's and Trial Staff's proffered interpretation. Specifically: (1) the System Agreement should be interpreted to produce a just and reasonable result; (2) the terms in the agreement must be interpreted in a consistent manner and consistent with industry usage; (3) ambiguities must be construed against Entergy; and (4) Entergy should be estopped from changing its interpretation, given

¹⁶⁶ Louisiana Commission Brief Opposing Exceptions at 38.

¹⁶⁷ *Id.* at 42 (citing Trial Staff Brief on Exceptions at 29 and Entergy Brief on Exceptions at 41).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 43 (citing Tr. 869, 874, 875).

¹⁷⁰ *Id.* at 44.

¹⁷¹ *Id.* at 48-49.

Commission reliance on Entergy's representations in *Entergy Services* and similar representations before the Louisiana Commission and the Louisiana courts.¹⁷²

82. The Louisiana Commission also rejects Entergy's unsupported capacity rationale for the Opportunity Sales as an argument that has no evidentiary support, given the lack of any specific capacity identified as "excluded" from rate base or deemed "excess" capacity.¹⁷³ It argues that, with respect to the 91 MW of Grand Gulf Retained Share, while the Arkansas Commission in the 1980s did accept a settlement proposed by Entergy Arkansas, the Retained Share capacity was never excluded from Commission cost allocations among the Operating Companies, so the System's ratepayers outside Arkansas bore proportionate cost responsibility for that capacity regardless of the retail treatment.¹⁷⁴

83. The Louisiana Commission states that for Commission ratemaking purposes, all of the "unsupported capacity"¹⁷⁵ has been included at full cost in allocating System production costs among the Operating Companies. Thus, the Louisiana Commission argues, the System's ratepayers supported all of Entergy Arkansas's capacity regardless of retail settlements.¹⁷⁶ The Louisiana Commission states that Entergy could not provide a credible calculation of the supposed unsupported capacity, and gave varying and incomplete testimony.¹⁷⁷

84. The Louisiana Commission contends that Entergy improperly states that the Opportunity Sales were justified because the slice-of-system capacity was disallowed from the retail rate base. However, the Louisiana Commission asserts that the 1996 retail

¹⁷² *Id.* at 50-61 (citing *Entergy Services*, 58 FERC ¶ 61,234; *Delaney*, Docket No. U-23356 (La. PSC 2000); *Gordon v. Entergy New Orleans*, Res. No. R-04-66 (N.O. City Council), *aff'd in part and reversed in part*, 977 S. 2d 212 (La. 4th Cir. 2008), *reinstated*, 08-C-0929 (La. 2009)).

¹⁷³ *Id.* at 62 (citing Entergy Brief on Exceptions at 2, 24, 27; Exh. LC-10 at 5-6 (portion of settlement)).

¹⁷⁴ *Id.* (citing Tr. 398-99 (Entergy witness Louiselle)).

¹⁷⁵ As discussed above, the Presiding Judge uses the term "unsupported capacity" to refer to the North Little Rock and Grand Gulf capacity that were excluded from retail rate base pursuant to agreements with the Arkansas Commission. *See supra* n.68.

¹⁷⁶ Louisiana Commission Brief Opposing Exceptions at 62-63.

¹⁷⁷ *Id.* at 63.

settlement approved by the Arkansas Commission merely adopted a typical retail-wholesale cost allocation that used MWs and MWHs of load data to allocate costs.¹⁷⁸ Even with the loss of North Little Rock as a wholesale requirements customer, Entergy Arkansas's load grew substantially.¹⁷⁹ Even if there was some "unsupported" capacity, it resulted from voluntary actions by Entergy that cannot provide a legal or equitable defense to a tariff violation.¹⁸⁰

85. The Louisiana Commission argues that Entergy's violation of the System Agreement raised costs to native load customers and improperly cross-subsidized competitive sales for the account of shareholders because Entergy diverted cheap energy from the System's baseload resources to serving opportunity sales in the competitive market. It states that Entergy should be required to refund to native load customers the excessive costs that they were required to pay.¹⁸¹ The Louisiana Commission rejects Entergy's contentions that the Opportunity Sales did not create a windfall to stockholders. The Louisiana Commission also objects to other Entergy arguments on damages. The Louisiana Commission asserts that, contrary to Entergy's arguments, the Louisiana Commission did timely object to the Opportunity Sales in the Opinion No. 485 proceeding. The Louisiana Commission also argues that Entergy's interpretation of Commission precedent implicitly permitting the Opportunity Sales is in error. Further, the Louisiana Commission maintains that the decisions relied on by Entergy do not provide any valid basis for denying refunds. Finally, the Louisiana Commission maintains that Entergy and Trial Staff err in arguing that the Intra-System Bill is not sufficient to measure damages. The Louisiana Commission argues that Entergy's concerns about "ripple effects" that would be produced as a result of an Intra-System Bill recalculation are not in the record.

86. In Entergy's Brief Opposing Exceptions, Entergy states that the Louisiana Commission does not take exception to the Initial Decision's finding that Entergy Arkansas was permitted under the System Agreement to make the Opportunity Sales and

¹⁷⁸ *Id.* at 68 (citing Entergy Brief on Exceptions at 24-25, 28; Exh. LC-10).

¹⁷⁹ *Id.* at 69-70 (citing Tr. 57-08; Tr. 492-94; Exh. LC-77 at 13; Exh. LC-82 at 59-64; Exh. LC-105; Exh. LC-106; Exh. LC-107; Exh. LC-109; Exh. LC-110; Exh. LC-111; Exh. LC-112; Exh. LC-113).

¹⁸⁰ *Id.* at 72.

¹⁸¹ *Id.* at 73.

because the Louisiana Commission declined to take exception on this particular issue, it is now waived.¹⁸²

87. Entergy agrees with the Louisiana Commission that the “normal” ratemaking practice is for the net margins from opportunity sales to be credited to native load customers, but says this does not apply when prudently incurred capacity is not placed in rate base (or base rates).¹⁸³ Entergy submits that no Operating Company ratepayers bore ultimate cost responsibility for the capacity used to support the Opportunity Sales. Rather, Entergy Arkansas’s shareholders bore that risk, a fact that Entergy contends is undisputed.¹⁸⁴

88. Trial Staff agrees that under a settlement agreement with the Arkansas Commission, Entergy Arkansas was permitted to either “put” the energy from its Grand Gulf Retained Share to its retail ratepayers or use the energy for its own purposes. Trial Staff states that Entergy Arkansas’s decision to follow the latter course was lawful under the System Agreement and the terms of the Arkansas Commission settlement.¹⁸⁵

89. Entergy states that Entergy Arkansas’s shareholders were entitled to retain the revenues from the Opportunity Sales because they bore the costs of the excluded capacity. Entergy contends that numerous Commission precedent and state court proceedings have so held.¹⁸⁶

90. Entergy states that the Louisiana Commission’s assertions are based on the unstated, but mistaken, premise that there is one single, homogenous group of native load ratepayers entitled to receive all wholesale revenue credits no matter which Operating

¹⁸² Entergy Brief Opposing Exceptions at 2 (citing 18 C.F.R § 385.711(d)(2)).

¹⁸³ *Id.* at 9-10.

¹⁸⁴ *Id.* at 10.

¹⁸⁵ Trial Staff Brief Opposing Exceptions at 19.

¹⁸⁶ Entergy Brief Opposing Exceptions at 10-11 (citing *Va. Elec. Power Co.*, 27 FERC ¶ 61,093, at 61,182 (1983), *reh’g denied*, 27 FERC ¶ 61,406 (1984); *Fla. Gas Transmission Co.*, 24 FERC ¶ 61,005, at 61,032 (1983), *Trunkline Gas Co.*, 90 FERC ¶ 61,017 at 61,101 (2000); *Pa. Pub. Util. Comm’n v. Pa. Power & Light Co.*, Docket Nos. R00943271C001-C0145, 1995 Pa. PUC LEXIS 189 at *367 (Sept. 27, 1995); *Application of Entergy Gulf States, Inc. for Authority to Reconcile Fuel & Purchased Power Costs*, Docket No. 32710, Order on Certified Issue at 3 (Pub. Util. Comm’n of Tex. Feb. 2, 2007)).

Company makes a particular sale. It states that this is not the case and that, rather, each Operating Company is required to recover its revenue requirement from its retail and wholesale customers, with revenues obtained from sales by individual Operating Companies to wholesale customers -- whether requirements or otherwise -- retained by the individual Operating Company making the sale, not “shared” with the other Operating Companies.¹⁸⁷

91. Entergy states that under the System Agreement, it is the customers of the Operating Company making the wholesale sales that receive credits from individual Operating Company opportunity sales. Service Schedule MSS-3 requires that any such sales be accounted for in the “load shape” of the Operating Company making them and, in that way, such Operating Company “assumes sole responsibility” for the sales, consistent with section 4.05.¹⁸⁸

92. Entergy disputes the Louisiana Commission’s contention that the Opportunity Sales resulted in “cross subsidization,” allegedly in conflict with *Entergy Services* and *Golden Spread*.¹⁸⁹ It states that both *Entergy Services* and *Golden Spread* stand for the unremarkable proposition that an appropriate incremental cost rate should be assigned to opportunity sales to protect wholesale customers served under fuel adjustment clauses. However, section 30.03 places the Opportunity Sales in Entergy Arkansas’s “load shape” and thereby imputes the variable costs of Entergy Arkansas’s generating resources to those sales.¹⁹⁰ Entergy argues that there is no “cross-subsidy” because Entergy Arkansas alone, not other Operating Companies, is fully responsible for the costs of its Opportunity Sales and none of those costs are shifted to other Operating Companies.¹⁹¹

93. Entergy also rejects the Louisiana Commission’s complaints that the System’s incremental cost might be “higher” than Entergy Arkansas’s variable costs and therefore Entergy Arkansas is harming the System by making the sales and that the System’s incremental cost responsibility is the “true” cost of the Opportunity Sales.¹⁹² Entergy argues that the “true” cost of Entergy Arkansas’s opportunity sales is the System’s

¹⁸⁷ *Id.* at 11-12.

¹⁸⁸ *Id.* at 12.

¹⁸⁹ *Id.* at 13-14 (citing Louisiana Commission Brief on Exceptions at 17-18).

¹⁹⁰ *Id.* at 15 (citing Louisiana Commission Brief on Exceptions at 42, 48-51).

¹⁹¹ *Id.*

¹⁹² *Id.* (citing Louisiana Commission Brief on Exceptions at 25-28).

incremental cost is an assertion that would apply to every sale and, thus, the Louisiana Commission's assertion provides no basis for disregarding the clear provisions of Service Schedule MSS-3.¹⁹³ Second, Entergy argues that Service Schedule MSS-3 ensures that no Operating Company "leans on" energy produced by the other Operating Companies when making sales by requiring an Operating Company short on energy to reimburse the "long" Operating Companies for the higher cost resources in those Operating Companies' stacks, ensuring that no cross-subsidization occurred.¹⁹⁴

94. Entergy also rejects the Louisiana Commission's contentions that Entergy Arkansas's Opportunity Sales were unprecedented and conflicted with "decades" of "making off-system opportunity sales for the joint account of all the companies."¹⁹⁵ This is factually wrong, Entergy argues, as there are many other examples of individual Operating Company opportunity sales.¹⁹⁶

95. Entergy contends that the Louisiana Commission's reliance on the *Delaney* proceeding has no merit and was correctly ignored by the Presiding Judge.¹⁹⁷ Entergy notes that the *Delaney* proceeding involved purchases, rather than sales, of energy.¹⁹⁸ The Louisiana Commission's reliance on a few pages of Entergy witness Louiselle's testimony to try to create the mistaken impression that the case addressed the merits of individual Operating Company opportunity sales is highly misleading.¹⁹⁹

96. Entergy also contends that the Louisiana Commission misinterprets Operating Committee minutes to find that they bar individual Operating Company opportunity sales, ignoring testimony and documentary evidence to the contrary.²⁰⁰

¹⁹³ *Id.* at 15-16.

¹⁹⁴ *Id.* at 16-17.

¹⁹⁵ *Id.* at 17 (citing Louisiana Commission Brief on Exceptions at 16).

¹⁹⁶ *Id.* at 17-18.

¹⁹⁷ *Id.* at 18.

¹⁹⁸ *Id.* at 18-19.

¹⁹⁹ *Id.* at 19-20.

²⁰⁰ *Id.* at 20-22.

97. Entergy contends that the Louisiana Commission improperly takes exception to the Presiding Judge's finding that Entergy Louisiana's customers should not be enriched by actions of the Louisiana Commission that contributed to the volume of the Opportunity Sales. The transfer of a portion of Entergy Arkansas's unsupported capacity to Entergy Louisiana was delayed more than two years due to the Louisiana Commission's protracted review of the proposed transaction, causing Entergy Arkansas to seek cost support through Opportunity Sales.²⁰¹ Entergy also argues that the Commission should not accept the Louisiana Commission's request that sales margins should be allocated among the Operating Companies. Entergy argues that if the Opportunity Sales are treated as if Entergy Arkansas made them, then they are placed in Entergy Arkansas's load shape and Entergy Arkansas retains any net margins. Entergy further contends that if the Opportunity Sales are treated as joint account sales then this requires more than simply allocating the margins to the Operating Companies – the margins must be shared proportionately. Similarly, the load associated with those sales must be treated consistent with joint account sales (i.e., removed from Entergy Arkansas's load shape).

98. Entergy also argues that the Louisiana Commission was actually aware of the Opportunity Sales beginning in 2003 in the context of Docket No. EL01-88, but did not raise any claim that those sales violated the System Agreement.²⁰² Entergy argues that the Louisiana Commission's theories regarding the Entergy Arkansas Opportunity Sales continued to change when the Louisiana Commission filed its complaint in this proceeding. Entergy argues that the Louisiana Commission's witness Baron never articulated what sales were permissible or impermissible under the System Agreement.²⁰³ Entergy notes that the Louisiana Commission's positions show the Louisiana Commission believed the Opportunity Sales were permissible when made and was aware the sales would continue until Entergy Arkansas's unsupported capacity was transferred to Entergy Louisiana.²⁰⁴

99. Trial Staff states that it generally agrees with the Louisiana Commission's position that Entergy Arkansas's use of its own low-cost energy for the Opportunity Sales and its retention of the margins therefrom is in conflict with broad statements of policy made by the Commission in prior Entergy proceedings, as well as with more general statements of policy made by the Commission in unrelated proceedings. Trial Staff argues that Entergy

²⁰¹ *Id.* at 24 (citing Louisiana Commission Brief on Exceptions at 37-38).

²⁰² *Id.* at 25 (citing Exh. ESI-32; Tr. at 59-60 (Baron)).

²⁰³ *Id.* at 26.

²⁰⁴ *Id.* at 27.

Arkansas's practices are also at odds with various statements contained in the System Agreement which set forth its general purpose and goals. However, the System Agreement is a contract among the Operating Companies and Entergy Services and is likewise a Commission-approved rate schedule. As such, its provisions must be viewed in a manner consistent with long-established rules of contract interpretation. Trial Staff restates its bases for concluding that the Initial Decision misapplied relevant rules of contract interpretation, as described in its Brief on Exceptions.²⁰⁵ Trial Staff argues that the appropriate remedy for the conflicts identified by Trial Staff is to institute a section 206 proceeding to modify the System Agreement prospectively to foreclose individual Operating Companies from using their own energy to conduct opportunity transactions.²⁰⁶

100. Trial Staff states that the Louisiana Commission makes much of the fact that prior to 2000, the Entergy System conducted its off-system energy transactions as joint account sales. But Trial Staff finds that Entergy's adoption in 1976 of an explicit policy prohibiting individual Operating Companies from engaging in non-firm energy transactions in the wholesale market merely confirms that individual Operating Company opportunity sales were permissible under the System Agreement, as the Initial Decision later found.²⁰⁷

101. Trial Staff rejects the Louisiana Commission's claims that Entergy conceded in the *Delaney* proceeding that the System Agreement required opportunity sales to be conducted as joint account transactions, stating that at no point in his testimony did Entergy witness Louiselle state that individual Operating Company opportunity sales were barred by the System Agreement.²⁰⁸ Rather, Entergy witness Louiselle stated that individual Operating Company sales were almost always requirements sales made to governmental entities, implying that while rare, opportunity sales by individual Operating Companies were permitted.²⁰⁹ Trial Staff also describes as incorrect the Louisiana Commission's claims in its Brief on Exceptions that two other Entergy witnesses in the

²⁰⁵ Trial Staff Brief Opposing Exceptions at 10.

²⁰⁶ *Id.* at 13-14.

²⁰⁷ *Id.* at 14-15.

²⁰⁸ *Id.* at 16 (citing Louisiana Commission Brief on Exceptions at 19).

²⁰⁹ *Id.*

Delaney proceeding, Frank Gallaher and Alan Ralston, asserted, as pertinent, that individual Operating Company sales were prohibited by the System Agreement.²¹⁰

102. Trial Staff states that the Louisiana Commission apparently agrees that energy-only opportunity sales are permissible under the System Agreement and that the real issues, rather, involve ascertainment of the cost priority of the energy assumed to have been used to complete those sales, and a determination of whether an Operating Company can retain the margins it earned on those sales.²¹¹ Trial Staff states that the evidence presented by the Louisiana Commission does not bear on these issues. The appropriate cost priority for the energy used by an individual Operating Company to complete its opportunity transactions depends on whether these transactions are part of its loads under section 30.03(a).²¹²

103. Trial Staff states that the Louisiana Commission recites a selective history of Entergy's market-based sales authority filings and authorizations before the Commission in its Brief on Exceptions and implies that the Opportunity Sales somehow violated that authority during the 2000-2005 period. Trial Staff finds, rather, that the Opportunity Sales are consistent with Entergy's Rate Schedule SP authority.²¹³

104. Trial Staff states that the Louisiana Commission also appears to argue that Entergy Services, as agent for the Operating Companies, should have made opportunity sales on behalf of all of the Operating Companies collectively rather than for Entergy Arkansas standing alone.²¹⁴ However, Trial Staff states that, contrary to the Louisiana Commission's suggestions, Entergy Services made no representations in the proceeding in which it filed its revised Rate Schedule SP that Entergy Arkansas's opportunity sales were for the collective benefit of the Operating Companies as an aggregated unit. Nor

²¹⁰ *Id.* at 16-17.

²¹¹ *Id.* at 18.

²¹² *Id.* at 18-19.

²¹³ *Id.* at 19 (citing Louisiana Commission Brief on Exceptions at 16-19). Trial Staff explains that the Commission originally required Entergy to insert a floor in its Rate Schedule SP for pricing opportunity sales equal to incremental cost and accepted Entergy's subsequent filing, but later accepted a revised Rate Schedule SP that removed the floor. *Id.* at 20-22. Trial Staff also states that the earlier version of the Rate Schedule SP limited opportunity sales to joint sales whereas the later version merely stated that such sales would be made by Entergy Services.

²¹⁴ *Id.* at 22 (citing Louisiana Commission Brief on Exceptions at 19).

did it make any representations concerning the relationship between opportunity sales pricing and the System's incremental cost of energy. Trial Staff argues that since the System Agreement is an approved rate schedule and Entergy Arkansas's historical Opportunity Sales were transacted consistent with it, the sales cannot now be recast as unlawful and damages imposed to remedy them.²¹⁵

105. Trial Staff states that the Louisiana Commission's assertion that "[t]he diversion of Entergy Arkansas's cheap baseload energy and resultant harm to the System is not disputed," is incorrect, as the quantification of damages has been set for a later phase of this proceeding.²¹⁶

IV. Commission Determination

106. We affirm in part and reverse in part the Presiding Judge. As we discuss in more detail below, we agree with the Presiding Judge that sections 4.05, 30.03, and 30.04 of the System Agreement are of critical importance to evaluation of the Opportunity Sales at issue but find that these provisions are ambiguous. We find that the more logical interpretation of the System Agreement grants the right to Operating Companies to make opportunity sales for their own accounts under section 4.05. We also find that section 30.03 does not provide authority for individual Operating Companies to allocate the energy associated with such opportunity sales as part of their load, and that, rather, section 30.04 provides the authority for allocation for these sales as sales to others. Accordingly, we find that the Entergy Operating Companies were required to first allocate energy to higher priority Operating Company sales pursuant to section 30.03(a) and (b) before allocating energy to the Opportunity Sales pursuant to section 30.04. As such, we find that the Louisiana Commission has met its burden of proof²¹⁷ and that

²¹⁵ *Id.*

²¹⁶ *Id.* at 23 (citing Louisiana Commission Brief on Exceptions at 26; Initial Decision, 133 FERC ¶ 63,008 at P 413). Trial Staff appears to refer to the Presiding Judge's instruction to Entergy to calculate damages by re-running the Intra-System Bill, treating the Opportunity Sales as if they had been joint account sales, and adding interest on the damages, consistent with the Commission's published interest rates. *See* Initial Decision, 133 FERC ¶ 63,008 at P 413.

²¹⁷ We also agree with the Presiding Judge's determination that the appropriate standard for the Louisiana Commission's burden of proof is the preponderance of the evidence, rather than a clear and convincing evidence standard. *See Town of Highlands v. Nantahala Power and Light Co.*, Opinion No. 139, 19 FERC ¶ 61,152, at 61,276 (1982) (finding that a preponderance of evidence did not support a finding for complainant), *reh'g denied*, Opinion No. 139-A, 20 FERC ¶ 61,430 (1982).

Entergy violated the System Agreement. We establish further hearing procedures to determine refunds.

A. Did the Opportunity Sales Violate the System Agreement?

107. As the Presiding Judge notes, Entergy relies on section 4.05 of the System Agreement for authority for the Opportunity Sales made by Entergy Arkansas. The section, titled “Sales to Others for the Joint Account of All the Companies” states:

Sales of capacity and energy to others for which any Company does not wish to assume sole responsibility, shall, with the consent of or under conditions specified by the Operating Committee, be made by the Company having direct connection with such others, for the joint account of all the Companies, and the net balance derived from such sales shall be divided among the Companies as provided in the applicable Service Schedule.

108. At issue here are the meanings of two phrases: “for which any Company does not wish to assume sole responsibility,” and “sales of capacity and energy.” As discussed below, these phrases are ambiguous in the context of section 4.05.²¹⁸

109. With respect to the language “for which any Company does not wish to assume sole responsibility,” Entergy and Trial Staff argue that the clause implicitly means that an Operating Company may choose to assume sole responsibility for sales of capacity and energy to others, and that this means that the Opportunity Sales are allowed by the System Agreement. The Presiding Judge finds that “[t]his is illogical, and this initial

²¹⁸ It is well-settled that an ambiguity may be found where, as here, the contract or tariff is susceptible to different constructions or interpretations. *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 85, *clarified*, 123 FERC ¶ 61,060 (2008). When a contract or tariff provision is found to be ambiguous, the ambiguity must be resolved by reference to the contract or tariff as a whole. *Id.* P 85 & n.70 quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (“[It is a] cardinal principal of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other.”); *see also Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.*, 119 FERC ¶ 61,314, at P 19 (2007) (contract provisions should be interpreted as consistent with the contract as a whole). In addition, extrinsic evidence of interpretation or intent may be considered to prove a meaning to which the tariff language is reasonably susceptible. *See N.Y. Indep. Sys. Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216, at P 34 (2007); *see also Miss. River Transmission Corp.*, 96 FERC ¶ 61,185, at 61,819 (2001) (citing *Consolidated Gas Transmission Corp.*, 771 F.2d 1536, 1554 (D.C. Cir. 1985)).

faulty premise necessarily leads to further mischief....”²¹⁹ We agree with Entergy’s and Trial Staff’s interpretation. Although the Presiding Judge dismisses this reading as illogical, he presents no other interpretation for how to read the phrase. If we were to find that Operating Companies are not allowed to assume sole responsibility for sales to others, this would read the phrase out of the section entirely. In other words, under the Presiding Judge’s ruling, section 4.05 would have the exact same meaning even if one removed the phrase “for which any Company does not wish to assume sole responsibility.” This is contrary to Commission practice.²²⁰ The more logical interpretation of section 4.05 is that there are circumstances under which an Operating Company may choose to assume sole responsibility for its sales to others, and that if it chooses not to do so, those sales will be governed under the requirements of section 4.05.

110. Examining the System Agreement’s six Articles, it is clear that no provision specifically precludes an Operating Company from making and accepting sole responsibility for the Opportunity Sales. This is significant because the System Agreement does limit certain individual Operating Company activities. Notably, section 4.02 conditions individual Operating Company purchases upon “the consent of or under conditions specified by the Operating Committee.” Similarly, section 3.05 conditions sales of generating capacity and associated energy upon a right of first refusal for the capacity and associated energy to the other Operating Companies, stating, in part: ²²¹

²¹⁹ Initial Decision, 133 FERC ¶ 63,008 at P 348.

²²⁰ See, e.g., *Central Maine Power Co.*, 128 FERC ¶ 61,143, at P 31 (2009) (rejecting a contractual interpretation that would “violate longstanding principles of contract interpretation by effectively reading section 3.04(a)(i) out of the TOA,”); *Nicole Gas Production, Ltd.*, 105 FERC ¶ 61,371, at P 9 (2003) (“Like a contract, a tariff must be interpreted to give meaning to all provisions of the tariff.”); *Pub. Serv. Co. of New Hampshire v. New Hampshire Elec. Coop., Inc.*, 86 FERC ¶ 61,174, at 61,598 (1999) (“It is well established in contract law that a contract should be construed so as to give effect to all of its provisions and to avoid rendering any provision meaningless.”); *DeNovo Oil & Gas Inc.*, 71 FERC ¶ 61,057, at 61,209 (1995) (rejecting an interpretation that would “violate the rules of contractual construction which require that contracts be construed in a manner which gives meaning to each of its provisions.”); *Southern Co. Servs., Inc. v. FERC*, 353 F.3d 29, 35 (D.C. Cir. 2003) (rejecting an interpretation that would render contract provisions superfluous, and stating “[c]ontracts must be read as a whole, with meaning given to every provision.”).

²²¹ This provision does not govern the dispute at hand because the Opportunity Sales were sales of non-firm energy, not of capacity or firm energy. Initial Decision, 133 FERC ¶ 63,008 at P 252 (citing Exh. LC-47 at 13:23-24). We thus find certain

(continued...)

Any Company which has generating capacity above its requirements, which desires to sell all or any portion of such excess generating capacity and associated energy, shall offer the right of first refusal for this capacity and associated energy to the other Companies under Service Schedule MSS-4 Unit Power Purchase.

111. The System Agreement’s drafters knew how to incorporate limitations upon the activities of individual Operating Companies when they so intended. While it is true that the System Agreement does not specifically include a section describing how to treat sales where an Operating Company chooses to assume sole responsibility, this is not enough to find that such sales are prohibited. At most, this means that treatment of such sales is ambiguous, and we must further analyze the provisions of the System Agreement to determine how the sales should be accounted for, as we do below.

112. With respect to the second phrase (“sales of capacity and energy”), we disagree with the Presiding Judge that “capacity and energy,” as used in section 4.05, should be read conjunctively, such that any sales made must include both capacity and energy together. There is nothing in section 4.05 to suggest that sales of capacity and energy must include both items, rather than sales of either or both. Indeed, the phrase “sales of X and Y” could refer to both X and Y conjunctively, or disjunctively, depending on the context.²²²

113. Although the Presiding Judge points to the industry use of the phrase “capacity and energy” to mean firm sales of both capacity and energy, its use is also context-dependent, such that it sometimes refers to both capacity and energy, and sometimes to either one. We find that, although ambiguous, the more logical interpretation of section 4.05 refers to sales of either or both of capacity and energy. There are several reasons why this is the case, beyond the language of section 4.05 itself. First, other provisions in the System Agreement use more targeted language when intending to link capacity and energy conjunctively. Section 3.05 refers to “capacity *and associated energy*” (emphasis added), thus clarifying that the limitation in section 3.05 applies to firm sales of both capacity and energy, as all parties agreed. Had section 4.05 used “capacity and

comments by the Presiding Judge stating that the Operating Committee may not circumvent the section 3.05 right of first refusal as beyond the scope of this proceeding, given, as the Presiding Judge notes, this provision applies only to firm opportunity sales, while it is non-firm energy sales that are at issue in this proceeding. *Id.* P 354.

²²² “‘Or’ and ‘and’ are generally interchangeable and one may be substituted for the other, if consistent with the legislative intent.” *Holyoke Water Power Co. v. FERC*, 799 F.2d 755, 761 (D.C. Cir. 1986) (quoting 1A C. Sands, Sutherland Statutory Construction § 21.14 at 127, and cases cited at 127-34, n.6 (4th ed. 1985)).

associated energy” to refer to the sales covered in the section, there would have been no doubt that it intended to refer to only firm sales of both capacity and energy, rather than to firm or non-firm sales of either capacity, energy or both.

114. Second, the phrase “capacity and energy” is used to mean “capacity and/or energy” elsewhere in the System Agreement. For example, section 4.02 refers to both “capacity and/or energy” and “capacity and energy” interchangeably for the purpose of determining the allocation of purchased capacity and energy.²²³ We agree with Trial Staff that, “[o]n its face, the simultaneous use of disjunctive and conjunctive constructions in section 4.02 substantially weakens any claim that section 4.05 should be read to prohibit energy-only sales.”²²⁴

115. Even if the Presiding Judge were correct that “capacity and energy” as used in section 4.05 should be read conjunctively, this would not conclusively determine whether an Operating Company was prohibited from making energy-only sales for its own account. At most, a conjunctive reading of “capacity and energy” would mean that section 4.05 would only govern sales of both capacity and energy for the joint account of

²²³ The first sentence of section 4.02 indicates that an Operating Company or Companies may purchase “capacity and/or energy” from outside sources for the account of a “Company or Companies.” If that purchase is made by an Operating Company for its own account, section 4.02 breaks down its treatment individually by capacity and by energy. However, if the purchase is made for the joint account of some or all of the Operating Companies, section 4.02 discusses the allocation of “capacity and energy” to each company. Since it is clear that under the first sentence of section 4.02 an Operating Company may purchase either capacity or energy or both for the joint account of some or all of the Operating Companies, the reference to “capacity and energy” in the discussion of allocation related to purchases for the joint account must also refer to purchases of capacity or energy or both. This reference suggests that the drafters of the System Agreement viewed the phrase “capacity and energy” as interchangeable with “capacity and/or energy.” Moreover, sections 2.16 and 2.17 describe “the allocation of a purchase of *capacity and energy* [emphasis added] for the joint account of all Companies under Section 4.02” although, as discussed above, section 4.02 discusses purchases of either capacity or energy or both.

²²⁴ Trial Staff Brief on Exceptions at 34-35; *see also* Entergy Brief on Exceptions at 46.

the Operating Companies. The treatment of energy-only sales for a single Operating Company would thus not be covered by section 4.05.²²⁵

116. We also disagree with the Presiding Judge's finding of a right for individual Operating Company opportunity sales in section 30.04 of Service Schedule MSS-3 of the System Agreement.²²⁶ We agree with the parties' and Trial Staff's arguments that the provisions giving or limiting the right of individual Operating Companies to make opportunity sales reside in the System Agreement's six articles and not in the Service Schedules MSS-1 through MSS-7, which, as noted in the System Agreement itself, concern "[t]he basis of compensation for the use of facilities and for the capacity and energy provided or supplied by a Company to another Company or Companies under this Agreement."²²⁷ In other words, these Service Schedules generally concern cost allocation issues, not the antecedent question of Operating Company powers, or lack thereof, under the System Agreement. As the parties and Trial Staff argue, if section 30.04 was read to empower only individual Operating Company opportunity sales, it would leave no provision to provide for the allocation of joint Operating Company opportunity sales. The Louisiana Commission also agreed that section 30.04 has been "traditionally used for Joint Account Sales."²²⁸

117. We reject the arguments of the Louisiana Commission that Commission statements in Opinion No. 505 limit the right of Operating Companies to make opportunity sales or govern the manner in which they are allocated energy. The Louisiana Commission argues that in Opinion No. 505, the Commission stated that the opportunity sales at issue were part of a class of sales that were labeled "non-requirements sales."²²⁹ In footnote 172 of Opinion No. 505, the Commission stated that for the computation of each Operating Company's energy ratio, "[t]he non-requirements

²²⁵ The Louisiana Commission's contention that Trial Staff witness Sammon stated in his testimony that section 4.05 was intended to refer to firm wholesale sales exaggerates the significance of Sammon's statement; Sammon's testimony does not assert that that section 4.05 was drafted to exclude non-firm sales of energy. While Sammon stated that a sale of capacity and energy has historically been considered a firm sale, *see* Tr. 869:7-9, he never specifically asserted that section 4.05 is explicitly limited to firm wholesale sales. *See* Tr. 869-75.

²²⁶ Initial Decision, 133 FERC ¶ 63,008 at P 356.

²²⁷ System Agreement, section 4.12.

²²⁸ Exh. LC-1 at 49.

²²⁹ Opinion No. 505, 130 FERC ¶ 61,023.

sales include the individual Operating Company off-system opportunity sales.”²³⁰ However, the term “requirements” and “non-requirements” in that order referred to the narrow context of determining Operating Companies’ net area loads. Opinion No. 505 makes clear that net area loads are not total load, and thus not relevant to section 30.03, which allocates based on total load.²³¹ As Trial Staff witness Sammon notes, this is actually evidence that the Opportunity Sales at issue were allowed under the System Agreement:

It is somewhat difficult for me to understand why the Commission would direct that the energy associated with an “individual Operating Company off-system opportunity sale” or as I ... have been calling it “an off-system opportunity sale made by an Operating Company for its own account” would need to be subtracted when developing the Operating Company’s bandwidth energy ratio if the System Agreement prohibited such sales.²³²

118. The Louisiana Commission argues that various principles of contractual interpretation should guide the Commission in its review. These include, among others, that: (1) the System Agreement should be interpreted to produce a just and reasonable result; (2) the terms in the agreement must be interpreted in a consistent manner and consistent with industry usage; and (3) ambiguities must be construed against Entergy.²³³ The first two principles are general maxims that do not conflict with our determination on the merits here. With respect to the third, although a written agreement must be construed against its drafter, this canon of construction should not be applied so as to deprive a contract of meaning. The problem remains of assigning some meaning and effect to the phrase “for which any Company does not wish to assume sole responsibility.”

119. We disagree with the Louisiana Commission’s argument that Entergy should be estopped from changing its interpretation of the relevant provisions of the System Agreement, given Commission reliance on Entergy’s representations in *Entergy Services* and similar representations before the Louisiana Commission and the Louisiana courts.²³⁴ Entergy executive statements in the *Delaney* case are not relevant here given that energy

²³⁰ *Id.* P 137 n.172.

²³¹ *Id.* P 111.

²³² Exh. S-1 at 21:10-16.

²³³ Louisiana Commission Brief Opposing Exceptions at 50-61.

²³⁴ *Id.* at 59 (citing *Entergy Services*, 58 FERC ¶ 61,234).

purchases, rather than opportunity sales, were the focus of that proceeding.²³⁵ We also find that the statements made by Entergy in *Entergy Services* were merely general descriptions of the treatment of native load ratepayers, and do not justify estoppel.²³⁶ Regardless, the Louisiana Commission has not met its burden to show the elements of estoppel should apply here.²³⁷

120. Although we find here that the Opportunity Sales at issue were allowed under the System Agreement, we acknowledge that there are some facts that make this determination difficult. We note that the Louisiana Commission has presented evidence that few individual Operating Company opportunity sales were conducted prior to the Opportunity Sales at issue, and that the Operating Committee sought to limit such sales. The Louisiana Commission points to adoption in 1976 of an explicit policy prohibiting individual Operating Companies from engaging in non-firm energy transactions in the wholesale market. However, such evidence does not by itself show that the Opportunity Sales by Entergy Arkansas were invalid, as Entergy may have chosen to discourage such sales, rather than to expressly ban them under the System Agreement by altering its language. If Entergy did indeed have a formal or informal policy discouraging non-firm energy transactions in the wholesale market prior to the Opportunity Sales in 2000, it was within its rights to overturn that policy and allow the sales at issue here, as long as the sales did not violate the System Agreement.

121. Additionally, we agree with Trial Staff that there may be some tension between allowing opportunity sales for the accounts of individual Operating Companies and the interests of the System as a whole.²³⁸ Opportunity sales, if widespread, may ultimately vitiate the provisions of the System Agreement calling for the use of facilities for the mutual benefit of all the Operating Companies. However, we note that this outcome is not presented by the facts in this case. Entergy presented evidence that it acted to reduce the volume of Opportunity Sales by entering into power purchase agreements to sell excess power to other Operating Companies, and was delayed in its ability to do so by the

²³⁵ *Delaney*, Docket No. U-23366 (La. P.S.C. 2000).

²³⁶ *Entergy Services*, 58 FERC at 61,750.

²³⁷ These elements include false representation, a purpose to invite action by the party to whom the representation was made, ignorance of the true facts by that party, reliance, and unjust enrichment. *See Bangor Hydro-Electric Co. v. ISO New England*, 97 FERC ¶ 61,339, at 62,590 (2001).

²³⁸ *See, e.g.*, System Agreement, section 3.01.

actions of the Louisiana Commission itself.²³⁹ Entergy also presented evidence that it greatly reduced the volume of Opportunity Sales after the year 2005.²⁴⁰ In addition, Trial Staff witness Sammon noted that the value of the Entergy Arkansas excess energy to the other Operating Companies is largely a function of the relative price of natural gas prices and he stated that he foresaw the adverse effect of such sales upon other Operating Companies as likely to diminish, reducing the urgency of addressing such sales prospectively.²⁴¹

122. In addition, while the System Agreement does provide for a certain degree of sharing of capacity and energy between the Operating Companies, it also provides for Operating Companies to own their own generation, and to use that generation to serve their own loads before the rest of the system. Operating Companies are not obligated to act only on behalf of the System as a whole, but may act on their own behalf as well, as long as their actions are allowed under the System Agreement.²⁴²

123. Regardless, we agree with Trial Staff that the remedy to any conflict between the specific provisions of the System Agreement that allow the Opportunity Sales and the general purposes of the System Agreement is to revise the System Agreement in a section 205 or 206 proceeding. We note that the Louisiana Commission does not seek to modify the System Agreement in this proceeding.

²³⁹ Initial Decision, 133 FERC ¶ 63,008 at PP 397-98. Entergy states that more than 70 percent of the sales at issue occurred in the 2003 to 2005 period while the Louisiana Commission failed to act on a pending Power Purchase Agreement with Entergy Louisiana. Entergy Brief on Exceptions at 23-24.

²⁴⁰ See Exh. LC-35 at 16. See also Exh. ESI-14 at 21.

²⁴¹ See Exh. S-1 at 15:9-21.

²⁴² This finding is consistent with our recent decision that the plain language of the System Agreement allows two Entergy Operating Companies, Entergy Mississippi and Entergy Arkansas, to withdraw from the System Agreement upon 96 months prior notice to the other parties. See *Entergy Services, Inc.*, 129 FERC ¶ 61,143 (2009), *reh'g denied*, 129 FERC ¶ 61,075 (2011). In that decision, we rejected arguments similar to those of the Louisiana Commission and the Presiding Judge in this proceeding regarding the right to the output of each Operating Company's generation and declined arguments to infer unstated conditions upon, and continuing obligations related to, such withdrawals. As the Commission found, the history of the System Agreement demonstrates generation in the Entergy system is, and was intended to be, owned by the individual Operating Companies, rather than by the system as a whole or shared among the various Operating Companies. *Id.* P 28.

B. Were the Opportunity Sales Properly Allocated Under the System Agreement?

124. With respect to the issue of cost allocation for the Opportunity Sales under the System Agreement, the Presiding Judge found that the sales had been improperly allocated under Service Schedule MSS-3, with energy made available for the Opportunity Sales before System needs were considered and with fuel incorrectly priced at Entergy Arkansas's average cost, rather than System incremental cost. The parties, Trial Staff, and the Presiding Judge agree that sections 30.03 and 30.04 are the significant operative provisions with respect to allocation.²⁴³ We agree.

125. Section 30.03, titled "Allocation of Energy," states:

The energy from the lowest cost source available and scheduled as in Section 30.02 above shall be allocated on an hourly basis, in the order of the following priorities:

(a) first to the loads of the Company having such sources available, except that in the case of energy generated by a Designated Generating Unit, each Company to which a portion of the Capability of the Designated Generating Unit as defined in Section 40.02 has been sold shall be entitled to receive each hour that portion of the total energy generated by the Designated Generating Unit that the capability sold to the Company bears to the total capability of the Designated Generating Unit. (b) second to supply the requirements of the other Companies' Loads (Pool Energy).

126. Section 30.04, titled "Energy for Sales to Others," states:

Energy used to supply others will be provided in accordance with rate schedules on file with the Federal Energy Regulatory Commission. A Company will be reimbursed for the current estimated cost of fuel used by the specific unit or units supplying the energy together with the adder determined in Section 30.08(f) on an hour by hour basis.

127. The Presiding Judge found that sections 30.03 and 30.04 provide that lowest cost energy goes first to satisfy the native load of the Operating Companies that generate the

²⁴³ See Louisiana Commission Exh. LC-47 and Tr. 116:7-19 (Baron); Trial Staff Exh. S-1 at 8 (Sammon); Entergy Exh. ESI-1 at 7 (Rainer). Further, we agree with the Presiding Judge that, contrary to the arguments of Entergy, the requirements of the Intra-System Bill do not establish the priority of energy allocated to the Opportunity Sales. See Initial Decision at PP 385-389.

energy, second to satisfy the native load of the pool of all Operating Companies, and, if any energy remains, third to sales to “others” at negotiated rates. The Opportunity Sales at issue here were treated by Entergy as part of Entergy Arkansas’s load, and thus were allocated the lowest cost energy under section 30.03. The Presiding Judge stated that these sales instead should have been treated as “sales to others” under section 30.04. The Presiding Judge said that other System Agreement provisions that call for operation of the System as an integrated whole to share in the benefits of coordinated operations, such as sections 3.01, 3.02, and 3.09, also meant that excess energy should have gone to the other Operating Companies to reduce their operating costs. The Presiding Judge also found that Entergy Arkansas’s pricing of off-system sales at its average cost, rather than the incremental cost of the system as a whole, violated Commission precedent calling for off-system sales to be made at incremental fuel cost to avoid subsidization of shareholders at the expense of ratepayers.

128. We agree that the Opportunity Sales should not have been considered part of Entergy Arkansas’s “load” under section 30.03, but instead should have been treated as “sales to others” under section 30.04. First, we find that the terms “loads” and “requirements” in section 30.03 are ambiguous. As parties have indicated, the terms are used in various ways throughout the System Agreement. We agree with the Louisiana Commission that Entergy implicitly concedes that the term “requirements” means “native load” in some parts of the System Agreement, but inconsistently argues that planning “requirements” are different from energy allocation “requirements” in the System Agreement.²⁴⁴ Yet we also agree with Entergy and Trial Staff that the Louisiana Commission has not demonstrated that the terms “load” and “requirements” as used in the key phrases in sections 30.03 must refer exclusively to “native load,” given these phrases are often used in the electric industry in a more generic, inclusive sense.²⁴⁵

129. We find that the most logical reading of the Service Schedule MSS-3 allocation provisions is that the Opportunity Sales should be treated as “sales to others” under section 30.04. We base this determination on both the language of sections 30.03 and 30.04 specifically, as well as the context of the System Agreement as a whole. Although sections 30.03 and 30.04 do not clearly state how the costs of the Opportunity Sales should have been allocated, we believe it is reasonable for the more specific language of section 30.04 referring to sales “to others” to control. Reading section 30.04 together with section 4.05 provides further support for allocating energy to the Opportunity Sales pursuant to section 30.04. Section 30.04 is titled “Energy for Sales to Others” and

²⁴⁴ Louisiana Commission Brief Opposing Exceptions at 25 (citing Entergy Brief on Exceptions at 64).

²⁴⁵ See, e.g., Exh. S-1 at 39 (Sammon).

mimics the “to others” language in section 4.05, which contains the provision that we find governs the Opportunity Sales at issue, providing further support that this provision governs the energy allocation for those sales.²⁴⁶

130. Although Entergy makes the further argument that its allocation of the Opportunity Sales was allowed under section 2.16 of the System Agreement, we disagree. Section 2.16 governs the determination of Company Load Responsibility for the purposes of Service Schedules MSS-1, MSS-2, MSS-5, and MSS-6. Service Schedule MSS-3’s energy exchange and allocation provisions, which govern the allocation of the Opportunity Sales at issue, are not covered by section 2.16. The Presiding Judge correctly rejected the application of section 2.16, but in so doing also stated that adding the Opportunity Sales to Operating Companies’ load responsibility is contrary to the Commission’s decision on interruptible load in Opinion No. 468. We find that the Presiding Judge’s interpretation of Opinion No. 468 is inapplicable given that the energy exchange provisions of Service Schedule MSS-3 were not at issue in that proceeding and the proceeding, rather, concerned allocation of fixed capacity costs, not variable energy costs.²⁴⁷

131. We disagree with Trial Staff that the reference in section 30.04 to an Operating Company’s right to reimbursement for fuel used to supply energy for sales to others clearly demonstrates that section 30.04 refers to joint account sales and not individual Operating Company sales, since only joint account sales would require reimbursement. The language regarding the right to reimbursement for fuel is necessary for an opportunity sale made by an Operating Company for its own account because of the manner in which the System is dispatched. As set forth in section 30.02 of the System Agreement:

The System Capability shall be operated as scheduled and/or controlled by the System Operator to obtain the lowest reasonable cost of energy to all the Companies consistent with the requirements of daily operating generation reserve, voltage control, electrical stability, loading of facilities and continuity of service to the customers of each Company.

²⁴⁶ The other sections within Service Schedule MSS-3 that address allocation (sections 30.05, 30.06 and 30.07) also clearly do not apply to the Opportunity Sales at issue. Section 30.05 applies to unscheduled energy, section 30.06 to fuel contract energy, and section 30.07 to cogeneration or small power production energy.

²⁴⁷ See Opinion No. 468, 106 FERC ¶ 61,228 (2004). Notably, that proceeding did not address Service Schedule MSS-3’s energy exchange and allocation provisions, which are the key provisions with respect to the allocation issues in this proceeding.

Accordingly, the energy to supply an opportunity sale made by an Operating Company for its own account does not necessarily come from that individual Operating Company's own generation. That is, individual Operating Company sales could require reimbursement of another Operating Company for fuel.²⁴⁸ We also find that a reference in section 50.02 of Service Schedule MSS-5 requiring a deduction from gross sales proceeds of the cost of energy determined under section 30.04 does not establish that section 30.04 is limited to energy allocations for joint Operating Company sales, rather than also applying to sales by an individual Operating Company for its own account. There is simply no basis for such an inference.

132. While we find that Entergy's allocation of energy pursuant to the System Agreement was inappropriate, we reject the Presiding Judge's determination that the Opportunity Sales also violated Commission precedent on off-system sales. The Presiding Judge cites to *Minnesota Power* and *Golden Spread*, two decisions where the Commission addressed the proper pricing of off-system sales. In *Minnesota Power*, the Commission noted that off-system sales were generally priced at the cost of incremental fuel used to meet the load, as this would ensure that requirements customers would not pay more than they would have had the off-system sale not occurred. In *Golden Spread*, the Commission held that public utilities should impute incremental fuel costs to market-based intersystem (i.e., opportunity) sales to assure that native load customers do not pay more than they would have paid had the intersystem sale not occurred.²⁴⁹ The Commission explained that this was necessary to forestall the danger that public utilities would force wholesale requirements customers to cross-subsidize opportunity sales to third parties using underpriced system power, with fuel costs for such sales flowed through a utility's fuel cost adjustment clauses used to bill wholesale requirements customers.

133. We find that the treatment of the Opportunity Sales in the allocation of energy costs among the Operating Companies under the System Agreement does not violate precedent on off-system sales. In *Minnesota Power*, the Commission rejected a request for declaratory order, and stated that "assignment of lower cost fuel to off-system transactions, while uncommon, is not *per se* unreasonable."²⁵⁰ As such, the general statements made by the Commission in *Minnesota Power* regarding the typical treatment

²⁴⁸ The Presiding Judge finds that the System Agreement does not authorize joint account sales of energy. This finding is outside the scope of the proceeding.

²⁴⁹ *Golden Spread*, 123 FERC ¶ 61,047 at PP 41-45.

²⁵⁰ *Minnesota Power*, 47 FERC ¶ at 61,184.

of off-system sales do not control here. With respect to *Golden Spread*, that decision did not address the issue of what priority the native load of each operating company of a holding company system has *vis a vis* the opportunity sales of the other operating companies in the system. Resolution of that issue depends on the specific provisions of the system agreement governing the coordination among the operating companies in the holding company system. Accordingly, we find that the precedent on off-system sales cited by the Presiding Judge is not applicable to the instant proceeding.²⁵¹

C. Should Entergy be required to make refunds of damages? If so, how should refunds be calculated?

134. Based on our finding, above, that section 30.03 does not provide authority for individual Operating Companies to allocate the energy associated with such opportunity sales as part of their load, and that the Entergy Operating Companies should have made the Opportunity Sales using energy allocated after Entergy Arkansas and other Operating Companies' load was served pursuant to section 30.03, we find that Entergy violated the System Agreement.

135. We agree with the Presiding Judge (and parties and Trial Staff) that re-running the Intra-System Bill is the appropriate basis for determining damages.²⁵² However, we find that further hearing procedures are necessary to determine the amount of damages due to be refunded, as discussed below.

136. We affirm the Presiding Judge's determination that damages are warranted and disagree with Entergy that the equities require no finding of damages. Based on the discussion above, we find Entergy violated the System Agreement, notwithstanding the fact that the Opportunity Sales were made and priced in good faith. Accordingly, we find that, based on the circumstances before us, the Opportunity Sales should be re-priced consistent with our interpretation of the requirements of the System Agreement. Namely, Entergy should calculate the difference between the incremental energy costs allocated to

²⁵¹ Whether Entergy Arkansas properly accounted for *its* incremental costs of supplying energy for the Opportunity Sales in the rates it charged its wholesale requirements customers is beyond the scope of this proceeding, which only concerns the allocation of costs among the Operating Companies under the System Agreement. We also find the Louisiana Commission's arguments that the Opportunity Sales violated earlier Commission orders concerning Entergy's Rate Schedule SP are outside the scope of this proceeding for similar reasons. *See Entergy Services, Inc.*, 58 FERC ¶ 61,234, *reh'g denied*, 60 FERC ¶ 61,168 (1992); Louisiana Commission Brief on Exceptions at 16-19.

²⁵² Initial Decision, 133 FERC ¶ 63,008 at P 413.

Entergy Arkansas due to inclusion of the Opportunity Sales in its load under section 30.03(a) and the incremental costs of energy sales to the system it should have been allocated for the Opportunity Sales under section 30.04. That difference should be paid in the form of refunds to the other Operating Companies consistent with how they should have been allocated energy under 30.03(b) absent Entergy's violation of the System Agreement. Because we disagree with the Presiding Judge that these sales should have been treated as joint account sales, parties' arguments regarding distribution of the margins are not relevant. All refunds will be paid from Entergy Arkansas to the other Operating Companies.

137. We agree with Entergy and Trial Staff that further proceedings are necessary to determine the appropriate level of damages. We find there is insufficient information in the record to determine the results of re-running the Intra-System Bill and how those results may need to be adjusted to determine the appropriate amount due to be refunded. Therefore, we will remand the issue for further hearing proceedings.

138. Entergy contends that if the Opportunity Sales were treated comparably to joint account sales, as held the Presiding Judge, they should not have been considered "load" for purposes of any calculations under the System Agreement including, but not limited to Service Schedules MSS-1, MSS-2, and MSS-3 (with respect to the bandwidth provision).²⁵³ Given that we are modifying the Presiding Judge's determination to instead treat the Opportunity Sales as Entergy Arkansas sales, but of a lower energy priority, we direct the judge, in the further hearing proceedings, to determine whether adjustments to settlements under these service schedules or other provisions of the System Agreement are necessary.

139. We also find that whether "unloaded coal" should be taken into consideration in re-running the Intra-System Bill should be addressed in the hearing. The Presiding Judge recognizes that if Entergy Arkansas had unloaded coal, "it very well might have been used to supply off-system opportunity sales" and through the redispatch process, "the computer model may assign higher cost units to a sale than the units that actually were used in making the sale."²⁵⁴ We find there is insufficient information in the record on this issue. Therefore, we will remand the issue for further hearing proceedings to determine whether "unloaded coal" should be taken into consideration in re-running the Intra-System Bill.

²⁵³ Because of our finding that the Opportunity Sales should not be treated as joint account sales, Service Schedule MSS-5 does not apply.

²⁵⁴ Initial Decision, 133 FERC ¶ 63,008 at P 394.

140. However, we do find the record adequate to make some determinations regarding the scope of the remedy. Given that we find a right of individual Operating Companies to make opportunity sales, we find Entergy's assertion of unsupported capacity to be irrelevant to its right to make such sales. We find that Entergy has not demonstrated that any alleged unsupported capacity justifies according such sales an energy allocation priority other than that pursuant to section 30.04, as discussed above, and exclude this as a matter to be addressed in the further hearing proceedings we order.

141. We also affirm the Presiding Judge's finding that the last 12 months of the 28-month delay in approving the Entergy Louisiana PPA constituted unreasonable delay. It is not unreasonable for the Presiding Judge to reason that "[t]he 12-month refund period, which runs from May 1, 2004 to May 2005 is the difference between the 63 weeks that the FERC allots for the resolution of Track III hearing cases, rounded to the nearest month, subtracted from 28 months."²⁵⁵ Accordingly, we find that payments of damages to Entergy Louisiana should be limited in this manner.

142. We also affirm the Presiding Judge's finding regarding laches. We agree with the Presiding Judge that:

It is apparent that the [Louisiana Commission] thought that the issue of pricing third-party opportunity sales was contained in Docket No. ER03-583-000 proceedings, and that this issue remained active throughout the appeals process, which terminated only in December 2008, when the D.C. Circuit Court found that the Commission's pronouncements on whether the section 3.05 right of first refusal applied to third-party sales was unreviewable dicta.²⁵⁶

The instant complaint was filed just six months after the D.C. Circuit Court ruling. Accordingly, we find that the Louisiana Commission did not delay in filing the Complaint and laches is not a defense to damages by Entergy.

The Commission orders:

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

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the

²⁵⁵ *Id.* P 398.

²⁵⁶ *Id.* P 408.

Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the limited issues raised in the body of this order.

(C) A presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner Clark voting present.

(S E A L)

Kimberly D. Bose,
Secretary.