

142 FERC ¶ 61,211
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation	Docket Nos. EL00-66-016 EL00-66-017
Louisiana Public Service Commission v. Entergy Services, Inc.	EL95-33-011

ORDER DENYING REHEARING

(Issued March 21, 2013)

1. On June 9, 2011, the Commission issued an order finding that, while it had statutory authority to order refunds for the 15-month refund period that followed the Louisiana Public Service Commission's (Louisiana Commission) filing of a complaint in March 1995 opposing Entergy Services, Inc.'s (Entergy) inclusion of interruptible load in certain rate calculations under the Entergy System Agreement (System Agreement), and while it had earlier directed Entergy to remove interruptible load from these calculations, it would invoke its equitable discretion to deny refunds.¹
2. The Louisiana Commission then filed a request for rehearing of the Rehearing Order, challenging the Commission's finding that no refunds were warranted. Upon consideration of the Louisiana Commission's rehearing request, the Commission issued an order establishing a paper hearing, limited to the Commission's exercise of equitable discretion to deny refunds.²
3. Having reviewed the Louisiana Commission's request for rehearing in Docket Nos. EL00-66-017 and EL95-33-011, along with the briefs opposing refunds, and the

¹ *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 135 FERC ¶ 61,218 (2011) (Rehearing Order).

² *Louisiana Public Service Commission and the Council of the City of New Orleans v. Energy Corporation*, 137 FERC ¶ 61,018 (2011) (Briefing Order).

Louisiana Commission's reply brief, the Commission denies the Louisiana Commission's request for rehearing. We will also dismiss, as moot, the Louisiana Commission's request for rehearing in Docket No. EL00-66-016.

I. Background

4. This proceeding began on March 15, 1995, when the Louisiana Commission filed a complaint alleging that certain cost allocation calculations by Entergy under the System Agreement were unjust and unreasonable and seeking revision of the System Agreement to exclude interruptible load from calculation of peak load responsibility.³ The Commission issued an order finding that inclusion of interruptible load in such calculations was reasonable, noting that the System Agreement had included interruptible load in the calculation of peak load responsibility since the parties entered into the System Agreement in 1951.⁴

5. However, on appeal, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that the Commission had failed to explain its departure from certain Commission precedent, including, in particular, *Kentucky Utilities Company*.⁵ In *Kentucky Utilities*, the Commission had rejected the inclusion of interruptible load in allocating capacity costs since the utility, by interrupting supply, could keep the interruptible customer from imposing demand on the system during peak periods and could thus control its capacity costs. The court directed the Commission to either adhere to the principles that it articulated in *Kentucky Utilities* or provide a reason for including interruptible load in the allocation of capacity costs.⁶

³ Under the System Agreement, the Operating Companies had included interruptible load when calculating a Company's peak load responsibility if the Company was serving interruptible load at the time of the Entergy System peak. The bulk of the interruptible load on the Entergy System is located in Louisiana, and the System Agreement's inclusion of interruptible load in the calculation of peak load responsibility therefore tended to increase the share of costs allocated to Louisiana's customers.

⁴ *Louisiana Public Service Commission v. Entergy Services, Inc.*, 76 FERC ¶ 61,168, at 61,955 (1996) (Louisiana I), *reh'g denied*, 80 FERC ¶ 61,282 (1997) (Louisiana II).

⁵ Opinion No. 116, 15 FERC ¶ 61,002, *reh'g denied*, Opinion No. 116-A, 15 FERC ¶ 61,222 (1981) (*Kentucky Utilities*).

⁶ *Louisiana Public Service Company v. FERC*, 184 F.3d 892, 897, 900 (D.C. Cir. 1999).

6. On remand, in Opinion No. 468, the Commission held that Entergy must exclude interruptible load from its computation of peak load responsibility used to allocate certain costs among its Operating Companies under the System Agreement.⁷ It further held that the new allocation method could be phased in over twelve months and that, while the company's cost allocation resulted in unjust and unreasonable rates, refunds for the 15-month period following the filing of the complaint (complaint refund period)⁸ were precluded by section 206(c) of the Federal Power Act (FPA), 16 U.S.C. § 824e(c) (2006). Whether the Commission should order refunds for the complaint refund period is what remains at issue in this proceeding.

7. On appeal of Opinion No. 468, the D.C. Circuit, *inter alia*, held that the Commission had failed to sufficiently explain why FPA section 206(c) barred refunds in this case, and remanded that issue "for a more considered determination."⁹ The Commission issued an order in response to the court's remand, determining that refunds were both legal and appropriate.¹⁰ After determining that FPA section 206(c) did not bar refunds, the Commission explained that refunds were warranted:

given the court's finding that the Commission may, in these circumstances, order refunds, we will reverse our prior determination and adopt the presiding judge's finding in the [initial decision] that refunds are appropriate, based on his analysis of the relevant testimony, because we believe that his reasoning provides a rational basis for a refund consistent with the court's remand.^[11]

The Commission directed Entergy to make refunds within 30 days of the date of issuance of the order. The refunds were paid on October 15, 2008.

⁷ *Louisiana Public Service Commission v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh'g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005).

⁸ The complaint refund period runs from May 14, 1995 through August 13, 1996.

⁹ *Louisiana Public Service Commission v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007).

¹⁰ *Louisiana Public Service Commission v. Entergy Corp.*, 120 FERC ¶ 61,241 (2007) (2007 Remand Order), *reh'g denied*, 124 FERC ¶ 61,275 (2008).

¹¹ *Id.* P 8.

8. These orders were in turn appealed to the D.C. Circuit by the Arkansas Public Service Commission (Arkansas Commission) and Entergy.¹² However, on June 24, 2009, in response to a motion by the Commission, the court remanded the refund issue so that the agency could address it more fully.

9. On December 17, 2009, the Commission issued an order on remand.¹³ The Commission noted that, “we emphasize that, as the court has long recognized, the Commission's ‘general policy’ is one of ‘granting full refunds.’ . . . Thus, the parties should address whether there are special circumstances militating against applying this general policy here.”¹⁴ The Commission requested that the parties file further briefs and evidentiary submissions on this issue.¹⁵

10. On August 13, 2010, the Commission issued an amended order on remand, holding that: (1) it was authorized to order refunds in this case in spite of the strictures of section 206(c) of the FPA; and (2) it was ordering refunds pursuant to its discretionary remedial authority.¹⁶ In ordering refunds, the Commission explained that it has a policy of granting full refunds to correct unjust and unreasonable rates and that “[t]he only issue is whether Arkansas/Mississippi and Entergy have demonstrated any reason here for the Commission to deviate from its policy of granting full refunds.”¹⁷ The Commission held that there was not, and further explained that “there is no doubt that Entergy's inclusion of interruptible load affected the Operating Companies' cost of service, led to an overcharge to Louisiana customers, and resulted in unjust and unreasonable rates.”¹⁸ Second, the Commission held that this was not a rate design case where customer usage patterns are relevant, but rather involved misallocation of costs, so that one group of customers was paying too much, while others paid too little. The Commission found

¹² *Arkansas Public Service Commission v. FERC*, Nos. 08-1330, *et al.* (D.C. Cir. October 14, 2008).

¹³ *Louisiana Public Serv. Comm'n v. Entergy*, 129 FERC ¶ 61,237 (2009) (Order on Voluntary Remand).

¹⁴ *Id.* P 15.

¹⁵ *Id.* P 16.

¹⁶ *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 132 FERC ¶ 61,133 (2011) (Amended Remand Order).

¹⁷ *Id.* P 31.

¹⁸ *Id.* P 32.

that, under the facts of the case, it did not consider the length of time since the complaint was filed to be a relevant factor “one way or the other” in whether refunds were warranted.¹⁹

11. On June 9, 2011, the Commission issued an order granting rehearing in part of the Amended Remand Order, affirming its interpretation of section 206(c), but now invoking its equitable discretion to deny refunds.²⁰ In the Rehearing Order, the Commission first disavowed the distinction between rate design cases and cost allocation cases it sought to draw in the Amended Remand Order. The Commission explained:

On the question of refunds, the Commission has two lines of precedent, each dealing with a different situation. When a case involves a company over collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers. [FN40] By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds. [FN41] Reconsidering the matter, the Commission disavows the distinction we attempted to draw in the Amended Rehearing Order between the treatment of refunds in rate design and cost allocation cases.

FN40. *See, e.g., Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009); *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).

FN41. *See, e.g., Portland General Electric Co.*, 106 FERC ¶ 61,193; *Union Electric Co.*, 58 FERC ¶ 61,247; *Commonwealth Edison Co.*, 25 FERC ¶ 61,335.^[21]

12. The Commission determined that the Entergy System as a whole collected the proper level of revenue, but incorrectly allocated peak load responsibility among the various Entergy Operating Companies and therefore did not engage in an over-collection of revenue that would justify refunds.²² It explained it therefore would “apply here our

¹⁹ *Id.*

²⁰ Rehearing Order, 135 FERC ¶ 61,218 at P 25.

²¹ *Id.* P 23.

²² *Id.* P 24.

usual practice in such cases, invoking our equitable discretion to not order refunds, notwithstanding our authority to do so.”²³ In response to this holding, the amounts previously refunded were reversed on July 5, 2011.²⁴

13. On July 11, 2011, the Louisiana Commission filed a request for rehearing of the Rehearing Order, challenging the Commission’s finding that no refunds are warranted. Upon consideration of Louisiana Commission’s rehearing request, the Commission issued an order establishing a paper hearing, limited to this equitable discretion issue.²⁵

II. Procedural Matters

14. In response to the Briefing Order, Entergy²⁶ and the Arkansas Commission each filed briefs opposing refunds.²⁷ On November 28, 2011, the Louisiana Commission filed its reply brief on the issue. On December 2, 2011, the Arkansas Commission filed a motion to strike the Louisiana Commission’s reply brief on the ground that it exceeded the 30-page limit on briefs established by the Commission’s Briefing Order. On December 5, 2011, the Louisiana Commission responded to the Arkansas Commission’s motion by moving to resubmit a redacted brief that complies with the 30-page limit and simultaneously submitting the redacted brief. On December 8, 2011, the Louisiana Commission filed a supplemental answer to the motion to strike. On May 14, 2012, the Louisiana Commission filed a motion to lodge three recent Commission decisions. On May 29, 2012, the Arkansas Commission filed a motion to reject the motion to lodge.

²³ *Id.*

²⁴ See July 20, 2011 Amended/Corrected Refund Report of Entergy Services, Inc. in Docket No. EL00-66-012 at p. 2.

²⁵ Briefing Order, 137 FERC ¶ 61,018 at P 3.

²⁶ Entergy Services, Inc. filed its brief on behalf of the Entergy’s Operating Companies: Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC (Entergy Louisiana); Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc. An Entergy predecessor of Entergy Gulf States Louisiana, L.L.C. and Entergy Texas, Inc. was Entergy Gulf States, Inc. (Entergy Gulf States).

²⁷ In addition, the Council of the City of New Orleans (New Orleans) filed a brief on November 7, 2011, in support of the Commission’s denial of refunds. However, on November 8, 2011, New Orleans filed a notice withdrawing its brief. Accordingly, we need not consider or address New Orleans’ arguments.

15. We will grant the Louisiana Commission's motion to file a redacted reply brief, and accept that brief, which now complies with the page limit prescribed in the Briefing Order, and limit our discussion to the arguments preserved in the Louisiana Commission's revised reply brief. We find that given the Commission's knowledge of its own holdings, the motion to lodge and the motion to reject are moot as well.

III. Request for Rehearing, Briefs in Opposition, and Reply Brief

Louisiana Commission's Rehearing Request

16. In its rehearing request, the Louisiana Commission argues that the Rehearing Order erroneously applied a "'rate design' policy" intended to prevent a utility from under collecting its legitimate revenue requirement in cases "where the Commission, without any prior notice, determined that the utility's rate design was faulty and imposed a new one."²⁸ It contends that the Commission required refunds even for rate design changes in section 205 cases prior to the late 1970s.²⁹ It contends that subsequent exercises of discretion to not order refunds in section 205 cases reflected instances where a rate design change would cause the utility to undercollect its costs.³⁰ These cases, it avers, reflected policy choices regarding rate design and did not necessarily involve a determination that the preexisting rate design was unjust and unreasonable.

17. The Louisiana Commission maintains that the precedent on which it believes the Commission relied in its Rehearing Order for invoking its equitable discretion to deny refunds – *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*³¹ – "actually supports refunds in a situation where the utility will not be subjected to an undercollection of

²⁸ Louisiana Commission Request for Rehearing at 10.

²⁹ *Id.* at 11 (citing *Federal Power Commission v. Tennessee Gas Trans. Co.*, 371 U.S. 145 (1962) (*FPC v. Tennessee Gas. Trans. Co.*)).

³⁰ *Id.* at 12-14 (citing *Transcontinental Gas Pipe Line Corp.*, 8 FERC ¶ 61,138 (1979); *Commonwealth Edison Co.*, 8 FERC ¶ 61,277 (1979); *Connecticut Light & Power Co.*, 15 FERC ¶ 61,056 (1981); *Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982); *Second Taxing District of the City of Norwalk v. FERC*, 683 F.3d 477, 490 (1981); *Tennessee Gas Pipeline*, 46 FERC ¶ 61,113, at 61,446 (1989); *Southern California Edison Co.*, 50 FERC ¶ 61,138, at 61,408 (1990); *Union Electric Co.*, 58 FERC ¶ 61,247, at 61,818 (1992)); *Great Lakes Gas Trans. Ltd P'ship*, 57 FERC ¶ 61,526 (1991); *Consumers Energy Co.*, 89 FERC ¶ 61,138, at 61,397 (1999)).

³¹ 110 FERC ¶ 61,378 (2005) (*Occidental*).

costs,” in that “the key factor” there supporting a solely prospective remedy “was the showing that the transmission owners would experience an unrecoverable revenue loss below their legitimate costs.”³² It contends that the Commission in *Occidental* referred to a long-standing policy under section 206, but actually cited cases involving section 205 rate applications filed by utilities in which no refund period pursuant to a complaint was established.³³

18. According to the Louisiana Commission, “the equitable factors justifying the refusal to grant refunds in ‘rate design’ cases are not applicable here.”³⁴ In this regard, the Louisiana Commission indicates that “the Entergy System will collect the same amount of revenues *whether or not* the Commission requires refunds.”³⁵ Nor, it contends, does this case involve “a situation where the change in cost allocation triggers a change in rate design that customers could have responded to if it were imposed earlier.”³⁶ Rather, Entergy’s customers “respond to the rate designs in the retail and wholesale requirements of the operating companies, which already provided recognition of the savings gained from interruptible loads.”³⁷

19. The Louisiana Commission further maintains that, in cases where costs are allocated among affiliated jurisdictional entities, including those involving the Entergy System, the Commission has required refunds for unjust and unreasonable cost allocations.³⁸ The Louisiana Commission states that in *Middle South Services, Inc.*³⁹ the Commission found that Entergy improperly used “target” capital structure ratios and failed to deduct accumulated deferred income taxes from the rate base of Operating

³² Louisiana Commission Request for Rehearing at 14-15 (emphasis in original).

³³ *Id.* at 15.

³⁴ *Id.* at 16.

³⁵ *Id.* (emphasis in original).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 16-18 (citing, *e.g.*, *Louisiana Public Service Comm’n v. Entergy Corp.*, 132 FERC ¶ 61,253 (2010); *Nantahala Power & Light Co.*, 19 FERC ¶ 61,152 (1982) (*Nantahala*) (the underlying allocation decision in this case was approved and deemed preemptive in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 933 (1976)).

³⁹ 16 FERC ¶ 61,101 (1981).

Companies in the System Agreement cost allocations and ordered refunds.⁴⁰ It claims that in a recent Entergy case the Commission granted refunds.⁴¹ It notes that in another Entergy case the Commission established a refund effective date with respect to a Louisiana Commission complaint and accepted a settlement by the parties that included refunds of amounts collected in excess of the settlement rates.⁴²

20. The Louisiana Commission contends that other holding company cases do not establish any policy against refunds. For example, the Louisiana Commission identifies *Southern Co. Serv., Inc.*,⁴³ as one case where “the Commission required refunds with respect to the unreasonably high return on equity included in cost allocations.”⁴⁴ In this and other cases correcting unjust and unreasonable cost allocations among affiliates, the Louisiana Commission believes, “[t]he pertinent concern is whether the regulated utilities – the utilities that are regulated by the Commission – collected the correct level of costs,” not the effect on the parent holding company.⁴⁵

21. The Louisiana Commission also argues that the Commission’s decision conflicts with the core purposes of the FPA by allowing public utilities to retain unjust and unreasonable rates without a compelling reason to do so. The Louisiana Commission observes that, while the Commission denied refunds based on the fact that “the Entergy System as a whole collected the proper level of revenue,” the Entergy System will collect the same level of revenue “*whether or not* the Commission orders refunds.”⁴⁶ The Louisiana Commission contends that the Rehearing Order identified no equitable factor served by denying refunds.⁴⁷

⁴⁰ Louisiana Commission Request for Rehearing at 17.

⁴¹ *Id.* (citing *Louisiana Public Service Comm’n v. Entergy Corp.*, Opinion No. 509, 132 FERC ¶ 61,253 (2010)).

⁴² *Id.* at 18 (citing *System Energy Resources, Inc.*, 56 FERC ¶ 61,465 (1991)).

⁴³ Opinion No. 377, 61 FERC ¶ 61,075 (1992), *order on reh’g*, Opinion No. 377-A, 64 FERC ¶ 61,033 (1994) (*Southern*).

⁴⁴ Louisiana Commission Request for Rehearing at 19.

⁴⁵ *Id.* at 20.

⁴⁶ *Id.* at 21 (emphasis in original) (quoting Rehearing Order, 135 FERC ¶ 61,218 at P 24).

⁴⁷ *Id.* at 24.

22. The Louisiana Commission states that, while the Commission does have considerable discretion in fashioning remedies, that is only so when its remedial authority is exercised to fulfill the purposes of the enabling statute.⁴⁸ It states that in another D.C. Circuit case applicable to Commission refund decisions, the D.C. Circuit made clear that an agency must identify the equitable factors it considered and demonstrate how it weighed those factors.⁴⁹ The Louisiana Commission also argues that the purpose of the Regulatory Fairness Act, Pub. L. No. 100-473 § 2, 102 Stat. 2299-300 (1988), of providing protection to ratepayers during periods of delay in section 206 cases should inform the Commission's decision and counsel a determination of refunds.⁵⁰ The Louisiana Commission contends that Entergy realized a net gain at the holding company level because, in 1995 and 1996, a reduction in System Agreement charges would have been flowed through to Entergy Louisiana's and Entergy Gulf States' customers, but an increase in charges might not have been flowed through to Entergy customers in other jurisdictions because there were no corresponding annual base rate reviews.⁵¹ It also contends that the Rehearing Order does not respond to the D.C. Circuit's instruction to explain why the Commission would exercise discretion not to order some Entergy Operating Companies to make refunds to other Entergy Operating Companies.⁵²

Entergy's Brief in Opposition

23. Entergy argues that the Commission should continue to invoke its equitable discretion to deny refunds. Entergy states that the Commission has a policy of ordering refunds for overcharges of a customer and over-collections of revenues, but denying refunds for misallocations of costs among different groups of customers.⁵³ In Entergy's view, "[l]ike a rate design issue, a holding company cost allocation that implicates FPA section 206(c) involves purely a question regarding allocation of costs among customers

⁴⁸ *Id.* (citing *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)).

⁴⁹ *Id.* at 25 (citing *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (1981) (*Las Cruces TV Cable*)).

⁵⁰ *Id.* at 26.

⁵¹ *Id.*

⁵² *Id.* at 27 (citing *Louisiana Public Service Comm'n v. FERC*, 482 F.3d 510 at 520).

⁵³ Entergy Brief at 10.

(i.e., the affected companies and their ratepayers), not an overcollection of revenues.”⁵⁴ Entergy believes that the Commission has recognized this principle in *Southern* and other cases.⁵⁵

24. Entergy asserts that the equitable considerations for denying refunds in rate design cases are applicable in a holding company cost allocation case under FPA section 206(c). In this regard, Entergy asserts initially that “[t]he inclusion of interruptible load in cost allocations under the Entergy System Agreement did not result in any additional revenues to the shareholders of Entergy Corp., but merely determined how some costs were allocated among the Operating Companies and their customers.”⁵⁶ Entergy asks the Commission to reject the Louisiana Commission’s focus on the individual Operating Companies, rather than Entergy as a whole, because the Louisiana Commission’s approach would “ignore the economic reality of the Entergy System Agreement, under which any change in cost allocations to one Operating Company is offset by an equal but opposite change in cost allocations to the other Operating Companies”⁵⁷ and therefore represents a zero-sum game. It notes that prior Commission orders have focused on whether there was a net gain at the holding company level in determining whether to impose refunds in holding company cost allocation cases.⁵⁸ It claims that the Louisiana Commission’s arguments in its Request for Rehearing that Entergy might have realized a net gain at the holding company level are unsupported.⁵⁹

25. Entergy further argues that its risk of under-recovery of costs, the “primary reason why Congress added FPA section 206(c),” supports the Commission denying refunds, as that section “makes clear that, even if the Commission makes the statutorily required

⁵⁴ *Id.* at 13.

⁵⁵ *Id.* at 13-14 (citing *Southern*, 64 FERC at 61,332; *American Elec. Power Serv. Corp.*, 114 FERC ¶ 61,288 (2006); *American Elec. Power Serv. Corp.*, Opinion No. 311, 44 FERC ¶ 61,206 (1988)).

⁵⁶ *Id.* at 15 (footnote omitted).

⁵⁷ *Id.* at 16.

⁵⁸ *Id.* at 17 (citing *Southern*, 64 FERC at 61,332; *Entergy Servs., Inc.*, Opinion No. 415, 80 FERC ¶ 61,197, at 61,787 (1997) (“there was no unjust enrichment as a result of the violation, given that *Entergy as a whole received no net gain.*”) (emphasis added)).

⁵⁹ *Id.*

finding that there will be no loss of revenues,” it retains equitable discretion to deny refunds.⁶⁰

26. According to Entergy, several factors render refunds inequitable in this case. First, Entergy proposes that, as in a traditional rate design case, Operating Company customers facing the prospect of surcharges cannot now alter their past usage decisions.⁶¹ Similarly, refunds would be inequitable here because of changes in the makeup of the affected customers since the applicable period (here, more than fifteen years ago).⁶² Entergy further asserts that the Commission has held that it may recognize administrative burdens associated with remedies and has held that the threat of needless litigation is a valid basis to deny retroactive refunds under FPA section 206(b).⁶³ It also contends that Congress’ primary purpose for adding a refund remedy in FPA section 206 cases does not apply in holding company cost allocation cases that concern allocations between operating companies, as incentives to delay proper allocation of revenue are not present because holding company retention of excessive revenues is not at issue.⁶⁴

27. Entergy contends that, contrary to the Louisiana Commission’s assertions, denying refunds would not contravene the FPA and states that ensuring just and reasonable rates is distinct from the Commission’s broad equitable discretion as to whether to award refunds.⁶⁵

28. Entergy further asserts that all of the cases cited by the Louisiana Commission in which the Commission allowed refunds “involving unjust and unreasonable allocations by a holding company system” are distinguishable.⁶⁶ Entergy states that, in all of the

⁶⁰ *Id.* at 18.

⁶¹ *Id.* at 19-20.

⁶² *Id.* at 20 (citing *Am. Elec. Power Corp.*, Opinion No. 311-B, 46 FERC ¶ 61,382, at 62,195 (1989)).

⁶³ *Id.* at 20-21 (citing *Ameren Services Co. and Northern Indiana Public Service Co. v. Midwest Independent Transmission System Operator, Inc.*, 127 FERC ¶ 61,121, at P 157 (2009) (*Ameren*); *New York Independent System Operator Corp.*, 92 FERC ¶ 61,073, at 61,307 (2000)).

⁶⁴ *Id.* at 22.

⁶⁵ *Id.* at 23 (citing *California Indep. Sys. Operator*, 120 FERC ¶ 61,271 (2007) (*California ISO*)).

⁶⁶ *Id.* at 24.

cases cited by the Louisiana Commission, the refund issue was not discussed or analyzed in any detail and that many cases cited were the result of settlements or voluntary actions by the holding company.⁶⁷ And Entergy challenges the Louisiana Commission's citation of *Nantahala*.⁶⁸ as allowing refunds in a holding company context, contending there were special circumstances in that case. Entergy states that the fact that the public utility did not file the agreement containing the challenged cost allocation (even though such a filing was required by section 205) of the filing resulted in the cost allocation in that case never being accepted for filing by the Commission.⁶⁹

29. Entergy contends that *Middle South Services, Inc.* did not represent a case, like the instant one, where refunds would alter retroactively cost allocations in an agreement that was on file with and approved by the Commission. It notes, rather, that that case involved a situation in which new rates were put into effect subject to refund. It also contends that two citations by the Louisiana Commission to cases involving refunds by Entergy and Southern Company among their affiliated utilities involved settlements and not Commission determinations regarding refunds.⁷⁰ It notes that a subsequent order in *Southern* denied retroactive refunds and held that the general rule against refunds in rate design cases was applicable in cases involving holding company cost allocations.⁷¹ It also notes that two other citations by the Louisiana Commission to refunds provided when Entergy failed to implement properly the bandwidth formula and when Entergy made billing errors in cost allocations under the System Agreement reflected voluntary refund payments, rather than Commission rulings.⁷²

Arkansas Commission's Brief in Opposition

30. The Arkansas Commission challenges the Louisiana Commission's rationale for refunds. The Arkansas Commission contends that the Louisiana Commission's attempt

⁶⁷ *Id.*

⁶⁸ *Nantahala*, 19 FERC ¶ 61,152.

⁶⁹ Entergy Brief at 25.

⁷⁰ *Id.* at 26 (citing the Louisiana Commission Brief at 18-19 and its citation of, *e.g.*, a letter order in Docket No. EL90-45).

⁷¹ *Id.* (citing *Southern*, 64 FERC ¶ 61,033).

⁷² *Id.* (citing Louisiana Commission Brief at 18, 20 and its citation of a settlement in Docket No. ER08-1056 and an affidavit by Stephen Baron).

to distinguish past Commission refund orders as either rate design cases, for which refunds are denied, or cost allocation cases, in which refunds are awarded, does not represent a valid distinction.⁷³ It contends that the Louisiana Commission's assertion that the Commission required refunds even for rate design changes in section 205 cases prior to the late 1970s is unsupported because the refunds in *FPC v. Tennessee Gas. Trans. Co.* did not involve rate design issues, but rather a refund relating to an excessive rate of return.⁷⁴ It states that other cases cited by the Louisiana Commission as examples of refunds in cost allocation situations also reflected excessive amounts collected by the utility.⁷⁵ It states the Louisiana Commission's interpretation of *Occidental* is flawed, and that it cannot be inferred that unless undercollections are found, refunds will be ordered in cost allocation and rate design cases.⁷⁶

31. The Arkansas Commission contends that, contrary to the Louisiana Commission's statements, prospective relief is the norm where an existing rate design is found to be unjust and unreasonable.⁷⁷ The Arkansas Commission asserts that refunds are not appropriate because, as the Commission found, the Entergy System has collected the proper level of revenue.⁷⁸ The Arkansas Commission disputes the Louisiana Commission's view that the Commission should evaluate the revenues collected by the individual Operating Companies, as "the Commission's system-wide analysis of revenue recovery properly reflects the actual situation and the complained of problems."⁷⁹ It asserts that *Southern* does not stand for the Louisiana Commission's asserted proposition that denying refunds in rate design cases does not apply when rates are found

⁷³ Arkansas Commission Brief at 3.

⁷⁴ *Id.* at 3-4.

⁷⁵ *Id.* at 4 (citing *Nantahala*, 19 FERC ¶ 61,152; *Middle South Svcs, Inc.* 16 FERC ¶ 61,101 (1981)).

⁷⁶ *Id.* at 5 (citing *Occidental Chem. Co.*, 110 FERC ¶ 61,378).

⁷⁷ *Id.* at 6 (citing *Tennessee Gas Pipeline Co.*, 46 FERC, at 61,446; *Southern California Edison Co.*, 50 FERC, at 61,408; *Great Lakes Gas Transmission Ltd. P'ship*, 57 FERC ¶ 61,140, at 61,522, 61,526; *Union Elec. Co.*, 58 FERC at 61,817-18).

⁷⁸ *Id.* at 7.

⁷⁹ *Id.* at 8.

unreasonable or unduly discriminatory, as the refunds in that case reflected a settlement and are therefore not a Commission determination.⁸⁰

32. The Arkansas Commission avers that the Commission's decision not to order refunds is consistent with the Commission's duties under the FPA, contending that nothing in the statute or case law compels the Commission to order refunds.⁸¹ The Arkansas Commission also takes issue with the Louisiana Commission's view that the Commission did not strike a reasonable accommodation among competing factors in exercising its discretion to deny refunds. To the contrary, the Arkansas Commission states that the Commission's decision is supported by "the constant factor that the Commission considers in all these reallocation cases, *viz.*, the adverse affects on those customers who must pay retroactive rate increases to fund other customer classes' refunds."⁸²

Louisiana Commission's Reply Brief

33. The Louisiana Commission reiterates its position that the Commission's focus pursuant to the FPA should be on the Entergy Operating Companies, rather than the Entergy holding company. It is the "Entergy *operating companies*," the Louisiana Commission emphasizes, whose rates must be just and reasonable, rather than "the profits of a parent holding company that has no regulated rates."⁸³

34. The Louisiana Commission further asserts that the Commission's remedial discretion must be "exercised to fulfill the purposes of the enabling statute."⁸⁴ In this case, the Louisiana Commission maintains, providing a remedy for "[t]he excessive rates . . . charged by some operating companies to other operating companies," which were "in turn . . . passed through to consumers . . . would serve the core purposes of the [FPA], while denying relief conflicts with these purposes."⁸⁵ The Louisiana Commission states that the Commission and D.C. Circuit decisions have recognized that the Commission has

⁸⁰ *Id.*

⁸¹ *Id.* at 9.

⁸² *Id.* at 10 (citing Rehearing Order, 135 FERC ¶ 61,218 at PP 23-24).

⁸³ Louisiana Commission Reply Brief at 2 (emphasis in original).

⁸⁴ *Id.* at 3-4 (citing *Maislin Industries v. Primary Steel*, 497 U.S. 116, 132 (1990)).

⁸⁵ *Id.* at 6.

a general policy requiring refunds for unjust and unreasonable rates.⁸⁶ It notes that in *Towns of Concord v. FERC*, 955 F.2d 67, 67 (D.C. Cir. 1992), the D.C. Circuit noted “the Commission’s general policy of granting full refunds remains in effect.” It adds that the D.C. Circuit later held in *Consolidated Edison Co. of New York v. FERC* that “we will remand to FERC for it either to follow its ‘general policy’ of providing refunds, or to explain, in accordance with *Towns of Concord*, 955 F.2d at 76, its divergence from this policy.”⁸⁷ The Louisiana Commission also cites Commission precedent for the proposition that the Commission has relied in the past upon its general policy to grant refunds.⁸⁸

35. Nor can the Commission, the Louisiana Commission maintains, justify departing in this case from its general policy to grant refunds by invoking the rate design exception, which is “generally inapplicable to Section 206 cases, where a complaint provides notice that a change in the rate or cost allocation may occur” through the complaint and the Commission’s establishment of a refund-effective date.⁸⁹ The Louisiana Commission reiterates that, despite Entergy’s and the Arkansas Commission’s contention that a rate design exception applies in holding company cases, the Louisiana Commission has not found a case applying that exception where a subsidiary utility charged unjust and unreasonable rates to its affiliates.⁹⁰

36. The Louisiana Commission rejects Entergy’s assertions that the *Nantahala* decision is not applicable because the allocation agreement at issue had not been filed timely with the Commission, contending that factor had no part in the decision to grant refunds.⁹¹ It claims that Entergy’s attempt to distinguish another case resulting in refunds for cost allocations by Entergy’s predecessor, Middle South Utilities, Inc., on the ground

⁸⁶ *Id.* at 7-8.

⁸⁷ *Id.* (citing *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 973 (D.C. Cir. 2003)).

⁸⁸ *Id.* at 7-8 (citing, *e.g.*, *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1581 (D.C. Cir. 1993); *Illinois Power Co.*, 52 FERC ¶ 61,162 (1990); *Central Power & Light Co.*, 97 FERC ¶ 61,157, at 61,698 (2001); Order on Voluntary Remand, 129 FERC ¶ 61,237 at P 15)).

⁸⁹ *Id.* at 8.

⁹⁰ *Id.* at 9.

⁹¹ *Id.* at 10.

that the proposed rates were subject to refund is not a valid basis for distinguishing it.⁹² It also rejects Entergy's contention that the refund the Commission approved in *System Energy Resources, Inc.*, 56 FERC ¶ 61,465 (1991) was inapplicable because it was made pursuant to a settlement because "this fact actually supports the conclusion that refunds are normal when costs are reallocated among affiliates. . . [as] otherwise Entergy would not have entered the settlement."⁹³

37. It claims that other holding company cases do not establish any policy against refunds. It states that the Commission required refunds with respect to the unreasonably high return on equity included in cost allocations, but exercised discretion to deny refunds with respect to the allocation of O&M costs in *Southern*.⁹⁴ The Louisiana Commission rejects Entergy's citation of *American Electric Power Services Corp.*⁹⁵ for the proposition that refunds should be denied in a cost allocation case, stating that that decision merely left in place a phase-in of a proposed rate design change that took place prior to the Commission's order.⁹⁶ It states the Commission relied upon the filed rate doctrine to prevent collection of the surcharges, a concern it contends has been eliminated from this case. It also seeks to distinguish that case, in that the Commission made no finding that the phase-in rates were unjust and unreasonable⁹⁷ and states that in another case involving the same company, the Commission did grant refunds.⁹⁸

38. The Louisiana Commission contends that correcting unjust and unreasonable cost allocations among affiliates results in no wholesale revenue impact upon the parent, and

⁹² *Id.* (citing *Middle South Services, Inc.*, 16 FERC ¶ 61,101 (1981)).

⁹³ *Id.* at 11.

⁹⁴ *Southern*, 61 FERC ¶ 61,075, *reh'g denied in part and granted in part*, 64 FERC ¶ 61,033.

⁹⁵ Opinion No. 311, 44 FERC ¶ 61,206.

⁹⁶ Louisiana Commission Reply Brief at 12.

⁹⁷ *Id.* at 12-13.

⁹⁸ *Id.* at 13 (citing *Corporation Comm'n of the State of Oklahoma v. American Electric Power Company, Inc.*, 125 FERC ¶ 61,237 (2008) (*Oklahoma Commission v. AEP*)).

contends that the Commission traditionally has required refunds to correct cost allocations that it has found unjust and unreasonable.⁹⁹

39. The Louisiana Commission states that a no-refund policy would undermine the Commission's policy in Entergy bandwidth cases of allowing challenges by parties to the justness and reasonableness of the bandwidth remedy through section 206 complaint proceedings. The Louisiana Commission contends that the Commission has granted refunds in bandwidth remedy cases under both section 205 and section 206, even though they are cost allocation cases.¹⁰⁰ It contends that both Entergy and the Arkansas Commission have adopted positions in bandwidth remedy cases supporting such refunds and that these positions conflict with their stance in this proceeding.¹⁰¹ The Louisiana Commission contends that exceptions to the Commission's general policy favoring refunds for unjust and unreasonable rates are not applicable because they were created for special circumstances not applicable to this proceeding.¹⁰² The Louisiana Commission states that the rate design exception applies only to unique circumstances – where a utility files new rates and chooses a rate design, but the Commission later adopts a different rate design without prior notice.¹⁰³ It states that this exception is generally inapplicable in section 206 cases.

40. The Louisiana Commission also contends that other factors influencing the Commission's decision to create a "rate design" exception are inapplicable here. First, the complaint in this case provided notice of the exact change in cost allocations that the Commission later approved. Second, the change eliminated unjust, unreasonable and unduly discriminatory cost allocations, unlike typical rate design cases. Third, the change does not affect the rate designs of the rates charged to the customers served by the Entergy Operating Companies at all, and cannot influence customer behavior. Finally,

⁹⁹ *Id.* at 13-14.

¹⁰⁰ *Id.* at 14-16 (citing Opinion No. 509, 132 FERC ¶ 61,253: *Louisiana Public Service Commission v. Entergy Corp.*, 124 FERC ¶ 61,010 (2008); *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010)).

¹⁰¹ *Id.* at 16-18.

¹⁰² *Id.* at 18.

¹⁰³ *Id.* at 19

the change affects total costs assigned to the Entergy Operating Companies, not the costs allocated to their customers.¹⁰⁴

41. The Louisiana Commission contends that the rate design exception has rarely been applied in section 206 cases and then only in transmission market cases where transmission owners may undercollect the revenue requirement.¹⁰⁵ It finds Entergy's citation of *Occidental* as a basis to deny refunds is undercut because the Commission was concerned transmission owners would suffer unrecoverable revenue losses below legitimate costs and noted the Commission stated this policy was applicable where the cost-of-service or revenue requirement was not found to be unjust or unreasonable.¹⁰⁶ The Louisiana Commission states that another section 206 case in which refunds were not allowed, *Black Oak Entergy LLC v. PJM Interconnection, LLC*, likely reflected court decisions finding some transmission members of the regional transmission organization were excluded from Commission jurisdiction and could not be ordered to pay refunds.¹⁰⁷ The Louisiana Commission argues that these cases and the exceptions to the general policy of refunds do not apply here because the Commission has found that the Entergy Operating Companies can flow through surcharges and refunds, there are no jurisdictional issues, and there are no market complications. The Louisiana Commission also contends that cases where the Commission has declined to order refunds because of concerns of disruptions of orderly operation of the market are inapplicable.¹⁰⁸

42. The Louisiana Commission also challenges Entergy's assertion of the equitable factors justifying why refunds should be denied. It contends that the fact that collections of the parent holding company are zero-sum is irrelevant and maintains that the individual Operating Companies over and undercollected revenues in an unjust and unreasonable manner that must be remedied.¹⁰⁹

43. The Louisiana Commission contends that, while the Commission has decided that section 206(c) does not bar refunds in this case, Entergy repackages potential

¹⁰⁴ *Id.* at 23-24.

¹⁰⁵ *Id.* at 24 (citing *Occidental*, 110 FERC ¶ 61,378).

¹⁰⁶ *Id.* at 25.

¹⁰⁷ *Id.* at 25 (citing *Black Oak Energy*, 136 FERC ¶ 61,040 (2011) (*Black Oak*)).

¹⁰⁸ *Id.* at 25-26 (citing *California ISO*, 120 FERC ¶ 61,271 at P 25; *Ameren*, 127 FERC ¶ 61,121; *New York Ind. Sys. Oper., Inc.*, 92 FERC ¶ 61,073).

¹⁰⁹ *Id.* at 27.

underrecovery by the holding company as a so-called equitable factor.¹¹⁰ It contends that this claim is meritless “because the Commission has already decided that the Operating Companies do not have an inability to pass through refunds and surcharges. Moreover, all the active parties have settled the refund and surcharge issues.”¹¹¹

44. The Louisiana Commission further asserts that reallocation of costs caused by a refund would not have affected customer behavior and challenges Entergy’s contention that higher or lower cost allocations may affect customer behavior.¹¹² The Louisiana Commission contends that Entergy provides no support for this conclusion whereas the Louisiana Commission provided support that the usage patterns of customers would not have been affected. If there were a change in behavior or consequence, the Louisiana Commission maintains, it would not result from any change in rate design.

45. The Louisiana Commission also challenges as unsupported Entergy’s contention that the passage of time weighs against refunds and notes that the Commission ruled in the Amended Remand Order that the passage of time is not an equitable factor affecting the refund determination.¹¹³ It asserts that there are no administrative burdens to implementing refunds given the settlement and contends that Entergy’s contentions of a risk of litigation are irrelevant given the Commission’s finding that section 206(c) does not bar recovery and Supreme Court precedent holds that the Commission must enforce the settlement between the parties and ensure that rates are lawful, notwithstanding possible objections by individual state commissions.¹¹⁴

Louisiana Commission’s Motion to Lodge

46. On May 14, 2012, the Louisiana Commission filed a motion to lodge three recent decisions by the Commission ordering Entergy to pay refunds to the Louisiana Commission. The first case, *Entergy Services, Inc.*, 139 FERC ¶ 61,106 (2012), involved acceptance of a compliance filing to implement Opinion No. 509, which held that the Spindletop Regulatory Asset costs should be included in the bandwidth formula as of the

¹¹⁰ *Id.* (citing Entergy Brief at 17-19).

¹¹¹ *Id.*

¹¹² *Id.* at 28 (citing Entergy Brief at 19-20).

¹¹³ *Id.* at 29 (citing Amended Remand Order, 132 FERC ¶ 61,133 at P 32).

¹¹⁴ *Id.* (citing *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986)).

refund effective date established in that complaint proceeding.¹¹⁵ A second case, *Entergy Services, Inc.*, 139 FERC ¶ 61,104 (2012), involved a compliance filing to implement Opinion No. 505, which addressed the first year implementation filing for the bandwidth formula. The third case, *Louisiana Pub. Serv. Comm'n v. Entergy*, 139 FERC ¶ 61,100, at P 27 (2012), relates to the instant proceeding and required refunds for interruptible load included in System Agreement Service Schedule MSS-3 calculations – as opposed to the Service Schedule MSS-1 calculations at issue in this proceeding – for the 15 months following the refund effective date in that proceeding.

47. The Louisiana Commission argues that these cases “confirm that the Commission has never had a policy to deny refunds in either Section 205 or Section 206 cases involving cost misallocations on the Entergy System.”¹¹⁶

Louisiana Commission’s Request for Rehearing in Docket No. EL00-66-016

48. On December 16, 2010, the Commission issued an order in Docket No. EL00-66-015 clarifying that Entergy had paid refunds covering the 15-month complaint refund period (extending from May 14, 1995 through August 13, 1996).¹¹⁷ The Commission noted that, in an earlier decision, *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy*, 132 FERC ¶ 61,233 (2010), it had incorrectly stated that Entergy had not yet paid refunds corresponding to the complaint refund period because a report from Entergy stating the refund had been paid had not been timely uploaded into the Commission’s eLibrary system. *Id.* P 2. In response to this order, the Louisiana Commission filed a request for rehearing or clarification seeking confirmation that the Commission’s clarification was not intended to be a ruling that interest will not be owed and paid by Entergy on any adjustments to refund amounts that may result from later procedures.

IV. Discussion

49. Our analysis of the appropriate remedy begins, as it must, with an assessment of the wrong it is intended to address. It has been established in this case that “it was unjust and unreasonable for Entergy to include interruptible load in its calculation of peak load responsibility because the Operating Companies could control capacity costs by

¹¹⁵ Opinion No. 509, 132 FERC ¶ 61,253.

¹¹⁶ Louisiana Commission Motion to Lodge at 3.

¹¹⁷ *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 133 FERC ¶ 61,213 (2010) (December 16 Order).

curtailing interruptible service during times of peak demand.”¹¹⁸ As a result of this improper allocation of costs among the Operating Companies, the Louisiana Commission states that Entergy Louisiana’s ratepayers have paid amounts that should have been charged to the ratepayers of the other Entergy Operating Companies for the applicable 15-month refund period.

50. Save for one unsupported and largely irrelevant assertion, which we will discuss further below, the Louisiana Commission agrees that this overcharge did not result in the Entergy System as a whole recovering an amount in excess of its cost of service.¹¹⁹ Nor does the Louisiana Commission point to any violation of a tariff or filed rate. Rather, the Louisiana Commission and the other parties recognize that this case involves an improper allocation of costs among the Entergy Operating Companies.¹²⁰

51. The precise parameters of the issue this case poses can be further reduced: in matters where a rate is subject to refund in a section 205 or 206 proceeding and the Commission subsequently orders this rate changed, whether the new rate should run only prospectively or whether the Commission should also order refunds for the difference between the new rate and previously effective rate during the previous period subject to refund. To assist in determining this issue in the instant case, the Commission has sought an extensive record and airing of related issues through multiple considerations of this issue, including successive paper hearings. We determine here that while we will continue to allow for, as discussed below, discretion in a particular case to determine whether refunds are appropriate, we find it appropriate under the circumstances presented in the instant proceeding to follow our general rule that new cost allocations or rate designs that do not reflect over-recoveries or other special circumstances will run prospectively from the date of the issuance of the order and that refunds will not lie. Thus, we affirm our finding in our earlier order where we exercised our discretion not to order refunds in the instant proceeding.

52. The Louisiana Commission argues that the Commission’s mandate under the FPA to protect consumers from unreasonable rates and charges requires that the Commission

¹¹⁸ *Louisiana Public Service Com’n v. FERC*, 482 F.3d 510, 514 (D.C. Cir. 2007) (citing *Louisiana Public Service Commission v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228, at PP 67-77 (2004)).

¹¹⁹ See Louisiana Commission Request for Rehearing at 16, 21; Louisiana Commission Reply Brief at 27.

¹²⁰ Louisiana Commission Request for Rehearing at 10-16.

must order refunds.¹²¹ However, as Entergy notes, this general statutory mandate does not equate to an obligation to order refunds whenever a rate or practice is found to be unjust and unreasonable. This is embodied in the language of the statute: “At the conclusion of any proceeding under this section, the Commission *may* order refunds of any amounts paid....”¹²² As the Commission noted in *California ISO*:

While the Commission has a duty, under the FPA, to ensure that rates are just and reasonable, when the Commission determines that a rate is not just and reasonable, it has broad remedial discretion in fashioning a remedy. . . . Consequently, when the Commission determines that a rate is unjust and unreasonable, it may set a just and reasonable rate prospectively, and is not obligated to order refunds.^[123]

53. The Commission has broad equitable discretion in determining whether and how to apply remedies.¹²⁴ The Commission has exercised its remedial discretion, as relevant here, through its development of a series of distinctions based upon the nature of the underlying matter at issue that help determine the advisability of ordering refunds. An examination of these distinctions will help clarify why we deny refunds in this matter and will address and refute the various arguments made by the Louisiana Commission that it maintains show that refunds are warranted in the instant proceeding.

54. One distinction that the Commission has drawn, as noted in the Rehearing Order, is between rate design and cost allocation cases, on the one hand, for which refunds are generally not ordered, and cases involving over-recovery, for which refunds are generally ordered. As we noted in our recent *Black Oak* decision:

The Commission has two lines of precedent on refunds, each dealing with a different situation. When a case involves a company over-collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers. [FN35] By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues

¹²¹ See Louisiana Commission Reply Brief at 3-7.

¹²² 16 U.S.C. § 824e(b) (2006) (emphasis added).

¹²³ *California ISO*, 120 FERC ¶ 61,271 at P 24.

¹²⁴ See *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (the Commission's breadth of discretion is “at its zenith” when fashioning remedies).

should have been allocated differently, the Commission traditionally has declined to order refunds. [FN36]

FN35. *See, e.g., Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009); *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).

FN36. *See, e.g., La. Pub. Serv. Comm'n v. Entergy Corp.*, 135 FERC ¶ 61,218 (2011); *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193, at P 5 (2004) (accepting rate design change on a prospective basis); *Consumers Energy Co.*, 89 FERC ¶ 61,138, at 61,397 (1999) (same); *Union Elec. Co.*, 58 FERC ¶ 61,247, at 61,818 (1992) (same); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983); *accord Second Taxing Dist. v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (affirming determination to make rate design changes prospective only); *Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982) (same).^[125]

55. One reason why refunds are not granted in such circumstances is that refunds would potentially result in under-recovery. The Commission's job is to set just and reasonable rates, not rates that are inordinately low, to the detriment of utilities, nor high, to the detriment of customers.¹²⁶ Another, independent consideration in many cost recovery and rate design cases is that a different allocation would have resulted in a different decision by consumers or the utility had it been instituted at the time of the facts at issue, but it is simply too late to alter the result.¹²⁷ In contrast, for straight overcharges, the considerations described above do not exist.

¹²⁵ *Black Oak Energy, L.L.C.*, 136 FERC ¶ 61,040 at P 25, *reh'g denied*, 139 FERC ¶ 61,111 (2012).

¹²⁶ *See, e.g., Southern California Edison, Co.*, Opinion No. 359-A, 54 FERC ¶ 62,320, at 62,019 (1991).

¹²⁷ These are not the only equitable considerations that the Commission has examined. *See, e.g., Ameren*, 127 FERC at 61,522 (detrimental effect upon an organized market); Opinion No. 311-B, 46 FERC at 62,195 (declining to order refunds in a holding company cost allocation case, *inter alia*, because the "surcharge" resulting from refunds "would fall on the current generation of ratepayers" who were not the same ratepayers that received the benefits."); *California ISO*, 120 FERC ¶ 61,271 (complication and cost of rerunning markets).

56. The cost allocation/rate design versus over-recovery distinction described above has acquired greater prominence in recent decisions, but it is not novel. In a 1989 decision involving a compliance filing in a case filed pursuant to section 205, *Union Electric Co.*,¹²⁸ for example, the D.C. Circuit rejected the Commission's original decision, in which the Commission held that a utility's partial requirements customers should be assessed demand charges even though they did not impose demands upon the utility's system during the periods that were used to determine customer responsibility for capacity costs. In implementing the court's mandate on remand,¹²⁹ the Commission concluded that, while the utility must change its rate design prospectively, refunds to the customers previously charged for an off-peak demand charge was not an appropriate remedy. This was because, as the Commission explained, the charges at issue did not affect the costs to serve customers, but rather the sharing of costs among the customers, and Union had not charged rates that recovered in excess of its revenue requirement.¹³⁰

57. Subsequently, in *Occidental*,¹³¹ the Commission explained that its general policy of denial of refunds applies equally to both disputes over rate design and over cost allocation in Commission actions under section 206 of the FPA:

The Commission's long-standing policy is that when a Commission action under section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively.^[132]

58. In the context of allocations between holding company system affiliates in particular, the Commission has similarly denied refunds where the matters disputed involved cost allocations rather than cost over-recoveries. *Southern*, on which the Louisiana Commission particularly relies, involved very similar circumstances to the instant proceeding and the Commission on rehearing ultimately denied refunds with respect to the section 205 portion of the decision involving whether O&M charges based upon Southern's Intercompany Interchange Contract (IIC) should be allocated as fixed or

¹²⁸ *Union Electric Co. v. FERC*, 890 F.2d 1193 (D.C. Cir. 1989).

¹²⁹ *Union Electric Co.*, 64 FERC ¶ 61,355 (1993).

¹³⁰ *Id.* at 63,468.

¹³¹ 110 FERC ¶ 61,378.

¹³² *Id.* P 10.

variable costs under the IIC. As described in its order on rehearing, the Commission's original order in that proceeding, Opinion No. 377, at first ordered refunds:

The Commission [in Opinion No. 377] required the operating companies to revise the classification of certain production operation and maintenance (O&M) expenses in six accounts. The Commission directed that all such costs other than company labor costs be treated as variable costs and recovered through the energy charge (Southern had proposed to treat them as fixed costs and recover them through the capacity charge) and that for Account 501 (fuel handling only) all costs also be treated as variable costs (Southern had proposed to treat these costs as fixed costs). 61 FERC at pp. 61,307-12. This, in turn, shifts the apportionment of these costs among the various operating companies, with some companies assuming more cost responsibility under the Commission's cost classification than under Southern's proposed cost classification while other companies would assume less cost responsibility. *See* 61 FERC at p. 61,307; *see also* 54 FERC at p. 65,015. The Commission ordered refunds accordingly. 61 FERC at p. 61,312.^[133]

59. On rehearing, in Opinion No. 377-A, the Commission reversed Opinion No. 377, and denied the refunds originally ordered on the grounds of the very policy we have cited above:

The present circumstances involve the Southern pooling agreement, where the amounts involved do not, overall, represent excess revenues to the Southern System. There is no issue in this case as to the legitimacy of these production O&M expenses or as to the appropriate total level of production O&M expenses; the sole issue is their classification, and thus their apportionment among the operating companies.^[134]

¹³³ *Southern*, 64 FERC at 61,328.

¹³⁴ *Id.* at 61,332. While in the same proceeding Southern did agree to refund excess amounts to remedy an excessive rate of return, Southern made these refunds voluntarily as part of a settlement and the Commission has held that approval of an uncontested settlement does not have precedential effect. *See, e.g., Tampa Electric Company*, 140 FERC ¶ 61,046, at P 31 (2012); *Old Dominion Electric Cooperative and North Carolina Electric Membership Corp. v. Virginia Electric and Power Co., PJM Interconnection, L.L.C. and Virginia Electric and Power Co.*, 139 FERC ¶ 61,137, at

(continued...)

60. Subsequently, in another holding company case involving a section 205 filing, *American Electric Power*,¹³⁵ the Commission again recognized this policy. That matter involved a change in the manner of allocating Trading and Marketing Realizations, which represented net revenues or margins from off-system sales, between American Electric Power (AEP) operating companies.¹³⁶ The Commission again declined to impose refunds and instead implemented the change prospectively:

We agree with AEP's proposed effective dates. Its proposal to maintain the currently-effective allocation methodology under Schedule D, without retroactive refunds, until the first day of the following month following the issuance of this order approving the new methodology without suspension or potential refund is consistent with Commission precedent. n9

[FN9] *See, e.g., Southern Company Services, Inc.*, 64 FERC 61,033 (1993).

. . . .

In the past, the Commission exercised discretion by not ordering refunds in analogous cases involving allocation of costs among the operating companies of holding company systems. AEP's proposal is consistent with this practice, and we find no reason to deviate from this here.^[137]

61. We see no reason not to follow this same approach here, as we view the issues of inclusion or exclusion of interruptible load in allocating costs as a demand allocation

P 12 (2012). The Louisiana Commission also points to a settlement approved by the Commission in *System Energy Resources, Inc.*, 56 FERC ¶ 61,465, which authorized refunds. But in that order, the Commission, as in other orders approving uncontested settlements, similarly included language that its “approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.” *Id.* at 62,643.

¹³⁵ 114 FERC ¶ 61,288 (2006).

¹³⁶ *Id.* PP 3-5. AEP's filing eliminated a two-tier allocation methodology based, in part, upon generating capacity and earlier test period results in favor of a pure direct assignment methodology.

¹³⁷ *Id.* at 61,975.

dispute, rather than a case of cost over-recovery. And the allocation of demand-related reserve costs under Service Schedule MSS-1 is a zero-sum game in which the Entergy System receives no excess revenues.¹³⁸ There is no dispute as to the appropriate level of production capacity costs and revenues subject to the demand allocator at issue in this proceeding, only their apportionment among the Operating Companies.¹³⁹

62. The Louisiana Commission contends, to the contrary, that Entergy realized a net gain at the holding company level because of differential treatment in different retail jurisdictions. The Louisiana Commission suggests that Entergy might have suffered a loss had the treatment of interruptible load been changed during the 1995-96 period, but we find its claims questionable and, in any case, irrelevant. The Louisiana Commission in essence asserts that retail regulatory treatment of interruptible load could have resulted in losses at the holding company level. In the first place, any such results at the local level are better characterized as avoided losses due to retail rate treatment, rather than windfalls for the holding company. More significantly, however, the Commission found in the Amended Remand Order that, pursuant to section 206(c), state retail proceedings would not block recovery of such costs at the retail level.¹⁴⁰ Thus, retail regulatory policies toward base rate review during 1995-96 should not have prevented Entergy Operating companies from recovering any increased costs in other jurisdictions outside of Louisiana.

63. In addition, consistent with the approach we have taken in past cost allocation and rate design cases,¹⁴¹ we find that, while the danger of under-recovery of costs in this case is not present, an equitable ground disfavoring refunds in this context is the fact that Entergy cannot review and revisit past decisions were we to order a refund, a rationale cited in numerous Commission decisions denying refunds.¹⁴² In the affiliated holding company context, the Commission has noted that refunds may not be appropriate because system operating decisions cannot be revisited and redone:

¹³⁸ Entergy Brief at 16.

¹³⁹ *See Southern*, 64 FERC at 61,332.

¹⁴⁰ *See Amended Remand Order*, 132 FERC ¶ 61,133 at P 26.

¹⁴¹ *See discussion supra* at PP 54-57.

¹⁴² *See, e.g. NYISO*, 92 FERC ¶ 61,073, at 61,307 (2000); *Union Electric Co.*, 58 FERC at 61,818; *Ameren*, 127 FERC ¶ 61,121 at P 155; *Connecticut Light & Power*, 15 FERC ¶ 61,056 (1981), *aff'd sub nom. Second Tax Dist. of Norwalk v. FERC*, 683

(continued...)

Additionally, operational decisions made while the operating companies' proposed cost classification was in effect, and thus made in reliance on that classification, cannot be undone.^[143]

64. Thus, the Louisiana Commission's assertion that we have failed to adequately examine relevant factors is incorrect. We also believe the Louisiana Commission's characterization of the *Las Cruces TV Cable* decision exaggerates the consideration of equitable factors that the agency is required to make. In a later decision, the D.C. Circuit explicitly noted the narrow scope of the inquiry required by its earlier decision:

[A]bsent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion.... The agency need only show that it 'considered relevant factors and... struck a reasonable accommodation among them.'^[144]

65. Several of the cases cited by the Louisiana Commission as evidence of a general, global Commission policy to award refunds instead only demonstrate that there is a general policy to award refunds in cases that involve cost over-recovery,¹⁴⁵ which is not the case here. The Louisiana Commission cites *Nantahala Power & Light Co.*, for the proposition that in cases involving unjust and unreasonable allocations of costs among affiliates, the Commission generally does require refunds.¹⁴⁶ However, in *Nantahala*, the Commission authorized refunds to the extent that the utility had charged its customers an

F.3d 477, 790 (D.C. Cir. 1983) ("A rate design affects, to some degree, customers' consumption patterns. A change in that design by Commission order cannot affect that pattern retroactively since the customers' energy usage was based on the rate design in effect during the period."); *Commonwealth Edison Co.*, 8 FERC ¶ 61,277 (1979) (noting that customers can only modify their consumption patterns prospectively).

¹⁴³ *Southern*, 64 FERC at 61,332.

¹⁴⁴ *Town of Concord, v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (quoting *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981)).

¹⁴⁵ See Louisiana Commission Reply Brief at 8, 13 (citing *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1581 (D.C. Cir. 1993); *Illinois Power Co.*, 52 FERC ¶ 61,162 (1990); *Central Power & Light Co.*, 97 FERC ¶ 61,157, at 61,698 (2001); *Oklahoma Commission v. AEP*, 125 FERC ¶ 61,237 (2008)).

¹⁴⁶ See Louisiana Commission Reply Brief at 9 (citing *Nantahala*, 19 FERC ¶ 61,152, at 61,280 (1982)).

excessive amount under its filed purchase power adjustment clause.¹⁴⁷ Thus, it represents an overrecovery case. In contrast, the issue at hand involves a comparatively straightforward dispute over cost allocation.

66. The Louisiana Commission also contends that the Rehearing Order wrongly focuses on the consequences for a parent holding company rather than the jurisdictional Operating Companies. This relates to another contention of the Louisiana Commission: that the Commission's policy of no refunds for rate design or cost allocation matters should not be, and has not been applied in cases, like this one, where costs are allocated among affiliated jurisdictional companies operating in a coordinated system. However, as demonstrated above, notably in the Commission's *Southern* and *American Electric Power* decisions, that assertion is incorrect. As those cases reveal, the Commission has treated coordinated holding company systems (like that of Entergy) effectively as a single utility, with the operating companies as its customer groups. This accurately reflects the coordinated nature of Entergy's integrated operating system, long recognized by both the courts and the Commission.¹⁴⁸ In such contexts, excessive recoveries may logically accrue to an individual Operating Company or the system as a whole, making it a legitimate target of Commission scrutiny. And, independently, the Louisiana Commission presents no persuasive reason why – in this context – a multi-utility system like Entergy's should be treated differently than multi-utility coordinated RTO/ISO systems like PJM.

67. The Louisiana Commission similarly contends that the Commission has not applied the cost allocation/rate design versus over-recovery distinction to section 206 cases. This is incorrect. While this policy has been applied more often in section 205 cases (the vast majority of cases filed with the Commission are section 205 cases), several of the decisions that have applied the policy and denied retroactive refunds have involved section 206 complaints. *Occidental*,¹⁴⁹ for example, originally arose as a section 206 complaint in which refunds were ultimately denied (on rehearing) due to a Commission finding that they would run afoul of the policy barring refunds in rate design matters. *Black Oak*¹⁵⁰ represents yet another case in which refunds were denied in the context of a section 206 complaint. A third section 206 case in which refunds were

¹⁴⁷ See *Nantahala Power and Light Co.*, 727 F.2d 1342, 1349-50 (4th Cir. 1984).

¹⁴⁸ See generally, e.g., *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987).

¹⁴⁹ 110 FERC ¶ 61,378.

¹⁵⁰ 136 FERC ¶ 61,040.

denied is *Ameren*.¹⁵¹ While the Louisiana Commission attempts to distinguish these cases on other bases, it is incontrovertible that they are section 206 cases and that the Commission chose to exercise its discretion and not order refunds – and did so relying on essentially the same rationale employed here.

68. In any event, we see no reason why the policy should differ as between section 205 and section 206 cases; where there has been an unjust and unreasonable allocation of costs, whether a finding was made in the context of section 205 or in the context of section 206, the analysis as to whether to order refunds should be the same.

69. The Commission also draws a distinction in cases where companies have failed to abide by the filed rate or contractual terms and, in such cases, generally orders refunds.¹⁵² But that is not the circumstance present here either. Thus, certain of the decisions that the Louisiana Commission advances in support of the imposition of refunds do not apply because they, unlike this matter, involve a remedy for cost over-recovery or for a violation of an existing rate. But neither is present here. In this matter, the Louisiana Commission's original complaint did not aver that Entergy had violated an existing rate, but, rather, that interruptible load should be excluded from demand allocation calculations under the System Agreement to reflect Commission policy. In contrast, the complaint in the *Oklahoma Commission v. AEP* proceeding, which the Louisiana Commission points to, involved a tariff violation – a deviation from the filed rate during the period refunds were at issue.

70. The Louisiana Commission cites other cases where refunds have been ordered to support its claim that they should be ordered in this matter as well. We find these cases can be distinguished or at least lack clarity with respect to why refunds were imposed. We can find no clear Commission statement of why, more than 30 years ago, refunds were ordered in *Middle South Services, Inc.*¹⁵³, and so do not accord it significant weight. We also find that other examples cited by the Louisiana Commission where refunds were awarded are inapposite to the facts involved in this case. The Louisiana Commission concedes, for example, that another case it cites¹⁵⁴ allowing refunds did not involve a rate

¹⁵¹ 127 FERC ¶ 61,121 at P 157.

¹⁵² See, e.g., *Louisiana Pub. Serv. Comm'n v. Entergy*, 139 FERC ¶ 61,240 (2012); *Oklahoma Commission v. AEP*, 125 FERC ¶ 61,237.

¹⁵³ 16 FERC ¶ 61,101.

¹⁵⁴ *Federal Power Commission v. Tennessee Gas Trans. Co.*, 371 U.S. 145 (1962).

design change.¹⁵⁵ And a number of the cases that Louisiana Commission cites involve uncontested settlements, which have no precedential weight.¹⁵⁶

71. There are exceptions to the distinctions drawn above. Opinion No. 415,¹⁵⁷ for example, originated as a complaint that Entergy had violated the System Agreement by including generating units in Extended Reserve Shutdown status as available for calculating Operating Companies' capability under Service Schedule MSS-1. The Commission agreed that this conduct violated its filed rate, but held that nonetheless refunds were not warranted, given in part the off-setting benefits to the Entergy System and ratepayers involved in the program at issue. Such exceptions, however, do not disprove general rules.

72. The Louisiana Commission also contends that several of the Commission's orders directing refunds in cases involving Entergy filings or related complaints concerning the bandwidth remedy ordered in Opinion No. 480 conflict with the distinctions that we draw above.¹⁵⁸ The Louisiana Commission first contends that application of a no-refund policy would undermine the Commission's policy in Entergy bandwidth remedy cases of allowing challenges to Entergy's bandwidth remedy formula¹⁵⁹ pursuant to section 206

¹⁵⁵ See Louisiana Commission Reply Brief at 20.

¹⁵⁶ See, e.g., *System Energy Resources, Inc.*, 56 FERC ¶ 61,465 (1991); *Southern Co. Svc.*, Opinion No. 377, 61 FERC, at 61,306 n.6 (1992). The Louisiana Commission's assertion that the fact active parties have settled refund and surcharge issues demonstrates refunds are feasible shares the same flaw; such arguments are not precedential. *Id.*; see Louisiana Commission Reply Brief at 28.

¹⁵⁷ Opinion No. 415, 80 FERC ¶ 61,197, *aff'd* Opinion No. 415-A, 82 FERC ¶ 61,098, *aff'd sub nom. Louisiana Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999).

¹⁵⁸ Louisiana Commission Reply Brief at 18 (citing Opinion No. 505, 130 FERC ¶ 61,023; *Entergy Services Inc.*, 128 FERC ¶ 61,181 (2009)).

¹⁵⁹ In Opinion Nos. 480 and 480-A, the Commission established a bandwidth remedy to ensure rough production cost equalization among the Entergy Operating Companies under the Entergy System Agreement. See *Louisiana Public Service Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005), *order on reh'g, Louisiana Public Service Comm'n v. Entergy Servs., Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282, *aff'd in part and remanded in part sub nom. Louisiana Public Service Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

complaints.¹⁶⁰ The Louisiana Commission suggests if such section 206 complaints allow refunds as of the refund effective date,¹⁶¹ so too should this proceeding. We do not agree.

73. Some of the Commission orders cited by the Louisiana Commission pertain to Entergy's annual filings to implement the bandwidth formula to calculate the annual bandwidth remedy payments and receipts.¹⁶² These implementation proceedings, ordered by the Commission to roughly equalize production costs between the Entergy Operating Companies, involve implementation of the filed formula rate and refunds are appropriate consistent with our policy of generally ordering refunds where a utility violates the filed rate.¹⁶³

74. On the other hand, in cases involving filings by Entergy or complaints by third parties seeking to change elements of the bandwidth remedy formula, whether refunds should be ordered depends on whether the relief involves a change in allocation or rate design, in which case refunds generally are not provided, or whether it involves an over-recovery of costs, in which refunds generally are provided, consistent with the discussion above.

75. We note that some recent bandwidth remedy decisions involving complaints to change the formula have not followed this approach because, in light of the remand from the D.C. Circuit in this proceeding, the Commission had initially doubted its authority to deny refunds based on equitable considerations in matters involving holding company systems. Some of the section 206 decisions that the Louisiana Commission cites, including Docket No. EL08-51-000 (resulting in exclusion of Waterford 3 capital lease

¹⁶⁰ The Commission has allowed numerous section 206 complaints challenging elements of the bandwidth formula and one of the decisions that the Louisiana Commission seeks to lodge relates to just such a challenge. *See Entergy Services, Inc.*, 139 FERC ¶ 61,106. Another, cited at page 16 of the Louisiana Commission's Reply Brief, is *Louisiana Public Service Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010.

¹⁶¹ *See* Opinion No. 509, 132 FERC ¶ 61,253 at P 41.

¹⁶² The decision the Louisiana Commission cites in Docket No. ER07-956-000, *Entergy Services, Inc.*, 139 FERC ¶ 61,104, involved a filing to implement Opinion No. 505, which addressed the first year implementation filing for the bandwidth formula, and logically falls into this category and has been treated consistent with this approach.

¹⁶³ *See Entergy Services, Inc.*, 130 FERC ¶ 61,170, at P 20 (2010) ("the purpose of the annual bandwidth filings is to apply the specified formula using actual data to determine whether or not there was rough production cost equalization").

amounts in production costs in the plant ratios) and Docket No. EL08-51-002 (involving addition of Spindletop Regulatory Asset production costs to the bandwidth formula) were decided prior to our June 2011 findings in the Amended Remand Order that clarified our approach in this area. And while our decision in EL07-52-001 (removing interruptible load from determinations of Service Schedule MSS-3 load used in bandwidth remedy calculations) came after the Amended Remand Order, we note that our policy in this area was still under consideration and evolving, as evidenced by the fact that we sought further input from the parties on this issue through a second paper hearing on the equitable discretion issue.¹⁶⁴ Indeed, the Commission did not consider exercising its discretion and denying refunds in these orders.

76. In sum, the Commission finds that the case law cited by the Louisiana Commission does not support its position that refunds are required.

77. Finally, in light of the Commission's denying rehearing on the refund issue presented in Docket No. EL00-66-017, we dismiss, as moot, the Louisiana Commission's request for rehearing in Docket No. EL00-66-016.

The Commission orders:

The Louisiana Commission's requests for rehearing of the Rehearing Order and of the December 16 Order are hereby denied and dismissed, respectively, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁶⁴ We also note that none of the parties sought rehearing of our refund decisions in these complaint matters.