

155 FERC ¶ 61,064
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

v.

Docket No. EL09-61-003

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

OPINION NO. 521-A
ORDER DENYING IN PART AND GRANTING IN PART REHEARING

(Issued April 21, 2016)

1. On July 23, 2012, the Louisiana Public Service Commission (Louisiana Commission) and Entergy Services, Inc.¹ (Entergy) filed requests for rehearing of Opinion No. 521,² issued on June 21, 2012, in which the Commission found that the

¹ Entergy filed on behalf of Entergy Corporation and the Entergy Operating Companies (Operating Companies). The Operating Companies at the time of the filing were Entergy Arkansas, Inc. (Entergy Arkansas); Entergy Mississippi, Inc. (Entergy Mississippi); Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States Louisiana); Entergy Louisiana, L.L.C. (Entergy Louisiana); Entergy Texas, Inc., and Entergy New Orleans, Inc. (Entergy New Orleans) (collectively, Operating Companies). The generation and bulk transmission systems of all the Operating Companies are collectively referred to as the Entergy system.

² *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 521, 139 FERC ¶ 61,240 (2012).

Operating Companies were permitted under the Entergy System Agreement (System Agreement) to make off-system sales of energy for their own behalf but had violated the System Agreement through improper allocation of energy used to source those off-system sales from 2000 through 2009. In this order, we deny in part and grant in part the requests for rehearing.

I. Background

2. The System Agreement, a Commission-approved rate schedule, is a 1982 contract between the Operating Companies³ 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 eight Service Schedules, numbered as Service Schedule MSS-1 through MSS-8, 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.

3. On June 29, 2009, the Louisiana Commission filed a complaint pursuant to section 206 of the Federal Power Act (FPA),⁴ alleging that Entergy and its affiliates 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 during the period 2000 through 2009 (the Opportunity Sales).⁵ After the Commission set the complaint for

³ Entergy Arkansas withdrew from the System Agreement effective December 18, 2013. Entergy Mississippi withdrew effective November 7, 2015. On December 29, 2015, the Commission approved a settlement agreement terminating the System Agreement effective August 31, 2016. *Entergy Ark., Inc.*, 153 FERC ¶ 61,347 (2015).

⁴ 16 U.S.C. § 824 d (2012).

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.

hearing,⁶ the Presiding Judge issued an Initial Decision finding that Entergy Arkansas had violated the system and ordering refunds.⁷

4. In Opinion No. 521, the Commission affirmed in part and reversed in part the Initial Decision.⁸ It found that while the relevant provisions of the System Agreement are ambiguous, section 4.05 provides authority for individual Operating Companies to make opportunity sales for their own account. The Commission also found 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 to allocate system energy to individual Operating Companies to make opportunity sales for their own account.

5. The Commission further found that because the Operating Companies allocated lower cost energy to the Opportunity Sales pursuant to section 30.03, rather than relatively higher cost energy pursuant to section 30.04, Entergy had violated the System Agreement. The Commission established further hearing procedures to determine refunds while providing direction regarding certain refund-related issues (Damages Phase Proceeding).⁹

6. Entergy filed a request for rehearing and the Louisiana Commission filed a request for rehearing and clarification. The Louisiana Commission and the Council of the City of New Orleans (New Orleans Council) filed motions for leave to reply and replies to Entergy's filing.

⁶ *La. Pub. Serv. Comm'n v. Entergy Corp.*, 129 FERC ¶ 61,205 (2009).

⁷ *La. Pub. Serv. Comm'n v. Entergy Corp.*, 133 FERC ¶ 63,008 (2010) (Initial Decision).

⁸ Opinion No. 521, 139 FERC ¶ 61,240 at PP 2-3.

⁹ The Commission concurrently issues an order accepting in part and rejecting in part the Initial Decision in the Damages Phase Proceeding. *Louisiana Public Service Commission v. Entergy Corporation, Entergy Services, Inc., Entergy Louisiana, L.L.C., Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy New Orleans, Inc., Entergy Gulf States Louisiana, L.L.C., and Entergy Texas, Inc.*, 155 FERC ¶ 61,065 (2016).

II. Discussion

A. Procedural Matters

7. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2015), prohibits an answer to a request for rehearing. Accordingly, we reject the replies filed by the Louisiana Commission and New Orleans Council.

B. Substantive Matters

8. Entergy and the Louisiana Commission request rehearing with respect to four elements of the Commission's decision in Opinion No. 521. First, was the Commission correct in finding that the Opportunity Sales were permitted under the System Agreement? Second, did Entergy violate the System Agreement in accounting for the Opportunity Sales as part of Entergy Arkansas's load under section 30.03 and allocating it relatively low-cost energy pursuant to that section? Third, was the Commission correct in ordering refunds as a result of Entergy's energy allocation violation? And, finally, did the Commission err in reducing the refund amount as a result of the Louisiana Commission's delay in approving a Power Purchase Agreement (PPA) between Entergy Louisiana and Entergy Arkansas?

1. Did the Opportunity Sales Violate the System Agreement?

9. In Opinion No. 521, the Commission found that Entergy Arkansas was permitted to make Opportunity Sales under section 4.05 of the System Agreement. That 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.

10. The Commission noted that its finding turned upon the meanings of two phrases: "for which any Company does not wish to assume sole responsibility," and "sales of capacity and energy," and that these phrases were ambiguous in the context of section 4.05. The Commission determined that 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 if it does not, those sales will be governed under section 4.05.¹⁰ The Commission also found that the phrase "capacity and energy"

¹⁰ Opinion No. 521, 139 FERC ¶ 61,240 at P 109.

could mean either sales of both capacity and energy or sales of only energy or only capacity, depending upon the context.¹¹

11. On rehearing, the Louisiana Commission raises a variety of arguments against the Commission's findings on whether the Opportunity Sales were permitted by the System Agreement. The Louisiana Commission argues that section 4.05 is not ambiguous and concerns firm sales to directly connected utilities that historically have been firm wholesale requirements sales.¹² The Louisiana Commission contends that Entergy interpreted the provision in this manner until 2001 and made sales of energy only as joint account sales.¹³ The Louisiana Commission also disputes the Commission's statement that "no provision [of the System Agreement] specifically precludes an Operating Company from making and accepting sole responsibility for the Opportunity Sales."¹⁴ The Louisiana Commission claims that the System Agreement delegates to the Operating Committee and the System Operations Center the responsibility to determine the availability of energy for opportunity sales and to negotiate the terms of those sales.¹⁵ The Louisiana Commission asserts that Opinion No. 521 ignores the realities of a system economic dispatch, namely that the energy for the Entergy Arkansas sales largely came from units owned by other Operating Companies.¹⁶

12. The Louisiana Commission also argues that Opinion No. 521's finding of an ambiguity in the System Agreement conflicts with the purposes of the System Agreement, which it states is to produce economies for all of the Operating Companies and to achieve the lowest reasonable cost for all the Operating Companies. The Louisiana Commission claims that Opinion No. 521 recognizes that permitting individual Operating Company sales is at odds with the purpose of operating the system for the mutual benefit of all Operating Companies, but fails to explain how the individual sales were not sufficient to recognize the conflict with the "mutual benefit" purpose.¹⁷

¹¹ *Id.* P 112.

¹² Louisiana Commission Request for Rehearing at 9.

¹³ *Id.* at 9-10 (citing Tr. 874-77).

¹⁴ *Id.* at 10 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 110).

¹⁵ *Id.*

¹⁶ *Id.* at 12 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 122).

¹⁷ *Id.* at 16 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 121).

13. The Louisiana Commission states that the Commission suggests that the System Agreement permits an Operating Company to make use of its own resources before dedicating them to other Operating Companies but overlooks the fact that Entergy Arkansas was permitted to use facilities in the system dispatch, generally owned by other Companies, to make the sales.¹⁸ The Louisiana Commission states that the System Agreement prohibits an Operating Company from making off-system sales of energy from any generating units for its own benefit before considering the requirements of other Operating Companies. The Louisiana Commission argues that the Commission fails to reconcile its finding of a right for individual Operating Companies to make such sales based upon the allocation of energy first to the Operating Company that owns the resource with the purpose of the System Agreement, given the Commission held that the allocation provisions of the System Agreement do not determine rights.¹⁹

14. The Louisiana Commission argues that the Commission's interpretation of the System Agreement conflicts with Entergy's course of conduct until 2000, which the Louisiana Commission states was to prohibit individual Operating Company opportunity sales, with off-system sales of energy made only on a joint account basis. The Louisiana Commission states that the Commission recently ruled in an Entergy case that the utility's own prior conduct and representations constitute powerful evidence that its advocacy of a new and different contractual interpretation is unfounded.²⁰ The Louisiana Commission contends that Entergy's course of conduct, namely that Entergy had a firm policy that energy transactions could be made only on a joint account basis, conflicts with its new interpretation in this case.²¹

15. 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 System Agreement must be interpreted in a consistent manner and consistent with industry usage; and (3) ambiguities must be construed against Entergy because it drafted the System Agreement.²²

¹⁸ *Id.* (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 122).

¹⁹ *Id.* (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 116).

²⁰ *Id.* at 17 (citing *Arkansas Elec. Coop. Corp. v. Entergy Servs., Inc.*, 117 FERC ¶ 61,099 (2006)).

²¹ *Id.* at 18-19 (citing Exs. LC-51 at 49, LC-3, Art. IV; LC-52 at 2; LC-53).

²² *Id.* at 22-25.

16. The Louisiana Commission also states that Opinion No. 521 fails to explain how the System Agreement will operate under an interpretation that permits individual Operating Companies to make opportunity sales for their own accounts, which it terms “a prescription for chaos.”²³ It further states that the Commission fails to indicate whether its decision is intended to preempt the ability of state regulators to review the prudence of decisions of the other Operating Companies to waive their “supposed” right to sell system energy.²⁴

Commission Determination

17. We deny the Louisiana Commission’s request for rehearing. Although the Louisiana Commission argues that section 4.05 is not ambiguous, it does not provide a meaning for the phrase “for which any Company does not wish to assume sole responsibility.” We see no reason to change the Commission’s finding that 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. The Louisiana Commission’s interpretation would read this clause out of section 4.05, which conflicts with Commission policy. There is also no reason to suggest that section 4.05 only applies to firm sales. As the Commission noted in Opinion No. 521, the System Agreement uses more specific language in other sections of the System Agreement to refer to firm sales.²⁵

18. Although the Louisiana Commission argues that the System Agreement prohibits opportunity sales through its provisions concerning the powers of the Operating Committee charged with administering the System Agreement, it is notable that the Louisiana Commission can point to no specific provisions that make such a prohibition. The provisions cited by the Louisiana Commission refer only to the ability of the Operating Committee to make sales from system energy, but say nothing as to the authority of the Operating Companies to make their own sales off-system. As the Commission noted in Opinion No. 521, this is significant because the System Agreement does limit certain individual Operating Company activities.²⁶ While it is true that the

²³ *Id.* at 26.

²⁴ *Id.*

²⁵ Opinion No. 521, 139 FERC ¶ 61,240 at P 113.

²⁶ For example, the Commission noted in Opinion No. 521 that section 4.02 conditions individual Operating Company purchases upon “the consent of or under conditions specified by the Operating Committee.” Opinion No. 521, 139 FERC ¶ 61,240 at P 110. Similarly, section 3.05 conditions sales of generating capacity and
(continued...)

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.

19. The Louisiana Commission also argues that the bulk of the energy used for the Opportunity Sales came from units owned by other Operating Companies, thus making the Opportunity Sales invalid. The Commission found in Opinion No. 521 that energy used to supply opportunity sales for an Operating Company's own account did not necessarily come from the Operating Company's own generation, but the Commission made no findings with respect to the source of the energy used for the specific Opportunity Sales.²⁷ However, even if we were to assume that the Louisiana Commission was correct about the source of the energy actually used on an hourly basis for the Opportunity Sales, this would not invalidate the Commission's findings regarding section 4.05. The Louisiana Commission assumes that because the energy being sold off-system is system energy, it must fall under the joint account sales provision. However, the Louisiana Commission can point to no term in the System Agreement that makes such a requirement. The Commission found that an Operating Company may take responsibility for off-system sales; the energy to be used for such sales and the priority given to that sale are determined under sections 30.03 and 30.04. The Louisiana Commission's argument would have more force if the Commission had determined that the Opportunity Sales should be allocated in the same manner as native load. However, the Commission determined that the Opportunity Sales should be given priority under section 30.04 instead, which means that they should be allocated in the same manner as a joint account sale.

20. The Louisiana Commission argues that the purpose of the System Agreement conflicts with allowing the Opportunity Sales. However, while important, the purpose of a contract cannot rewrite the specific provisions of the contract. In this circumstance, the Commission found that the most reasonable reading of the System Agreement was that Operating Companies were allowed to take responsibility for their own opportunity sales. To the extent there is a conflict between the specific provisions of the System Agreement that allow the Opportunity Sales and the general purpose of the System Agreement, the solution is to revise the System Agreement in an FPA section 205 or 206 proceeding.²⁸

associated energy upon a right of first refusal for the capacity and associated energy to the other Operating Companies. *Id.* P 110.

²⁷ *See id.* P 131. *See also id.* P 140 (finding that the issue of unsupported capacity was irrelevant to Entergy Arkansas's right to make the Opportunity Sales).

²⁸ *Id.* P 123.

21. We find that the contractual interpretation principles cited by the Louisiana Commission are general ones that do not argue for a different result than the result reached by the Commission. We also find concerns the Louisiana Commission expresses regarding the Commission's alleged failure to explain how individual Operating Company sales should be prioritized or regarding how the prudence of "company waivers" should be reviewed to be speculative and therefore lacking a foundation for any possible reconsideration by the Commission.

22. Finally, we note that Entergy's course of conduct with respect to off-system sales, while relevant, is not by itself decisive with respect to the meaning of the terms of the System Agreement at issue. Even if Entergy did indeed have a policy discouraging non-firm energy transactions in the wholesale market prior to the Opportunity Sales in 2000, it was allowed to revisit that policy and allow the sales at issue here, as long as the sales did not violate the System Agreement. Either way, any such practice is only one piece of evidence and not sufficient to overturn our findings here.

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

23. In Opinion No. 521, the Commission determined 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.

24. 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).

25. 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.

26. The Commission found that the terms “loads” and “requirements” are ambiguous, and refer to different things throughout the System Agreement. The Commission determined that, based upon the language of the two sections at issue as well as the System Agreement as a whole, it is more reasonable to place the Opportunity Sales within section 30.04. As such, the Commission found that Entergy had violated the System Agreement by allocating the Opportunity Sales under section 30.03, rather than as lower-priority energy under section 30.04.

27. On rehearing, Entergy asserts that the Commission’s finding of ambiguity was erroneous because the Commission incorrectly held that the terms “loads” and “requirements” “are used in various ways throughout the System Agreement” and that Entergy “implicitly concedes” that the term “requirements” is used in different ways. Entergy contends that section 30.03(a) requires that an Operating Company’s generating resources be allocated first to its “loads,” with no exclusions. Entergy notes that the fact that “requirements” may be used in other ways when not discussing energy accounting has no bearing on energy accounting for the Operating Companies’ load under section 30.03. Entergy also argues that, contrary to the Commission’s finding, the term “loads” is used in a consistent manner throughout the System Agreement, the term “requirements” is used consistently when referring to energy accounting, and these terms are defined to mean all loads, unless a specific exclusion is enumerated to subtract defined loads.²⁹

28. Entergy disagrees with the Commission’s finding that the Opportunity Sales should be accounted for under section 30.04, noting that the Commission did not explain why it deemed “sales to others” to be “more specific” than “loads” and that there is no basis for the finding. It states that the common definition of “others” (as a noun) is an “additional one” or “another person.”³⁰ Entergy argues that, instead, the Commission should have interpreted section 30.04 in a manner consistent with the allocation methodology set forth in section 30.03, which requires that energy be “first” allocated to

²⁹ Entergy Request for Rehearing at 16. Entergy notes that section 2.16 and section 70.06 set forth definitions that describe an Operating Company’s load, with “load” intended to mean “all loads except for categories specifically excluded.” *Id.* at 17. Likewise, Entergy claims that section 30.13 treats the term “net area requirements” as “inclusive of all load unless a specific deduction is set forth in the relevant provision.” *Id.* at 18.

³⁰ *Id.* at 19.

the loads of each Operating Company and then to “pool energy.”³¹ Entergy states that these two allocations then leave only one other category of sales, the joint account sales, and the Commission erred in finding ambiguity where there is none.

29. Entergy additionally argues that the Commission incorrectly interpreted section 30.04 through its interpretation of “others” in section 4.05. Entergy asserts that section 4.05 establishes two classes of “others,” with the first being sales “for which any Company does not wish to assume sole responsibility” (i.e., joint account sales), and the second being sales where an individual Operating Company does wish to assume sole responsibility.³² Entergy claims that the Commission mistakenly lumped all “others” into a single class, and that only the first class of sales triggers the reimbursement provision of section 30.04, while the second class should be accounted for under section 30.03.³³

30. Entergy takes issue with the Commission’s observation that the system is dispatched on an integrated basis and that “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,” stating that this says nothing about the correct mode of after-the-fact accounting.³⁴

31. Entergy asserts that the Commission failed to consider the course of performance in interpreting the term “loads” and states that when the Commission finds that a contract is ambiguous, it must consider relevant extrinsic evidence, including course of performance or conduct.³⁵ Entergy argues that the evidence on course of performance is clear and supports its interpretation of section 30.03, namely that individual Operating Company wholesale sales always have been accounted for under section 30.03, and not under section 30.04.

³¹ *Id.*

³² *Id.* at 20 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 109).

³³ *Id.* at 21.

³⁴ *Id.* at 21-22 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 131).

³⁵ *Id.* at 22 (citing *Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 984 (D.C. Cir. 2009); *S.D. Pub. Utils. Comm’n v. FERC*, 934 F.2d 346, 351 (D.C. Cir. 1991); *Jersey Cent. Power & Light Co. v. Atl. City Elec. Co.*, 122 FERC ¶ 61,169, at PP 48, 50 (2008); *City of Bedford*, 64 FERC ¶ 61,381, 63,640 (1993)).

32. Entergy provides several examples of individual Operating Company opportunity sales being accounted for under section 30.03 and being included in the selling Operating Company's load shape.³⁶ Among these, it states, are: (1) sales by Entergy New Orleans of wholesale opportunity sales after Hurricane Katrina; (2) retail opportunity sales by Operating Companies in Louisiana and Texas under an "experimental as-available power service" program; and (3) sales relating to removal by retail regulators of a portion of Operating Companies' nuclear capacity from rate base while permitting Operating Companies owning such capacity the right to mitigate that loss through sales in the wholesale market. This third category of nuclear-capacity-related sales, it asserts, includes sales by Entergy Arkansas of the retained share of the Grand Gulf nuclear facility and sales related to a similar removal, under a "deregulated asset plan," of a portion of the River Bend nuclear plant from retail rate base while giving Entergy Gulf States Louisiana the option to sell it into the wholesale market for its own account. Entergy states that there is no rational basis for upending the Operating Companies' historical practices and depriving them of a reasonable opportunity to recover at least a portion of their investments. It contends that applicable course of conduct evidence also shows section 30.04 has been used for joint account sales.

33. The Louisiana Commission states that, although Opinion No. 521 correctly ruled that the Opportunity Sales were sales to "others" to be allocated under section 30.04 and that Entergy violated that provision, the Commission incorrectly "reject[ed] the presiding [sic] Judge's determination that the Opportunity Sales also violated Commission precedent on off-system sales."³⁷ The Louisiana Commission contends that there is no question that Entergy's actions required ratepayers to cross-subsidize sales for the benefit of stockholders. The Louisiana Commission argues that the Commission adopted simplistic distinctions to hold that Entergy's use of ratepayer-supported capacity to cross-subsidize stockholder sales did not violate precedent.³⁸ The Louisiana Commission argues that, if the Commission is going to exempt holding companies from the requirement that ratepayer-supported resources not be used to cross-subsidize utility sales into the competitive market, it must provide an explanation. The Louisiana Commission asserts that the Commission's ruling could open the door to abusive practices by holding

³⁶ *Id.* at 23-26.

³⁷ Louisiana Commission Request for Rehearing at 42-43 (quoting Opinion No. 521, 139 FERC ¶ 61,240 at P 132).

³⁸ *Id.* at 44-45 (citing *Minn. Power & Light Co.*, 47 FERC ¶ 61,064 (1989) (*Minnesota Power*); *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, Opinion No. 501, 123 FERC ¶ 61,047 (2008)).

companies, and states that the Commission has not identified a good reason for an exemption.³⁹

Commission Determination

34. We first reject Entergy's arguments and affirm 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. We confirm our finding that the terms "loads" and "requirements" in section 30.03 are ambiguous. As Trial Staff noted, the terms are used in various ways throughout the System Agreement.⁴⁰ We see no reason to reverse the Commission's determination that the most logical reading of the Service Schedule MSS-3 energy allocation provisions is that the Opportunity Sales should be treated as "sales to others" under section 30.04.

35. Entergy argues that the Commission deprives an Operating Company of the benefits of its generation for some of its sales but not others, without justifying this departure from prior decisions. Entergy ignores the Commission's analysis of the System Agreement, and the distinction between sales made to native load and those sales made off-system that is inherent within the System Agreement itself. Based upon this distinction, it is reasonable to read the System Agreement to give greater priority to on-system sales made to the native load customers who helped to pay for the generation, rather than to short-term off-system sales made to others.

36. Entergy's argument that the terms "loads" and "requirements" mean the same thing – all loads absent a specific exclusion – throughout the System Agreement is also incorrect. Entergy itself notes that the term "requirements" is used in different ways throughout the System Agreement.⁴¹ Entergy's argument that energy accounting is the only context in which the Commission should review these terms, while ignoring other contexts, is unavailing.

³⁹ *Id.* at 46.

⁴⁰ *See, e.g.*, Ex. S-1 at 39-40 (Sammon).

⁴¹ Entergy Request for Rehearing at 16 n.6. Entergy, however, urges that this term is used consistently when applied to the after-the-fact energy accounting process.

37. Additionally, Entergy's interpretation of the meaning of "load" in section 2.16 is inapposite. The version of section 2.16(a)(i) and (b)(i) of the System Agreement effective during 2000-2009⁴² defined load as:

The average of the sum of the Company's twelve monthly peak hour load for the period ended with the current month measured in megawatts. Each demand shall represent the simultaneous hourly input from all sources into the system of a Company, less the sum of the simultaneous hourly outputs to the systems of other interconnected utilities.

38. Entergy argues that load thus means all hourly input into the system of an Operating Company. Entergy argues that the System Agreement then subtracts hourly outputs as well as joint account sales from load, and states that the System Agreement drafters were thus able to explicitly exclude categories from load when intended. However, as the Commission noted in Opinion No. 521, while section 2.16 governs determination of Company Load Responsibility⁴³ for purposes of certain System Agreement Service Schedules, 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 2.16.⁴⁴ We do not find Entergy's interpretation to be persuasive. We also do not find that language in sections 70.06 and 30.13 of the System Agreement supports Entergy's assertion that "loads means all loads unless a specific exclusion is enumerated."

39. We reject Entergy's criticisms of the Commission's interpretation of section 30.04 of the System Agreement. We affirm the finding in Opinion No. 521 that, although sections 30.03 and 30.04 do not clearly state how the costs of the Opportunity Sales should have been allocated, it is reasonable for the more specific language of section 30.04 referring to sales "to others" to control. We reject Entergy's argument that the Commission provided no basis for the finding that "sales to others" are "more specific" than "loads." As the Commission found in Opinion No. 521, reading section 30.04

⁴² This definition was subsequently changed effective December 19, 2013. *See Entergy Servs., Inc.*, 145 FERC ¶ 61,247 (2013).

⁴³ Each Operating Company's Company Load Responsibility, which is determined pursuant to section 2.16, is used as an input for determination of its Responsibility Ratio, section 2.18, which is used in various Service Schedules of the System Agreement in order to allocate costs or benefits among the participating Operating Companies based on peak-load demand.

⁴⁴ Opinion No. 521, 139 FERC ¶ 61,240 at P 130.

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 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.⁴⁵

40. Entergy also cites to the common definition of “others” as an “additional one” or “another person.” In fact, these definitions show why Entergy’s interpretation is incorrect. Section 30.04 refers to sales to others as a category. Under Entergy’s interpretation, however, every sale made by an Operating Company for its own account is part of its load under section 30.03(a), whether within its territory or off-system. Under such an interpretation, there is no “others” that section 30.04 could be referring to, because there is no additional purchaser that would not be load under section 30.03. Entergy argues that section 30.04 refers only to joint account sales. But section 30.04 makes no reference to the joint account, only to the sales being made to “others.” If joint account sales are sales to others, by virtue of their being made off-system, it follows that similar off-system sales for which an Operating Company takes responsibility are also sales to others under the terms of the System Agreement.

41. We reject Entergy’s assertions that past course of performance evidence should govern the interpretation of section 30.03. As we note above, the prior practice of Entergy is only one piece of evidence when evaluating the terms of the System Agreement. Additionally, the evidence on Entergy’s prior practices is at best inconclusive. As the Commission noted in Opinion No. 521, Entergy made few if any opportunity sales by individual Operating Companies prior to the Opportunity Sales at issue.⁴⁶ Entergy’s citation to experimental as-available power services sales, for example, some of which did occur prior to 2000, do not support its course of conduct argument because they were within its service area. Likewise, as concerns other course of conduct evidence proffered, that relating to the River Bend Deregulated Asset Plan (RBDA), Entergy concedes that no RBDA sales ever occurred.⁴⁷ Sales related to Hurricane Katrina we find to represent an extraordinary event on the system. We also find that the non-jurisdictional actions of retail regulators in removing capacity from

⁴⁵ 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.

⁴⁶ See Opinion No. 521, 139 FERC ¶ 61,240 at P 120.

⁴⁷ See Entergy Request for Rehearing at 25.

retail rate base and allowing cost recovery through wholesale sales do not establish the propriety of including such sales in an Operating Company's load profile under the System Agreement, which is a Commission-jurisdictional rate schedule. With respect to Entergy's section 30.04 course of conduct evidence, we again do not find this persuasive given the lack of opportunity sales by individual Operating Companies for their own accounts prior to the Opportunity Sales.

42. We reject the Louisiana Commission's contentions that Opinion No. 521 improperly failed to find the Opportunity Sales caused ratepayers to cross-subsidize sales for the benefit of stockholders pursuant to Commission precedent. We find the Louisiana Commission's request for rehearing has largely replicated its arguments in its Brief Opposing Exceptions,⁴⁸ which the Commission in Opinion No. 521 considered and rejected along with the Presiding Judge's determination that the Opportunity Sales violated Commission precedent on off-system sales.⁴⁹

43. In Opinion No. 521, the Commission held that Entergy's treatment of the Opportunity Sales in the allocation of energy costs among the Operating Companies under the System Agreement did not violate precedent concerning off-system sales. It noted that 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."⁵⁰ It found that the general statements made by the Commission in *Minnesota Power* regarding the typical treatment of off-system sales did not control in this matter. With respect to Opinion No. 501, the Commission noted that 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. Rather, the Commission held, 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.⁵¹ While

⁴⁸ See Louisiana Commission Brief Opposing Exceptions at 73-74.

⁴⁹ Specifically, the Presiding Judge held that the Opportunity Sales contravened Commission policy toward utility opportunity sales expressed in Opinion No. 501, 123 FERC ¶ 61,047 at P 41 and *Minnesota Power*, 47 FERC ¶ 61,064 at 61,183 n.2. See Initial Decision, 133 FERC ¶ 63,008 at PP 379-81.

⁵⁰ *Minnesota Power*, 47 FERC ¶ 61,064 at 61,184.

⁵¹ The Commission found that 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 was beyond the scope of the proceeding, which it stated only concerns the allocation of costs among the Operating Companies under the

(continued...)

the Louisiana Commission asserts that the Commission's ruling could open the door to abusive practices by holding companies, and the Commission has not identified a good reason for an exemption,⁵² we find that the Commission's holding in Opinion No. 521 strikes the correct balance between the rights of individual Operating Companies to make opportunity sales for their own account and the rights of the system as a whole in the light of the System Agreement's language. Further, the Commission's determination that lower cost energy on the system should be allocated first to native load customers should reduce the potential and incentive for abusive practices.

3. Should Entergy be required to make refunds of damages?

44. In Opinion No. 521, the Commission affirmed the Presiding Judge's determination that damages were warranted given Entergy's violation of the System Agreement and disagreed with Entergy that the equities required no finding of damages.⁵³ The Commission agreed with the Presiding Judge and all parties that the proper methodology to determine damages was to re-run the Intra-System Bill (ISB).⁵⁴ However, it found that further hearing procedures were necessary to determine the amount of damages due to be refunded, as discussed below.

45. The Commission ordered that the Opportunity Sales be re-priced consistent with its interpretation of the requirements of the System Agreement, such that Entergy should calculate the difference between the incremental energy costs allocated to 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, with that difference paid in the form of refunds to the other Operating Companies consistent with how they should have been allocated energy under section 30.03(b) absent Entergy's violation of the System Agreement.⁵⁵ The Commission stated that because it disagreed with the Presiding Judge that these sales should have been treated as joint account sales, parties' arguments regarding distribution

System Agreement. It also found that 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. Opinion No. 521, 139 FERC ¶ 61,240 at P 110 n.221.

⁵² Louisiana Commission Request for Rehearing at 46.

⁵³ Opinion No. 521, 139 FERC ¶ 61,240 at PP 135-36.

⁵⁴ *Id.* P 135 (citing Initial Decision, 133 FERC ¶ 63,008 at P 413).

⁵⁵ *Id.* P 136.

of the margins were not relevant. It added that all refunds were to be paid from Entergy Arkansas to the other Operating Companies. The Commission found that further proceedings were necessary to determine the appropriate level of damages and remanded the issue for further hearing proceedings.

46. The Commission provided certain guidance regarding the Damages Phase Proceeding that it ordered. Responding to Entergy's contention that the Opportunity Sales affected calculations under the System Agreement including, but not limited to Service Schedules MSS-1, MSS-2, and MSS-3 (with respect to the bandwidth formula), the Commission directed that the Presiding Judge, in the further hearing proceeding, determine whether adjustments to settlements under these service schedules or other provisions of the System Agreement were necessary.

47. In its request for rehearing, Entergy states that the Commission failed to apply applicable equitable factors before ordering refunds.⁵⁶ Entergy states that the Commission did not discuss, adequately consider, or weigh, any of the relevant equitable factors, despite the fact that Entergy had briefed them extensively in its brief on exceptions. Entergy asserts that under applicable precedent, the Commission must "cogently explain why it has exercised its discretion in a given manner,"⁵⁷ including in cases where the Commission finds a tariff violation.⁵⁸

48. Entergy cites various equitable bases for a finding that refunds were not warranted. It states that good faith is often a bar to damages and that the Commission found the Opportunity Sales to have been made in good faith.⁵⁹ Entergy notes that the Commission has declined to order refunds where they would inequitably retroactively change the economic consequences of past business decisions⁶⁰ and contends it similarly should do so for Entergy Arkansas with respect to the Opportunity Sales. Entergy states that in rate design cases the Commission has declined to order refunds when utilities

⁵⁶ Entergy Request for Rehearing at 27-28.

⁵⁷ *Id.* at 28 (citing *Exxon Corp. v. FERC*, 206 F.3d 47, 54 (D.C. Cir. 2000) (quoting *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 48 (1983))).

⁵⁸ *Id.* at 29.

⁵⁹ *Id.* at 30 (citing Opinion No. 521, 139 FERC ¶ 61,240 at PP 106, 128 & 136).

⁶⁰ *Id.* at 30-31 (citing, *inter alia*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,184, at P 129 (2010); *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,185, at P 74 (2010)).

cannot revisit past usage decisions made in reliance on the previous rate design.⁶¹ Entergy states that Entergy Arkansas likely would not have entered into some of the sales if it had known that the cost of those sales later would be “re-priced” above market prices. It also states that awarding refunds given the Commission’s findings of ambiguity and good faith is contrary to applicable precedent.⁶²

49. It also states that refunds are inappropriate because this case involves the reallocation of costs among the Operating Companies, not an over-recovery of costs by an individual Operating Company. It states that the Commission has consistently held that refunds are not appropriate in a situation where the utility did not over-recover its costs but rather misallocated costs among different customer groups or companies.⁶³

50. The Louisiana Commission opines that Opinion No. 521 erroneously allows Entergy to attack the accuracy of its ISB process. The Louisiana Commission states that, in pre-filed testimony and through cross-examination of the Louisiana Commission witnesses, no one suggested that any difficulty would arise from re-running the ISB. Despite this, however, it states that Entergy and Trial Staff argued for a new proceeding to limit damages when there is “unloaded coal” on the system. The Louisiana Commission states that the Presiding Judge properly rejected this belated proposal, but Opinion No. 521 provides no explanation for the decision to permit Entergy to attack the Louisiana Commission’s proposed damage calculations methodology, where Entergy has used the ISB for decades without suggesting any flaws in its methodology. The Louisiana Commission notes that it does not have access to Entergy’s ISB program.⁶⁴

51. The Louisiana Commission states that the Presiding Judge correctly enforced the agreement to use the ISB program to calculate damages. In addition, the Louisiana

⁶¹ *Id.* at 31 (citing *Consumers Energy Co.*, 89 FERC ¶ 61,138, at 61,397 (1999); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983); *Conn. Light and Power*, 15 FERC ¶ 61,056, at 61,124 (1981)).

⁶² *Id.* at 28-30 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113, at P 95 (2006); *Niagara Mohawk Power Corp. v. N.Y. Indep. Sys. Operator*, 110 FERC ¶ 61,244, at 64 (2005); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 815 (D.C. Cir. 1998); *Minn. Power & Light Co. v. FERC*, 852 F.2d 1070, 1073 (8th Cir. 1988)).

⁶³ *Id.* at 32-33 (citing *La. Pub. Serv. Comm’n v. Entergy Corp.*, 135 FERC ¶ 61,218, at P 23 (2011); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (2011)).

⁶⁴ Louisiana Commission Request for Rehearing at 47.

Commission states that the Presiding Judge's directive to treat the Opportunity Sales as joint account sales ensures that stockholders receive the same treatment that Entergy has for many years provided ratepayers in measuring the cost of off-system sales.⁶⁵

52. The Louisiana Commission also requests that the Commission clarify that Entergy will be required to include interest on refunds, as ordered in the Initial Decision.

Commission Determination

53. We first reject Entergy's contention that Opinion No. 521's direction to calculate refunds was inappropriate. Entergy argues that this matter involves a misallocation of costs among different companies rather than an over-recovery, thus the Commission's policy requires that no refunds be granted. We disagree.

54. The Commission's policy on refunds establishes two lines of cases: first, cases of utility over-collection where the Commission generally granted refunds; and second, cases where a cost allocation or rate design has been found to be unjust and unreasonable where the Commission traditionally has declined to order refunds.⁶⁶

55. While we acknowledge that there are elements of this matter that make it appear to be similar to those cases involving cost allocation or rate design where the Commission has declined to grant refunds, a closer review of the specific facts show that the violation of the System Agreement at issue here is much closer to the cases of over-collection. While the Opportunity Sales themselves were made at market-based rates, and thus did not reflect an over-collection from the specific customers of the sales, the energy allocated to those sales resulted in an overcharging to the customers of all of the other Operating Companies who were not able to avail themselves of that cheaper energy. The Opportunity Sales involved an improper accounting of energy that undermined the energy allocation priorities under the System Agreement that balance the rights of the individual Operating Companies against those of the Entergy system, and native load customers against third parties. Entergy Arkansas' off-system sales of low-cost energy from system resources had the effect of forcing up the rates of captive customers of other

⁶⁵ *Id.* at 50.

⁶⁶ *See, e.g., Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (stating that the Commission has a "general policy of granting full refunds' for overcharges"); *Occidental Chemical Corp. v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,378, at P 10 (2005) (*Occidental*) (stating that the "Commission's long-standing policy is that when a Commission action under Section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively").

operating companies by precluding their purchase of the low-cost energy. Those captive customers were essentially over-charged as a result of Entergy's improper accounting under the System Agreement, and thus are due refunds. Allowing the use of improperly low-priced energy for Opportunity Sales for the refund period would represent a windfall for an Operating Company at the expense of the Entergy system and native load customers.

56. The Commission has found two primary grounds for denying refunds in cases involving cost allocation matters, neither of which apply here. First, the Commission has noted the potential of under-recovery.⁶⁷ However, in this matter the excess revenues from the Opportunity Sales were received by Entergy Arkansas' shareholders, meaning that there is no similar risk of under-recovery.⁶⁸

57. Second, the Commission has found that past decisions that could not be undone also represented an equitable basis for denying refunds.⁶⁹ However, such past decisions related to actions taken by other parties in reliance upon the challenged tariff provision. The Commission has found that it would be unfair to attempt to reverse those prior actions. In this matter, the past decisions are the very Opportunity Sales at issue, which the Commission found to be accounted for in violation of the System Agreement. Those Opportunity Sales can be undone, and the method for undoing them is addressed in the Damages Phase Proceeding. Entergy argues that refunds are inappropriate because it would not have entered into the contracts under which the Opportunity Sales were made had it known the Commission's interpretation of the energy allocation provisions. It is entirely possible that the Opportunity Sales would not have been made, or would have been made in a different way, had Entergy required a proper allocation of energy be made to the Opportunity Sales. However, ultimately the Opportunity Sales were in fact made, and system ratepayers were harmed as a result.⁷⁰ Granting refunds provides the best available method of putting parties in the same place that they would have been absent the violation of the System Agreement.

⁶⁷ *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1304 (D.C. Cir. 2014); *Occidental*, 110 FERC ¶ 61,378 at P 10.

⁶⁸ *See* Opinion No. 521, 139 FERC ¶ 61,240 at P 46.

⁶⁹ *Occidental*, 110 FERC ¶ 61,378 at P 10.

⁷⁰ *See La. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,211, at P 55 (2013) (noting that as concerns equitable arguments that refunds would result in under-recoveries or that consumers or utilities would have made different decisions "for straight overcharges, [such] considerations . . . do not exist.").

58. Our decision to grant refunds is consistent with the Commission's decision in *Oklahoma Commission v. AEP*,⁷¹ where the Commission found that AEP's inclusion of unrealized revenues in the Base Year ratio calculation violated an express provision of AEP's System Agreement and ordered refunds. AEP argued that the Commission should exercise its discretion to not require refunds. The Commission disagreed, noting that AEP's actions benefitted certain AEP utilities at the expense of other AEP utilities, and provided AEP shareholders with a net gain.⁷² These elements are also present in this proceeding, and similarly warrant the granting of refunds here.

59. Entergy argues that the Commission's description of the Opportunity Sales as having been made in "good faith"⁷³ and its statement that the applicable provisions in the System Agreement are ambiguous support a finding that retroactive refunds should not be imposed. The Commission's statement that the sales were made in good faith reflects the Commission's inability to divine a discriminatory intent on behalf of Entergy with respect to the Opportunity Sales. Specifically, Entergy stated that it was responding to "unsupported capacity" on its system based on retail decisions. Though the Commission in Opinion No. 521 found this issue to be irrelevant to the propriety of the Opportunity Sales,⁷⁴ Entergy may well have believed it was acting based upon these considerations. This does not, however, obviate the need for refunds given the violation of the filed rate, as well as the windfall that would otherwise accrue to Entergy Arkansas' shareholders.

60. Most of the precedent Entergy cites for its assertion that ambiguity warrants a finding of no refunds involved exercises of discretion by the Commission.⁷⁵ In *Koch Gateway Pipeline Co. v. FERC*, the court found the Commission's ordered refunds to be arbitrary and capricious because they would contravene a stated policy, misallocate costs

⁷¹ *Corporation Comm'n of the State of Okla. v. Am. Elec. Power Co., Inc.*, 125 FERC ¶ 61,237 (2008) (*Oklahoma Commission v. AEP*).

⁷² *Id.* P 33. The Commission also noted that section 206(c) of the FPA, relating to the Commission's authority to issue refunds with regard to utilities in registered holding companies, does not apply to refunds directed as a result of a violation of a filed rate. *Id.*

⁷³ Entergy Request for Rehearing at 29-30 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136: "Entergy violated the System Agreement, notwithstanding the fact that the Opportunity Sales were made and priced in good faith.").

⁷⁴ See Opinion No. 521, 139 FERC ¶ 61,240 at P 140.

⁷⁵ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113; *Niagara Mohawk Power Corp. v. N.Y. Indep. Sys. Operator*, 110 FERC ¶ 61,244; *Towns of Concord*, 955 F.2d 67 (D.C. Cir. 1992).

from shippers to shareholders, and would do so based upon a mere technical error.⁷⁶ It found persuasive a finding in an earlier decision that denied refunds because the refund was disproportionate and that no windfall had been received by the offending party as a consequence of its action.⁷⁷ We find these considerations do not apply to the Opportunity Sales, based upon the rationale stated above. In another court case, *Minnesota Power & Light Co. v. FERC*,⁷⁸ the court remanded for a Commission determination regarding whether retroactive application was appropriate in light of an equitable consideration, given Minnesota Power's "logical and reasonable good faith, albeit incorrect, argument for inclusion of the fees and expenses."⁷⁹ Yet the court remanded only for Commission consideration of whether it should waive retroactive application of its interpretation, a determination inherently within the discretion of the Commission.⁸⁰ In this matter, the Commission has reviewed Entergy's arguments, and has determined that refunds are indeed warranted under our discretion.

61. Entergy in its request for rehearing asserts that the impact of the recalculation directed by the Commission might be offset by the effects upon the bandwidth remedy and upon other Service Schedules, thereby eliminating the effect of such refunds. This issue is also raised by parties in the Damages Phase Proceeding established by the Commission in Opinion No. 521 and is addressed in the companion order on initial decision in that proceeding that we also issue today.

62. We disagree with the Louisiana Commission's contention that it was improper to allow Entergy to raise issues concerning the ISB in the further proceeding that we ordered. The precise manner of ISB calculation is important to determine the correct filed rates and allowing parties to raise issues regarding the same in the Damages Phase Proceeding was just and reasonable to help ensure calculation of more accurate damages figures.

⁷⁶ *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d at 817.

⁷⁷ *Id.* (citing *Gulf Power Co. v. FERC*, 983 F.2d 1095 (D.C. Cir. 1993)).

⁷⁸ *Minn. Power & Light Co. v. FERC*, 852 F.2d 1070.

⁷⁹ *Id.* at 1073.

⁸⁰ *Id.* at 1074 ("In remanding, we would observe that, *if the FERC now grants a waiver...*") (emphasis supplied).

63. We also grant clarification that interest on refunds should be included, consistent with our general policy.⁸¹ We see no compelling reason to depart from our policy on interest here.

4. Should the Commission reduce damages for delay?

64. In Opinion No. 521, the Commission affirmed the Presiding Judge's finding that the last 12 months of the 28-month period that the Louisiana Commission took to approve a PPA between Entergy Louisiana and Entergy Arkansas constituted unreasonable delay. The Commission agreed with the Presiding Judge's reasoning 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" and declined to order refunds for that period.⁸²

65. Entergy argues that the Louisiana Commission's unreasonable delay should have led the Commission to have imposed a four-month limit for the Louisiana Commission's review of the PPA, based upon the Louisiana Commission's own internal standard for processing of such cases, which it contends means the Commission should determine the period of unreasonable delay by the Louisiana Commission for which refunds should be barred to be 24 months rather than 12 months.⁸³

66. Entergy also states that the Commission did not appear to expressly resolve the question of whether Entergy Louisiana's forfeited refunds during this period should be reallocated to the other Operating Companies and states that allocating Entergy Louisiana's share of refunds to other Operating Companies would be inequitable, providing a windfall to the other Operating Companies and their customers given the other Operating Companies were not harmed by the unreasonable delay.⁸⁴

⁸¹ See, e.g., *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,153, at P 30 and n.30 (2014) (finding it appropriate to "follow our general policy and allow interest to be paid to ensure that customers are appropriately made whole for any overcharges refunded" and citing *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999) ("[t]he Commission's general policy, in effect for many years, requires interest to be paid on various kinds of overcharges.")).

⁸² Opinion No. 521, 139 FERC ¶ 61,240 at P 141 (citing Initial Decision, 133 FERC ¶ 63,008 at P 398).

⁸³ Entergy Request for Rehearing at 33-34.

⁸⁴ *Id.* at 36-37.

67. In contrast, the Louisiana Commission argues that the Commission has acted beyond its constitutional and statutory authority in penalizing a state regulatory commission for an alleged “unreasonable” delay in approving certain Entergy contracts. The Louisiana Commission asserts that nothing in the Initial Decision or in Opinion No. 521 articulates a legal theory under which a federal agency may punish retail ratepayers because it disagrees with the time consumed in a state regulatory review process. The Louisiana Commission also questions how it can be unreasonable to take 28 months to review contracts that the Commission took 43 months to review. The Louisiana Commission notes that much of the delay in the Louisiana Commission proceeding was caused by or agreed to by Entergy Louisiana,⁸⁵ and the Louisiana Commission accepted the contract long before the Commission determined its parallel Commission case. The Louisiana Commission adds that the Louisiana Commission proceeding involved multiple complex issues.⁸⁶

68. The Louisiana Commission notes that in the Initial Decision’s discussion of the Louisiana Commission proceeding the Presiding Judge did not make a 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. The Louisiana Commission further observes that there is no evidence that it was aware of the Opportunity Sales until mid-2004, and thus, it could not have acted to encourage the sales prior to that time.⁸⁷

69. The Louisiana Commission argues that the Commission’s decision punishes ratepayers regulated by a state agency for an alleged failure to abide by Commission procedural timelines, which it asserts is not authorized by the FPA and violates the U.S. Constitution. The Louisiana Commission states that it conducted an examination of contracts alleged to be anticompetitive, no party alleged that the investigation was conducted in bad faith or was intended to encourage Entergy’s violation of the System Agreement, and Louisiana’s rates contained charges required under Commission tariffs to support the same capacity that Entergy was offering for resale. The Louisiana Commission asserts that imposing a penalty on the basis that the Louisiana Commission did not act on a federal bureaucratic timeline designed to govern federal administrative law judges impermissibly undermines state sovereignty.⁸⁸ The Louisiana Commission

⁸⁵ Louisiana Commission Request for Rehearing at 28, 33-34.

⁸⁶ *Id.* at 30-31.

⁸⁷ *Id.* at 32.

⁸⁸ *Id.* at 35.

also states that it had no notice that it would be held to Commission time standards and had no opportunity to comply.⁸⁹

Commission Determination

70. Upon reconsideration, we are persuaded by the Louisiana Commission's arguments that the measure of refunds should not be reduced by a 12-month period. In Opinion No. 521, the Commission affirmed the Initial Decision's finding that a reduction of refunds for a 12-month period was warranted given that the Louisiana Commission failed to approve a PPA between Entergy Arkansas and Entergy Louisiana for 28 months, the time between Entergy Louisiana's filing of its application with the Louisiana Commission and the Commission, and the Louisiana Commission's approval of the agreement (January 2003 to May 2005).⁹⁰ During this time, Entergy Arkansas sold the energy that would have been sold under the PPA, in order to minimize revenues that would have otherwise been lost, as part of the Opportunity Sales.

71. While not described in the Initial Decision's nor Opinion No. 521's determination sections, the Louisiana Commission approved neither a wholesale base load contract for energy sales between Entergy Arkansas and Entergy Louisiana, nor a shorter, more temporary bridge arrangement until May 2005.⁹¹ The treatment of this 12-month period is particularly significant because a large proportion of the Opportunity Sales were made during this period.⁹² The Presiding Judge found that some portion of the 28 months constituted unreasonable delay in the Louisiana Commission's decision-making process, thereby encouraging Entergy Arkansas to make additional off-system opportunity sales. He reasoned that, "I see no reason why the Louisiana Commission could not have acted on the Energy Louisiana contract within the same period" and found that the last 12 months out of the 28-month delay in approving the contract, which runs from May 1, 2004 to May 2005, constituted unreasonable delay.

72. We disagree with the Louisiana Commission that Constitutional considerations bar this Commission from premising a reduction in refund amounts upon unreasonable delay by a state regulatory body in processing a matter that relates to our determination of

⁸⁹ *Id.* at 39.

⁹⁰ Opinion No. 521, 139 FERC ¶ 61,240 at P 141 (citing Initial Decision, 133 FERC ¶ 63,008 at P 398).

⁹¹ *See* Ex. ESI-5 at 35-38 (Testimony of Entergy witness Bruce Louiselle).

⁹² *See* Ex. LC-35 at 16; Ex. ESI-14 at 21.

damages. The Commission has discretion in the matter of determination of refunds.⁹³ The Commission may reasonably consider a party's actions that relate to its claims before the Commission in determining whether refunds are warranted and, if so, the proper amount.

73. However, as the Louisiana Commission states, the PPAs before it for approval involved complex issues and, upon reconsideration, we cannot necessarily conclude that its delay in processing the PPAs was so excessive that it merits reducing refund amounts otherwise owed. We find neither Entergy nor the Presiding Judge have made a persuasive case that delays of a magnitude that warrant a reduction in refunds were involved. Even Entergy's own expert states that he does not believe the Louisiana Commission's delay reflected a strategy to delay approval to later seek damages from shareholders.⁹⁴

74. Presented with a complicated record as to the processing of the PPAs, along with the important interest of using refunds to remedy the harm sustained by ratepayers of the other Operating Companies, we find there are countervailing issues that argue for and against a reduction and find that in such circumstances the more equitable approach is to reinstate refunds for the 12-month period at issue.

The Commission orders:

The requests for rehearing and clarification are granted in part and denied in part, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁹³ See *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 139 FERC ¶ 61,254, at P 45 n.74 (2012) ("Refunds are discretionary, see, e.g., *Towns of Concord*, 955 F.2d 67, 76 (D.C. Cir. 1992), and the Commission's authority is at its zenith in fashioning refunds, see, e.g., *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).").

⁹⁴ See Ex. ESI-5 at 38 (Louiselle).