

155 FERC ¶ 61,065
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

Docket No. EL09-61-002

v.

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

OPINION NO. 548

ORDER ON INITIAL DECISION

(Issued April 21, 2016)

1. This case is before the Commission on exceptions to an Initial Decision issued on August 28, 2013.¹ On December 7, 2009, the Commission issued an order setting a complaint filed by the Louisiana Public Service Commission (Louisiana Commission) for hearing and settlement judge procedures.² The Louisiana Commission's complaint (Complaint), filed pursuant to section 206 of the Federal Power Act (FPA),³ alleges that

¹ *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 144 FERC ¶ 63,021 (2013) (Initial Decision).

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

³ 16 U.S.C. § 824e (2012).

Entergy Corporation (Entergy) and its affiliates⁴ violated Entergy's Commission-approved generation and transmission pooling arrangement, the Entergy System Agreement (System Agreement), and engaged in imprudent utility conduct when Entergy Arkansas sold excess electric energy to third-party power marketers and others that are not members of the System Agreement for the benefit of its shareholders over the period 2000 through 2009 (the Opportunity Sales).⁵ On June 21, 2012, the Commission issued Opinion No. 521, finding that while Entergy Arkansas had authority under the System Agreement to engage in the Opportunity Sales, Entergy violated the System Agreement by improperly allocating lower cost energy to those sales.⁶ The Commission established further hearing procedures to determine refunds.

2. The Presiding Administrative Law Judge's (Presiding Judge) Initial Decision determined that a full re-run of the Intra-System Bill (ISB) was necessary to determine damages for the period in question, and declined to reduce damages based on adjustments to other Service Schedules in the System Agreement.⁷ As discussed below, we affirm in part and reverse in part the Initial Decision and remand this matter for further hearing procedures for a final determination of refunds consistent with our determinations in this order. Specifically, we find that a full re-run of the ISB that reflects a reordering of energy priorities on the Entergy system is necessary to provide a full and fair accounting of damages. However, we also find that damages should be adjusted to reflect adjustments to Service Schedules and other provisions in the System Agreement, including for bandwidth payments made under Service Schedule MSS-3 of the System

⁴ Entergy is a registered public utility holding company. The Complaint also names as respondents Energy Services, Inc. (Entergy Services), and the Entergy Operating Companies at the time: Entergy Arkansas, Inc. (Entergy Arkansas); Entergy Louisiana, LLC (Entergy Louisiana); Entergy Mississippi, Inc. (Entergy Mississippi); Entergy New Orleans, Inc. (Entergy New Orleans); Entergy Texas, Inc. (Entergy Texas); and Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States Louisiana) (collectively, Operating Companies).

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

⁶ *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 521, 139 FERC ¶ 61,240 (2012).

⁷ Initial Decision, 144 FERC ¶ 63,021 at P 373.

Agreement (Exchange of Electric Energy Among the Operating Companies), to reflect the energy priority reordering that we direct herein. In a concurrently issued order, we grant in part and deny in part rehearing requests of Opinion No. 521.⁸

I. Background

3. The Entergy Operating Companies are a multi-state, affiliated public utilities that, at the time of the Complaint, shared the costs and benefits of power generation and bulk transmission. Many aspects of this relationship are governed by the System Agreement, a 1982 contract among the Operating Companies⁹ 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.

4. This proceeding arose out of a complaint filed by the Louisiana Commission alleging that sales of electric energy by Entergy Arkansas to third-party power marketers and others that were not members of the System Agreement were imprudent and violated the terms of the System Agreement.¹⁰ After the Commission set the complaint for hearing, the Presiding Judge issued an Initial Decision finding that Entergy Arkansas had violated the System Agreement and ordering refunds.¹¹

⁸ *Louisiana Public Service Commission v. Entergy Corporation, Entergy Services, Inc., Entergy Louisiana, LLC, Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy New Orleans, Inc., Entergy Gulf States Louisiana, L.L.C., and Entergy Texas, Inc.*, 155 FERC ¶ 61,064 (2016).

⁹ 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).

¹⁰ Further background on the complaint can be found in Opinion No. 521.

¹¹ *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 133 FERC ¶ 63,008 (2010) (Phase 1 Initial Decision).

5. In Opinion No. 521, the Commission affirmed in part and reversed in part the first Initial Decision. The Commission found that Operating Companies had the authority to make Opportunity Sales for their own accounts under section 4.05, which implicitly gave Operating Companies the ability to assume sole responsibility for their sales to others.¹²

6. After finding that Entergy Arkansas had authority to make the Opportunity Sales at issue, the Commission then determined that Entergy had improperly allocated energy used for these sales. The Commission noted that the energy used to source the Opportunity Sales had been allocated to Entergy Arkansas's load under section 30.03 of the System Agreement, which provided for the lowest cost energy to be allocated on an hourly basis to the load of the Operating Company having such source available. However, the Commission found that the Opportunity Sales should have been classified as "sales to others" under section 30.04 of the System Agreement and allocated higher-priced energy on the Entergy system.¹³

7. The Commission found that damages were due as a result of Entergy's violation of the System Agreement. The Commission agreed with the Presiding Judge that re-running the ISB is the appropriate method of determining damages. The Commission found that further hearing procedures were necessary to re-price the Opportunity Sales consistent with the requirements of the System Agreement. The Commission stated that Entergy should calculate the difference between the incremental energy costs allocated to Entergy Arkansas due to the inclusion of the Opportunity Sales in its load and the incremental costs of energy sales to the system it should have been allocated for under section 30.04.¹⁴ The Commission also directed the Presiding Judge to determine whether adjustments to settlements under Service Schedules MSS-1, MSS-2, and MSS-3, and any other schedules were necessary. The Commission affirmed the Presiding Judge's finding that the last 12 months of the 28-month delay in approving a power purchase agreement (PPA) between Entergy Arkansas and Entergy Louisiana constituted unreasonable delay, and that damages therefore should be limited in the manner prescribed by the Presiding Judge, and also made several additional damages findings.

II. Discussion

8. The Presiding Judge divides his discussion into three sections: first, the methodology for determining damages; second, whether to adjust damages based on a

¹² Opinion No. 521, 139 FERC ¶ 61,240 at P 109.

¹³ *Id.* P 128.

¹⁴ *Id.* P 136.

revised Responsibility Ratio¹⁵ of the System Agreement as a result of the change in priority given to the Opportunity Sales; and third, whether to adjust damages for a revised bandwidth payment.¹⁶

9. We affirm in part and reverse in part the Initial Decision. As described further below, we affirm the Presiding Judge's findings regarding the proper method for determining damages using the ISB, modified as discussed below. However, we reverse the Presiding Judge's findings that damages should not be adjusted for revisions to the calculations performed to implement other Service Schedules within the System Agreement, including the bandwidth formula under Service Schedule MSS-3. We find instead that the damages calculation should reflect the impact of the Opportunity Sales upon these Service Schedules, including the bandwidth formula, which would have occurred had they been properly assigned energy and accounted for under the System Agreement and the ISB.

A. Appropriate Methodology for Determining Damages

1. Initial Decision

10. At hearing, Entergy and the Louisiana Commission provided competing methodologies for re-running the ISB, based upon their interpretations of the Commission's instructions in Opinion No. 521. Under one methodology the re-run of the ISB required a full reallocation of energy, as advocated by the Louisiana Commission, Trial Staff, and the City Council of New Orleans (City of New Orleans), and not opposed by the Arkansas Public Service Commission (Arkansas Commission). Under the other methodology the re-run of the ISB required recalculation using re-priced energy based on the equation stated by the Commission in Paragraph 136 of Opinion No. 521, as advocated by Entergy.¹⁷

¹⁵ The Responsibility Ratio of an Operating Company 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. *See* System Agreement, § 2.18.

¹⁶ The Commission determined that the bandwidth remedy should commence on June 1, 2005, so the bandwidth payment period that is at issue in this proceeding is from June 1, 2005 through the end of 2009. *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,047, at P 34 (2011).

¹⁷ The parties and the Presiding Judge agree that the key language in Paragraph 136 is as follows:

(continued ...)

11. The Presiding Judge determines that Entergy's proposed methodology is deeply flawed, and that the Louisiana Commission's methodology appropriately determines damages under Opinion No. 521. The Presiding Judge orders Entergy to use the Louisiana Commission's methodology, without change or modification, to re-run the ISB, the results of which will be used to determine damages.

12. The Presiding Judge states that Entergy witness Mr. Louiselle's testimony in this proceeding falls far short of presenting an acceptable damage calculation, and his proposed methodology does not conform to Opinion No. 521.¹⁸ The Presiding Judge also states that Mr. Louiselle's methodology is deeply flawed because it ignores the Commission's holding that Entergy's initial allocation of energy violated the System Agreement.¹⁹

13. The Presiding Judge summarizes Entergy's methodology as:

[d]etermining the difference between two values: (A) the incremental energy costs allocated to Entergy Arkansas due to the inclusion of the Opportunity Sales in its load under Section 30.03(a); and (B) the incremental costs of energy sales to the System it should have been allocated under Section 30.04. Thus, under the Commission's formula, Component A is subtracted from Component B, and the resulting difference is the amount of refunds due among the Operating Companies. This difference, calculated on an hourly basis, represents the additional cost that should have been used to price the Entergy Arkansas Opportunity Sales.^[20]

Accordingly, we find that, based on the circumstances before us, the Opportunity Sales should be re-priced consistent with our interpretation of the requirements of the System Agreement. Namely, Entergy should calculate the difference between the incremental energy costs allocated to 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.

¹⁸ Initial Decision, 144 FERC ¶ 63,021 at P 373.

¹⁹ *Id.* P 390.

²⁰ *Id.* P 391 (citing Entergy Initial Br. 4).

14. The Presiding Judge states that Entergy refers to the “A” and “B” values above as “Component A” and “Component B,” respectively.²¹ For each hour in the Base Case in which an Opportunity Sale occurred, Entergy calculated the difference between (1) the cost of sourcing the Opportunity Sale from the system stack in the Change Case and (2) the cost of sourcing that volume of sales at the top of Entergy Arkansas’s requirements stack in the Base Case.²²

15. The Presiding Judge states that Entergy used the last set of monthly ISB results to measure the Component A from the Base Case by isolating each hour that Entergy Arkansas made an Opportunity Sale. The Presiding Judge notes that, in each such hour, Entergy determined the cost of the volume of energy based on the top of Entergy Arkansas’s resource stack, just below any Entergy Arkansas resources that sourced a joint account sale.²³ The Presiding Judge states that Entergy claimed that because the section 30.03(a) stack is determined before the allocation of energy to the exchange of energy among Operating Companies under section 30.03(b) (energy exchange),²⁴ the section 30.03(a) stack still included resources that may have been subsequently allocated to the energy exchange.²⁵ The Presiding Judge notes that, in light of the refund being determined by subtracting Component A from Component B, inflating Component A by including exchange energy minimized this difference, which consequently minimized refunds.

16. The Presiding Judge states that, as Trial Staff noted, Entergy incorrectly measured Entergy Arkansas’s incremental energy costs for the purpose of inflating the incremental costs allocated to the Opportunity Sales, thus decreasing refunds. Further, the Presiding Judge states that Entergy clearly committed an error in its definition of the “incremental energy costs allocated to Entergy Arkansas due to the inclusion of the Opportunity Sales in its load under section 30.03(a).”²⁶ The Presiding Judge finds that no measure of load under section 30.03(a) should include section 30.03(b). The Presiding Judge reasons that Entergy’s interpretation incorrectly included not just the “energy costs allocated to

²¹ *Id.* P 392.

²² *Id.* (citing Entergy Initial Br. 11).

²³ Section 4.05 of the System Agreement provides for sales to others for the joint account of all of the Operating Companies.

²⁴ Energy so exchanged is referred to as “exchange energy.”

²⁵ Initial Decision, 144 FERC ¶ 63,021 at P 393 (citing Entergy Initial Br. 13-14).

²⁶ *Id.* P 394 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136).

Entergy Arkansas” but also the cost of energy allocated to other Operating Companies through the energy exchange.²⁷

17. The Presiding Judge claims that there is no logical purpose in measuring the cost of the energy exchange sales because an Operating Company making an energy exchange sale is compensated for the cost of its energy under Service Schedule MSS-3. Furthermore, energy sold to the other Operating Companies (via the energy exchange) could not simultaneously be allocated to the Opportunity Sales. The Presiding Judge states that Entergy’s methodology simply compares Entergy Arkansas’s costs already allocated and paid for by other Operating Companies to the system incremental cost of generating electricity for the sales.²⁸ Thus, the Presiding Judge finds that the result of this comparison does not comply with Opinion No. 521. The Presiding Judge concludes that the top of the section 30.03(a) stack is the proper measure of “incremental cost” – i.e. with the section 30.03(b) sales removed.

18. The Presiding Judge states that Entergy used the Change Case to derive Component B and redefined the Opportunity Sales from being sourced out of Entergy Arkansas’s requirements to being joint account sales sourced out of system requirements. The Opportunity Sales were sourced with a higher energy priority than joint account sales. The Presiding Judge notes that Entergy then allocated that difference (B minus A) to the other Operating Companies based on each Operating Company’s proportion of exchange energy purchases in that hour.²⁹

19. The Presiding Judge states that the Opportunity Sales are the highest-cost, lowest-priority energy on the system. Unlike section 30.03 of the System Agreement, which clearly distinguishes between the relative priorities of section 30.03(a) and section 30.03(b), the Presiding Judge states that the Commission found that section 30.04 represents a catch-all for all sales to others.³⁰

20. The Presiding Judge states that, although the System Agreement does not distinguish between the two categories of “sales to others” (Opportunity Sales and joint account sales), the Commission found that these two categories of section 30.04 sales were distinct in several aspects. First, the margins for joint account sales are split among the Operating Companies based on their Responsibility Ratios, whereas the margins for

²⁷ *Id.* P 395 (citing City of New Orleans Initial Br. 16.)

²⁸ *Id.* P 396 (citing Louisiana Commission Initial Br. 22).

²⁹ *Id.* P 398.

³⁰ *Id.* P 399 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 129).

Opportunity Sales are retained by the Operating Company making the sale.³¹ Second, fuel costs for supplying a joint account sale are split among all Operating Companies based on their Responsibility Ratios, whereas a company making an Opportunity Sale must reimburse the Operating Company supplying the Opportunity Sale for fuel costs.³² Third, capacity-related charges for the joint account sales are split among all Operating Companies based on their Responsibility Ratios, whereas an Operating Company takes sole responsibility for the costs associated with its section 30.04 load. The Presiding Judge points to Paragraph 138 of Opinion No. 521 for the proposition that the Commission clearly decided that Opportunity Sales were *not* to be treated comparably to joint account sales; instead they were to receive an energy priority lower than joint account sales.³³

21. The Presiding Judge states that, after re-categorizing the Opportunity Sales from Entergy Arkansas's section 30.03(a) load to Entergy Arkansas's section 30.04 load, the ISB re-run automatically re-allocates the proper energy priority to each type of sale in accordance with the Commission's interpretation of the System Agreement. The

³¹ *Id.* (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136 n.253).

³² *Id.* (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 131).

³³ Paragraph 138 of Opinion No. 521 states:

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

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

Presiding Judge notes that Entergy did not attempt to quantify the effects of a re-categorization.³⁴

22. The Presiding Judge determines that a reasonable reading of Opinion No. 521 Paragraph 136 alone and of the Opinion as a whole clearly requires a re-allocation of energy through re-categorization of the Opportunity Sales.³⁵ The Presiding Judge finds that the Commission's repeated use of the phrase "should have been allocated" to be equivalent to the term "re-allocated."³⁶

23. The Presiding Judge states that Entergy's position regarding the allocation of refunds is unsupported and ignores the fact that Entergy's misallocation of energy was found to have violated the System Agreement and that, as a result of Entergy's violation, the other Operating Companies were forced to sell their lower-cost energy to Entergy Arkansas to support the Opportunity Sales. The Presiding Judge disagrees with Entergy's interpretation that Opinion No. 521 permits it to use its generating resources to serve Opportunity Sales load before loads of the rest of the Entergy system. The Presiding Judge states that Entergy mistakenly believes that Entergy Arkansas possesses the right "to use *all* of its resources to serve *all* of its load before allocating any of those resources to the energy exchange to serve other System load."³⁷

24. The Presiding Judge believes that Entergy's interpretation of Paragraph 122 of Opinion No. 521 is in error because it does not give meaning to the Commission's clarification that "Operating Companies are not obligated to act only on behalf of the System as a whole, but may act on their own behalf as well, *as long as their actions are allowed under the System Agreement.*"³⁸ The Presiding Judge states that the

³⁴ Initial Decision, 144 FERC ¶ 63,021 at P 405 (citing City of New Orleans Initial Br. at 14).

³⁵ *Id.* P 406.

³⁶ *Id.* P 408.

³⁷ *Id.* P 412 (citing Entergy Initial Br. 18-19 (emphasis in the original)).

³⁸ *Id.* P 413 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 122 (emphasis added)). The full language of P 122 is as follows:

In addition, while the System Agreement does provide for a certain degree of sharing of capacity and energy between the Operating Companies, it also provides for Operating Companies to own their own generation, and to use that generation to serve their own loads before the rest of the

(continued ...)

Commission's interpretation of the System Agreement, as provided in Opinion No. 521, agrees that the Opportunity Sales are part of Entergy's load. The Presiding Judge points out that under the System Agreement, the Opportunity Sales are the lowest priority resources on the system. The Presiding Judge states that Entergy Arkansas is entitled to use its own resources to serve the Opportunity Sales, but only once the other Operating Companies have already received their rightful allocations of high priority energy per the System Agreement.

25. The Presiding Judge states that any past precedent regarding how these resources are to be allocated must be modified in light of the fact that, prior to Opinion No. 521, section 30.04 load did not exist. The Presiding Judge finds that the relevant "specific provisions" of the System Agreement are section 30.03 and section 30.04, as interpreted by the Commission in Opinion No. 521.³⁹ The Presiding Judge finds that Entergy's reliance on the precedent of the U.S. Court of Appeals for the District of Columbia Circuit is not controlling because it does not address the "specific provisions" at issue in this proceeding.

system. Operating Companies are not obligated to act only on behalf of the System as a whole, but may act on their own behalf as well, as long as their actions are allowed under the System Agreement.[242]

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

³⁹ *Id.* P 419.

26. The Presiding Judge observes that the Commission was clear 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”⁴⁰ and that the Commission understood that other Operating Companies’ resources would source the Opportunity Sales; it recognized that allocations would change.

27. The Presiding Judge states that as the Commission found in Opinion No. 521, section 30.03(a) allows Operating Companies to first allocate their low-cost, high-priority energy to serve native load.⁴¹ Section 30.03(b) then requires “long” Operating Companies to allocate the next-lowest-cost energy to any “short” Operating Companies through the energy exchange. Then the system as a whole is entitled to the next increment of energy under section 30.04 to serve joint account sales, with the margins shared among all Operating Companies based on their Responsibility Ratios. Finally, individual Operating Companies are permitted to make Opportunity Sales with the system’s lowest-priority (i.e., highest cost) energy under section 30.04.

28. The Presiding Judge finds that Entergy misconstrues the Commission’s instructions, claiming the Commission stated: “[n]amely, Entergy should calculate the difference between the incremental energy *costs* allocated to Entergy Arkansas”⁴² The Presiding Judge states that the full sentence actually says:

Namely, 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 30.04.⁴³

29. The Presiding Judge concludes that the principle instruction of the “namely” sentence is to describe the proper allocation and states that by emphasizing the word “cost” Entergy attempts to change the meaning. The Presiding Judge states that the Commission did not order Entergy to calculate the cost of a re-pricing, and instead, ordered Entergy to measure the cost difference of two different allocations. Therefore, the Presiding Judge finds that the appropriate damages will be calculated by re-allocating

⁴⁰ *Id.* P 420 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 131).

⁴¹ *Id.* P 421.

⁴² *Id.* P 422 (citing Entergy Initial Br. 10-11).

⁴³ *Id.* P 423 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136).

the system's highest-cost, lowest-priority energy to the Opportunity Sales and then re-running the ISB.⁴⁴ This will result in the required "re-pricing" of energy under sections 30.03 and 30.04 of the System Agreement.

30. The Presiding Judge finds that the Louisiana Commission's methodology for re-running the ISB correctly implements Opinion No. 521 and is the appropriate methodology for determining the damages arising from Entergy's violation of the System Agreement for the entire 2000-2009 refund period. The Presiding Judge agrees with the Louisiana Commission's position that the Opportunity Sales are placed at the top of the system stack, allocating the lowest-priority, highest-cost energy to the Opportunity Sales. Furthermore, the Presiding Judges states that the Louisiana Commission's methodology ensures compensation for fuel costs to Operating Companies that sourced the Opportunity Sale.⁴⁵

31. The Presiding Judge states that the Louisiana Commission's methodology properly defines both the terms "Base Case" and "Change Case." The Louisiana Commission defines the Base Case as the original run of the ISB, with incremental cost measured at the top of Entergy Arkansas's section 30.03(a) stack (but below the section 30.03(b) energy exchange sales).⁴⁶ The Presiding Judge contends that this is correct because the Commission required pricing at "the incremental energy costs *allocated* to Entergy Arkansas due to inclusion of the Opportunity Sales in its load under section 30.03(a)."⁴⁷ The Presiding Judge states that the energy costs incurred by Entergy Arkansas do not include section 30.03(b) energy exchange costs.

32. The Presiding Judge further states that the Louisiana Commission defines the "Change Case" as one that reclassifies the Opportunity Sales as sales to others with the lowest priority of energy on the system or at the top of the section 30.04 stack.⁴⁸ The Commission defined this value as "the incremental costs of energy sales to the system it should have been allocated for the Opportunity Sales under section 30.04."⁴⁹ The Presiding Judge notes that, with the Opportunity Sales re-categorized, the ISB

⁴⁴ *Id.* P 424.

⁴⁵ *Id.* P 442 (citing Louisiana Commission Initial Br. 12).

⁴⁶ *Id.* P 443 (citing Ex. LC-201 at P 56).

⁴⁷ *Id.* (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136 (emphasis added)).

⁴⁸ *Id.* P 444.

⁴⁹ *Id.* (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136).

automatically generates the allocations that Entergy Arkansas should have been allocated for the Opportunity Sales.⁵⁰

33. The Presiding Judge contends that Entergy's arguments against the Louisiana Commission's methodology are unfounded. Specifically, the Presiding Judge rejects Mr. Louiselle's arguments that the Louisiana Commission's methodology would create an imbalance on the system because an Operating Company cannot be both a buyer and a seller into the energy exchange in a given hour. The Presiding Judge finds that under the Louisiana Commission's methodology, Entergy Arkansas is not purchasing energy from the energy exchange to source the Opportunity Sales, and the Opportunity Sales are sourced with excess system energy just like joint account sales.

34. The Presiding Judge explains that, in a given hour, the ISB will determine which movable energy has the highest energy cost in the system stack and deduct the associated quantity of energy from whichever Operating Company sourced that energy.⁵¹ The Presiding Judge explains that the ISB then compensates that supplying Operating Company for the fuel costs, and an Operating Company making an Opportunity Sale then receives (or pays) the margins on those sales.

35. The Presiding Judge agrees with Trial Staff's contention that there is no physical change in exchange energy in the ISB re-run. He states that what changes is the energy the ISB deems to have been sold and purchased through the exchange. The Presiding Judge reiterates that Paragraph 136 of Opinion No. 521 clearly requires refunds that are consistent with how the "energy *should have been* allocated... absent Entergy's violation of the System Agreement[.]" and notes that Entergy never attempts to define the phrase "should have been allocated."⁵² The Presiding Judge rejects Entergy's proposed proportional allocation of refunds based on energy exchange purchases because it is not required or supported by Opinion No. 521.

36. The Presiding Judge clarifies that Service Schedule MSS-5 margins for opportunity sales belong to the Operating Company making such sales, and Service Schedule MSS-5 margins for joint account sales are split among Operating Companies based on their Responsibility Ratios.⁵³ Meanwhile, the Presiding Judge notes that Opinion No. 521 clearly states that the Operating Company responsible for making an

⁵⁰ *Id.* (citing Louisiana Commission Initial Br. 11).

⁵¹ *Id.* P 448.

⁵² *Id.* P 450 (citing Entergy Initial Br.).

⁵³ *Id.* P 451.

Opportunity Sale receives all of the margins from those sales; Service Schedule MSS-5 does not apportion the margins.⁵⁴ Therefore, the Presiding Judge concludes that Entergy Arkansas will receive all Opportunity Sales margins.

37. The Presiding Judge notes, however, that the Commission remained silent as to the Service Schedule MSS-5 margins with regard to joint account sales.⁵⁵ The Presiding Judge finds that, as a result of the re-allocation determined by the ISB re-run, margins on joint account sales will change. He reasons that this change occurs because the joint account sales are now sourced from less expensive energy than in the Base Case.

38. The Presiding Judge determines that the Service Schedule MSS-5 margins on joint account sales still are distributed according to the same methodology as used in the Base Case, and the Responsibility Ratios do not change.⁵⁶ The Presiding Judge finds that each Operating Company, including Entergy Arkansas, is entitled to the same proportion of these benefits as in the Base Case, but there are now different margins to distribute among them.

39. The Presiding Judge rejects Entergy's arguments that the damages that result from the Louisiana Commission's methodology are too high, and finds that the Louisiana Commission's numbers are appropriate for various reasons. First, he finds that the Louisiana Commission's methodology properly implements Opinion No. 521, and the results of the re-run of the ISB properly generate damages. Second, the Presiding Judge finds that the damages properly measure the full contractual damages the other Operating Companies suffered as a result of Entergy's violation of the System Agreement.⁵⁷ Finally, the Presiding Judge states that, although Mr. Louiselle's arguments that the Opportunity Sales might never have been made had Entergy known they should be sold under section 30.04 instead of section 30.03(a) have some merit, the issue of the sales' prudence is not at issue in this proceeding.⁵⁸

⁵⁴ *Id.* P 452 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 138 n.253).

⁵⁵ *Id.* P 454 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 138).

⁵⁶ *Id.* P 455.

⁵⁷ *Id.* P 456. The Presiding Judge emphasizes that these damages are not a penalty. Instead, the Presiding Judge explains that the use of the Louisiana Commission's methodology rectifies the harm imposed on the other Operating Companies as a result of Entergy Arkansas's violation of the System Agreement.

⁵⁸ *Id.* P 457.

2. Briefs on Exceptions

40. Entergy argues that the Initial Decision incorrectly concludes that the Louisiana Commission presents a valid methodology for calculating refunds. Entergy states that the Initial Decision endorses the same theory that the Commission rejected in Opinion No. 521, where the Commission stated that “the Opportunity Sales should not be treated as joint account sales.”⁵⁹ Entergy submits that the Louisiana Commission’s methodology does just that, except it assigns the negative margins to Entergy Arkansas alone.

41. Entergy asserts that the Initial Decision relies upon a faulty premise that the Opportunity Sales are system load for purposes of Paragraph 136 of Opinion No. 521, but Entergy Arkansas’s load for purposes of Paragraph 138.⁶⁰ Entergy notes that the Initial Decision provides no citation for this purported Commission finding that there are two categories of section 30.04 “sales to others.”⁶¹ Additionally, Entergy argues that the Initial Decision incorrectly states that fuel costs for supplying a joint account sale are split among Operating Companies based on their Responsibility Ratios under section 30.04. Moreover, Entergy disputes the Initial Decision’s claim that capacity-related charges are split among all Operating Companies based on their Responsibility Ratios, stating that there is no such provision in the System Agreement.⁶² Entergy rejects the Initial Decision’s treatment of Opportunity Sales as load that has a lesser energy priority than actual joint account sales, and argues that the Commission found that Opportunity Sales of Entergy Arkansas were of a lower priority than other Entergy Arkansas sales, not lower than actual joint account sales. Entergy states that, in other words, these sales are non-firm, energy-only sales.⁶³ Entergy also takes issue with the Initial Decision’s repeated use of the word “re-categorize” in relation to the Opportunity Sales, which it states is contrary to Opinion No. 521’s directive that the Opportunity Sales be treated as Entergy Arkansas’s load, and not “re-categorized” as section 30.04 load.⁶⁴ Entergy concludes that it is clear that the Commission found that the Opportunity Sales are not

⁵⁹ Entergy Brief on Exceptions at 11-12 (citing Opinion No. 521, 139 FERC ¶ 61,240 at PP 136 and 138 n.253).

⁶⁰ *Id.* at 12.

⁶¹ *Id.* at 13.

⁶² *Id.* at 13-14.

⁶³ *Id.* at 15-16 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 110 n.221).

⁶⁴ *Id.* at 16.

system load under section 30.04, but remain Entergy Arkansas's responsibility and Entergy Arkansas's load.

42. Entergy next alleges that the Initial Decision relies on a reconstruction of the System Agreement and the adoption of terms that cannot be applied retroactively. Specifically, Entergy invokes the filed rate doctrine and the rule against retroactive ratemaking in arguing that the Initial Decision characterizes the Opportunity Sales as "historical actions [that] have become 'inconsistent with the System Agreement.'"⁶⁵ Entergy claims that the Initial Decision posits that "something has become illegal as a result of Opinion No. 521 that was not illegal at the time the Opportunity Sales occurred."⁶⁶ Entergy also observes that the Initial Decision, in stating that Opportunity Sales did not exist under section 30.04 prior to Opinion No. 521, interprets Opinion No. 521 as having created a distinction in the System Agreement that did not exist at the time the sales were made and attempts to apply the distinction retroactively.

43. Entergy argues that when the Commission indicates its intent to amend the System Agreement, it does so expressly, and the Initial Decision's retroactive amendments directly contradict the Commission's intent. Entergy also contends that implementation of the Initial Decision would require amendments to the System Agreement. Entergy notes that the Louisiana Commission did not seek amendments or modification in this proceeding. Entergy criticizes the Presiding Judge for his interpretation of section 30.04, specifically his findings that the Commission held that two categories of "sales to others" exist under the section, that the Commission intended that the System Agreement require the two categories be treated differently, and that any past precedent regarding how the resources are to be allocated must be modified to conform to Opinion No. 521.⁶⁷

44. Among the amendments Entergy claims would have to be made to implement the Initial Decision is that section 30.04 would have to specify that the Company-specific Opportunity Sales would have the lowest priority, be allocated the highest system cost, would have a lower priority/higher cost than system sales to others, and would have to prescribe a different treatment for the margins from such sales. Entergy argues that it would be insufficient to simply specify a new category of section 30.04 sales; rather, Service Schedule MSS-3 would have to specify accounting for the new sub-category of sales via two different ISB runs, one with the Company-specific sale in its load and one with it removed. The damages would be the difference between those two ISB runs. Entergy also argues that, in order to implement the Initial Decision, section 2.16, which

⁶⁵ *Id.* at 18.

⁶⁶ *Id.*

⁶⁷ *Id.* at 20-21.

defines Company Load Responsibility for the purposes of Service Schedules MSS-1, MSS-2, MSS-5, and MSS-6 must be revised, because prior to the Initial Decision, if a section 30.04 sale was made, that load was not included in the calculation of an Operating Company's Company Load Responsibility.⁶⁸

45. Entergy further claims that amendments would have to be made to section 2.20 (Pool Energy) and Service Schedule MSS-3, as a result of the Initial Decision. According to Entergy, the Initial Decision redefined Pool Energy as "energy generated by a Company in excess of its own requirements *where its requirements do not include energy it sold to others under [revised] Section 30.04.*"⁶⁹ Correspondingly, Entergy argues that section 30.03 would need to be amended to remove from an Operating Company's load sales to others for which it takes sole responsibility.

46. Finally, Entergy argues that section 2.14 of the System Agreement, which defines an Operating Company's "Capability," would need to be amended to include the resources of the Operating Company that sourced the Opportunity Sale, assuming that that Operating Company is not the Operating Company deemed to have sourced the sale.⁷⁰

47. Entergy rejects the Presiding Judge's justifications for the Commission's departure from past precedent in Paragraph 416 of the Initial Decision, stating that the Presiding Judge improperly assumes the interpretation and application of the System Agreement is a function of retail rate-setting. In addition, Entergy disputes the justification for the departure on the basis that other Operating Companies used their low-cost energy to supply the Opportunity Sales because Entergy Arkansas was "long" in 92 percent of the hours in which it made Opportunity Sales.⁷¹ Entergy lastly disputes the Initial Decision's statement that section 30.04 load customers did not bear any of the costs or risks associated with the Opportunity Sales, stating that such customers paid what they agreed to pay for the services.⁷²

⁶⁸ *Id.* at 22.

⁶⁹ *Id.* at 22-23 (emphasis in original).

⁷⁰ *Id.* at 24.

⁷¹ *Id.* at 25 (citing Ex. ESI-106 at 13).

⁷² *Id.* at 26.

48. Entergy takes issue with the Louisiana Commission's methodology. First, Entergy criticizes the Louisiana Commission's conversion of the Opportunity Sales from Entergy Arkansas load to system load. Second, Entergy asserts that the Initial Decision improperly relies on a redefinition of "incremental cost" and ignores Opinion No. 521's mandate to use Entergy Arkansas's incremental cost, instead of its average cost, to determine damages. Entergy states that the Louisiana Commission's damage calculation depends solely on two ISB runs – the Base Case ISB and a Change Case ISB where the Opportunity Sales are removed from Entergy Arkansas's load and put in as system load – which is contrary to Opinion No. 521.⁷³ Entergy claims that the Initial Decision avoids the inconsistency by redefining Entergy Arkansas's incremental cost by using its average cost.

49. Entergy states that the Louisiana Commission's calculation of refunds is not possible under the current terms of the System Agreement. Entergy claims that the System Agreement is governed by certain mathematical principles: (1) payments and receipts among the Operating Companies must net to zero; (2) the loads and resources of the system and each Operating Company must be equal (i.e., in balance); and (3) an Operating Company cannot simultaneously buy and sell energy through the energy exchange under Service Schedule MSS-3 in a given hour.⁷⁴ Entergy asserts that if the Initial Decision is affirmed, then Entergy Arkansas's and some other Operating Company's load and resources would be out of balance. Balancing of load and resources could only be obtained by violating the prohibition of simultaneously buying and selling in an hour under the Service Schedule MSS-3 energy exchange, according to Entergy. Entergy notes that section 30.04 does not allocate a resource of one Operating Company to another, and thus does not provide a solution to the Initial Decision's problematic methodology. Entergy reiterates that the Louisiana Commission's methodology violates the filed rate doctrine by attempting to modify the System Agreement on file with the Commission and apply the modified version to the historical period during which the Opportunity Sales occurred.⁷⁵

50. Entergy alleges that the Louisiana Commission's methodology assumes that damages are to be based on changes in the availability and cost of exchange energy, however, nowhere in Opinion No. 521 did the Commission state that damages are to include changes in the effects on the cost of exchange energy. Instead, Entergy claims, the Commission repeatedly stated that the Opportunity Sales are Entergy Arkansas's

⁷³ *Id.* at 28-29.

⁷⁴ *Id.* at 31-32 (citing Initial Decision, 144 FERC ¶ 63,021 at PP 25, 363; Ex. ESI-106 at 46-47; Ex. ESI-106 at 48).

⁷⁵ *Id.* at 35.

load, and Entergy Arkansas bears sole responsibility for them; therefore, there is no reason that exchange energy should change. Entergy states that there are only three variables that can affect the cost of exchange energy: (1) the cost of each of the system's resources; (2) the loads of each Operating Company; and (3) the resources of each Operating Company. Entergy notes that none of these variables change, and therefore, neither should the exchange energy.⁷⁶

51. Entergy states that the Commission has broad discretion to fashion remedies and determine how they should be quantified. Entergy states that the refund formula described in Paragraph 136 of Opinion No. 521 is a unique formula that is specific to the facts and circumstances presented in this case, and although the parties may disagree whether the formula is intended to achieve any particular objectives, the Commission has made clear that it is the formula to apply in calculating refunds. Entergy argues that, because the Initial Decision tilts the balance entirely in favor of the other Operating Companies, it must be overturned. Entergy also states that the Commission considered equitable factors in creating the Paragraph 136 formula, and the outcome resulting from a straight-forward application of Paragraph 136 is not surprising or inconsistent with the Commission's primary finding in Paragraph 136. Moreover, Entergy asserts that the Paragraph 136 re-pricing formula is specifically tailored and applicable to the Opportunity Sales at issue.⁷⁷

52. Entergy provides a comparison of the proposed refund calculations and states that it reveals the punitive nature of the Louisiana Commission's methodology. Entergy claims that under the Louisiana Commission's methodology damages total \$77.5 million, whereas under Entergy's methodology damages total \$24.4 million. Entergy asserts that the Louisiana Commission's methodology produces illogical results. Entergy argues that adopting the Louisiana Commission's methodology would mean that the Commission, in determining that Entergy Arkansas had the right to make the Opportunity Sales for its own account and that the sales were made in good faith, nonetheless intended that damages should be several times higher than if Entergy Arkansas was not allowed to take responsibility for the sales or they were made in bad faith.⁷⁸

53. Entergy argues that another illogical result is demonstrated by comparing the revenues received from the Opportunity Sales to the total cost of the sales. Entergy states that the revenues for the Opportunity Sales in 2003, 2004, and 2006 were \$113 million, while the total costs for the sales under the Louisiana Commission's methodology would

⁷⁶ *Id.* at 37.

⁷⁷ *Id.* at 40.

⁷⁸ *Id.* at 42.

be \$125 million.⁷⁹ Entergy states that another illogical result is that the net effect of the Louisiana Commission's methodology is a refund that is \$12 million more than the total revenues from the sales. Entergy also notes that the Louisiana Commission's methodology would place the other Operating Companies in a better position than if the Opportunity Sales had been treated as joint account sales in the first place, or had never occurred at all. Entergy concludes that any methodology that proposes refunds to other Operating Companies in excess of the level of refunds due if the Opportunity Sales were treated strictly as joint account sales would be punitive, and should be rejected.⁸⁰

54. Entergy states that Opinion No. 521 confirmed that Entergy Arkansas has the right to use its generating resources to serve its own load before the rest of the system, but the Initial Decision incorrectly attempts to limit this right. Entergy criticizes the Initial Decision for dismissing precedent, ignoring Paragraph 122 of Opinion No. 521, and assuming that Opinion No. 521 stands for the proposition that Entergy Arkansas is entitled to use its resources to serve only certain parts of its load. Instead, Entergy argues that Opinion No. 521 held that Entergy Arkansas had a right to "own their own generation, and to use that generation to serve their own loads before the rest of the system."⁸¹ Entergy explains that Paragraph 122 is not qualified in any respect or limited to serving section 30.03(a) or any other subset of Entergy Arkansas's load, and the Initial Decision cannot amend Paragraph 122 to make it applicable only to certain types of Entergy Arkansas load. Entergy maintains that the Initial Decision's interpretation of Paragraph 122 is contrary to the principle "that a document should be read to give effect to all its provisions and to render them consistent with each other."⁸²

55. Entergy argues that the Initial Decision misinterprets Paragraph 122, where the Commission found that "Operating Companies are not obligated to act only on behalf of the System as a whole, but may act on their own behalf as well, as long as their actions are allowed under the System Agreement."⁸³ Entergy argues that the "action" was

⁷⁹ *Id.*

⁸⁰ *Id.* at 43.

⁸¹ *Id.* at 45 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 122).

⁸² *Id.* at 46 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)).

⁸³ *Id.* at 47.

making the Opportunity Sales, and the Commission found that such sales are allowed under the System Agreement.⁸⁴

56. Entergy states that Entergy Arkansas has paid the high costs to construct and own its units, and the costs were not borne by the other Operating Companies under Service Schedule MSS-1 or otherwise. Entergy claims that the Louisiana Commission now avers that the customers of the other Operating Companies should have priority access to the output of those units and pay only the relatively low energy costs, which is inequitable.⁸⁵

57. Entergy argues that the Initial Decision incorrectly rejected Entergy's methodology and that the Commission directed the Presiding Judge to re-price the energy deemed to have been used to serve the Opportunity Sales, as opposed to a transfer of the sales from Entergy Arkansas's load to system load for ISB purposes. Entergy asserts that Paragraph 136 did not direct a change in the allocation of load or resources; therefore, there could be no change in exchange energy from what occurred in the Base Case.⁸⁶ Entergy explains that for each hour in which there was an Opportunity Sale in the Base Case, Entergy took the difference between (1) the cost of sourcing the Opportunity Sale from the system stack in the Change Case and (2) the cost of sourcing that volume of sales at the top of Entergy Arkansas's requirements stacks in the Base Case. The hourly difference in costs was then allocated to all Operating Companies consistent with the Commission's directive in Paragraph 136 based on each Company's proportion of exchange energy purchases in that hour pursuant to section 30.03(b).⁸⁷

58. Entergy disputes the Initial Decision's criticism that Entergy's witness Mr. Louiselle focused solely on Paragraph 136, noting that Mr. Louiselle properly interpreted the paragraph and explained how his interpretation was consistent with the other findings throughout Opinion No. 521. Entergy states that, contrary to the Initial Decision's position that the Commission simply stated "energy re-allocation – end of story," the Commission discussed numerous concepts, including that Entergy Arkansas was permitted to make the Opportunity Sales and could take sole responsibility for them, and that an Operating Company can use its own resources to serve its own load.⁸⁸

⁸⁴ *Id.*

⁸⁵ *Id.* at 48.

⁸⁶ *Id.* at 50.

⁸⁷ *Id.*

⁸⁸ *Id.* at 51.

59. Entergy disagrees with the Initial Decision's statement that "Entergy's method ignores the fact that, as a result of Entergy's violation, the other Operating Companies were forced to sell their lower-cost energy to Entergy Arkansas to support the Opportunity Sales," stating that it is undisputed that Entergy Arkansas was a seller to the energy exchange in 92 percent of the hours at issue.⁸⁹ Entergy also objects to the Initial Decision's statement that the "[n]amely" sentence in Paragraph 136 is not about cost allocation.⁹⁰ Entergy concludes that the Commission did not find that the Opportunity Sales were a violation of the System Agreement, but that Entergy improperly priced the sales; therefore, the Commission required a re-pricing of those sales and not a transfer of such sales from Entergy Arkansas's load to system load for ISB purposes.⁹¹

60. Entergy disputes the Initial Decision's finding that Entergy's methodology is a collateral attack on Opinion No. 521. Instead, Entergy argues that the Initial Decision actually attacks Opinion No. 521 and finds damages that are totally unsupported by that Opinion. In addition, Entergy states that its witness's criticism of the Louisiana Commission's after-the-fact accounting of the ISB Change Case was not a collateral attack.⁹²

61. Entergy further asserts that its re-run of the ISB is, in fact, the only full re-run, arguing that the ISB re-run performed for the Louisiana Commission required Entergy to artificially freeze certain values, for example, the Responsibility Ratios. Entergy states that the only way to treat a sale as a "sale to others" under section 30.04 is to treat it like a joint account sale.⁹³

62. Trial Staff states that the cost of incremental system energy, which should have been allocated to Entergy Arkansas's Opportunity Sales, should be used to calculate variable production costs in the bandwidth formula. Trial Staff claims that the purpose of the proceeding is to restore the Operating Companies to the position they would have been in had the energy allocated to the Opportunity Sales been sourced properly when the transactions occurred. Trial Staff argues that if the system incremental energy had been allocated to those transactions, the correct price of that energy would have been reflected

⁸⁹ *Id.* at 55.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 58.

⁹³ *Id.*

both in the ISB calculations and in bandwidth calculations at the time.⁹⁴ Trial Staff asserts, on the other hand, that given that many of the Opportunity Sales actually had negative margins because they were improperly priced, it would be inequitable to burden other Operating Companies with the full consequences of the pricing mistake which led Entergy Arkansas to proceed with these transactions. Thus, Trial Staff proposes an annual cap to the Paragraph 138 adjustments for each Operating Company at a level equal to Entergy's energy damages exposure. Trial Staff argues that this approach is not inconsistent with Commission policy, the bandwidth calculations must be based on current FERC Form No. 1 data, and the instant proceeding is precisely the forum intended by Commission precedent for conducting an inquiry into whether the Operating Companies' FERC Form No. 1 data used as bandwidth formula inputs should be adjusted to provide an equitable remedy.⁹⁵

63. Trial Staff argues that joint account sales and individual Operating Company opportunity sales should have equal priority in the allocation of hourly system energy, noting that section 30.04 does not explicitly delineate a stacking priority of joint account sales made collectively by all the Operating Companies relative to opportunity sales for which an individual Operating Company assumes sole responsibility under section 4.05.⁹⁶ Trial Staff observes that, in the context of the overall damages calculus, the cost impact of this issue is relatively minor. However, Trial Staff argues that the Presiding Judge's interpretation of the phrase "but of a lower energy priority" as referring to the relative priority of joint account sales and individual Operating Company sales is incorrect.⁹⁷ Trial Staff asserts that the Commission's reference to "lower energy priority" in Paragraph 138 relates to a comparison between section 30.03(a) load and section 30.04 Opportunity Sales, and that both types of section 30.04 transactions should have an equal energy stacking priority.⁹⁸

3. Briefs Opposing Exceptions

64. Trial Staff argues that Entergy's damages methodology is based on an impermissibly narrow reading of Opinion No. 521 Paragraph 136 and that all participants agreed that damages should be determined by re-running the ISB. Trial Staff discusses

⁹⁴ Trial Staff Brief on Exceptions at 39.

⁹⁵ *Id.* at 40.

⁹⁶ *Id.* at 41.

⁹⁷ *Id.* at 42.

⁹⁸ *Id.* at 42-43.

the different damages amounts proposed by Entergy, noting that initially Entergy proposed damages of \$66,237,300.⁹⁹ In revised testimony, Entergy proposed damages of \$12,248,000, which Entergy witness Mr. John asserted was a result of his misinterpretation of Mr. Louiselle's instruction to source the Opportunity Sales after sourcing joint account sales, but before sourcing energy exchange transactions.¹⁰⁰

65. Trial Staff notes that, if damages relating to the mispricing of energy assumed to have sourced the Opportunity Sales is governed by a strict reading of Paragraph 136 rather than a full re-run of the ISB, then the original calculation of approximately \$66 million accurately reflects the Commission's intent. Conversely, the revised figure of approximately \$12 million is inconsistent with the Commission's intent that the "A" portion of the Paragraph 136 formula reflect the incremental character of the Opportunity Sales as part of its section 30.03(a) load in hours when Entergy Arkansas was selling into the energy exchange.¹⁰¹ Trial Staff argues that during these hours, which occurred in over 90 percent of the hours in which Entergy Arkansas made Opportunity Sales, the ISB deemed the Opportunity Sales to be part of Entergy Arkansas's section 30.03(a) load, at a priority higher than exchange energy. Trial Staff argues that positioning the Opportunity Sales energy at the top of Entergy Arkansas's stack after joint account sales energy has been removed, but before the occurrence of energy exchange transactions, improperly inflates the assumed price of the Opportunity Sale energy. Therefore, Trial Staff states that by including Opportunity Sales as part of section 30.03(a) load, the ISB originally assigned it a stacking priority superior to that of exchange energy, and Entergy's application of the formula must be modified to reflect the correct price of energy deemed to have sourced the Opportunity Sales in each of the Base Cases.¹⁰²

66. Trial Staff contends that, in redefining the Opportunity Sales as part of Entergy Arkansas's load rather than as joint account sales, the Commission intended to fix the amount of joint account sales margins at its pre-existing level. However, Trial Staff continues, a change in the distribution of joint account sales margins resulting from a recalculation of the Responsibility Ratios is an entirely separate issue, independent of the actual amount of joint account sales margins.¹⁰³

⁹⁹ Trial Staff Brief Opposing Exceptions at 14 (citing Ex. ESI-101 (Second Revised) at 18).

¹⁰⁰ *Id.* at 14 (citing Ex. ESI-105 (Revised) at 11).

¹⁰¹ *Id.* at 15.

¹⁰² *Id.* at 15-16 (citing Ex. S-101 at 22-23).

¹⁰³ *Id.* at 17-18.

67. The City of New Orleans states that the Commission should affirm the Initial Decision because the Presiding Judge correctly concluded that the Louisiana Commission's methodology should be used to determine damages. The City of New Orleans criticizes Entergy for using a methodology that: (1) extracts only select data from the ISB Change Case and fails to completely quantify the damages through a complete re-run of the ISB; and (2) allocates the incomplete estimate of damages based on each Operating Company's proportion of exchange energy purchases.¹⁰⁴

68. The City of New Orleans states that, by failing to conduct a full ISB re-run, Entergy did not completely account for the change in energy accounting as a result of re-classifying the Opportunity Sales. The City of New Orleans notes that there is no need for an additional calculation, as Entergy has performed, to distribute refunds among the Operating Companies because using the results from a full re-run of the ISB as a comparison to the original ISB run would identify the proper allocation to each Operating Company without additional calculations. The City of New Orleans objects to Entergy's argument that the Commission directed Entergy to re-price the Opportunity Sales instead of reallocating the energy in the calculation of damages, stating that, instead, the Commission made clear that it expected changes in the allocation of energy.¹⁰⁵

69. The Louisiana Commission argues that Entergy's methodology is results driven, noting that the Louisiana Commission's methodology was supported by Trial Staff, the City of New Orleans, and not opposed by the Arkansas Commission. The Louisiana Commission observes that Entergy proposed four different versions of damages, ranging from \$54.4 million to minus \$1.7 million, with its final proposal requiring other Operating Companies to pay refunds for Entergy Arkansas's violations. The Louisiana Commission states that Entergy's methodology has the effect of preserving a huge profit for Entergy and a huge cost for consumers of \$77.1 million.

70. The Louisiana Commission argues that Entergy's methodology constitutes a collateral attack on Opinion No. 521 because it includes the Opportunity Sales in Entergy Arkansas's section 30.03(a) load, fails to properly reallocate the Opportunity Sales under the System Agreement, and does not reimburse the other Operating Companies under section 30.04 for the cost of the sales. The Louisiana Commission contends that Entergy's methodology does not rectify the economic consequences of Entergy's violation and cannot make consumers whole.¹⁰⁶

¹⁰⁴ City of New Orleans Brief Opposing Exceptions at 15.

¹⁰⁵ *Id.* at 17-18 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136).

¹⁰⁶ Louisiana Commission Brief Opposing Exceptions at 30.

71. The Louisiana Commission states that Entergy's methodology does not attempt to correct the violation in energy allocations, and instead, leaves everything as it was except for an insignificant "repricing" of the Opportunity Sales through a small damage payment. The Louisiana Commission posits that, under Entergy's theory, the Opportunity Sales would be sourced from Entergy Arkansas's highest-cost resources below those allocated to joint account sales. The Louisiana Commission notes that the resources at the top of the Entergy Arkansas resource stack below joint account sales are the resources that were allocated to other Operating Companies through the energy exchange in the Base Case. The Louisiana Commission states that Entergy's inclusion of the Opportunity Sales in section 30.03(a) load, which allocated the average section 30.03(a) cost to the sales, made section 30.03(a) load larger than it otherwise would have been, requiring that less energy at a higher average cost be allocated to the energy exchange under section 30.03(b).¹⁰⁷

72. The Louisiana Commission contends that Entergy ignores the fact that repositioning the Opportunity Sales at the top of the Entergy Arkansas resource stack would lower the cost of energy available to the energy exchange, and that Entergy assumes that the same resources could serve both Opportunity Sales and energy exchange sales at the same time, which is physically impossible. The Louisiana Commission also states that Entergy's methodology is flawed because the cost of those resources were already paid to Entergy Arkansas by other Operating Companies in all hours in which Entergy Arkansas was a seller to the energy exchange in the Base Case.¹⁰⁸

73. The Louisiana Commission asserts that, even under Entergy's stand-alone theory, Energy Arkansas did not have sufficient resources to serve its own load, including Opportunity Sales, in eight percent of the hours. The Louisiana Commission notes that Entergy Arkansas did not interrupt these sales or refuse to supply the energy because the system supplied the energy for all of the sales. Moreover, the Louisiana Commission argues that Opinion No. 521 makes clear that an individual Operating Company action is permissible "when allowed under the System Agreement", and the Commission found that Entergy violated the System Agreement in allocating energy for the Opportunity Sales.¹⁰⁹

74. The Louisiana Commission asserts that Entergy's arguments that adoption of the Initial Decision would require amendments to the System Agreement and violate the rules against retroactive ratemaking proceed from false premises. The Louisiana

¹⁰⁷ *Id.* at 32.

¹⁰⁸ *Id.* at 35.

¹⁰⁹ *Id.* at 39.

Commission states that there is no need to amend the System Agreement to create two categories of “sales to others” because the Commission ruled that the System Agreement already provided for Entergy’s Opportunity Sales under section 30.04. The Louisiana Commission states that Entergy, in complying with Opinion Nos. 468 and 468-A,¹¹⁰ included the Opportunity Sales in load responsibility; thus, no amendment to the System Agreement is required.¹¹¹

75. The Louisiana Commission counters Entergy’s buy-sell argument by stating that it is based on denying the conclusions in Opinion No. 521, where the Commission ruled that Opportunity Sales should be allocated under section 30.04. The Louisiana Commission argues that, since a sale to an “other” goes off-system, the resources that supply the sales are matched with the off-system load and removed from the intra-system energy allocations. The Louisiana Commission quotes the Initial Decision’s conclusion that “[a]t no point is Entergy Arkansas selling its excess energy to the other Operating Companies and simultaneously buying more expensive energy from the energy exchange to supply the Opportunity Sales.”¹¹²

76. The Louisiana Commission disputes Entergy’s argument that capability assigned to an Operating Company’s Opportunity Sale would have to be included in the Operating Company’s capacity, noting that Entergy does not explain why this would be true. The Louisiana Commission states that the allocations of system energy pursuant to sections 30.03 and 30.04 have nothing to do with the determination of capability. The Louisiana Commission asserts that, if an Operating Company owns a resource or has it under contract, section 30.03 permits it to have first preference to the energy to serve its own native load. Energy allocated to another Operating Company, or to an off-system customer, does not transfer ownership of the resource.¹¹³

¹¹⁰ *Louisiana Pub. Serv. Comm’n and the Council of the City of New Orleans v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh’g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005). Opinion No. 468 directed Entergy to exclude interruptible load from the calculation of the Responsibility Ratio for certain Service Schedule calculations based upon evidence that Entergy could interrupt such load at system peak.

¹¹¹ Louisiana Commission Brief Opposing Exceptions at 41-42 (citing *Entergy Servs., Inc.*, 111 FERC ¶ 63,077 (2005), *aff’d*, 119 FERC ¶ 61,019 (2007)).

¹¹² *Id.* at 42 (quoting Initial Decision, 144 FERC ¶ 63,021 at P 448).

¹¹³ *Id.* at 43.

77. The Louisiana Commission likewise disagrees with Entergy's retroactive ratemaking argument, stating that Opinion No. 521 held that Entergy violated the System Agreement when it allocated the wrong energy to the Opportunity Sales, covering the entire period of the Opportunity Sales. The Louisiana Commission states that the Presiding Judge's observation that Entergy could not rely now on its own past allocation methodology simply follows Opinion No. 521's holding.¹¹⁴

78. The Louisiana Commission disagrees with Entergy's argument that the Operating Companies do not split fuel costs or share capacity costs associated with joint account sales based on Responsibility Ratios. The Louisiana Commission states that Service Schedule MSS-5 provides that the Operating Companies share a "net balance," which reflects revenues from these sales less the costs, which include "the cost of energy determined under . . . Section 30.04"¹¹⁵ Section 30.04 provides for reimbursement of the "cost of fuel used by the specific unit or units supplying the energy", and thus, the Louisiana Commission concludes, there is an implicit sharing of fuel costs, which is "in proportion to the Responsibility of each"¹¹⁶

79. The Louisiana Commission argues that, with regard to capacity, load for joint account sales is excluded from the Company Load Responsibility of any Operating Company supplying a joint account sale; therefore, it does not cause any change in Responsibility Ratios. The Louisiana Commission also criticizes Entergy for emphasizing the Presiding Judge's finding that the Opportunity Sales should have a lower energy priority than joint account sales within section 30.04, noting that this issue involves a total of \$154,160. The Louisiana Commission notes that Entergy, like the Presiding Judge, fails to provide support for its interpretation or any substantive reason why individual Operating Company opportunity sales should have a higher priority, or even the same priority, as sales that benefit the entire system and its native load customers.¹¹⁷

80. The Louisiana Commission describes the difference between the "full ISB rerun" of the Louisiana Commission and that of Entergy, stating that the margins for the Opportunity Sales, calculated correctly using the cost allocation under section 30.04, were negative by \$49,537,000. The Louisiana Commission states that Entergy's "full ISB re-run," which treated the Opportunity Sales as joint account sales, allocated the

¹¹⁴ *Id.*

¹¹⁵ *Id.* (citing Ex. ESI-111 § 50.02).

¹¹⁶ *Id.* (citing Ex. ESI-111 §§ 30.04, 50.03).

¹¹⁷ *Id.*

negative margins to all of the Operating Companies according to Responsibility Ratios, per Service Schedule MSS-5, with the amount of \$38,326,000 allocated to the other Operating Companies. The Louisiana Commission asserts that, as a result of that allocation of negative margin, the damages were reduced from \$62.8 million to \$24.4 million.¹¹⁸

81. The Louisiana Commission asserts that Entergy has never provided support for its allocation methodology, Opinion No. 521 dictates that this treatment not be accorded to the Opportunity Sales, and the sales were made on behalf of Entergy Arkansas, who must bear responsibility for them. Further, the Louisiana Commission states that if the Opportunity Sales had been treated as joint account sales, most of them would never have been made, since Entergy chose to make the sales only because it thought it could attribute lower-cost energy to the sales rather than actual cost (i.e., where the system could expect a positive margin from the transaction).¹¹⁹

82. The Louisiana Commission contends that Entergy did not compare the revenue for the Opportunity Sales to the expected system incremental cost, and instead allowed Entergy Arkansas to make the sales if revenues exceeded Entergy Arkansas's expected average cost. The Louisiana Commission alleges that Entergy engaged in uneconomic behavior so that shareholders could obtain a profit by allocating low-cost energy sales at the expense of the system's native load customers.¹²⁰

83. The Louisiana Commission criticizes Entergy's assertion that the methodology approved in the Initial Decision would cause Entergy Arkansas to incur a loss of \$12 million, arguing that Entergy's position would allow Entergy Arkansas and its stockholders to keep more than \$75 million in profit gained through the System Agreement violation, which would be inequitable. The Louisiana Commission dismisses Entergy's reliance on its "good faith" because the Commission used the term only in holding that good faith is irrelevant to the damages issue.¹²¹

84. The Louisiana Commission states that Entergy caused the system to incur \$163 million in costs for the Opportunity Sales, obtained \$113 million in revenues, attributed only \$35.9 million to the sales, and kept a \$77.1 million profit while system ratepayers absorbed most of the cost. The Louisiana Commission claims that Entergy now seeks a

¹¹⁸ *Id.* at 46.

¹¹⁹ *Id.* at 46-47.

¹²⁰ *Id.* at 47.

¹²¹ *Id.* at 49.

ruling that would add \$691,000 to the cost of the sales, raising the total cost attributed to the Opportunity Sales to \$36.6 million, meaning that Entergy would still retain \$76.4 million in profits. The Louisiana Commission asserts that equity does not support Entergy's position, and allowing Entergy to keep more than \$76 million in profits would be inherently unjust and unreasonable.¹²²

4. Commission Determination

85. In Opinion No. 521, the Commission found that re-running the ISB was the appropriate method of determining damages for the violation of the System Agreement. The ISB is a suite of software programs that reconciles monthly payments among Operating Companies for energy supplied for system needs. In Paragraph 136 of Opinion No. 521, the Commission provided instructions for how damages should be calculated:

Accordingly, we find that, based on the circumstances before us, the Opportunity Sales should be re-priced consistent with our interpretation of the requirements of the System Agreement. Namely, Entergy should calculate the difference between the incremental energy costs allocated to 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.

86. As the Presiding Judge notes, Entergy and the Louisiana Commission presented competing methodologies for calculating damages using the ISB that resulted in significantly different damage figures. Although Entergy presented multiple damage figures, it ultimately presented a figure based on the difference between a Base Case cost of energy originally allocated to Entergy Arkansas and a Change Case cost of energy allocated to the Opportunity Sales assuming they were treated as equivalent to joint account sales, though with a higher energy allocation priority. On the other side, the Louisiana Commission presented a figure based upon a full re-run of the ISB, where energy priority was reallocated to give the lowest priority to the Opportunity Sales. This resulted in a higher damage figure than that presented by Entergy, because the reallocation of priority changed the energy allocated to all other sales.

87. We affirm the Presiding Judge's determination that the Louisiana Commission's methodology presents the most reasonable methodology for determining the effects of the violation of the System Agreement here, though we make one modification as discussed below.

¹²² *Id.* at 50-51.

88. Our decision here is consistent with the Commission's findings in Opinion No. 521. In the determination section of Opinion No. 521, the Commission found that Entergy had violated the System Agreement by improperly allocating energy to the Opportunity Sales.¹²³ As a result, the Commission determined that a re-run of the ISB was necessary to determine damages due as a result of this misallocation.¹²⁴ The focus of the Commission's determination on damages was to correct for the improper allocation of energy, not merely to address a mispricing of energy, as Entergy now claims. In order to correct for the improper allocation, it is necessary here to perform a full re-allocation using the ISB, to determine how the system would have looked had Entergy properly applied the System Agreement with respect to the Opportunity Sales.

89. As noted by the Presiding Judge, Entergy seeks to limit analysis to only a single paragraph of the determination, Paragraph 136. Entergy argues for a narrow reading of Paragraph 136's language such that energy should be re-priced based on the change in costs between the actual and attributed costs of the Opportunity Sales. It notes the Commission's instruction to calculate the difference in incremental costs, and then distribute that difference to the other Operating Companies. However, Entergy ignores that in the next sentence in Paragraph 136, the Commission notes that refunds to the other Operating Companies should be made "consistent with how they should have been allocated energy under 30.03(b) absent Entergy's violation of the System Agreement."¹²⁵ Additionally, Entergy's arguments ignore the remainder of the determination section, where the Commission found that it was necessary to address the improper allocation of energy through a re-run of the ISB.

90. Further, we agree with the Presiding Judge that the goal of the damage proceeding here should be to put the parties as close as possible to the position they would have been in had the Opportunity Sales not been improperly allocated for under the System Agreement. Since the capability exists to re-run the ISB to determine how allocations would have been made on a system-wide basis with a revised priority for the Opportunity Sales, a full re-run as contemplated by the Louisiana Commission's methodology provides a closer estimation of the appropriate damages here. Obviously, no damage calculation will be completely accurate under the circumstances as presented; we are attempting to recreate a situation that did not exist at the time the original allocation was made, which inevitably requires some adjustments. However, we agree with the Presiding Judge that the Louisiana Commission's methodology is the more reasonable of the two proposed.

¹²³ Opinion No. 521, 139 FERC ¶ 61,240 at PP 124-131.

¹²⁴ *Id.* P 135.

¹²⁵ *Id.* P 136.

91. We also affirm the Presiding Judge's findings regarding the allocation of refunds.¹²⁶ We agree that the refunds to be rewarded as a result of Entergy Arkansas's violation of the System Agreement should be allocated to the various Operating Companies on the basis of a full re-allocation of energy, not, as proposed by Entergy, on the basis of their relative level of energy exchange transactions with Entergy Arkansas.

92. One modification is necessary to the damage calculation methodology adopted by the Presiding Judge. In the Initial Decision, the Presiding Judge finds that the Opportunity Sales should be given the lowest priority for energy under Opinion No. 521.¹²⁷ However, this finding is based upon a misreading of Opinion No. 521. In his finding, the Presiding Judge paraphrases Opinion No. 521 to suggest that the Commission intended for the Opportunity Sales to have a lower priority than joint account sales. However, the Commission's statement to which the Presiding Judge refers only indicates that the Opportunity Sales were to be given lower priority than Entergy Arkansas's native load service.¹²⁸ There is no reason under Opinion No. 521 to distinguish between the priority given to Opportunity Sales and to joint account sales under section 30.04, and we find that the two sales should have the same priority for purposes of energy allocation. This is consistent with the finding in Opinion No. 521 that there is a balance between the rights of individual Operating Companies to make opportunity sales for their own account, as well as for the system to do the same through joint account sales. Based upon this finding, we also modify the Presiding Judge's findings on the allocation of Service Schedule MSS-5 margins for joint account sales¹²⁹ to reflect the effect of receiving energy to source such sales at the same priority as the Opportunity Sales.

93. Entergy argues that the damage calculations proposed by the Louisiana Commission create imbalances in the ISB, as an Operating Company cannot be both a buyer and a seller of energy during the same hour. We do not need to make a determination on the factual claim of whether the Louisiana Commission's methodology produces imbalances in the ISB, as Entergy points to no provision of the System Agreement that prohibits a company from selling energy to other Operating Companies under 30.03 while also purchasing energy for opportunity sales under 30.04. To the extent there is a conflict between proper energy allocation under Service Schedule MSS-3 and accounting under the ISB, it is accounting that must give way. We found in Opinion No. 521 that the body of the System Agreement governs Operating Company powers

¹²⁶ Initial Decision, 144 FERC ¶ 63,021 at P 450.

¹²⁷ *Id.* P 402.

¹²⁸ *See* Opinion No. 521, 139 FERC ¶ 61,240 at P 138.

¹²⁹ *See* Initial Decision, 144 FERC ¶ 63,021 at P 454.

under the System Agreement, not the Service Schedules.¹³⁰ So, too, the provisions of Service Schedule MSS-3 govern allocation of energy for energy sales transactions by the Operating Companies, not the ISB, which merely performs an after-the-fact accounting for transactions between the Operating Companies.

94. Further, the goal of re-running the ISB in this proceeding is to determine a damage figure for past violations of the System Agreement; we cannot precisely allocate energy among the Operating Companies. It is inevitable that some difficulties will arise when attempting to recreate a complex system based on a counterfactual arrangement. We expect that Entergy will be able to properly balance its system going forward based upon the priority for off-system opportunity sales as explained in Opinion No. 521.

95. Similarly, Entergy argues in its briefs that the Louisiana Commission's methodology as adopted by the Presiding Judge, requires revisions to the System Agreement, and that its retroactive application to the refund period would violate the filed rate doctrine. We disagree. The Commission determined that the allocation of energy for the Opportunity Sales was made in violation of the terms of the System Agreement as written; the Commission interpreted the terms of the System Agreement as they were rather than requiring any changes to them. The Commission's calculation of damages is based on the terms of the System Agreement as written. No changes are required to the System Agreement to effectuate the findings of Opinion No. 521. As noted above, some difficulties may arise in calculating past damages given that they involve hypothetical alternate scenarios that did not actually occur. However, there is no reason why any damage calculation would necessitate revisions to the System Agreement. Entergy does not argue that it would be impossible to run the ISB going forward with opportunity sales given the correct priority according to Opinion No. 521. Instead, Entergy seeks to apply the filed rate doctrine to the dispute over methodology. This is inapposite.

96. Entergy argues that the Louisiana Commission's methodology, as adopted by the Presiding Judge, is backwards because it provides for a higher damages figure than had the Commission determined that the Opportunity Sales themselves violated the System Agreement and were made in bad faith. However, this argument is irrelevant. The Commission tasked the Presiding Judge with determining the damages for a reallocation of energy based on a re-run of the ISB, not with calculating all possible damage figures based on varying findings of liability. Additionally, Entergy's argument does not account for the adjustments to the other Service Schedules that we order below.

¹³⁰ Opinion No. 521, 139 FERC ¶ 61,240 at P 116.

B. Other Adjustments to Settlements Under the System Agreement**1. Initial Decision**

97. The Presiding Judge rejects Trial Staff's contention that the Louisiana Commission, as the complainant in this proceeding, bears the burden of proof with regard to the adjustment of other Service Schedules in the System Agreement.¹³¹ The Presiding Judge finds that it is Entergy that is trying to change the "current rate" by introducing the changes to the Responsibility Ratio, and that it has failed to meet that burden.

98. The Presiding Judge concludes that the Opportunity Sales are to remain in Entergy Arkansas's load. The Presiding Judge explains that an Operating Company's Responsibility Ratio represents its share of system load over a 12-month period at the time of the system monthly peak. As described in sections 2.16 and 2.18 of the System Agreement, the Responsibility Ratio nets certain inputs and outputs, and excludes power supplied for joint account sales.¹³²

99. The Presiding Judge notes that Entergy included the Opportunity Sales in Entergy Arkansas's load under section 2.16 of the System Agreement. Including the Opportunity Sales in Entergy Arkansas's load increased Entergy Arkansas's Responsibility Ratio as determined under section 2.18 of the System Agreement, thus affecting Entergy Arkansas's cost responsibilities under Service Schedules MSS-1 and MSS-2. Additionally, the Presiding Judge notes that the allocation of the costs of joint account purchases made during the refund period were affected by the Opportunity Sales as well as Entergy Arkansas's receipt of margins for joint account sales.¹³³

100. The Presiding Judge rejects Entergy's argument that Opinion No. 521 requires that the Opportunity Sales be allocated a lower energy priority with regard to the Base Case. Instead, the Presiding Judge finds the Commission held that the Opportunity Sales are not to be treated comparably to joint account sales, and instead treated as Entergy Arkansas's sales. In addition, the Presiding Judge states that the Commission ordered him to assign the Opportunity Sales "a lower energy priority" than joint account sales.¹³⁴ The Presiding Judge states that, under the System Agreement, sales with these two properties had not

¹³¹ Initial Decision, 144 FERC ¶ 63,021 at P 458 (citing Trial Staff Reply Br. 16).

¹³² *Id.* P 463 (citing Trial Staff Initial Br. 26).

¹³³ *Id.* P 465 (citing Ex. ESI-101 at 37-38).

¹³⁴ *Id.* P 467 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 138).

previously existed, and so a previous understanding of other types of sales is not directly applicable.

101. The Presiding Judge states that just because joint account sales under section 30.04 are excluded from an Operating Company's Responsibility Ratio does not mean that *all* section 30.04 sales are similarly excluded from an Operating Company's Responsibility Ratio.¹³⁵ The Presiding Judge states that this is because the Commission held that Opportunity Sales are distinct from joint account sales. The Presiding Judge notes that the Commission directed him to determine whether adjustments to the Service Schedules or other provisions were necessary, making adjustments to the Responsibility Ratios permissive, but not mandatory.¹³⁶

102. The Presiding Judge states that, prior to Opinion No. 521 there had never been a sale categorized as a section 30.04 Sale to Others that was not a joint account sale, and that the Commission makes clear that the Opportunity Sales are to remain within Entergy Arkansas's load in Opinion No. 521. However, the Presiding Judge notes that the Commission stated that the Opportunity Sales should not be part of Entergy Arkansas's load under section 30.03. The Presiding Judge concludes that, instead, the Commission interpreted the System Agreement to include two types of load: native load and section 30.04 load (i.e., Opportunity Sales).

103. The Presiding Judge reasons that, in Paragraph 138 of Opinion No. 521, the Commission rejected Entergy's arguments that the Opportunity Sales "should not have been considered 'load' for [any] purposes"¹³⁷ and the Commission intended for Entergy Arkansas to continue to take responsibility for the costs these sales imposed.¹³⁸ The

¹³⁵ *Id.* P 468.

¹³⁶ *Id.* P 469 (citing City of New Orleans Initial Br. 18-19).

¹³⁷ *Id.* P 472 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 138).

¹³⁸ *Id.* (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 130). Paragraph 130 stated:

Although Entergy makes the further argument that its allocation of the Opportunity Sales was allowed under section 2.16 of the System Agreement, we disagree. Section 2.16 governs the determination of Company Load Responsibility for the purposes of Service Schedules MSS-1, MSS-2, MSS-5, and MSS-6. Service Schedule MSS-3's energy exchange and allocation provisions, which govern the allocation of the Opportunity Sales at issue, are not covered by section 2.16.

(continued ...)

Presiding Judge concludes that it would be inappropriate for Entergy Arkansas not to bear the cost associated with its Opportunity Sales customers' access.

104. The Presiding Judge finds that Opinion No. 468 is distinguishable from this proceeding. The Presiding Judge notes that Entergy initially treated the Opportunity Sales as firm load for the purposes of its load Responsibility Ratios. The Presiding Judge quotes the central holding of Opinion No. 468: “[t]his order directs Entergy Corporation (Entergy) to modify the Entergy System Agreement (System Agreement) prospectively to exclude interruptible load from the calculation of peak load responsibility.”¹³⁹ The Presiding Judge states that section 2.16 of the System Agreement, which is used to calculate load responsibility, requires the removal of the “full amount of interruptible load.”¹⁴⁰ In addition, Opinion Nos. 468 and 468-A require the removal of interruptible load for the purposes of allocating costs under Service Schedule MSS-1, MSS-5, and the allocation of joint account purchases. The Presiding Judge notes that nothing in Opinion No. 521 changes the contractual characteristics of the Opportunity Sales with regard to how they could be interrupted at the time they were sold.¹⁴¹

The Presiding Judge correctly rejected the application of section 2.16, but in so doing also stated that adding the Opportunity Sales to Operating Companies' load responsibility is contrary to the Commission's decision on interruptible load in Opinion No. 468. We find that the Presiding Judge's interpretation of Opinion No. 468 is inapplicable given that the energy exchange provisions of Service Schedule MSS-3 were not at issue in that proceeding and the proceeding, rather, concerned allocation of fixed capacity costs, not variable energy costs.[247]

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

¹³⁹ *Id.* P 474 (citing Opinion No. 468, 106 FERC ¶ 61,228 at P 1).

¹⁴⁰ *Id.* P 475 (citing Louisiana Commission Initial Br. 49).

¹⁴¹ *Id.* P 476 (citing Opinion No. 468, 106 FERC ¶ 61,228).

105. The Presiding Judge rejects Trial Staff's view that the Opportunity Sales are sufficiently similar to the transactions at issue in Opinion No. 468 to require exclusion from Entergy Arkansas's Responsibility Ratios.¹⁴² The Presiding Judge finds that, in contrast to Opinion No. 468, which addressed an instance where a utility built its bulk power facilities to serve firm customers, here Entergy acquired additional firm capacity to serve its off-system Opportunity Sales with limited interruption service, but attempted to impose the cost of these additional capacity acquisitions on the other Operating Companies' firm native load customers.

106. The Presiding Judge also finds Opinion No. 468 distinguishable in that in the scenario at issue there the system assets supplied all of the capacity used to serve non-firm customers, and the non-firm customers subsidized the cost of capacity for the system's firm customers.¹⁴³ The Presiding Judge finds that, here, the system's firm customers would be forced to bear the cost of acquiring additional capacity to supply off-system firm customers, because the Opportunity Sales were not simply drawing on the firm capacity of "long" Operating Companies.

107. The Presiding Judge further states that, in Opinion No. 468, the Commission reasoned the sales were interruptible because Entergy could curtail that load during system peak.¹⁴⁴ In contrast, the Presiding Judge finds that in this case it is clear that Entergy included the Opportunity Sales in its planning for summer peak as non-interruptible. The Presiding Judge further finds that, unlike the Opportunity Sales that were interruptible "at will" in Opinion No. 468,¹⁴⁵ the Opportunity Sales here had to be served, even if they would result in an economic loss, unless the reliability of native load itself was threatened. Moreover, the Presiding Judge notes that Entergy could *plan* to interrupt the interruptible sales at issue in Opinion No. 468, whereas the Opportunity Sales were significantly less interruptible.

108. The Presiding Judge rejects the Arkansas Commission's arguments that the Opportunity Sales should be treated as non-firm sales because he finds that the Arkansas Commission failed to address why Entergy originally categorized them as firm.¹⁴⁶ The Presiding Judge also rejects the Arkansas Commission's arguments that Entergy largely

¹⁴² *Id.* P 477 (citing Trial Staff Reply Br. 12).

¹⁴³ *Id.* P 479 (citing Opinion No. 468, 106 FERC ¶ 61,228 at P 62).

¹⁴⁴ *Id.* P 480.

¹⁴⁵ *Id.* P 481 (citing Opinion No. 468, 106 FERC ¶ 61,228 at PP 71, 73).

¹⁴⁶ *Id.* P 489.

reported the Opportunity Sales as non-firm under its FERC Form 1s, stating that none of the categories in the FERC Form 1 requires a determination as to whether the sale was interruptible.¹⁴⁷

109. The Presiding Judge states that he believes the Commission's statements in footnote 221 of Opinion No. 521 indicating that these sales were non-firm were *dicta*, because it is unlikely that the Commission would decide such a central issue in a footnote without further analysis.¹⁴⁸ The Presiding Judge believes that the Commission intended to use the terms "firm" and "non-firm" in the context of whether Entergy possessed a long-term commitment to serve those sales, not whether the Opportunity Sales were interruptible for Responsibility Ratio purposes. The Presiding Judge states that the issue of whether the Opportunity Sales were interruptible was not central to the holding of Opinion No. 521, and the Commission did not intend to resolve issues related to the Service Schedules, but instead delegated the issue to the Presiding Judge.¹⁴⁹

110. The Presiding Judge dismisses Trial Staff's argument that including the Opportunity Sales in Entergy Arkansas's Responsibility Ratio would constitute a double recovery.¹⁵⁰ Instead, the Presiding Judge finds that changing the Responsibility Ratio would result in other Operating Companies subsidizing sales on which they received no margins, which would be unjust and unreasonable. Furthermore, the Presiding Judge notes that the Commission held that an Operating Company making an opportunity sale receives 100 percent of the margins from that sale, and it would therefore be inequitable for those other Operating Companies to subsidize capacity for which Entergy Arkansas was allowed to retain all of the margins by excluding the Opportunity Sales from Entergy Arkansas's Responsibility Ratio.¹⁵¹

¹⁴⁷ *Id.* P 492.

¹⁴⁸ *Id.* P 494 (noting that he also finds his own prior statement made in his Initial Decision that the sales were "non-firm" is *dicta* as it was addressing whether the Opportunity Sales were sales of "capacity and energy" within the meaning of section 4.05, and whether such sales were permitted under that section. The Presiding Judge states that, in the context of section 4.05, sales of "capacity and energy" were referred to as "firm" sales, however, that is not the context in which "firm" is being used here, which is instead discussing the contrast between firm and interruptible sales in terms of load responsibility) (citing Phase 1 Initial Decision, 133 FERC ¶ 63,008 at P 252).

¹⁴⁹ *Id.* P 495 (citing Opinion No. 468, 106 FERC ¶ 61,228 at PP 136, 138).

¹⁵⁰ *Id.* P 496 (citing Trial Staff Initial Br. 33).

¹⁵¹ *Id.* P 497.

111. The Presiding Judge finds that based on the evidence in testimony presented in the proceeding, Entergy treated the Opportunity Sales as firm (non-interruptible), Entergy marketed the sales as firm, the system was managed as if the Opportunity Sales were firm in the short-term, and the equities support Entergy Arkansas's bearing the costs of the capacity acquired to serve these Opportunity Sales.¹⁵²

2. Briefs on Exceptions

112. Entergy argues that the Louisiana Commission should have the burden of proof with regard to adjustments to other service schedules, noting that Opinion No. 521's direction to the Presiding Judge to conduct further hearing proceedings to determine the effect of its modifications to the Phase I Initial Decision was, in essence, a remand, and therefore, the Louisiana Commission, who bore the burden of proof in Phase I must continue to bear the burden as the complainant. Entergy states that its burden is limited to demonstrating compliance with the remedy imposed by Opinion No. 521.¹⁵³ Entergy contends that "[the Louisiana Commission] bears the burden with respect to the reasonableness of the full scope of the rate it proposes, which the Commission has determined includes any attendant adjustments to settlements under [System Agreement] service schedules."¹⁵⁴

113. Entergy argues that the Initial Decision incorrectly concludes that the Opportunity Sales must remain part of Entergy Arkansas's load for purposes of calculating its Responsibility Ratio.¹⁵⁵ Entergy states that the resolution of this issue is controlled by Opinion Nos. 468 and 468-A, where the Commission determined that interruptible load should not be included in determining load under section 2.16 of the System Agreement for purposes of allocating costs under Service Schedules MSS-1 and MSS-5, and the allocation of joint account purchases.¹⁵⁶

114. Entergy asserts that, contrary to the Initial Decision's findings, Entergy's past treatment of the Opportunity Sales is irrelevant. Instead, the relevant question is whether the Commission's action in Opinion No. 521 that determined the Opportunity Sales have a lower energy priority relative to Entergy's other load renders the Opportunity Sales

¹⁵² *Id.* P 498.

¹⁵³ Entergy Brief on Exceptions at 61.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 62 (citing Initial Decision, 144 FERC ¶ 63,021 at PP 458-499).

¹⁵⁶ *Id.* at 62-63 (citing Opinion No. 468, 106 FERC ¶ 61,228 at P 77).

interruptible. Entergy argues that, based on the Commission's analysis in Opinion No. 468, the Opportunity Sales are interruptible and should be excluded from Responsibility Ratios. Entergy claims that the Commission explained that it is the right to interrupt the load that is critical. Entergy states that it did not construct or acquire capacity in order to make the Opportunity Sales and other evidence in Phase I demonstrated that the sales were non-firm. Entergy argues that the Initial Decision, however, focused on whether Entergy acquired reserve capacity in the short-term, which is irrelevant.¹⁵⁷ Entergy notes that the evidence does not support the conclusion that Entergy did acquire reserve capacity to support the sales.¹⁵⁸

115. Entergy states that the determinative factor in Opinion No. 468 is whether Entergy had the right to interrupt the sales, not the degree to which they were interruptible or even whether Entergy did interrupt a sale; thus, Entergy clearly had the right and argues that the Opportunity Sales could be interrupted ahead of firm native load. Additionally, Entergy contends that the sales must be removed from Entergy's load for Responsibility Ratio calculations because under the terms of the System Agreement, sales under section 30.04 are not included in calculating Responsibility Ratio.¹⁵⁹

116. Entergy addresses the Initial Decision's conclusion that the equities require that the Opportunity Sales be included in Entergy Arkansas's load for Responsibility Ratio purposes and argues that Entergy Arkansas, not the other Operating Companies, has paid the substantial capacity costs to acquire and take responsibility for its resources. Entergy states that, if the Opportunity Sales are included in Entergy Arkansas's Responsibility Ratio calculations, it would mean that Entergy Arkansas bears the capacity equalization share of the Opportunity Sales costs, in addition to the fixed costs of those assets, but must also cede the energy output from those units to other Operating Companies while being forced to purchase the other Companies' higher-cost energy to serve the Opportunity Sales. Entergy concludes that this would be inequitable as the other Operating Companies are given priority to use Entergy Arkansas's capacity and energy to supply their loads without paying for that capacity.¹⁶⁰

117. The Arkansas Commission argues that the Initial Decision errs in concluding that the Opportunity Sales are firm sales from a seasonal, short-term perspective, while conceding that the same sales were non-firm sales from a long-term planning

¹⁵⁷ *Id.* at 64.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 67.

¹⁶⁰ *Id.* at 68.

perspective.¹⁶¹ The Arkansas Commission observes that the Initial Decision never attempts to explain this conclusion.

118. The Arkansas Commission also disputes the Initial Decision's attempts to distinguish the Opportunity Sales from non-firm, interruptible sales at issue in Opinion No. 468. The Arkansas Commission notes that the Commission in Opinion No. 521 determined that the Opportunity Sales were non-firm, when it concluded that "it is non-firm energy sales that are at issue in this proceeding."¹⁶² The Arkansas Commission notes that it was the Presiding Judge, himself, that proclaimed the sales non-firm in Phase I. Under Opinion No. 468, the Arkansas Commission argues, the Entergy Arkansas Opportunity Sales would be deemed to be "firm" only if: (1) capacity resources are planned by Entergy on a long-term basis to be built to serve such sales; and (2) no contractual rights exist for Entergy Arkansas to interrupt the sales. The Arkansas Commission explains that, as to the second element, it is not the fact that service is not interrupted by Entergy Arkansas that is relevant, but rather the fact that Entergy Arkansas has the right to interrupt at all that is decisive in determining whether a sale is firm or non-firm. The Arkansas Commission alleges that the Initial Decision ignores these criteria in finding that the Opportunity Sales were firm. The Arkansas Commission concludes that the Presiding Judge incorrectly relied on how Entergy itself treated the Opportunity Sales as firm, even though Entergy now argues that the sales were non-firm. Additionally, the Arkansas Commission observes that the Presiding Judge has dismissed Entergy's actual FERC Form 1 reporting of the Opportunity Sales to the Commission, which belies the conclusion that the Opportunity Sales are firm due to Entergy's prior conduct. In its FERC Form 1 filings for 2003, 2004, and 2006, Entergy reported that the majority (90.4 percent) of its Opportunity Sales were "non-firm" sales rather than firm requirements service sales or short-term firm service sales.¹⁶³ The Arkansas Commission argues that the FERC Form 1s are the best evidence of Entergy Arkansas's belief at the time that the Opportunity Sales took place.

119. Trial Staff argues that, as the complainant, the Louisiana Commission bears the burden of proof with regard to Opinion No. 521, Paragraph 138 issues and that it has failed to meet its burden. Trial Staff notes that the Commission, in Opinion No. 521, stated that the Louisiana Commission bears the burden of proof in showing that the

¹⁶¹ Arkansas Commission Brief on Exceptions at 18 (citing Initial Decision, 144 FERC ¶ 63,021 at P 478).

¹⁶² *Id.* at 20 (quoting Opinion No. 521, 139 FERC ¶ 61,240 at P 110 n.221).

¹⁶³ *Id.* at 24.

Opportunity Sales were unlawful.¹⁶⁴ Trial Staff argues that the Louisiana Commission carried its burden, in part, by showing that Entergy improperly accounted for the energy used to source the Opportunity Sales; however, in its complaint, the Louisiana Commission also argued that the sales “unreasonably increase [Entergy Arkansas’s] and System Energy costs, which decrease the receipts of other operating companies in the bandwidth calculation.”¹⁶⁵

120. Trial Staff asserts that the Louisiana Commission alleged that the effect of the Opportunity Sales should be examined with respect to all relevant System Agreement provisions. Therefore, Trial Staff states that it is the Louisiana Commission’s burden to show that its allegations are correct, and it bears the ultimate burden of proof with regard to Paragraph 138 issues. Trial Staff argues that the Louisiana Commission used a selective approach to re-run the ISB protocol to enrich the Louisiana Operating Companies at the expense of Entergy Arkansas. Trial Staff argues that the Louisiana Commission had the burden to show that its methodology complies with the Commission’s findings in Opinion No. 521, but failed to sustain its burden.¹⁶⁶ Trial Staff argues that, contrary to the Presiding Judge’s position that the “current rate” is the actual result in dollars and cents on the settlements derived from Entergy’s practice of including Opportunity Sales in Responsibility Ratios, the correct rate is the Responsibility Ratio formula that was approved by the Commission as just and reasonable.¹⁶⁷

121. Trial Staff states that, in the alternative, if Trial Staff did have the burden of proof or production on this issue, its burden is supported by the filed rate doctrine for the application of a Commission-approved rate (i.e., the formula), where there has been no finding that the filed rate is no longer just and reasonable.¹⁶⁸ Trial Staff rejects the Presiding Judge’s argument that he can depart from the filed rate because it would mean that Entergy Arkansas’s refunds would be offset, and Trial Staff reiterates that there is no error or omission in the underlying tariff.¹⁶⁹

¹⁶⁴ Trial Staff Brief on Exceptions at 14 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 106 & n.217).

¹⁶⁵ *Id.* at 14 (citing Louisiana Commission Compl. ¶ 39).

¹⁶⁶ *Id.* at 15.

¹⁶⁷ *Id.* at 16.

¹⁶⁸ *Id.* at 17-18.

¹⁶⁹ *Id.* at 18.

122. Trial Staff addresses the Presiding Judge's characterization that Trial Staff requested he consider issues related to Paragraph 138 *de novo*, and clarifies that Trial Staff meant only that the Presiding Judge was considering the issue of the application of Opinion No. 521 on the rest of the System Agreement for the first time, not that he was free to ignore the Commission's rulings.¹⁷⁰ Trial Staff further asserts that the Commission's decision regarding the allocation of energy for Opportunity Sales should be applied to the rest of the formula.¹⁷¹

123. Trial Staff argues that Entergy Arkansas's Opportunity Sales were off-system interruptible transactions and should be excluded from its load for the purpose of determining its Responsibility Ratio for allocating specified costs. Trial Staff summarizes the Commission's holding in Opinion No. 521 that section 4.05 of the System Agreement authorized Entergy Arkansas to make opportunity sales for its own account, but with an hourly energy stacking priority under section 30.04 as "sales to others" rather than under section 30.03(a).¹⁷² Trial Staff notes that the Presiding Judge was tasked with determining whether adjustments to the Service Schedules or other provisions of the System Agreement are necessary. Trial Staff contends that the most significant issue arising under Paragraph 138 of Opinion No. 521 is whether the removal of the Opportunity Sales from Entergy Arkansas's section 30.03(a) load should be reflected in its Responsibility Ratio, as derived under sections 2.16-2.18 of the System Agreement.¹⁷³

124. Trial Staff states that sections 2.16(a) and 2.16(b) measure the load located within the footprint of each Operating Company, and that section 2.16(b) excludes interruptible load. Trial Staff continues that since Entergy Arkansas's Opportunity Sales were made to off-system customers, they are not included in the definition of Company Load Responsibility under either sections 2.16(a)(1) or 2.16(b)(1). In addition, Trial Staff argues that, if the Opportunity Sales are deemed to be interruptible, then section 2.16(b)(iii)'s instruction to exclude loads served under interruptible tariffs or contracts must take this into consideration.¹⁷⁴ Trial Staff explains that once each Operating Company's Company Load Responsibility is determined under sections 2.16(a) and (b), the System Load Responsibility is determined under section 2.17. Subsequently, each

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 18-19.

¹⁷² *Id.* at 22-23 (citing Opinion No. 521, 139 FERC ¶ 61,240 at PP 107-123).

¹⁷³ *Id.* at 23.

¹⁷⁴ *Id.* at 25.

Operating Company's Responsibility Ratio is determined under section 2.18 by dividing its Load Responsibility by System Load Responsibility.¹⁷⁵

125. Trial Staff states that, in analyzing this issue as it relates to each of the Service Schedules and other provisions of the System Agreement relevant to Responsibility Ratio as an allocator, it is important to keep in mind differing economic contexts in which the Commission's basic ratemaking principles are applied. Trial Staff asserts that what is central or relevant with respect to one type of costs may be peripheral or irrelevant with respect to another. Trial Staff believes it is important to conduct the Paragraph 138 inquiry in light of what the Commission found to be the correct energy allocation priority applicable to relevant types of opportunity transactions, including Entergy Arkansas's Opportunity Sales and the interruptible retail transactions at issue in Opinion No. 468.¹⁷⁶

126. Trial Staff disagrees with the Presiding Judge's finding that Entergy Arkansas's Opportunity Sales should be included in its Responsibility Ratio with respect to each of the system cost centers for which Responsibility Ratio serves as an allocator. Trial Staff contends that Commission policy requires the exclusion of the Opportunity Sales from the determination of Entergy Arkansas's Responsibility Ratio with respect to Service Schedule MSS-1 production capacity reserve costs. Trial Staff explains that, unlike the retail interruptible load, which was removed from Responsibility Ratio in Opinion No. 468 and was part of the Operating Company's section 30.03(a) load, the Opportunity Sales are assigned the lowest priority, and therefore highest cost, energy on the system under Opinion No. 521. Therefore, Trial Staff states, when properly priced, the Opportunity Sales did not deprive the native load customers of other Operating Companies of low-cost system energy.¹⁷⁷

127. Trial Staff also notes that, in Opinion No. 468, the Commission concluded that service quality has little or no relevance as to whether interruptible sales should remain in the Responsibility Ratio allocator with respect to Service Schedule MSS-1 production costs. Trial Staff states that it interprets the Commission's statements in Opinion No. 468 to mean that the key factor in determining whether to include a particular load in Company Load Responsibility is whether the load can be interrupted, not the order in which interruption may occur. Trial Staff also states that there is no serious question that the Opportunity Sales are interruptible, pointing to the Presiding Judge's Phase I Initial Decision, in which he found the sales were non-firm energy, and to the Commission's findings in footnote 221 of Opinion No. 521. Trial Staff criticizes the Presiding Judge's

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 28.

subsequent characterizations in the Initial Decision of the Commission's finding in Opinion No. 521 as *dicta*.¹⁷⁸ The Presiding Judge found that the Commission intended to use the terms "firm" and "non-firm" in footnote 221 in the context of whether Entergy possessed a long-term commitment to serve those sales, rather than whether the Opportunity Sales were interruptible for Responsibility Ratio purposes. Trial Staff states that the appropriate inquiry into whether a particular service is firm or non-firm should be based on the substantive attributes of the service itself, rather than upon the context in which a description of the service is provided.¹⁷⁹

128. Trial Staff disagrees with the Presiding Judge's decision to include Opportunity Sales in Entergy Arkansas's Responsibility Ratio insofar as it is based on the conclusion that it would be inequitable for other Operating Companies to subsidize capacity used by Entergy Arkansas to conduct Opportunity Sales when they do not receive margins from the sales. Trial Staff claims that, while it is true Entergy Arkansas retains the margins from the Opportunity Sales, the vast majority of the sales were actually sourced from the other Operating Company's capacity, and the Operating Companies were fully compensated for the cost of their energy under section 30.08 of the System Agreement. In addition, Trial Staff explains that the fact that Entergy Arkansas retains the margins on its Opportunity Sales rather than passes them on to customers is a result of a 1985 settlement between Entergy and the Arkansas Commission.¹⁸⁰

129. Trial Staff addresses the Presiding Judge's attempt to distinguish the retail interruptible transactions in Opinion No. 468 from the Opportunity Sales on the ground that the former involved the construction of capacity to serve firm customers, whereas the Opportunity Sales involved the acquisition of short-term capacity to serve off-system interruptible customers. Trial Staff argues that the Commission's discussion in Opinion No. 468 actually refers to situations in which an Operating Company "has undertaken to construct or otherwise acquire" production facilities.¹⁸¹ Trial Staff notes that the system also included the retail interruptible transactions at issue in Opinion No. 468 in its load forecasts and capacity planning and caused Entergy to make additional summer reliability purchases.¹⁸²

¹⁷⁸ *Id.* at 29-30 (citing Initial Decision, 144 FERC ¶ 63,021 at P 494 n.579 & P 494 n.581 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 110 n.221))

¹⁷⁹ *Id.* at 30.

¹⁸⁰ *Id.* at 31-32.

¹⁸¹ *Id.* at 33 (citing Opinion No. 468, 106 FERC ¶ 61,228 at P 61).

¹⁸² *Id.* at 34 (citing Ex. S-101 at 51-52; Ex. LC-210 at 29).

130. Trial Staff asserts that Entergy Arkansas's Opportunity Sales should be excluded from its Responsibility Ratio for the purposes of allocating Service Schedule MSS-2 costs.¹⁸³ Trial Staff states that the Opportunity Sales do not impose an uncompensated transmission cost burden on other Operating Companies because Entergy Arkansas's contracts for its Opportunity Sales require counterparties to purchase transmission service from Entergy.¹⁸⁴ Where a transmission cost burden is imposed on the Operating Companies by a third-party user of the system, the cost is recovered through a rate collected under Entergy's Open Access Transmission Tariff (OATT) for the general benefit of the Operating Companies.¹⁸⁵ Therefore, Trial Staff argues that including the Opportunity Sales in Entergy Arkansas's Responsibility Ratio with respect to Service Schedule MSS-2 would constitute a double allocation of system capacity-related transmission costs.¹⁸⁶ In contrast, in Order No. 468, the Commission ruled that retail interruptible load should not be removed from Responsibility Ratios used to allocate Service Schedule MSS-2 costs because the Louisiana Commission failed to demonstrate that any interruptible load took non-firm point-to-point transmission service under Entergy's OATT.¹⁸⁷ Trial Staff concludes that, given the reasons set forth by the Commission for continuing to include retail interruptible sales in the Responsibility Ratios under Service Schedule MSS-2 (i.e., counterparties did not pay Entergy's OATT rate), the opposite is true with respect to the Opportunity Sales and exclusion of the Opportunity Sales from Entergy Arkansas's Responsibility Ratio is fully supported by the reasoning in Opinion No. 468.¹⁸⁸

131. Trial Staff argues that Entergy Arkansas's Opportunity Sales should be excluded for purposes of allocating joint account purchases under sections 4.02 and 4.03 and the distribution of margins on joint account sales under Service Schedule MSS-5, consistent with the Commission's determination in Opinion No. 468 on interruptible load.¹⁸⁹

¹⁸³ *Id.* at 35.

¹⁸⁴ *Id.* (citing Ex. ESI-18 at 6-7; Ex. LC-201 at 72; Ex. ESI-106 at 101).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (citing Opinion No. 468, 106 FERC ¶ 61,228 at P 80).

¹⁸⁸ *Id.* at 36.

¹⁸⁹ *Id.* (citing Opinion No. 468, 106 FERC ¶ 61,228 at P 77).

132. Trial Staff contends that the Opportunity Sales should also be excluded from Entergy Arkansas's Responsibility Ratio for the purpose of allocating Service Schedule MSS-6 costs.¹⁹⁰ Trial Staff notes that Service Schedule MSS-6 allocates the cost of Entergy's production scheduling and load dispatch System Operations Center in Woodlands, Texas to each Operating Company. Trial Staff states that the Opportunity Sales were discovered, analyzed, scheduled and dispatched at these facilities, and the correct application of the filed rate should exclude the sales from Entergy Arkansas's Responsibility Ratio with respect to Service Schedule MSS-6 because the sales were made exclusively to off-system customers.¹⁹¹

133. Trial Staff argues that the Opportunity Sales should be excluded from Entergy Arkansas's Responsibility Ratio for the purposes of fixed cost allocation in the bandwidth formula in Service Schedule MSS-3, for the same rationale as Trial Staff's argument for exclusion from the allocation of Service Schedule MSS-1 costs.¹⁹²

3. Briefs Opposing Exceptions

134. The Arkansas Commission disagrees with Trial Staff's position that Entergy Arkansas's Opportunity Sales should be removed from its Responsibility Ratio for Service Schedule MSS-5 purposes, stating that the Commission expressly excluded Service Schedule MSS-5 from the edict of Opinion No. 521 Paragraph 138.¹⁹³

135. Trial Staff explains that Opportunity Sales should be excluded in the derivation of Entergy Arkansas's Company Load Responsibility in section 2.16(b) and, in turn, in section 2.18, because these transactions are off-system and interruptible, and argues that its position is consistent with Opinion No. 521. Trial Staff states that, by contrast, Entergy's and the Arkansas Commission's position that Opportunity Sales should be excluded from the Responsibility Ratio applied to Service Schedule MSS-1 but included in Service Schedule MSS-5 would require altering the existing terms of the System Agreement.¹⁹⁴

¹⁹⁰ *Id.* at 37.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Arkansas Commission Brief Opposing Exceptions at 16.

¹⁹⁴ Trial Staff Brief Opposing Exceptions at 19.

136. The Louisiana Commission believes that the Initial Decision applied the correct burden of proof. Specifically, the Louisiana Commission argues that Entergy is seeking to change its own treatment of the Opportunity Sales by adjusting its Responsibility Ratios, and therefore, is the proponent of a rate change that bears the burden of proof.¹⁹⁵ The Louisiana Commission argues that it would be “absurd” to assign the burden of proof to it, since it is not seeking a rate change, but instead seeks a continuance of the status quo.¹⁹⁶

137. The Louisiana Commission notes that, regardless of the burden of proof, the Louisiana Commission was the only party who put on evidence that the Opportunity Sales caused the system to incur capacity costs. The evidence established that the Opportunity Sales load was included in the historical load data Entergy used to determine the level of summer capacity and energy purchases, and also established that the Opportunity Sales load was planned for and served without curtailment. The Louisiana Commission argues that there was no assumption that the Opportunity Sales load could be interrupted, and Entergy did not treat the load as interruptible in its summer planning, which increased the costs to serve load through the peak summer months.¹⁹⁷ The Louisiana Commission states that the evidence also shows that the Opportunity Sales were made in the peak summer months, they were firm, and they caused the system to incur capacity-related costs associated with operating reserves.¹⁹⁸

138. The Louisiana Commission argues that the Initial Decision correctly interpreted Opinion No. 468 when it distinguished the Opportunity Sales from the interruptible sales at issue in that opinion.¹⁹⁹ The Louisiana Commission states that the Initial Decision’s conclusions are fully supported by the record, namely that: (1) capacity was acquired to supply the Opportunity Sales; (2) if not included in Entergy Arkansas’s Responsibility Ratio, firm customers would be forced to subsidize the Opportunity Sales; (3) the Opportunity Sales were included in the system’s peak load as non-interruptible; and (4) the Opportunity Sales were not interruptible “at will” but could only be curtailed to protect native load.²⁰⁰

¹⁹⁵ Louisiana Commission Brief Opposing Exceptions at 53.

¹⁹⁶ *Id.* at 55.

¹⁹⁷ *Id.* at 57 (citing Ex. LC-213 at 9-13; Ex. LC-210 at 26-30).

¹⁹⁸ *Id.* (citing Ex. LC-210 at 30, 34-36; Tr. 776).

¹⁹⁹ *Id.* at 58 (citing Initial Decision, 144 FERC ¶ 63,021 at PP 474-499).

²⁰⁰ *Id.* at 58-59 (citing Initial Decision, 144 FERC ¶ 63,021 at PP 478-481).

139. The Louisiana Commission states that Opinion No. 468 provided “[w]hat is important is that Entergy was entitled to curtail its interruptible load at the time of its System peak,” which differs from proceeding this, where Entergy could not interrupt Opportunity Sales at the time of the system peak.²⁰¹ The Louisiana Commission asserts that Entergy planned to serve the Opportunity Sales during the time of the system’s summer peak load without interruption, and that no other party presented any evidence to rebut testimony of Entergy planners. The Louisiana Commission counters the argument presented by Entergy, the Arkansas Commission, and Trial Staff that interruptible sales were also included in Entergy’s summer load forecast, stating that Entergy planned to interrupt those sales in its summer planning.²⁰² The Louisiana Commission also notes that, in a compliance filing that was approved by the Commission, Entergy did not remove the Opportunity Sales loads in response to Opinion No. 468 when it was issued, apparently concluding that those sales did not meet the definition of “interruptible load” as set forth in Opinion No. 468.²⁰³ The Louisiana Commission states that nothing has changed since the issuance of Opinion No. 468, and the case law cited in the Initial Decision is consistent with the findings in Opinion No. 468 and support the inclusion of the Opportunity Sales load in Entergy Arkansas’s Responsibility Ratios.²⁰⁴

140. The Louisiana Commission disputes Entergy’s and the Arkansas Commission’s claim that the question of whether the Opportunity Sales should be excluded from Entergy Arkansas’s Responsibility Ratios was decided in Phase I, noting that Phase I evidence supports the inclusion of Opportunity Sales in Entergy Arkansas’s Responsibility Ratio. The Louisiana Commission asserts that Phase I addressed the question of whether the Opportunity Sales were of “capacity *and* energy” within the meaning of section 4.05 of the System Agreement, which were referred to as “firm” sales.²⁰⁵ The Louisiana Commission witness in Phase I testified that the Opportunity Sales were not “firm” in the same sense as requirements sales, and therefore, section 4.05

²⁰¹ *Id.* at 60 (citing Opinion No. 468, 106 FERC ¶ 61,228 at P 66).

²⁰² *Id.* at 61 (citing Entergy Brief on Exceptions at 64-66; Arkansas Commission Brief on Exceptions at 22; Trial Staff Brief on Exceptions at 34; Ex. LC-213 at 12-13).

²⁰³ *Id.* at 62-63 (citing Compliance Filing of Entergy Services, Inc., Docket Nos. EL00-66-005, ER00-2854, and EL95-33-007 (filed Sept. 16, 2005) *Louisiana Pub. Serv. Comm’n and the Council on the City of New Orleans v. Entergy Corp.*; 116 FERC ¶ 61,156 (2006) (Order on Compliance Filing)).

²⁰⁴ *Id.* at 63-64.

²⁰⁵ *Id.* at 64 (emphasis in original).

did not apply.²⁰⁶ The Louisiana Commission states that in Phase I, the Initial Decision includes a statement that the sales were “non-firm” but that was in the context of interpreting section 4.05 of the System Agreement.²⁰⁷

141. Moreover, the Louisiana Commission contends that footnote 221 of Opinion No. 521, which is cited by Entergy, the Arkansas Commission, and Trial Staff as the Commission’s supposed determination of the Responsibility Ratio issue in Phase I, also discussed the sales as “non-firm” in the same context as that used in the Phase I Initial Decision. That is, the sales were “non-firm,” meaning Entergy did not have a long-term commitment to serve those sales, which is not the same issue presented by Paragraph 138 of Opinion No. 521. The Louisiana Commission argues that if the Commission had already decided the issue in Opinion No. 521, there would have been no need for further proceedings to determine whether adjustment to Responsibility Ratios in the System Agreement Service Schedules are necessary.²⁰⁸

142. The Louisiana Commission argues that the deposition testimony supports the Louisiana Commission’s position in that the deposition described the sales as “non-firm,” but also that they could only be curtailed for reliability reasons and that the deponent would not characterize them as interruptible.²⁰⁹ The Louisiana Commission contends that the Initial Decision properly concluded that “the equities demand that Entergy Arkansas continue to bear the cost associated with the acquisition of this capacity.”²¹⁰ The Louisiana Commission states that its witness Mr. Baron demonstrated that the other Operating Companies supplied the resources for the Opportunity Sales more than 80 percent of the time, the entire system supplied the transmission for the sales, and excluding the sales load from Entergy Arkansas’s load responsibility would create a “free-rider” problem.²¹¹

²⁰⁶ *Id.* at 64-65 (citing Initial Decision, 144 FERC ¶ 63,021 at P 252).

²⁰⁷ *Id.* at 65 (citing Initial Decision, 144 FERC ¶ 63,021 at P 252).

²⁰⁸ *Id.* (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 138).

²⁰⁹ *Id.* at 68 (citing Entergy Brief on Exceptions at 65 n.218; Arkansas Commission Brief on Exceptions at 21; Ex. LC-47 at 59; Ex. LC-50 at 18).

²¹⁰ *Id.* at 70 (citing Initial Decision, 144 FERC ¶ 63,021 at P 497).

²¹¹ *Id.* at 71 (citing Ex. LC-201 at 70-72).

143. The Louisiana Commission claims that Entergy's statement that "the other Companies get priority access to [Entergy Arkansas's] resources ahead of [Entergy Arkansas's] Opportunity Sales" relates to priority access to energy, and is not relevant to the question of whether those resources should be included in Entergy Arkansas's share of capacity charges under Service Schedule MSS-1.²¹² The Louisiana Commission asserts that the question is whether the other Operating Companies incurred capacity costs to serve the Opportunity Sales, which the Louisiana Commission believes they did.

144. The Louisiana Commission states that the Initial Decision is correct to disregard Entergy's FERC Form 1s as "not useful" and having "no relevance in determining load responsibility ratios."²¹³ The Louisiana Commission notes that the FERC Form 1s should not be used because they are missing a significant portion of the sales, there are inconsistencies between the FERC Form 1 reporting and the actual contracts for those sales, and the FERC Form 1s do not provide any information regarding whether the sales caused the incurrence of capacity-related costs and are not probative.²¹⁴

145. The Louisiana Commission argues that, if the Responsibility Ratios are changed for Service Schedule MSS-2, the same change must be factored into Entergy's OATT. The Louisiana Commission notes that Entergy receives revenue from third parties under the OATT, and then it is split among the Operating Companies based on Responsibility Ratios. The Louisiana Commission states that it would make no sense to permit Entergy Arkansas to escape responsibility for transmission costs based on a lower Responsibility Ratio, but receive revenues for transmission based on a higher Responsibility Ratio.²¹⁵

4. Commission Determination

146. Entergy included the Opportunity Sales in Entergy Arkansas's load for purposes of the calculation of various Service Schedules under the System Agreement. In the initial hearing on liability, Entergy argued that if the Commission were to find that the Opportunity Sales should be treated the same as joint account sales, those Opportunity Sales should be removed from Entergy Arkansas's load for those calculations. In Opinion No. 521, the Commission directed the Presiding Judge to make a determination on whether any of the Service Schedules should be adjusted as a result of the Commission's decision:

²¹² *Id.* (citing Entergy Brief on Exceptions at 67).

²¹³ *Id.* at 73 (citing Initial Decision, 144 FERC ¶ 63,021 at PP 492, 493).

²¹⁴ *Id.* at 74 (citing Ex. AC-9 at 311; Tr. 714, 717).

²¹⁵ *Id.* at 76.

Given that we are modifying the Presiding Judge's determination to instead treat the Opportunity Sales as Entergy Arkansas sales, but of a lower energy priority, we direct the judge, in the further hearing proceedings, to determine whether adjustments to settlements under these service schedules or other provisions of the System Agreement are necessary.^[216]

147. The Louisiana Commission's damages calculations were based on ISB re-runs performed by Entergy pursuant to instructions provided by the Louisiana Commission. The Louisiana Commission directed Entergy to leave Opportunity Sales load in sections 2.16 and 2.18 of the System Agreement so as to not offset any refunds calculated under Service Schedule MSS-3. In his Initial Decision, the Presiding Judge addressed whether section 2.18's Responsibility Ratio variable²¹⁷ and section 2.16's Company Load Responsibility variable²¹⁸ should be adjusted to remove the Opportunity Sales from Entergy Arkansas's load, which would affect calculations made pursuant to several Service Schedules and System Agreement provisions. The Presiding Judge declined to make an adjustment, finding that Entergy had not met its burden to show that a change was necessary. The Presiding Judge found that the Opportunity Sales were treated by Entergy as firm, and that they should not be treated as interruptible load that is removed from Company Load Responsibility for certain Service Schedules and System Agreement provisions under the Commission's prior precedent. The Presiding Judge also noted that equities supported Entergy Arkansas bearing the costs of the capacity used to serve the Opportunity Sales it made. Both Trial Staff and Entergy now request that the Commission reverse the Presiding Judge's findings on this issue.

148. We first address the burden of proof on this issue and reverse the Presiding Judge's finding on this point. The Presiding Judge placed the burden of proof on Entergy to show that adjustments should be made to damages on the basis of the other Service Schedules, reasoning that Entergy is trying to change its "current rate" by adjusting its

²¹⁶ Opinion No. 521, 139 FERC ¶ 61,240 at P 138.

²¹⁷ The Responsibility Ratio of an Operating Company 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. *See* System Agreement, § 2.18.

²¹⁸ 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.

Responsibility Ratios.²¹⁹ We disagree. As complainant in this proceeding, the Louisiana Commission bears the burden to prove not only liability, but also damages.²²⁰ The issue of whether to include the other Service Schedules within the damage calculation is not a change to the current rate, nor is it an affirmative defense such that the burden would shift to the party raising the defense. It is instead part of the initial damage calculation and thus the burden of proof resides where it was originally: with the Louisiana Commission.

149. We next reverse the Initial Decision on the underlying substantive issue regarding whether the Responsibility Ratio should be adjusted to account for the removal of the Opportunity Sales from Entergy Arkansas's load with respect to calculations made pursuant to several Service Schedules and System Agreement provisions. As we noted above, the goal of the damage proceeding was to put the parties as close as possible to the position they would have been in had the Opportunity Sales been correctly allocated for.

150. The Opportunity Sales were originally treated as part of Entergy Arkansas's section 30.03(a) load, with priority access to low-cost system energy, and allocated energy as such. Although Opinion No. 521 found that Entergy Arkansas could take responsibility for the Opportunity Sales under section 4.05 of the System Agreement, the Commission changed the priority allocated to the Opportunity Sales, giving them a lower priority than native load sales and identical priority to joint account sales under section 30.04 of the System Agreement. Sections 2.16(a)(ii) and (b)(ii) of the System Agreement require a subtraction of "power supplied to others as sales for the joint account of all Companies" from the determination of peak demand. Although the Opportunity Sales are not joint account sales, they are given the same priority and thus are a closer analogy for the purposes of the determination of Responsibility Ratio than the on-system native load sales made under 30.03 of the System Agreement.

151. We find that exclusion of the Opportunity Sales from the Responsibility Ratio calculations is also required by the language of section 2.16 of the System Agreement and the related determinations in Opinion No. 521. In Opinion No. 521, the Commission noted that the Opportunity Sales were off-system sales of energy,²²¹ a finding not

²¹⁹ Initial Decision, 144 FERC ¶ 63,021 at P 460.

²²⁰ See *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,003, at P 28 (2010).

²²¹ Opinion No. 521, 139 FERC ¶ 61,240 at P 2 n.5. The Commission noted that the Presiding Judge held that the parties agreed upon a definition of "off-system" sales as "a sale out of the utility's control area" and define "control area" as "the area in which the utility controls the flow of energy and is responsible for it" and adopted this definition for purposes of the Phase 1 Initial Decision. *Id.* P 10 (citing Phase 1 Initial Decision,

(continued ...)

disputed by any party on rehearing or in this proceeding.²²² The version of section 2.16 of the System Agreement in effect during the period of the Opportunity Sales provides that the determination for peak demand to be used in the Responsibility Ratio should be made based on: “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.”²²³ In other words, opportunity sales made off-system are subtracted from peak demand and are thus not included in an Operating Company’s Responsibility Ratio.²²⁴

152. We note that this finding requires exclusion of the Opportunity Sales from Responsibility Ratio allocators in Service Schedule MSS-1, Service Schedule MSS-2, the Demand Ratio variable in the bandwidth remedy, Service Schedule MSS-6, system energy and capacity purchases pursuant to section 4.02, and, as discussed below, Service Schedule MSS-5.

133 FERC ¶ 63,008 at P 346). The Presiding Judge also adopted the Commission’s standard definition of “opportunity sales” for the opportunity sales, which he noted included a requirement that such sales be off-system. *Id.* (citing Phase 1 Initial Decision, 133 FERC ¶ 63,008 at P 346 (citing *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, Opinion No. 501, 123 FERC ¶ 61,047, at P 39 (2008))).

²²² The Louisiana Commission and Entergy in their pleadings refer to the sales at issue as being off-system. *See, e.g.*, Entergy Brief on Exceptions at 1 (defining the opportunity sales at issue for refund determination to be “the EAI off-system Opportunity Sales”), Louisiana Commission Brief Opposing Exceptions at 6 (“the cost to ratepayers, incurred to produce electricity for off-System sales, would still exceed \$162 million.”); *see also* Ex. LC-201 at 7 (Prefiled Direct Testimony of Louisiana Commission witness Mr. Baron) (“As the Commission found in Opinion No. 521, Entergy improperly included the load associated with off-system Opportunity Sales in EAI’s load used to allocate energy pursuant to System Agreement Section 30.03(a) . . .”), *see also id.* at 74.

²²³ Subsequent to the 2000-2009 period of the Opportunity Sales, this load calculation methodology was replaced with a methodology based upon Midcontinent Independent System Operator, Inc. (MISO) load zones pursuant to a December 2013 Commission order accepting Entergy’s proposed modifications to the System Agreement to reflect the departure of Energy Arkansas from the System Agreement and to facilitate the Operating Companies’ integration into MISO. *See Entergy Servs., Inc.*, 145 FERC ¶ 61,247, at P 124-25 (2013).

²²⁴ Louisiana Commission Witness Baron agreed in his Phase I testimony that Energy Arkansas’s Opportunity Sales should not be included in its section 2.16 Company Load Responsibility because its customers were off-system. Exh. LC-1 at 61-63.

153. We clarify that removal of the Opportunity Sales from section 2.16 calculations also includes Service Schedule MSS-5. Service Schedule MSS-5 provides for the distribution of the net balance of the proceeds received for joint account sales. In Opinion No. 521, the Commission directed the Presiding Judge to determine whether adjustments to settlements under any service schedules were necessary, but stated in footnote 253: “Because of our finding that the Opportunity Sales should not be treated as joint account sales, Service Schedule MSS-5 does not apply.” Trial Staff argues that the Commission should allow for calculations under Service Schedule MSS-5 to be made based on a changed Responsibility Ratio. We agree. The intention of the Commission in footnote 253 was to note that no revisions to the sales figures in Service Schedule MSS-5 were necessary, as the Opportunity Sales were to remain the responsibility of Entergy Arkansas. However, any change to the Responsibility Ratio should be reflected in the calculations under Service Schedule MSS-5, as it is in the other Service Schedules.

154. Because we find that the Opportunity Sales represent off-system sales that should be excluded from calculations made pursuant to section 2.16, we are not ruling here on the applicability of Opinion No. 468 to the Opportunity Sales. The Presiding Judge found that Opinion No. 468 required the exclusion of interruptible load from Responsibility Ratio calculations pursuant to several System Agreement Service Schedules and provisions. The Presiding Judge distinguished the Opportunity Sales at issue from the interruptible sales at issue in that proceeding, contending that Entergy essentially treated the Opportunity Sales as firm sales and that Entergy Arkansas should therefore be required to bear capacity costs related to those sales. The parties argue the applicability of Opinion No. 468 in their briefs. However, we do not reach this issue because both sections 2.16(a) and 2.16(b) call for exclusion of energy flowing off-system for purposes of calculation of load. Further analysis of whether the Opportunity Sales were firm or interruptible is therefore not required.

C. Bandwidth Payments

1. Initial Decision

155. The Presiding Judge finds that the equities demand that damages do not flow through the bandwidth formula payments. The Presiding Judge states that the bandwidth formula roughly equalizes production costs among the Operating Companies and the bandwidth calculation is made by populating a formula with values drawn mostly from Entergy’s FERC Form 1.²²⁵ The Presiding Judge notes that six weeks prior to publication

²²⁵ Initial Decision, 144 FERC ¶ 63,021 at P 500 (citing Entergy Reply Br. 55).

of Opinion No. 521, the Commission ruled that bandwidth calculations must be based on as-reported FERC Form 1 data, with no adjustments for out-of-period refunds.²²⁶

156. The Presiding Judge states that if damages flow through to bandwidth payments, ultimately, the other Operating Companies would flow refunds back to Entergy Arkansas through the bandwidth formula. The Presiding Judge notes that this change would make some of the other Operating Companies worse off than if the refunds had never been ordered, which is an inequitable result. The Presiding Judge states that Trial Staff recognized that this result would be inequitable when it proposed capping the bandwidth payments due from the other Operating Companies to Entergy Arkansas so that the net balance would not exceed zero.²²⁷

157. The Presiding Judge rejects Trial Staff's contention that this proceeding is the type of forum in which an adjustment to the bandwidth formula would be appropriate.²²⁸ The Presiding Judge notes that Opinion No. 521 does not make mention of any opinions with regard to capacity-related issues.²²⁹

158. The Presiding Judge states that Entergy correctly notes that allowing refunds but not adjusting the bandwidth would allow the other Operating Companies to receive a double-payment for the Opportunity Sales because the Operating Companies will receive both the bandwidth payments and the refund payments. However, the Presiding Judge also states that the functional purpose of Opinion No. 521 was to compensate the other Operating Companies for the damages from Entergy Arkansas's violation of the System Agreement.²³⁰ Thus, the Presiding Judge concludes, flowing back bandwidth payments to Entergy Arkansas would frustrate the purpose of the proceeding.

²²⁶ *Id.* P 501 (citing *Entergy Servs., Inc.*, 139 FERC ¶ 61,106 (2012)). The Presiding Judge appears to have inadvertently cited this order rather than *Entergy Servs., Inc.*, Opinion No. 518, 139 FERC ¶ 61,105 at P 46 (2012).

²²⁷ Initial Decision, 144 FERC ¶ 63,021 at P 503 (citing Trial Staff Reply Br. 25-26).

²²⁸ *Id.* P 504 (citing *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010); *Entergy Servs., Inc.*, Opinion No. 518, 139 FERC ¶ 61,105; *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 519, 139 FERC ¶ 61,107 (2012)).

²²⁹ *Id.* (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 117).

²³⁰ *Id.* P 507.

159. The Presiding Judge further finds that the Commission, in finding a tariff violation, is not required to modify all aspects of the affected transactions. The Presiding Judge rejects the arguments that a change to one portion of Service Schedule MSS-3 requires a change to all parts because such adjustments would improperly allow Entergy Arkansas to pass a portion of its Opportunity Sales' margins through to the other Operating Companies.²³¹

160. The Presiding Judge also rejects Trial Staff's argument that no precedent exists for not adjusting the bandwidth formula to account for changes in production costs. The Presiding Judge reasons that the Commission specifically granted him the authority to make adjustments to bandwidth settlements under Service Schedule MSS-3, which includes the authority not to make adjustments.²³² Moreover, in support of his decision regarding the adjustments, the Presiding Judge states that the Commission in Paragraph 136 found that "damages are warranted" and he must, therefore, order damages.²³³ The Presiding Judge states that the Commission did not order a remedy in which refunds would not be paid. Moreover, the Presiding Judge finds, the Commission certainly did not intend for damages to flow from the other Operating Companies to Entergy Arkansas.²³⁴

161. The Presiding Judge determines that the issue of unloaded coal was not developed in the proceeding and is therefore moot.²³⁵ The Presiding Judge agrees with Mr. Louiselle's proposal to distribute the refund allocations due to Entergy Texas and Entergy Gulf States Louisiana for periods prior to the spin-off of the two companies in proportion to the allocation of assets approved in the spin-off.²³⁶ The Presiding Judge

²³¹ *Id.* P 508 (citing City of New Orleans Initial Br. 20).

²³² *Id.* P 509 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 138).

²³³ *Id.* P 510 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136).

²³⁴ *Id.* P 511.

²³⁵ *Id.* P 513 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 139). In the first hearing, Entergy raised as a defense to the imposition of damages the possible existence of unloaded coal in Entergy Arkansas's supply inventory, which it contended might have been used in making the Opportunity Sales and which could have reduced the damages to the other Operating Companies. In Opinion No. 521, the Commission ordered further hearing procedures on this issue in the damages phase hearing proceeding to determine whether "unloaded coal" should be taken into consideration in re-running the ISB. Opinion No. 521, 139 FERC ¶ 61,240 at PP 37, 139.

²³⁶ Initial Decision, 144 FERC ¶ 63,021 at P 514 (citing Ex. ESI-101 at 17-18).

finds that the issue of who pays for the refunds, as between shareholders and ratepayers, is beyond the scope of this proceeding.²³⁷

162. The Presiding Judge states that the damages awarded in this case will be measured by re-running the ISB in accordance with the instructions in the Initial Decision, with the Opportunity Sales re-classified as the lowest energy priority resource on the System, allowing the ISB re-run to automatically re-allocate energy based on this new prioritization.²³⁸

163. Acknowledging that allowing both refunds and the original bandwidth payments to pass from Entergy Arkansas to the other Operating Companies would result in an inequitable windfall to other Operating Companies, the Presiding Judge orders a reduction in any damages (and the interest thereon) derived from the ISB re-run by 20 percent.²³⁹

2. Briefs on Exceptions

164. Entergy criticizes the Initial Decision for concluding that the refund calculation should ignore positive benefits already received by the other Operating Companies due to the effect the Opportunity Sales had on prior bandwidth calculations, but then arbitrarily applying a 20 percent reduction to balance the windfall it concedes would result. Entergy argues that, to the extent refunds are ordered, the offsetting bandwidth-related adjustment should occur as a direct reduction to the amount refunded or, in the alternative, the final bandwidth payments determined in each docket addressing the annual bandwidth calculations for the years 2005-2009 should reflect the manner in which the Opportunity Sales are accounted for as a result of this proceeding.²⁴⁰

165. Entergy disagrees with the Louisiana Commission's contention and the Initial Decision's finding that including the damage awards in the bandwidth calculation compliance filings would export negative margins to other Operating Companies. Entergy argues rather that subsequent bandwidth calculation compliance filings would reflect the actual refunds awarded in the proceeding, since none of the other parties have reflected negative margins in their recommended damages. Entergy also disputes the Initial Decision's finding that imputing refunds into prior bandwidth years would be

²³⁷ *Id.* P 515.

²³⁸ *Id.* P 516.

²³⁹ *Id.* P 518.

²⁴⁰ Entergy Brief on Exceptions at 68-69.

unjust and unreasonable because it would allow Entergy Arkansas “to receive back 80 percent of the required refund in any year’ if it is within the +/- 11 percent threshold.”²⁴¹ Entergy states that, even if this were true, neither the Initial Decision nor the Louisiana Commission explains why this is an unjust result.

166. Entergy claims that the Initial Decision does not put the Operating Companies in the position they would have been in but for the violation of the System Agreement, which was the undisputed intent of Opinion No. 521.²⁴² Entergy states that all parties agree that any refunds ordered should not create a penalty, and that non-Entergy Arkansas Operating Companies derived benefit from the Opportunity Sales in the form of increased bandwidth payments. Entergy notes that the Initial Decision acknowledges that a failure to adjust the bandwidth calculations would allow the other Operating Companies to receive a double-payment for the Opportunity Sales in bandwidth payments and refund payments. However, Entergy claims that the Initial Decision’s interpretation of Opinion No. 521 results in a punitive and “inequitable windfall.”²⁴³

167. Entergy notes that no quantitative analysis has been performed regarding including the bandwidth impacts of the accounting modification ordered in Opinion No. 521, and so there is no evidentiary basis to conclude that accounting for their effects would render the refunds negative.²⁴⁴ Entergy estimates that the Operating Companies have already received \$8.2 million from Entergy Arkansas as a direct result of the Opportunity Sales in 2006, and the Initial Decision would require Entergy Arkansas to pay damages incident to its 2006 Opportunity Sales in the amount of \$9.3 million.²⁴⁵ Entergy observes that, in response to this clearly inequitable result, the Initial Decision proposes to reduce the damage reward by 20 percent, with no basis to support the reduction.²⁴⁶

168. The Arkansas Commission states that it does not address the matter of the damage calculation under Paragraphs 136 and 137 in Opinion No. 521, and instead, focuses on Paragraph 138, in which the Commission directed the Presiding Judge to decide if

²⁴¹ *Id.* at 71 (citing Initial Decision, 144 FERC ¶ 63,021 at P 502).

²⁴² *Id.*

²⁴³ *Id.* at 72.

²⁴⁴ *Id.* at 73-74.

²⁴⁵ *Id.* at 75-76 (citing Ex. ESI-115 at 3; Ex. LC-45 (Hayet, Phase I); Tr. at 793 (Sammon Cross); Ex. ESI-106 at 57 (Louiselle Rebuttal)).

²⁴⁶ *Id.* at 76.

adjustments to settlements and other provisions of the System Agreement are necessary. The Arkansas Commission states that the Initial Decision wrongly determined that the damages payments paid by Entergy Arkansas need not flow back to the bandwidth payment calculation for bandwidth test years 2006-2009. The Arkansas Commission notes that this is the Initial Decision's recommendation, notwithstanding its recognition that to exclude the damage payments in the bandwidth calculation for those years will result in a windfall to the other Operating Companies, who would receive a double-payment for the Opportunity Sales through both bandwidth payments and refund payments.²⁴⁷

169. The Arkansas Commission contends that the effect of the tariff violation was to understate Entergy Arkansas's production costs for the relevant years, and, as a consequence, Entergy Arkansas's actual production costs should have been higher than reported in its FERC Form No. 1 accounts, and its bandwidth payments should have been lower than what was reflected. The Arkansas Commission states that as a result Arkansas retail ratepayers overpaid bandwidth payments for test years 2006-2009.²⁴⁸ Thus, the Arkansas Commission concludes that, for reasons of fairness and equity, the reduced bandwidth payments should be reflected by the "flow back" of damages to the bandwidth calculations for 2006-2009 to make Entergy Arkansas's ratepayers whole and to avoid a windfall to the Operating Companies in Louisiana.²⁴⁹

170. The Arkansas Commission objects to the Initial Decision's reliance on a finding that in Opinion No. 518, the Commission barred adjustment of the as-reported FERC Form No. 1 production cost data for "out-of-period" refunds, and argues that this finding is contrary to Opinion No. 518. The Arkansas Commission asserts that, in Opinion No. 518, the Commission rejected proposals to exclude such out-of-period expenses and revenues from the bandwidth calculation because they were properly recorded in accounts used in the bandwidth formula calculation, and there is no provision in the bandwidth formula that would allow for an adjustment to remove such amounts. The Arkansas Commission states that the previously described circumstance differs from the present one in that the refunds ordered by the Commission in Opinion No. 521 will be properly recorded by Entergy Arkansas in its FERC Form No. 1s for 2006-2009 under Account 555, and "recalculated" FERC Form No. 1s will be filed to reflect those

²⁴⁷ Arkansas Commission Brief on Exceptions at 8 (citing Initial Decision, 144 FERC ¶ 63,021 at P 505).

²⁴⁸ The Arkansas Commission incorrectly states that the bandwidth remedy would apply for the 2006 through 2009 refund period. As noted above, the Commission stated that the bandwidth remedy should commence in 2005.

²⁴⁹ *Id.* at 11.

additional amounts.²⁵⁰ The Arkansas Commission posits that, as the product of a formula rate, previous annual bandwidth payments remain open to recalculation to be ordered by the Commission, and since none of Entergy's annual bandwidth calculation filings have been finalized, they remain subject to future compliance filings.

171. The Arkansas Commission disputes the Initial Decision's reliance on the fact that "the Commission did not order a remedy [in Opinion No. 521] in which refunds would not be paid. Moreover, the Commission certainly did not intend for damages to flow from the Other Operating Companies to Entergy Arkansas" by virtue of reduced bandwidth payments.²⁵¹ The Arkansas Commission reiterates that the Presiding Judge mistakenly concludes that a reduction in Entergy Arkansas's bandwidth payments would flow to Entergy Arkansas, and states instead any reductions would go to the retail ratepayers in Arkansas.

172. In response to the Initial Decision's contention that there is no absolute requirement that damage/refund payments ordered under one part of the System Agreement be reflected in other parts of the agreement, the Arkansas Commission states that all of the provisions of the System Agreement and its Service Schedules are inter-related. Therefore, the Arkansas Commission argues, all parts of Service Schedule MSS-3, including the bandwidth calculation per section 30.12, should be equally affected by the damage award. The Arkansas Commission observes that there is no rational basis not to reflect the effects of the accounting for the Opportunity Sales in the bandwidth calculations.²⁵²

173. Although the Arkansas Commission agrees with the need for an equitable resolution to the "windfall" problem described by the Presiding Judge in assessing damages/refunds and excessive bandwidth payments by Entergy Arkansas, it finds fault with the 20 percent offset because it was not vetted anywhere prior to the Initial Decision and is without any record support.²⁵³ Moreover, the Arkansas Commission argues that, if adopted, the 20 percent offset would not flow back to the ratepayers of Entergy Arkansas who would otherwise pay the cost of the windfall to the other Operating Companies through the payment and receipt of excessive bandwidth payments for 2006-2009, but

²⁵⁰ *Id.* at 13.

²⁵¹ *Id.* at 15.

²⁵² *Id.* at 16.

²⁵³ *Id.* at 25.

would inure to the benefit of Entergy's shareholders.²⁵⁴ It contends that such a result would be unduly discriminatory, inequitable, unfair, and contrary to the principles of cost causation.²⁵⁵

174. Trial Staff contends that equity demands that the damages flow through the bandwidth payments and that the parties should be put in the same position they would have been in had Entergy properly accounted for the Opportunity Sales. Trial Staff notes that the Presiding Judge is concerned that making changes to the bandwidth payments could make some of the Operating Companies worse off than if the refunds had never been ordered, and that they could owe Entergy Arkansas as a result of adjusting bandwidth payments and netting the adjustment against their Opportunity Sales refunds.²⁵⁶ Trial Staff notes that, in order to rectify this inequitable result, it recommended capping the annual bandwidth payments so that the net balance would never be less than zero.²⁵⁷ Trial Staff notes that once the financial effects of the remedy ordered in Opinion No. 521 are known for the entire period in which Entergy Arkansas made Opportunity Sales, the Commission will know what the effect will be and can, if equity requires, grant reductions in a bandwidth payment offset to damages that may be unreasonable.²⁵⁸

175. The Louisiana Commission excepts to the Initial Decision, stating that the 20 percent discount ordered in Paragraph 518 should be applied only to damages assessed in bandwidth years. The Louisiana Commission argues that, if the discount is interpreted to apply to damages from non-bandwidth years, it would result in an unjust and unreasonable damage calculation and be inconsistent with the rest of the Initial Decision.²⁵⁹

176. The Louisiana Commission asserts that it is clear from the content of Paragraph 518 and the context of the entire Initial Decision that the 20 percent discount should apply only to bandwidth years. The Louisiana Commission quotes, among other

²⁵⁴ *Id.* at 26.

²⁵⁵ *Id.* at 26-27.

²⁵⁶ Trial Staff Brief on Exceptions at 19-20 (citing Initial Decision, 144 FERC ¶ 63,021 at P 502).

²⁵⁷ *Id.* at 20.

²⁵⁸ *Id.*

²⁵⁹ Louisiana Commission Brief on Exceptions at 6.

statements, Paragraph 518's acknowledgement that "Commission precedent does not permit out-of-period adjustments *to the bandwidth payments*."²⁶⁰ The Louisiana Commission states that the Initial Decision concludes that "[it] could [not] be equitable to allow Entergy Arkansas to impose losses on other Operating Companies by virtue of its violation of the System Agreement."²⁶¹

177. The Louisiana Commission provides an analysis to demonstrate that it would be inequitable to apply the credit to damages, stating that, of the three years reviewed in the proceeding (2003, 2004, and 2006), 2006 was the only year to which the bandwidth formula applied and in which Entergy Arkansas made payments to the other Operating Companies under the bandwidth formula. The Louisiana Commission argues that, in all the years that Entergy Arkansas made Opportunity Sales (2000-2009), the bandwidth formula required Entergy Arkansas to make payments in 2006, 2007, 2009, and a partial year in 2005, and thus the damages period includes five years that were not test years.²⁶² The Louisiana Commission states that Entergy's violation imposed costs on the other Operating Companies in those years that never entered the bandwidth calculation. Further, it contends that Entergy Arkansas made proportionally more Opportunity Sales using low-cost system energy in non-bandwidth years than in bandwidth years, and application of the credit to damages from non-bandwidth years would be inequitable. The Louisiana Commission states that total damages in the test years was \$75,486,729, but only \$9,349,262 (or 12.4 percent of total damages) were damages that relate to costs entered in the bandwidth calculation.²⁶³ The Louisiana Commission argues that applying a 20 percent credit to all damages, when the bandwidth effects related to only 12.4 percent of the costs would not serve the purpose intended in the Initial Decision.²⁶⁴

²⁶⁰ *Id.* at 7 (emphasis in original).

²⁶¹ *Id.*

²⁶² *Id.* at 9. The bandwidth calculation involves determination of payments between the Operating Companies based upon calculations of production costs in the preceding calendar, or "test," year. *See* Opinion No. 518, 139 FERC ¶ 61,105 at P 26; System Agreement, Service Schedule MSS-3, § 30.12, note 1.

²⁶³ Louisiana Commission Brief on Exceptions at 10.

²⁶⁴ *Id.*

3. Briefs Opposing Exceptions

178. Entergy argues that the Louisiana Commission's request for modification of the 20 percent discount fails to explain how it could be equitable to address an "inequitable windfall" by accounting for only 20 percent of that windfall.²⁶⁵ Entergy claims that the Louisiana Commission also fails to explain why it was equitable for it to propose a refund methodology that would ignore the bandwidth effects of the refund, when it previously advocated accounting for the effects in determining any refunds. Entergy states that the Louisiana Commission's evolving positions are self-serving and proof that the Louisiana Commission has no intent to put the Operating Companies in the same position they would have been had Entergy originally accounted for the Opportunity Sales as required by Opinion No. 521.²⁶⁶

179. Entergy disagrees with the Louisiana Commission's argument that a 20 percent credit should only be applied to bandwidth years. Entergy states that the Commission, in fashioning its bandwidth remedy, analyzed the production cost disparities among the Operating Companies, which analysis included years in which the Opportunity Sales were made. Entergy contends that, although the bandwidth remedy began in June 2005, the remedy was predicated on historical disparities that resulted, in part, from the actual accounting of Opportunity Sales in 2000-2002. Entergy claims that the Opportunity Sales were included in Entergy Arkansas's production costs and did "enter[] the bandwidth Calculation" since they affected the disparity that the Commission sought to remedy by requiring Operating Companies to fall within a specified bandwidth.²⁶⁷

180. Entergy also takes issue with Trial Staff's exceptions, noting that the relief sought by Trial Staff would require modifications to the System Agreement. Entergy reiterates its position that modifications to the tariff at issue cannot be retroactively applied without violating the filed rate doctrine and the rule against retroactive ratemaking. Entergy argues that certain of Trial Staff's proposed changes would require amendments to Service Schedule MSS-3 and sections 30.11-30.13.²⁶⁸ Further, Entergy claims that, if Trial Staff's proposals are accepted, additional amendments would be required. For example, Trial Staff proposes a cap on the recalculated annual bandwidth payments so that the net balance would not be less than zero. Entergy states that the current System Agreement contains no such provision, and Trial Staff does not explain how this

²⁶⁵ Entergy Brief Opposing Exceptions at 5.

²⁶⁶ *Id.* at 7-8.

²⁶⁷ *Id.* at 12.

²⁶⁸ *Id.* at 15 (citing Entergy Brief on Exceptions at 20-24).

comports with Opinion No. 521's intent to put the parties in the same position they would have been in had Entergy properly accounted for the Opportunity Sales. Entergy also notes that this change would presumably only apply retroactively and would not apply prospectively.²⁶⁹

181. Entergy also states that amendment to the System Agreement would be required with respect to: (1) the definition of Variable Demand Ratio in the bandwidth formula tariff; (2) Trial Staff's proposal to assign a system incremental cost to Entergy Arkansas's Opportunity Sales and use that value in calculating Entergy Arkansas's "variable production costs in the Bandwidth Formula"; (3) section 2.16(a) amendment to remove a reference to Service Schedule MSS-6, and new sections 2.16(c) and 2.17(c) created to calculate the new and unique Responsibility Ratio applicable to Service Schedule MSS-6; and (4) the adoption of any offset to damages.²⁷⁰

182. Entergy notes that, under its damage calculation, minimal changes to the System Agreement would be required. Entergy states that, while the re-pricing contemplated by Entergy's damage calculation would require the pricing of Opportunity Sales to be set forth in the System Agreement, that could be accomplished by including the formula set forth in Paragraph 136 of Opinion No. 521. Entergy presents two alternatives to accomplish the task of coordinating the damage award with the bandwidth effects. First, the effects of the decision of this proceeding would be netted against the damages awarded. Second, the awarded damages would be paid and the Commission would instruct Entergy to reflect the effects of this decision in the final Bandwidth Compliance filing applicable to 2005-2009. Entergy posits that, if the Commission adopts tariff modifications and applies them retroactively to the Entergy Arkansas Opportunity Sales, the modifications would also have to apply to opportunity sales made by any other Operating Company during the same period, including the sales made by Entergy New Orleans in 2005-2006 following Hurricane Katrina.²⁷¹

183. Finally, Entergy argues that it is not necessary for it to re-file the FERC Form No.1 reports of the Operating Companies, since all amounts awarded would be recorded in either Account 555, Purchased Power (if paid to another), or Account 447 Sales for Resale (if received from another).²⁷²

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 16.

²⁷¹ *Id.* at 17 (citing Ex. LC-1 at 54-55 (Baron Direct – Phase I)).

²⁷² *Id.* at 18.

184. The Arkansas Commission states that the Initial Decision determined erroneously that no adjustments to settlements under the System Agreement Service Schedules and other provisions were to be made and that the dollar amount of damages excludes from the calculation the bandwidth payments by Entergy Arkansas. The Arkansas Commission agrees with Entergy and Trial Staff that a failure to account for the bandwidth payments would provide an “inequitable windfall” to the other Operating Companies.²⁷³ The Arkansas Commission objects to the Initial Decision’s 20 percent credit solution, noting that it was not vetted in the proceedings, and that it would still leave a substantial amount of the excessive bandwidth payments by Arkansas ratepayers unresolved.

185. The Arkansas Commission opposes Entergy’s and Trial Staff’s proposals to offset or credit Entergy’s damage payment liability. The Arkansas Commission argues that it was Entergy Arkansas’s retail ratepayers in Arkansas, and not Entergy or its shareholders, who were responsible for paying Entergy Arkansas’s bandwidth payments from 2005-2009, and therefore any offsetting or netting should not inure to the benefit of the Operating Companies at the expense of Arkansas ratepayers. This would be inequitable, unduly discriminatory, and contrary to the principles of cost causation.²⁷⁴

186. The Arkansas Commission believes that Trial Staff’s proposal to cap the annual bandwidth payment/receipt refunds is ill-founded because it would inequitably deny Arkansas ratepayers the refunds of excessive bandwidth payments that they paid and leave Arkansas ratepayers of Entergy Arkansas worse off as a result of Entergy’s violation of the System Agreement. In addition, the Arkansas Commission alleges that Trial Staff’s proposal ignores evidence that the damage payments by Entergy Arkansas always will be positive *per se*. The Arkansas Commission notes that, even if the refunds were to exceed the damage receipts, then that result is due to the application and normal operation of the bandwidth formula itself.²⁷⁵

187. Trial Staff asserts that the Louisiana Commission’s exception to the application of the 20 percent offset to the entire damages award for all years is inconsistent with the Initial Decision’s finding that many of the Opportunity Sales would not have occurred had they been properly priced in the first place; therefore, the offset would be applicable

²⁷³ Arkansas Commission Brief Opposing Exceptions at 7.

²⁷⁴ *Id.* at 11-12.

²⁷⁵ *Id.* at 15.

to the entire period at issue in this proceeding, not just those in which the bandwidth mechanism was in place.²⁷⁶

188. The City of New Orleans disputes Entergy's and Trial Staff's position that a failure to flow damages through the bandwidth calculation would constitute a violation of the filed rate. The City of New Orleans states that the Commission is not required to unwind the settlements under the various Service Schedules and other provisions of the System Agreement, and instead has broad discretion to fashion remedies. The City of New Orleans argues that allowing Entergy Arkansas to reallocate the burden of the refunds to the other Operating Companies would be inequitable and defeat the purpose of ordering the refunds in the first place.²⁷⁷

189. The City of New Orleans states that Entergy's argument that it will be required to amend the System Agreement in order to re-run the ISB and implement refunds should be disregarded. The City of New Orleans quotes the Presiding Judge as stating "nowhere in Opinion No. 521 does the Commission state or imply that the remedy it ordered is intended to do anything more or less than remedy [] Entergy's violation of the System Agreement."²⁷⁸

190. The Louisiana Commission argues that it would be highly inequitable to reflect the refunds calculated in the bandwidth calculation. The Louisiana Commission argues that Opinion No. 518 precludes imputing out-of-period adjustments for refunds into bandwidth calculations. The Louisiana Commission states that in Opinion No. 518, the Commission affirmed the presiding judge's determination that the as-reported FERC Form No. 1 data constitutes the "actual" data to be used in the bandwidth calculation and that the formula precludes out-of-period adjustments.²⁷⁹ The Louisiana Commission notes that the Commission did not order retroactive adjustments to FERC Form No. 1 data and held that the bandwidth is controlled by what Entergy actual filed.

²⁷⁶ Trial Staff Brief Opposing Exceptions at 20-21.

²⁷⁷ City of New Orleans Brief Opposing Exceptions at 23 (citing *N.Y. Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,026, at P 55 (2006)).

²⁷⁸ *Id.* at 23-24 (citing Initial Decision, 144 FERC ¶ 63,021 at P 389).

²⁷⁹ Louisiana Commission Brief Opposing Exceptions at 78 (citing Opinion No. 518, 139 FERC ¶ 61,105 at P 24). The Louisiana Commission also notes that Entergy and the Arkansas Commission supported this reasoning. *Id.*

191. The Louisiana Commission claims that another inequitable consequence of retroactive adjustments to the bandwidth would be to export the negative margins associated with the tariff violation to the other Operating Companies. The Louisiana Commission notes that the imputation could place some of the other Operating Companies in a worse position than they would have been if the sales were not made. The Louisiana Commission acknowledges Trial Staff's proposal to cap the Paragraph 138 adjustments, and contends that the proposal does not address the imposition of negative margins related to a tariff violation on innocent customers.²⁸⁰

192. The Louisiana Commission asserts that the 20 percent credit to refunds for bandwidth effects is inequitable. The Louisiana Commission notes that it has argued that the credit could only have been intended to apply to years in which the bandwidth exists, but states, in addition, that even a 20 percent credit violates Opinion No. 518 because it is a proxy for an out-of-period adjustment to the bandwidth calculation.²⁸¹

4. Commission Determination

193. The bandwidth formula was established by the Commission in Opinion Nos. 480 and 480-A to ensure a rough equalization of production costs among the various Operating Companies.²⁸² Of relevance to this proceeding, when calculating the bandwidth payments, the Variable Production Expense element of section 30.12 of the bandwidth remedy provides that the determination of Variable Production Expense should reflect, *inter alia*:

[the addition of] PURP = Purchased Power Expense recorded in FERC Account 555, but excluding payments made pursuant to Section 30.09(d) of this Service Schedule²⁸³ [and]

²⁸⁰ *Id.* at 86 (citing Trial Staff Brief on Exceptions at 39).

²⁸¹ *Id.* at 87.

²⁸² *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 136, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part*, *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047, *order dismissing reh'g*, 137 FERC ¶ 61,048 (2011).

²⁸³ The language of this variable was modified over the course of the refund period in respects that are not material to the determination of matters in this proceeding.

[the subtraction of] RC = Revenue Credits resulting from revenue received from customers outside the Company's Net Area for Production Service recorded in FERC Account 447, but excluding receipts received pursuant to Section 30.09(d) of this Service Schedule.^[284]

194. The Presiding Judge notes that re-allocating energy and capacity costs as part of the ISB re-run would have the effect of changing Entergy Arkansas's production costs under section 30.12 of the bandwidth formula. The Presiding Judge finds that such a change could make some Operating Companies worse off than if refunds had never been ordered, and that such an inequitable result was not supported by Opinion No. 521. The Presiding Judge notes that Opinion No. 518 rejected out-of-period adjustments to the bandwidth formula, adds that that opinion was issued near the time of the issuance of Opinion No. 521, and concludes that the Commission likewise would reject out-of-period adjustments to the bandwidth calculations.

195. The Presiding Judge also states that the Commission's use of the term "whether" in its direction to him in Paragraph 138 to determine "whether" adjustments to Service Schedules should be made gave him authority to choose not to make any adjustments at all. He also states that the Commission found that "damages are warranted," which does not allow for him to find that no damages exist.²⁸⁵ However, the Presiding Judge acknowledges that allowing both the full damages here and the bandwidth payments to flow through would result in "an inequitable windfall" to other Operating Companies, so he requires that any damage figure be reduced by 20 percent.²⁸⁶ Both Trial Staff and the Louisiana Commission argue that the Commission should reverse the Presiding Judge's determination.

²⁸⁴ We also note that another provision of the bandwidth remedy related to energy costs, the Energy Ratio variable used to allocate system average variable production costs to Operating Companies in section 30.13, is not affected by our determinations in this proceeding because the Commission held in the first bandwidth calculation proceeding that opportunity sales such as the Opportunity Sales at issue must be excluded from this variable. *See* Opinion No. 505, 130 FERC ¶ 61,023 at P 137 n.172 (finding Entergy must remove from this variable non-requirements sales, which "include the individual Operating Company off-system opportunity sales.").

²⁸⁵ Initial Decision, 144 FERC ¶ 63,021 at P 510 (quoting Opinion No. 521, 139 FERC ¶ 61,240 at P 136).

²⁸⁶ *Id.* P 518.

196. We reverse the Presiding Judge on this issue and find that the damages figure should reflect the Opportunity Sales' effects upon bandwidth payments during the refund period, as further described below. Again, as the Presiding Judge notes, the purpose of the damages award in this proceeding is to put the parties in as close as possible to the same position they would have been absent the violation of the System Agreement.²⁸⁷ We agree with Trial Staff that had Entergy properly allocated system incremental cost to the Opportunity Sales at the time these transactions occurred, there is no question that the system incremental cost of that energy would have been used as an input in determining the bandwidth formula payment under the formula contained in sections 30.11 through 30.13 of Service Schedule MSS-3 in the System Agreement. The record shows that the treatment of the Opportunity Sales by Entergy had the result of increasing Entergy Arkansas's bandwidth payments beyond where they would have been otherwise and that failure to reflect the energy priority reordering and consequential effects would result in amounts that are in excess of what is required to make other Operating Companies whole.²⁸⁸

197. Although the Presiding Judge indicates that a reduction in damages to other Operating Companies by reflecting the impact of the energy cost reordering that we order could eliminate damages for non-Entergy Arkansas Operating Companies and lead to an "inequitable result," we do not find this rationale persuasive. If bandwidth payments were inflated as a result of the Opportunity Sales, it is more accurate to say that other Operating Companies have received a windfall of their own. In fact, the Presiding Judge admits that some consideration of bandwidth payments must be made by reducing the total damage figure by 20 percent. However, we find the 20 percent reduction figure to be arbitrary and unsupported. If it is the case that an adjustment to damages needs to be made, it is more reasonable simply to calculate the amount by which the bandwidth payments were affected and subtract that from the damage figures. If that subtraction is a large one, then the other Operating Companies were arguably already made whole from

²⁸⁷ See *id.* P 507 ("The functional purpose of Opinion No. 521 was to compensate the other Operating Companies for the damages that Entergy Arkansas's violation of the System Agreement imposed on them. Even Mr. Louiselle agrees that the remedy is supposed to place the parties in a position they would have been in but for Entergy Arkansas's violation.").

²⁸⁸ See Entergy Brief on Exceptions at 69-71, 75-76; Ex. ESI-124 at 174-176 (Acknowledgement by Louisiana Commission witness Mr. Baron that the effect of Entergy's original pricing of the Opportunity Sales was to reduce the bus bar production costs of Entergy Arkansas and increase the bandwidth payments made by Entergy Arkansas).

the violation of the System Agreement in this proceeding as a result of the bandwidth overpayments, and further damages are thus duplicative.²⁸⁹

198. However, we note that many of the years when the Opportunity Sales were made, including years in which Opportunity Sales transactions were most extensive, were prior to the imposition of the bandwidth remedy in 2005, which lessens the impact of an adjustment due to the bandwidth formula upon the damages awarded in this proceeding. We also note the numerical effect of adjusting damages to reflect the impact of refunds as bandwidth payment production costs are largely speculative, as the parties by agreement only determined the results for a single year of the refund period, 2006.

199. The Presiding Judge notes that the Commission rejected out-of-period adjustments to the bandwidth formula in Opinion No. 518.²⁹⁰ In Opinion No. 518, the Commission found that the bandwidth formula required inputs that were actually included in the FERC Form No. 1 for the prior 12 months, rather than adjusted figures.²⁹¹ The Commission explained that Service Schedule MSS-3 does not provide for the exclusion of out-of-period revenues and expenses because the actual costs properly recorded on the Operating Company's FERC Form No. 1s include out-of-period expenses and revenues.²⁹² However, Opinion No. 518 does not apply here, because the revision to the damage figure we are ordering is not an out-of-period adjustment to the bandwidth remedy amounts. Instead, our finding is that the excess bandwidth payments made as a result of the improper allocation of energy to the Opportunity Sales should be reflected in the damages to be paid in this proceeding itself, not through recalculations of any bandwidth remedy amounts for the years 2005 through 2009.

200. The Louisiana Commission argues that allowing a full reduction for bandwidth payments will result in Entergy Arkansas exporting the negative margins on many of its Opportunity Sales to the other Operating Companies. We note that the record is unclear as to what extent the Opportunity Sales will have negative margins following the reallocation, or whether it would be possible and/or advisable to remove such negative

²⁸⁹ The Louisiana Commission argues that an adjustment to damages for bandwidth overpayment would result in the exporting of Entergy Arkansas' negative margins to the other Operating Companies; to the extent this is true this does not suggest eliminating the adjustment, but rather capping it to the level of Entergy Arkansas' profits after energy reallocation. We discuss this further below.

²⁹⁰ See Opinion No. 518, 139 FERC ¶ 61,105.

²⁹¹ *Id.* P 25.

²⁹² *Id.* P 43

margins from the adjustment to damages, and thus we are unable to make a finding with respect to the Louisiana Commission's argument at this time. We accordingly remand for further hearing procedures the issue of whether a cap on reduction in damages to account for increased bandwidth payments is necessary to hold other Operating Companies harmless from exporting negative margins from the reallocated Opportunity Sales.

201. The Arkansas Commission argues that if the Commission accounts for the impact of our energy priority finding upon bandwidth payments, we should require that it be made as a reduction to bandwidth payments to be credited to ratepayers. The Arkansas Commission argues that Entergy Arkansas's retail ratepayers in Arkansas, and not Entergy or its shareholders, were responsible for paying Entergy Arkansas's bandwidth payments from 2005-2009, and therefore any offsetting or netting should not inure to the benefit of the Operating Companies at the expense of ratepayers. We agree with the Presiding Judge that the distribution of damages between ratepayers and shareholders is outside the scope of this proceeding.²⁹³ And, as we note above, our finding here does not represent a recalculation of the bandwidth payments due for any particular year.

D. Additional Matters

1. Interest

202. The Presiding Judge finds that Entergy should add interest on damages, consistent with the Commission's published interest rates calculated from the date of violation to the date of payment.²⁹⁴

203. Entergy argues that the Initial Decision incorrectly concluded that Opinion No. 521 required that interest be added to the refund amounts. Entergy states that the Commission did not explicitly require interest in Opinion No. 521, and the Louisiana Commission's request on rehearing seeks a revision of the Opinion to including a finding regarding interest.²⁹⁵ Entergy believes that this issue is properly before the Commission on rehearing of Opinion No. 521 (i.e., not to be addressed in the Initial Decision).

²⁹³ Initial Decision, 144 FERC ¶ 63,021 at P 515. This is consistent with the Commission's similar holding in Opinion No. 521. *See* Opinion No. 521, 139 FERC ¶ 61,240 at P 133 n.251 (finding the scope of the proceeding to be limited to allocation of costs among Operating Companies, not to allocations among classes of customers).

²⁹⁴ *Id.* P 517 (citing 18 C.F.R. §§ 35.19(a)(2)(iii)(A) and (B) (2012)).

²⁹⁵ Entergy Brief on Exceptions at 80.

Therefore, Entergy argues that the Initial Decision erred in recommending that the Commission require interest on refunds.²⁹⁶

204. Entergy also states that Commission precedent and the circumstances of this case militate against requiring interest on the refunds and that, as a matter of equity, the equities weigh strongly against ordering interest on refunds, which would punish Entergy Arkansas.

205. Trial Staff argues that any award of damages must include interest, noting that, in most instances, interest payments are mandatory unless there is a compelling basis to depart from them. Trial Staff asserts that it is the Commission's general policy to allow interest to be paid to ensure full recovery.²⁹⁷ Trial Staff argues that, unless the other Operating Companies are compensated with refunds that include interest, they will not be made whole.²⁹⁸

206. The Louisiana Commission argues that the Initial Decision correctly required the payment of interest on refunds and that a denial of interest would be inconsistent with the Regulatory Fairness Act, Commission policy and the equities in this case. The Louisiana Commission contends that the interest requirement in FPA section 205 cases, the Commission's general policy of granting interest on refunds in order to make injured parties whole, and testimony during the proceedings all support the inclusion of interest on the refunds.²⁹⁹ The Louisiana Commission disputes Entergy's argument that the Louisiana Commission's delay in bringing its complaint warrants denial of interest, stating that the same argument was rejected by the Commission in Opinion No. 521.

207. We agree with the Presiding Judge and find that interest should be included with damages here, in keeping with Commission policy. We discuss this issue further in the Order on Rehearing, also issued today.³⁰⁰

²⁹⁶ *Id.* at 79.

²⁹⁷ Trial Staff Brief Opposing Exceptions at 24 (citing *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999)).

²⁹⁸ *Id.* (citing Ex. S-101 at 57-58).

²⁹⁹ Louisiana Commission Brief Opposing Exceptions at 88-89.

³⁰⁰ *Louisiana Public Service Commission v. Entergy Corporation, Entergy Services, Inc., Entergy Louisiana, LLC, Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy New Orleans, Inc., Entergy Gulf States Louisiana, L.L.C., and Entergy Texas, Inc.*, 155 FERC ¶ 61,064 (2016).

2. Deposition Transcripts

208. On May 9, 2013, in an order granting in part and denying in part a motion to strike, the Presiding Judge determined that Rule 405(a)³⁰¹ permits use of “all” of a deposition properly taken against any participant present or represented at the taking of the deposition.³⁰² As a result, the Presiding Judge found that it is appropriate for the Louisiana Commission to attach the entire depositions of Messrs. John, Louiselle, and Wilhelm as exhibits.

209. Entergy argues that the Presiding Judge erred in denying Entergy’s motion to strike and admitting into evidence the entire deposition transcripts of Messrs. John, Louiselle, and Wilhelm as exhibits to the direct testimony of Louisiana Commission witness Mr. Baron. Entergy asserts that this ruling violates Rules 405 and 509,³⁰³ is contrary to prior Administrative Law Judge rulings, and threatens to severely alter and burden the practice of taking and using depositions in Commission proceedings.³⁰⁴

210. The Louisiana Commission disagrees, asserting that Rule 405 permits parties to use “any part or all” of a deposition during a hearing against a witness to contradict, impeach, or complete the testimony of the witness.³⁰⁵ Furthermore, the Louisiana Commission contends that Rule 509 provides that the only evidence that should be excluded is that which is “irrelevant, immaterial, or unduly repetitious.”

211. We agree with the Louisiana Commission and the Presiding Judge. Although Entergy cites to several cases that hold that unduly repetitious or unduly prejudicial evidence should be excluded, Entergy has failed to show that that the transcripts at issue here are irrelevant, unduly repetitious, or unduly prejudicial.³⁰⁶ Therefore, since there is no indication in the record that the deposition transcripts run afoul of Rule 509, we affirm

³⁰¹ 18 C.F.R. § 385.405(a) (2015).

³⁰² *La. Pub. Serv. Comm’n v. Entergy Corp.*, Order Granting in Part and Denying in Part Motion to Strike, Docket No. EL09-61-002, at P 17 (May 9, 2013) (unpublished order) .

³⁰³ 18 C.F.R. § 385.509 (2015).

³⁰⁴ Entergy Brief on Exceptions at 81.

³⁰⁵ Louisiana Commission Brief Opposing Exceptions at 90 (filed Oct. 17, 2013) (citing 18 C.F.R. § 385.405(a) (2014)).

³⁰⁶ Entergy Brief on Exceptions at 82, n.288-89.

the Presiding Judge's admission of the entire deposition transcripts of Messrs. John, Louiselle, and Wilhelm to be used as exhibits in this proceeding under Rule 405.

3. Further Proceedings

212. Further proceedings will be necessary to implement the adjustments to the Initial Decision's damages calculation methodology that we direct above. Such proceedings are also necessary because, based upon the request of the parties, the Initial Decision reflected an attempt to determine the appropriate damages methodology by first re-running the ISB for only three of the ten refund period years: 2003, 2004 and 2006. Thus, a further proceeding would be needed in any event to calculate and verify the full measure of damages. We therefore remand this matter for further hearing procedures and a final determination of refunds consistent with our determinations in this order.

The Commission orders:

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

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), a public hearing shall be held concerning the limited issues raised in the body of this order.

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

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.