United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 2, 2018 Decided March 6, 2018

No. 16-1382

LOUISIANA PUBLIC SERVICE COMMISSION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

ARKANSAS PUBLIC SERVICE COMMISSION AND
ENTERGY SERVICES, INC.,
INTERVENORS

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Michael R. Fontham argued the cause for petitioner. With him on the briefs were *Noel J. Darce*, *Dana M. Shelton*, and *Justin A. Swaim*. *Paul L. Zimmering* entered an appearance.

Holly E. Cafer, Senior Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were *David L. Morenoff*, General Counsel, and *Robert H. Solomon*, Solicitor.

Clifford M. Naeve argued the cause for intervenors. With him on the brief were *Gerard A. Clark*, *Matthew W.S. Estes*, *Gregory W. Camet*, *Glen Ortman*,

Dennis Lane, and *Paul Randolph Hightower*. *Jennifer S. Amerkhail* entered an appearance.

Before: GARLAND, *Chief Judge*, ROGERS, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: After finding a rate unjust and unreasonable under § 206 of the Federal Power Act, 16 U.S.C. § 824e, the Federal Energy Regulatory Commission sets a new just and reasonable rate to take effect for the future. In addition, the Commission "may order" refunds for a portion of the period in which the unreasonable rate was in effect. *Id.* § 824e(b). Here the Commission found in 2004 that certain of Entergy Corporation's rates were unjust and unreasonable. *Opinion No. 468*, 106 FERC ¶ 61,228, PP 60-77 (2004). After a good deal of vacillation, it refused to require refunds. 135 FERC ¶ 61,218, PP 20-25 (2011); 142 FERC ¶ 61,211, PP 49-77 (2013). On a challenge by the Louisiana Public Service Commission ("LPSC"), we remanded the case to the Commission, finding, as urged by LPSC, that the Commission had failed to adequately "explain its reasoning in departing from its 'general policy' of ordering refunds when consumers have paid unjust and unreasonable rates." *Louisiana Public Service Commission v. FERC*, 772 F.3d 1297, 1298 (D.C. Cir. 2014) ("*Louisiana III*"). (The numbering will soon be clear.)

On remand, the Commission clarified that it actually has no general policy of ordering refunds in cases

of rate design. 155 FERC ¶ 61,120, P 17 (2016) ("*Order on Remand*"); 156 FERC ¶ 61,221, P 20 (2016) ("*Rehearing Order*"). Now that the Commission has corrected its characterization of its own precedent, we find that the Commission's denial of refunds accords with its usual practice in cost allocation cases such as this one. We also find that the Commission adequately explained its conclusion that it would be inequitable to award refunds in this case. The Commission did not abuse its discretion; we deny the petition for review.

* * *

Much of the factual and procedural background has been recited at length in our three prior decisions. See *Louisiana Public Service Commission v. FERC*, 184 F.3d 892, 894-97 (D.C. Cir. 1999) ("*Louisiana I*"); *Louisiana Public Service Commission v. FERC*, 482 F.3d 510, 513-15 (D.C. Cir. 2007) ("*Louisiana II*"); *Louisiana III*, 772 F.3d at 1299-1302. We repeat here only what is necessary for the present decision.

More than two decades ago, LPSC filed a complaint under § 206(a), 16 U.S.C. § 824e(a), challenging Entergy's allocation of capacity costs among its various operating companies. At the time, Entergy did so on the basis of the companies' total usage at the time of peak demand, regardless of whether the load was "firm" (entitling the customer to service at any time) or "interruptible" (subject to Entergy's curtailment at any time of insufficient capacity). When Entergy had set these rates, the system was "awash in capacity" and projected firm load would have required no more

capacity. As a result, charging interruptible load for capacity costs was of comparatively little importance in terms of signaling to customers whether to use firm or interruptible service, or to Entergy whether to invest in more capacity. Over time, however, Entergy's capacity became inadequate to handle all demand; it changed its planning criteria so that, in deciding whether to add capacity, it no longer counted interruptible load. *Louisiana I*, 184 F.3d at 896.

The Commission initially rejected LPSC's complaint, 76 FERC ¶ 61,168 (1996); 80 FERC ¶ 61,282 (1997), but we reversed in *Louisiana I*. The Commission had in 1981 adopted the principle that costs should be allocated to customers according to the principle of cost causation; we rejected the Commission's explanations for failing to adhere to that principle. As we explained, interruptible customers do not cause the utility to incur capacity costs; by definition, the utility can curtail such service when load exceeds capacity. Charging them for capacity costs thus creates an uneconomic disincentive to the use of interruptible service; customers are dissuaded from using interruptible service even where the utility's costs of providing that service fall well below the potential benefit to the customer. By the same token, to the extent that such a cost allocation relieves *firm* customers of the burden of covering capacity costs that they do cause the utility to incur, it provides an inadequate disincentive to the choice of such service and signals to the utility more need for adding capacity than really exists. *Louisiana I*, 184 F.3d at 896-97; JAMES C. BONBRIGHT, PRINCIPLES

OF PUBLIC UTILITY RATES 494-96 (2d ed. 1988); 1 KAHN, ECONOMICS OF REGULATION 89-95 (2d ed. 1988).

On remand from *Louisiana I*, the Commission ultimately found Entergy's inclusion of interruptible load in the cost allocation equation to be unjust and unreasonable. It ordered the cost allocation changed for the future, but denied LPSC's request for refunds, which § 206(b), 16 U.S.C. § 824e(b), gave it authority to order for a 15-month period starting at a date set by the Commission at the outset of the proceedings. *Opinion No. 468*, 106 FERC ¶ 61,228, PP 60-77, 82-89 (2004), *rehearing denied, Opinion 468-A*, 111 FERC ¶ 61,080, PP 10-22. Because Louisiana customers relied on interruptible service in a higher proportion than other Entergy customers, they gained from the ordered future change in cost allocation, and would have gained more from any refund. In a series of orders, the Commission took a considerable variety of positions on refunds, culminating in denial in the orders reviewed in *Louisiana III* and in the present *Order on Remand* and *Rehearing Order.*

* * *

Louisiana III's conclusion determines our task here. There we were convinced by LPSC's argument that the Commission had failed to " 'reasonably explain the departure' from its 'general policy' of ordering refunds when consumers have paid unjust and unreasonable rates." *Louisiana III*, 772 F.3d at 1303. We acknowledged that the Commission was free to "depart from a prior policy or line of precedent, but it must

acknowledge that it is doing so and provide a reasoned explanation." *Id.* We find that the Commission has made its historic practice clear and justified its application of that practice here.

Above all, the Commission has clarified its previously muddled position, explaining that – despite its prior representations to the contrary – it has no generally applicable policy of granting refunds. *Order on Remand*, 155 FERC ¶ 61,120, P 17. The Commission now recognizes that its previous characterization of its refund policy does "not accurately represent that policy as both the Commission and the courts have described it in the past." *Id.* The Commission found that it had only twice – both times in the course of these proceedings – referred to a "general policy" in favor of refunds. *Id.* at P 18.

The Commission does "generally award[] refunds where there have been overcharges that result in overcollection of revenue." *Rehearing Order*, 156 FERC ¶ 61,221, P 10. But a series of Commission decisions, cited in the *Order on Remand*, 155 FERC ¶ 61,120, P 25 & n.58, makes clear that the Commission's default position is quite the opposite in the set of cases to which this belongs: ones in which it has found a rate unjust and unreasonable because of a flaw in rate design, such as cost allocation (at least so long as there is no violation of the filed rate doctrine). In such instances (putting aside some filed rate violations), the utility has received no net over-recovery. See *id.* "[I]n a case where the company collected the proper level of revenues, but it is later determined that those

revenues should have been allocated differently, the Commission traditionally has declined to order refunds." *Black Oak Energy, LLC*, 136 FERC ¶ 61,040, P 25 (2011); see also *Occidental Chem. Corp.*, 110 FERC ¶ 61,378, P 10 (2005) ("The Commission's long-standing policy is that when a Commission action under section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively."); *Consumers Energy Co.*, 89 FERC ¶ 61,138, 61,397 (1999) ("This case involves a change in rate design, that, while appropriate on a prospective basis, is inappropriate for retroactive application. The Commission's policy, albeit discretionary, is to avoid retroactive application of changes in rate design."); *S. Co. Servs., Inc.*, 64 FERC ¶ 61,033, 61,332 (1993) (explaining that where the "sole issue" is cost "apportionment among the operating companies," the Commission's typical practice is not to issue refunds).

Apart from noting that in such cases the utility has received no net over-recovery, the Commission rests this default position on its belief that two circumstances are usually present in such cases. *Order on Remand*, 155 FERC ¶ 61,120, P 28. First, it would be difficult for the utility to recover its costs fully. The sums that one set of customers lost through allocation of excessive costs will usually be matched by unduly low rates to another set, from whom it would be difficult or inequitable to extract recompense. Second, customer firms that had made operational decisions in reliance on one set of rates would be unable to "undo"

those transactions retroactively in light of the new, corrected rates; a refund would, at least in part, pull the economic rug out from under those transactions.

In the present case, LPSC's briefs do not respond to these Commission decisions. Pressed on the point at oral argument, counsel for LPSC offered two purported distinctions. First, counsel observed correctly that several of the cases were under § 205 of the Federal Power Act, 16 U.S.C. § 824d. But since § 205 also provides that the Commission "may" require a refund where it finds a rate to have been unjust and unreasonable, *id.* § 824d(e), it is unclear why the Commission should disregard its § 205 cases in the § 206 context.

Second, counsel noted that many of the cases invoked by the Commission did not involve a holding company, such as Entergy. Counsel failed to explain, however, why that should affect the Commission's general principle as to refunds in rate design cases.

After oral argument, LPSC directed us to its attempt to distinguish these cases in the run-up to *Louisiana III*. See Petitioner's Br. at 52-54, *Louisiana III*, 772 F.3d 1297 (2014) (No. 13-1155). But even if these arguments had been renewed before us, we would find them unavailing. In its previous briefing, LPSC emphasized that the cited cases involved situations in which utilities would likely suffer a loss of revenue and an under-recovery of costs. That of course is quite true, as our summary of the cases and the Commission's reasoning make clear. LPSC then argued that the cases did not support the Commission's denial of

refunds here. *Id.* That was true in the 2014 case, but is no longer true, because the Commission has – reasonably – changed its position on the feasibility of recoupment by Entergy.

In the decision under review in 2014, the Commission had – without explanation – disclaimed any reliance on a risk of under-recovery. See 142 FERC ¶ 61,211, P 63; see also *Louisiana III*, 772 F.3d at 1304. We noted that many of the cases in which the Commission had refused to order refunds involved at least "the possibility of under-recovery," *Louisiana III*, 772 F.3d at 1304, but, because of the Commission's disclaimer, we found those cases inapposite.

The Commission has now reversed its prior disclaimer and affirmatively explained why there is at least a risk of under-recovery. See *Order on Remand*, 155 FERC ¶ 61,120, PP 31-32.[1] Specifically, the Commission explained that Entergy sought to recover from retail customers surcharges to pay for certain other refunds previously ordered in this proceeding, *id.* at P 32; see 120 FERC ¶ 61,241, P 9, but the Arkansas Commission rebuffed Entergy, asserting that the surcharges would violate the filed rate doctrine and constitute retroactive ratemaking, *Order on Remand*, 155 FERC ¶ 61,120, P 32. As the Commission concedes,

[1] The Commission's conclusion that there is a risk of under-recovery rests in part on its interpretation of *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009). Finding that the Commission would have reached the same conclusion about under-recovery even absent reliance on *City of Anaheim*, we do not address the validity of the Commission's interpretation of that case.

the ultimate outcome of the Arkansas Commission proceedings is uncertain (if Entergy prevails, the Arkansas Commission's order will be reversed), but the Commission identifies definite evidence of at least a non-trivial risk of under-recovery – one factor that counsels against the issuance of refunds.

Second, the Commission offered a convincing answer to our query about the absence of evidence of "particular decisions" made in reliance on the old rate structure. First, since the object of sound cost allocation is to influence customer behavior by making those who "cause" the incurrence of costs to bear those costs and adjust their consumption accordingly (so that costs will be incurred only up to the point that is justified by customer benefit, evidenced by the customer's willingness to pay), we may fairly infer that their purchase decisions reflected that principle. While we were concerned in 2014 that "some amount of reliance is likely to be present every time the Commission considers ordering refunds," *Louisiana III*, 772 F.3d at 1305-06, it becomes apparent from the cases cited at footnote 58 of the *Order on Remand* that that is exactly the Commission's point: its general tendency to deny refunds in cost allocation cases stems from the high correlation between such reliance and that type of case. See, e.g., *Black Oak Energy, LLC*, 136 FERC ¶ 61,040, PP 25-28 (2011); *Occidental Chem. Corp.*, 110 FERC ¶ 61,378, PP 10-12 (2005). (Of course in cases where there has been over-recovery, the customers will also have rested their decisions on the prices previously applied, but the only customers affected will be ones

getting refunds from the utility, and they will obviously not complain despite their inability to alter prior decisions.) Second, LPSC itself, in objecting to Entergy's prior cost allocation system, invoked the desirability of correcting customers' incentives for the purpose of changing their behavior. *Rehearing Order*, 156 FERC ¶ 61,221, P 62; see also *Order on Remand*, 155 FERC ¶ 61,120, PP 34-35. That these past economic decisions cannot be revisited also justifies denying refunds here.

Finally, under the facts of this case, the Commission noted an additional equity militating against refunds: the disjunction between the beneficiaries of the old regime and those who would have to pay surcharges to ensure that each operating company fully recouped costs retroactively allocated to it. *Order on Remand*, 155 FERC ¶ 61,120, P 31. In part this referred to whatever customers might be said to have replaced the earlier era's wholesale customers, which then accounted for about 15% of Entergy Arkansas's load but have now almost entirely ceased to buy from Entergy Arkansas. *Id.* Further, given the passage of time, surcharges would fall on current Entergy Arkansas customers for benefits enjoyed by "past customers, or a prior generation of customers." *Rehearing Order*, 156 FERC ¶ 61,221, P 67; see also *Order on Remand*, 155 FERC ¶ 61,120, P 36.

LPSC argues that the Commission was largely responsible for the lag between LPSC's original complaint and the Commission's most recent orders, and that the turnover in customers can therefore be at least in part laid at the Commission's door. Maybe so.

But that would make it no more equitable to now force consumers who neither were at fault nor received any benefit to "pay back" consumers who were disadvantaged by the prior rate regime.

We note that the parties engaged in considerable argument as to the possible effect of § 206(c), 16 U.S.C. § 824e(c). It provides that in a proceeding "involving two or more electric utility companies of a registered holding company," refunds may *not* be awarded if they will be paid for "through an increase in the costs to be paid by other electric utility companies of such registered holding company," unless the Commission can determine that "the registered holding company would not experience any reduction in revenues which results from an inability" of such electric utility companies of the same holding company "to recover such increase in costs." 16 U.S.C. § 824e(c)(2). To the extent applicable, of course, the section would require the Commission to deny refunds if it could not conclude that the holding company will not suffer any reduction in revenues. But that is just what the Commission has independently chosen to do under § 206(b): it denied refunds in part because it could not conclude Entergy would be able to offset any refunds. Because we find that choice reasonable, we need not address the parties' debate over § 206(c)'s applicability.

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The petition for review is

Denied.

156 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation — Docket Nos. EL00-66-020

Louisiana Public Service Commission v. Entergy Services, Inc. — EL95-33-014

ORDER DENYING REHEARING

(Issued September 26, 2016)

1. The Louisiana Public Service Commission seeks rehearing of the Commission's April 29, 2016 order[1] issued in response to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remand in *La. Pub. Serv. Comm'n v. FERC*.[2] At issue was the Commission's reasoning in denying refunds in an order issued on March 21, 2013,[3] and the Order on Remand provides reasoning that responds to the points that the D.C. Circuit raised. In this order, we deny rehearing.

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[1] *La. Pub. Serv. Comm'n v. Entergy Corp.,* 155 FERC ¶ 61,120 (2016) (Order on Remand).

[2] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014) (Remand Order).

[3] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,211 (2013) (March 2013 Order).

I. **Background**

2. This proceeding has a lengthy and complex history which is summarized in the Order on Remand.[4] We note here only that in its Remand Order, the D.C. Circuit found that the Commission did not reasonably explain in the March 2013 Order its departure from the Commission's general policy of ordering refunds when consumers have paid unjust and unreasonable rates.[5] The court also found that the equitable factors the Commission relied on in previous cases to deny refunds were largely absent in this case.[6] Finally, the court criticized the Commission's conclusion that Entergy's inability to review and revisit past decisions made in reliance on pricing in effect at the time constituted an equitable ground disfavoring refunds.[7]

3. In the Order on Remand, the Commission explained how, historically, references to a Commission "general policy" of awarding refunds for unjust and reasonable rates pertained to a policy that typically applied in a specific set of circumstances, i.e., where a public utility had collected revenues in excess of what it was entitled to under its tariff. The Commission went on to explain that it had a separate policy of denying refunds where overcollection of revenues had not occurred and other equitable considerations were

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[4] Order on Remand, 155 FERC ¶ 61,120 at PP 2-16.

[5] Remand Order, 772 F.3d at 1303.

[6] *Id.* at 1303, 1305.

[7] *Id.* at 1305.

present.[8] In short, the Commission explained that it had never adopted a single, general policy that applied to all cases where rates had been found to be unjust and unreasonable.

4. In the Order on Remand, the Commission went on to explain how certain equitable considerations justified applying in this proceeding the Commission's policy of denying refunds in cases where overcollection of revenues has not occurred.[9] The Commission found there was a significant possibility that Entergy "could not recover the portion of necessary surcharges that would be attributed to wholesale customers during the refund period."[10] The Commission found that litigation before the Arkansas Commission regarding Entergy's ability collect surcharges constituted a second potential risk of under-recovery.[11] The Commission also determined that refunds pursuant to section 206(c) of the FPA were inappropriate. Under that section, the Commission may only order refunds if it determines that the affected registered holding company (here, Entergy Corporation) would "not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs."[12] Moreover, the Commission found

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[8] Order on Remand, 155 FERC ¶ 61,120 at PP 18-28.

[9] *Id.* PP 30-36.

[10] *Id*. P 31.

[11] *Id*. P 32.

[12] 16 U.S.C. § 824e(c) (2012).

that decisions made by the Entergy Operating Companies based on the prior rate could not be undone.

II. **Discussion**

A. **Procedural Issues**

5. On March 16, 2016, Entergy Services, Inc. submitted a motion to establish a briefing schedule on remand in this proceeding and an initial brief on remand. The Commission took no action on this motion. On rehearing, the Louisiana Commission maintains that the Commission improperly relied on Entergy's brief in the Order on Remand. We reject this contention. The Order on Remand is based on the record as developed up to the time of the Remand Order.

6. We also reject the Louisiana Commission's allegation that Entergy's brief constituted an *ex parte* communication.[13] An *ex parte* communication is an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.[14] No such communication occurred here. Entergy's brief was a public filing, and it was served on each person on the service list for this proceeding, which includes the Louisiana Commission. We also reject the Louisiana Commission's contention that the Commission committed procedural error by failing to provide all parties the opportunity to present

[13] Rehearing Request at 4-9.

[14] 5 U.S.C. § 551(14) (2012).

arguments on pending issues.[15] In response to Entergy's filing, the Louisiana Commission submitted a motion strenuously objecting to any further briefing in this proceeding.[16] As the Louisiana Commission itself explained in response to Entergy's proposed schedule for briefing on remand, Entergy's brief primarily recycled old arguments that had been previously rejected. To the extent a new argument had been raised, the Louisiana Commission disputed it as "specious."[17]

The Louisiana Commission also stated that the refund issue had been briefed 14 times in this case, and further briefing would only provide a forum for additional frivolous or recycled arguments.[18] We therefore reject the suggestion that the parties did not have a full opportunity to present their views to the Commission.

7. The Louisiana Commission describes its objections as raising a matter of procedural error, and it states that the Commission should give full consideration to its arguments on rehearing. We reject these objections, and the full consideration we give to the Louisiana Commission's arguments in the following is the same consideration that we give to all rehearing requests.

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[15] Rehearing Request at 9.

[16] Louisiana Public Service Commission, March 26, 2016 Opposition of the Louisiana Public Service Commission to Motion on Behalf of Entergy Services, Inc. for, Incredibly, *Still Another Round of Briefing* (emphasis in original) (Opposition Motion).

[17] *Id.* at 3.

[18] *Id.* at 1-2.

B. The Louisiana Commission's Challenges To The Order On Remand

8. In remanding this proceeding to the Commission, the court did not fundamentally challenge the legitimacy of the Commission's policy of not ordering refunds in rate design and cost allocation cases. Instead, the court questioned whether the Commission had established that the factors for applying this policy existed in this proceeding, i.e., factors such as: potential under-recovery by the utility; consumers' and utilities' inability to revisit past decisions; a "detrimental effect upon an organized market"; different generations of consumers paying the surcharges and receiving the past benefits; and the "complication and cost of rerunning markets."[19]

9. The Louisiana Commission addresses the factors identified by the Commission as supporting the no-refund policy in this proceeding, but the bulk of its arguments on rehearing take issue with the legal basis for the Commission's policy. We turn first to those arguments.

1. Challenges to the Commission's Description of its Refund Policy

10. In the Order on Remand, the Commission provided a summary of the two main strands of its refund policy under the FPA. The Commission explained that it generally does not impose refunds in cost allocation

[19] Remand Order, 772. F.3d at 1304.

and rate design cases where the public utility has not overcollected recovered revenues, but it generally awards refunds where there have been overcharges that result in overcollection of revenue.[20] The Commission also explained how references to a "general policy" of paying refunds have been confined to the class of cases in which the utility is found to have overcollected its revenue requirement.[21]

11. The Louisiana Commission describes the Commission's explanation of its refund policy in the Order on Remand as "revisionist," and it disputes the assertion that the presence or absence of overcharges that result in overcollection of utility revenue is a longstanding element of Commission policy.[22] This is incorrect. The Order on Remand creates no new Commission policy on refunds. Indeed, on two previous occasions in this proceeding, the Commission has described its refund policy in terms that are identical in all material respects to the description provided in the Order on Remand.

12. Thus in an order issued in this proceeding on June 9, 2011, the Commission stated

> On the question of refunds, the Commission has two lines of precedent, each dealing with a different situation. When a case involves a company over collecting revenues to which it was not entitled, the Commission generally

[20] Order on Remand, 155 FERC ¶ 61,120 at PP 17-28.

[21] *Id.* PP 18-28.

[22] Rehearing Request at 14.

> holds that the excess revenues should be refunded to customers. By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.[23]

13. The Commission expanded on this observation in great detail in an order denying rehearing in this proceeding issued on March 21, 2013.[24] That expanded discussion is entirely consistent with the discussion of Commission policy in the Order on Remand.[25]

In addition, the Commission stated in the March 2013 Order that the same description of Commission policy had been provided in its recent *Black Oak* order.[26]

14. The Order on Remand goes beyond these earlier discussions only in explaining the origin of references to a Commission "general policy" on refunds and how these references can be traced to *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*,[27] one of the

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[23] *La. Pub. Serv. Comm'n v. Entergy Corp.,* 135 FERC ¶ 61,218 (2011) (internal citations omitted).

[24] March 2013 Order, 142 FERC ¶ 61,211 at PP 54-60.

[25] *See, e.g., id.* P 54 (stating that "[o]ne distinction that the Commission has drawn . . . is between rate design and cost allocation cases, on the one hand, for which refunds are generally not ordered, and cases involving over-recovery, for which refunds are generally ordered").

[26] *Id.* (citing *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040, at P 25 (*Black Oak*), *reh'g denied*, 139 FERC ¶ 61,111 (2012)).

[27] 955 F.2d 67, 75 (D.C. Cir. 1992) (*Towns of Concord*).

seminal cases on the Commission's refund authority. The Commission explained that the court in *Towns of Concord* used the term to refer to a policy of awarding refunds in cases where a utility had overcollected revenues, i.e., the court used it to refer to one of the Commission's two lines of precedent. The Commission also explained how the term "general policy" had subsequently been limited to overcollection cases.[28] This discussion simply serves to clarify the apparent discrepancy between the assertion that the Commission has two lines of precedent on refunds and references to a Commission "general policy" on refunds. Taken out of the context in which it was used in *Towns of Concord*, the term "general policy" could be read to refer to a policy that applies in all cases. This clarification in the Order on Remand does not result in any revision to established Commission refund policy, and it therefore cannot be described as "revisionist."

15. We thus reject the Louisiana Commission's assertion that the Order on Remand presents "a drastic revision of policy that eliminates undue discrimination as a Commission concern."[29] The Louisiana Commission argues that "if refunds cannot be granted for unduly discriminatory cost allocations, the Commission will have eliminated any mechanism to enforce the statutory requirements."[30] The mechanism for enforcing the statutory requirement that rates not be unduly

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[28] Order on Remand, 155 FERC ¶ 61,120 at PP 21-24.

[29] Rehearing Request at 34.

[30] *Id.* at 33-34.

discriminatory is Commission action requiring that the rates be revised to eliminate such discrimination. The Louisiana Commission confuses the Commission's statutory obligation to ensure that rates are not unduly discriminatory with its discretionary authority to require refunds where circumstances warrant them. A finding that a rate is unduly discriminatory does not, by itself, mandate that refunds should be awarded. The Commission's policy of not awarding refunds in cost allocation cases that meet certain criteria does not inherently conflict with or undermine the Commission's obligation to correct unduly discriminatory rates on a prospective basis.

16. The Louisiana Commission argues that Commission policy on refunds in cost allocation and rate design cases is inconsistent with the purpose of the FPA, which is "'the protection of consumers from excessive rates or charges.'"[31] This is a correct description of the purpose of the statute, but the Commission policy in question is not inconsistent with it.

17. The Louisiana Commission points out that when interpreting the parallel purpose of the Natural Gas Act (NGA), the Supreme Court stated that this statute was intended "'to protect consumers against exploitation at the hands of natural gas companies. . . .'"[32] The essential question is thus what is meant by the

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[31] Rehearing Request at 15 (quoting *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971)).

[32] *Id.* at 16 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944)).

protection of consumers from "exploitation." The answer is the protection of consumers from the exercise of monopoly power. The Supreme Court has stated that "public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation."[33] To exploit through the exercise of monopoly power means to charge excessive rates that the absence of competition permits. Indeed, the "very reason for the regulation of private utility rates – by state bodies and by the Commission – is the inevitability of a monopoly that requires price control to take the place of price competition."[34]

18. This fact illuminates the Commission's distinction in its refund policy between instances of utility overcollection of revenues, on the one hand, and cost allocation and rate design cases where no overcollection has occurred, on the other. Collection of revenues above what the Commission has determined to be just and reasonable is tantamount to collection of revenues that could be received through the exercise of monopoly power in the absence of regulation. As explained in the Order on Remand, this is precisely the type of situation in which the Commission has exercised its equitable discretion to award refunds.[35]

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[33] *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-96 (1976).

[34] *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 389 (1973) (Stewart, J., dissenting).

[35] Order on Remand, 155 FERC ¶ 61,120 at P 27.

19. On the other hand, in cases where a cost allocation or rate design has been found to be unjust and unreasonable, but the utility has not collected more revenue than allowed under its tariff, one cannot say that exploitation in this sense has occurred. An unjust and unreasonable cost allocation or rate design is, of course, a problem that the statute requires be corrected, but if it has not resulted in what can be classified as unjust enrichment;[36] it does not, for purposes of refund policy, fall in the same category as the exploitation to which the Louisiana Commission refers. We thus disagree with the Louisiana Commission when it states that "[i]f refunds cannot be made for unduly discriminatory rates[ ] because a holding company or utility did not have an 'overcollection of revenue,' the purpose of the [FPA] is disserved."[37]

2. Analysis of Legal Precedent

20. The Louisiana Commission cites numerous cases that it contends conflict with the description of Commission refund policy in the Order on Remand, and we address these cases in the following discussion. The cases are instructive, as they serve to highlight the nature and scope of the policy in question. As previously indicated in this proceeding, the Commission's policy on refunds in cost allocation cases does not apply where there has been a tariff violation or in situations where past charges are corrected after review to

[36] *Towns of Concord*, 955 F.2d at 75.

[37] Rehearing Request at 16.

ensure proper implementation of the tariff.[38] Such cases do not involve a finding that the cost allocation or rate design itself is not just and reasonable. Many of the cases that the Louisiana Commission cites fall into one of these categories. Other cases that the Louisiana Commission cites involve other factors that distinguish them from cases that apply here.

21. One such case is *FPC v. Tennessee Gas Transmission Co.*,[39] which the Louisiana Commission cites as contradicting the Order on Remand.[40] But *Tennessee Gas* concerns refunds under the Natural Gas Act, not the FPA. The Commission's approach to refunds under the two statutes differs.

22. The Supreme Court held in *Tennessee Gas* that in a rate filing under section 4 of the NGA, a pipeline is at risk of having to pay refunds in a rate design or cost allocation case. The Court stated:

> . . . an analysis of the policy of the [NGA] clearly indicates that a natural gas company initiating an increase in rates under [section] 4(d) assumes the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being 'just and reasonable.' In addition, the company can never recoup the income lost when the five-month suspension power of the Commission is exercised under [section] 4(e). The company is also required to

[38] March 2013 Order, 142 FERC ¶ 61,211 at PP 69, 73.

[39] 371 U.S. 145 (1962) (*Tennessee Gas*).

[40] Rehearing Request at 17.

> refund any sums thereafter collected should it not sustain its burden of proving the reasonableness of an increased rate, and it may suffer further loss when the Commission upon a finding of excessiveness makes adjustments in the rate detail of the company's filing.[41]

23. Applied to a cost allocation case, this holding provides for refunds where some customers have been overcharged, but it treats recoupment of those refunded overcharges through surcharges to other customers as impermissible retroactive rate increases. In short, the holding authorizes refunds notwithstanding an inability to recoup the refunds and the resulting under-recovery.

24. Since *Tennessee Gas,* the Commission has taken different approaches to granting refunds under NGA section 4 and the corresponding FPA provision, section 205, in cases involving proposed changes in rate design and cost allocation. Under the NGA, the Commission generally has taken the position that, if a pipeline files a rate case involving rate design or cost allocation, and chooses to implement the proposed rate design or cost allocation, the pipeline will be at risk for refunds if the Commission ultimately determines that the proposed approach is unjust and unreasonable. As a result of this policy, pipelines usually propose rate design and cost allocation changes in *pro forma* tariff records, separate from the actual records reflecting any proposed increase in their cost of service. This allows the

[41] *Tennessee Gas*, 371 U.S. at 152.

pipeline to begin collecting the proposed cost of service increase as soon as the suspension period ends, while waiting to implement rate design and cost allocation changes until after the Commission ultimately rules, so the pipeline is not at risk of undercollection.[42]

25. In contrast, under the FPA, the Commission has declined to order refunds in cases involving proposed changes in rate design and cost allocation, ruling that a change in rate design is, for example, appropriate only on a prospective basis. The Commission has explained:

> Our general policy has been to deny refunds when ordering a change in rate design because retroactive implementation may result in undercollections by the company and may be unfair to the customers who cannot alter their past demands in light of the new rate design.[43]

26. In addition, the approach that pipelines use in NGA section 4 cases of making *pro forma* tariff filings is unavailable in FPA section 206 proceedings, such as this case. In section 206 proceedings, the utility has no choice as to whether to subject itself to the potential for refunds. Where the utility's pre-existing rate is the

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[42] *See Arkla Energy Resources*, 48 FERC ¶ 61,305, at 61,980 (1989) (finding that "any rate changes required by applying the Commission's rate design policy statement will be implemented prospectively"); *National Fuel Gas Supply Corp.*, 140 FERC ¶ 61,114 (2012).

[43] *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983).

target of a complaint, the utility cannot choose to make the challenged rate design or cost allocation effective prospectively from the date of the Commission order, which would obviate the potential for undercollection. Rather, the utility must continue to charge the filed rate until a new and superseding rate is adopted. Thus the question traditionally posed in FPA section 206 cases is whether, if the Commission determines that refunds are appropriate in proceedings involving rate design or cost allocation, the utility is at risk for those refunds, as in *Tennessee Gas*, or if it can surcharge other customers to avoid undercollection. The fact that *Tennessee Gas* permits undercollection as a legal matter does not alter the balancing of equitable considerations that is central to the Commission determination in electric proceedings not to order refunds in rate design and cost allocation cases. The Court affirmed this policy in *Cities of Batavia v. FERC*, finding reasonable the Commission's consideration of the "practical consequences" of ordering refunds in rate design and cost allocation proceedings.[44]

27. In any event, the *Tennessee Gas* approach is not applicable to complaints against holding companies, such as Entergy. *Tennessee Gas* finds that pipelines (utilities) can be required to pay refunds in cost allocation or rate design cases and that any undercollection of costs will be borne by the company and its shareholders. But Congress directed in FPA section 206(c) that the Commission cannot order refunds unless it

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[44] 672 F.2d 64, 85 (D.C. Cir. 1982) (*Cities of Batavia*).

can find the holding company“[will] not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs.”

28. The Louisiana Commission criticizes the use of *City of Anaheim v. FERC*[45] in the Order on Remand. The Commission stated there that “the court found in *Anaheim* that ‘§ 206(b) authorizes only retroactive refunds (rate decreases), not retroactive rate increases’ such as those that Entergy would have to assess on any wholesale customers subject to surcharges needed to cover the refunds.”[46] The Louisiana Commission states that the Commission failed to reconcile this statement with the Commission’s earlier finding that *Anaheim* did not prevent the awarding of refunds in this case. There is no conflict to reconcile. *Anaheim* does not prevent the Commission from ordering refunds. Rather, the Order on Remand explained that *Anaheim* identified a prohibition on retroactive rate increases under section 206(b).[47] The Commission’s established policy

[45] 558 F.3d 521, 524 (D.C. Cir. 2009) (*Anaheim*).

[46] Order on Remand, 155 FERC ¶ 61,120 at P 31 (quoting *Anaheim*, 558 F. 3d at 524).

[47] *See Order on Remand,* 155 FERC ¶ 61,120 at P 33. We thus disagree with the Louisiana Commission when it says “if cost reallocations, with refunds and surcharges, could not be awarded under Section 206(b) in holding company cases, there would have been no need to provide in Section 206(c) for situations in which the holding company undercollects.” Rehearing Request at 46. Section 206(b) authorizes, but does not require, refunds even if they lead to undercollection. Section 206(c) creates an exception by prohibiting refunds that lead to undercollection in the case of registered holding companies. *But see* PP 33, 71.

of not awarding refunds in rate design and cost allocation cases is predicated, in part, on the potential for under-recovery if rates cannot be retroactively increased for those customers who paid too little under the unjust and unreasonable rate design. Section 206(c) of the FPA evidences a similar concern and conditions the Commission's refund authority upon a finding that refunds would not cause the registered holding company to experience any reduction in revenus resulting from an inability of an electric utility in the system to recovery the resulting increase in costs.

29. The Louisiana Commission argues that *Nantahala Power and Light Co.*[48] represents a cost allocation case in which the Commission required refunds. This is incorrect. *Nantahala* is not a traditional cost allocation case involving the allocation of costs among different classes of utility system customers.[49] Instead it involved an apportionment of power between two subsidiaries of the Aluminum Company of America (Alcoa), and the ultimate finding was that Alcoa had used its power over both subsidiaries to benefit its interests as an industrial manufacturing company.

30. One of these subsidiaries, Tapoco, Inc. (Tapoco), was engaged in providing power to Alcoa for private use in its smelting operations. The other subsidiary, Nantahala Power and Light Company (Nantahala), supplied power for public service. The Commission

[48] 19 FERC ¶ 61,152 (1982) (*Nantahala*).

[49] *See*, e.g., *Louisiana Power & Light Co.*, 14 FERC ¶ 61,075, at 61,126 (1981).

found that the Tapoco and Nantahala systems could not be treated as a single system,[50] and the only jurisdictional rates at issue were Nantahala's rates for certain wholesale customers. The matter in dispute was not cost allocation under these rates, but rather the effects of an agreement between Tapoco and Nantahala (Apportionment Agreement) that apportioned between them entitlements to power received from the Tennessee Valley Authority (TVA).

31. The Apportionment Agreement had not been filed with the Commission, and it was treated as a contract affecting jurisdictional rates.[51] It had been modified in 1971 to reduce Nantahala's entitlement to TVA power, and the Commission determined that the 1971 agreement did not fairly represent the interests of Nantahala's customers because there was not sufficient evidence to show that Nantahala had received any consideration for entering into a less favorable agreement. The Louisiana Commission states that Nantahala's "customers were overcharged because Nantahala was allocated too much expensive power,"[52] but this was not the case. Instead, the modification of the Apportionment Agreement in 1971 required Nantahala to make "unnecessary energy purchases . . . from TVA,"[53] of power not included in the original entitlement and thus not subject to the Apportionment

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[50] *Id.* at 61,276.

[51] *Id.* at 61,279

[52] Rehearing Request at 20.

[53] Nantahala Commission order at 61,280.

Agreement. This was not a situation involving an improper allocation of costs among different classes of utility customers. It was a situation in which Nantahala's owner, Alcoa, unfairly imposed additional costs on Nantahala's jurisdictional wholesale customers by diverting for its own private use power to which Nantahala had previously been entitled. Thus, this case is similar to those in which the utility overcollected its just and reasonable revenue requirement to the benefit of the corporation as a whole.

32. Indeed, the court of appeals characterized the case in precisely these terms. It saw the case as involving a conflict between shareholders and utility customers, which is precisely the type of conflict involved in an overcollection case, i.e., a conflict involving shareholders' ability to profit from the exercise of monopoly power. The court stated that

> [u]nder the Nantahala framework, the utility's shareholder (Alcoa) can unfairly benefit vis-a-vis its customers not just directly through excessive rates, but also indirectly, by shifting resources from Nantahala to Alcoa, through Nantahala's sister corporation, Tapoco. The Commission's role is the same under these circumstances: to ensure that the customers are treated fairly.[54]

33. The Louisiana Commission points to a number of cases involving holding companies in which the

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[54] *Nantahala Power and Light Co. v. FERC*, 727 F.2d 1342, 1348 (4th Cir. 1984).

Commission "has rejected the contention that 'no over-collections' is a basis to deny refunds."[55] We first note that the absence of overcollection is not, in and of itself, the basis for the Commission policy of denying refunds in cost allocation and rate design cases where overcollection has not occurred. Rather, the absence of overcollection leads to equitable considerations that do not arise where overcollection is present, i.e., the inability to revisit past decisions and potential undercollection, and the Commission has held that these considerations generally preclude refunds. The holding company cases that the Louisiana Commission cites are not relevant here because either they in fact involve overcollections of revenue requirements, tariff violations,[56] or

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[55] Rehearing Request at 27.

[56] In cases of tariff violations, the Commission can require the payment of both refunds and surcharges to ensure that all customers pay the rate on file. *See DC Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 (2012) (the Commission can require retroactive billing to correct a filed rate violation). *See generally, Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (holding under Interstate Commerce Act, the filed rate doctrine permits recovery from customers paying less than the filed rate); *IDACORP Energy L.P. v. FERC*, 433 F.3d 879, 883 (D.C. Cir. 2006) (stating that "[t]he ban on retroactive ratemaking, however, imposes no obstacle to amending invoices; in fact, the prohibition on retroactive ratemaking may well require an amended invoice if the original invoice deviated from the tariff"); *Exelon Corp. v. PPL Elec. Utils. Corp.*, 114 FERC ¶ 61,298, at P 14 (2006) (stating that "[c]orrecting improperly billed invoices does not violate the ban on retroactive ratemaking . . . because it does not result in a change to a prior rate, but rather is enforcing the filed rate").

other considerations that place them outside the Commission policy that is applicable in this case.

34. The Louisiana Commission argues that *Blue Ridge Power Agency v. Appalachian Power Co.*[57] is a cost allocation case where the Commission awarded refunds in the absence of overcollection. However, *Blue Ridge* did not involve a question of whether refunds should be awarded after a cost allocation had been found to be unjust and unreasonable. *Blue Ridge* instead dealt with whether a cost allocation that had not been found to be unjust and unreasonable had been implemented correctly. The Commission found that it had not. Specifically, the Commission found that one subsidiary of American Electric Power Service Corporation (AEP) had failed to credit to its ratepayers, as it was required to do, its entire share of the gain on a sale/leaseback transaction undertaken by other AEP subsidiaries. Indeed, when the AEP subsidiary required to pay refunds argued that refunds could result in trapped costs, i.e., under-recovery, in violation of FPA section 206(c), the Commission replied that

> [a]ny "trapped costs'" which may be created have not been created by the Commission. Rather, they are created by a failure to abide by the relevant filed rate as well as Commission precedent. Consequently, they are not "trapped costs" for which refunds are barred by [FPA section 206(c)].[58]

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[57] 58 FERC ¶ 61,193 (1992) (*Blue Ridge*).

[58] *Blue Ridge*, 58 FERC ¶ 61,193 at 61,603.

35. The refund policy described in the Order on Remand does not apply where ratepayers have been adversely affected by a tariff violation.[59] No such violation has been alleged in this case, and therefore *Blue Ridge* is not on point.[60]

36. The Louisiana Commission also contends that the Order on Remand is inconsistent with cases involving Entergy filings or related complaints concerning the bandwidth remedy ordered in Opinion No. 480,[61] where the Louisiana Commission states the Commission granted refunds for unjust and unreasonable rates even though the holding company did not overcollect revenues. However, some of the Commission orders that the Louisiana Commission cites pertain to Entergy's annual filings to implement the bandwidth

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[59] *See supra* note 63.

[60] A similar conclusion applies to *Middle South Services, Inc.*, 16 FERC ¶ 61,101 (1981), which the Louisiana Commission cites in this connection. The Louisiana Commission also cites *Middle South Energy, Inc.*, 31 FERC ¶ 61,305 (1985*), aff'd and vacated in part on another issue*, *Mississippi Indus. v. FERC*, 808 F.2d 1525 (1987) but fails to explain how it relates to the Commission's refund policy. Apart from a mention in an ordering clause, the case contains no discussion of refunds.

[61] In Opinion Nos. 480 and 480-A, the Commission established a bandwidth remedy to ensure rough production cost equalization among the Entergy Operating Companies under the System Agreement. *See La. Pub. Servs. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *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, sub nom. Louisiana Public Service Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047 (2011).

formula and calculate annual bandwidth remedy payments and receipts.[62] These implementation proceedings, which the Commission required to achieve rough equalization of production costs between the Entergy Operating Companies, involve implementation of the filed formula rate. Refunds in such cases are consistent with the Commission's policy of generally ordering refunds and surcharges where a utility violates the filed rate.[63] They can be viewed as a true-up process that ensures that the filed rate is complied with. With one exception,[64] the other bandwidth cases that the Louisiana Commission cites as contradicting the conclusions in the Order on Remand fall into this category.[65] They thus can be distinguished from the present proceeding,

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[62] *Entergy Servs., Inc.*, 139 FERC ¶ 61,104 (2012); *Entergy Servs., Inc.*, 142 FERC ¶ 61,011 (2013).

[63] *See Gas Transmission Northwest Corp. v. FERC*, 504 F. 3d 1318, 1320 (D.C. Cir. 2007) (stating that the Commission's acceptance of unchallenged tariff provisions does not convert such provisions into "policy" or "precedent"); *Entergy Services, Inc.*, 130 FERC ¶ 61,170, at P 20 (2010) (stating that "the purpose of the annual bandwidth filings is to apply the specified formula using actual data to determine whether or not there was rough production cost equalization").

[64] This exception is cited *infra* note 73 below and is not on point for other reasons.

[65] These cases, cited in the Rehearing Request at 28-29 are: *Entergy Servs., Inc.*, 139 FERC ¶ 61,104 (involving a compliance filing to implement an opinion addressing the first year implementation filing for the bandwidth formula); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,253 (2010) (finding that an asset had been improperly excluded from the bandwidth calculation); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010 (2008) (finding that the bandwidth formula erroneously included certain capital lease amounts in production costs).

where the filed rate was complied with, but it was subsequently found to be unjust and unreasonable.

37. The Louisiana Commission cites to a number of uncontested settlements involving Entergy that provided for refunds, and the Louisiana Commission asserts that these settlements contradict the Commission policy described in the Order on Remand.[66] However, Commission approval of uncontested settlements does not constitute binding Commission precedent,[67] and orders approving uncontested settlements where the parties have agreed to refunds for their own reasons do not reflect Commission policy on refunds.

38. The Louisiana Commission also points to *Southern Company Services, Inc.*,[68] which involved a section 206 investigation into the return on equity payable from some companies to others under the Southern Company Intercompany Interchange Contract. The Louisiana Commission states that the return on equity

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[66] Rehearing Request at 29-30 (citing *Entergy Mississippi, Inc.*, 149 FERC ¶ 61,170 (2014); *Entergy Servs., Inc.*, 127 FERC ¶ 63,027, *approved*, 128 FERC ¶ 61,181 (2009)).

[67] *Florida Power Corp.*, 70 FERC ¶ 61,321, at 61,980 (1995). *See* also *Westar Energy, Inc.*, 125 FERC ¶ 61,252, at P 3 (2008) (stating that "Commission approval of the settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings."); *Oklahoma Gas and Electric Co.*, 127 FERC ¶ 61,296, at P 3 (2009) (same*); Southern Company Services, Inc.*, 61 FERC ¶ 61,339, at 62,335 n.59 (1992), *reh'g denied*, 63 FERC ¶ 61,217 (1993); *Old Dominion Elec. Coop. v. Va. Elec. and Power Co.*, 139 FERC ¶ 61,137, at P 12 (2012).

[68] 61 FERC ¶ 61,075 (1992) (*Southern*), *reh'g denied in part and granted in part*, 64 FERC ¶ 61,033 (1993).

ultimately was modified from 14 percent to 13.25 percent, requiring payments by some companies to other companies. The Louisiana Commission states that the Commission required refunds even though Southern Company as a whole did not overcollect revenues.[69] However, the relevant portions of *Southern* involve a settlement in which the parties stipulated to the modification of the return on equity from 14 percent to 13.25 percent.[70] As a result, the refunds were part of a voluntary settlement and, as with the other settlement cases that the Louisiana Commission cites, they have no precedential effect.

39. The Louisiana Commission cites *Corporation Comm'n of the State of Oklahoma v. American Elec. Power Co.*[71] as a case involving a holding company in which the Commission ordered refunds where the "rates did not produce an 'overcollection.'"[72] This case involved a tariff violation that misallocated costs under the AEP System Agreement, and this "violation . . . provided AEP shareholders with a net gain."[73] This unauthorized benefit for shareholders is precisely the type of overcollection of revenues that justifies refunds

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[69] The Louisiana Commission also cites to an initial decision in Docket No. EL 10-49-005 as supporting its arguments. Rehearing Request at 33 (citing *Old Dominion Elec. Coop. v. Va. Elec. and Power Co.*, 154 FERC ¶ 63,014, at P 68 (2016)). However, initial decisions by Commission administrative law judges do not constitute binding Commission precedent.

[70] *Southern*, 61 FERC ¶ 61,075 n.6.

[71] 125 FERC ¶ 61,237 (2008) (*Oklahoma*).

[72] Rehearing Request at 30.

[73] *Oklahoma*, 125 FERC ¶ 61,237 at P 33.

under Commission policy. The Louisiana Commission argues that the Commission action in *Oklahoma* should apply here because the net gain to AEP shareholders was a result of rate freezes in certain retail jurisdictions, and Entergy faced annual rate cases in Louisiana in the 1990s, while retail rate cases were rare in the other Entergy jurisdictions.[74] However, neither a violation of the Entergy System Agreement nor a net gain to Entergy shareholders has been alleged, let alone found, in this case. As result, the grounds for awarding refunds in *Oklahoma* are not present here.

40. The Louisiana Commission incorrectly describes *Central Power and Light Co.*[75] as a case where the Commission awarded refunds in the absence of overcollection.[76] *Central Pow. & Light* deals with Central and South West Corporation's (CSW) open access transmission tariff. The CSW system was made up of four separate utility operating companies, two of which operated within the Electric Reliability Council of Texas (ERCOT), which is not subject to Commission jurisdiction, and two of which operated in the Southwest Power Pool (SPP), which is subject to our jurisdiction. All of the companies were, nevertheless, interconnected to form a single integrated utility system, and the Commission had determined that while CSW could have separate rates for wholly intra-ERCOT service and wholly intra-SPP service, it also

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[74] Rehearing Request at 30.

[75] 97 FERC ¶ 61,157 (2001) (*Central Pow. & Light*).

[76] Rehearing Request at 32.

required that there be a single system-wide rate for transmission through both ERCOT and SPP.[77]

41. The Commission found in *Central Pow. & Light* that the CSW operating companies did not propose in their compliance filing a single-system rate in place of, or in addition to, separate intra-ERCOT and intra-SPP rates, as had been required. Instead, "they kept the intra-ERCOT rate and removed the intra-SPP rate in favor of a rate [i.e., the single-system rate] that *inflates* transmission rates for SPP-only customers, and that over-charges SPP-only customers."[78] The Louisiana Commission argues that the CSW "tariff had the effect of overcharging SPP-only customers, although it produced the proper level of revenues on a total System basis,"[79] but the Commission made no such finding. *Central Pow. & Light* involves inflated charges for SPP-only customers that resulted from a failure to satisfy compliance requirements.[80] The fact that a rate was inflated for these customers in this situation does not imply that there was a corresponding deflation elsewhere. These facts distinguish *Central Pow. & Light* from this proceeding, where no violations of Commission requirements by Entergy have been alleged.

42. The Louisiana Commission is also incorrect in its assertion that the award of refunds in *Public Serv.*

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[77] *Central Pow. & Light*, 97 FERC ¶ 61,157 at 61,696.

[78] *Id.* at 61,698 (emphasis supplied).

[79] Rehearing Request at 32.

[80] *Central Pow. & Light*, 97 FERC ¶ 61,157 at 61,698.

Comm'n of Wisconsin v. Midcontinent Indep. Sys. Operator, Inc.[81] supports a similar award here. An order on rehearing and clarification has recently been issued in that proceeding,[82] and we distinguish our decision here from our reasoning in that proceeding based on this recent order. In *Wisconsin*, the Commission found that the two primary grounds for the Commission's general denial of refunds in cost allocation cases were not present. First, the Commission found that, unlike in the instant case, the parties had not identified any particular decisions made in reliance on the challenged cost allocation methodology.[83] Second, the Commission found that, unlike in the instant case, there was no potential under-recovery of revenues, nor was there any concern that refunds would be charged to persons without any connection to these proceedings, because surcharges would be assessed on the persons who had paid too little under the previous cost allocation methodology to fund refunds to those persons who paid too much.[84] The Commission also found that the costs in the *Wisconsin* proceeding were out-of-market; thus, subsequent changes to the allocation of such costs would not undermine confidence in the settlements produced by any markets.[85] In addition, *Wisconsin* did not present notice issues of the type we describe

[81] 150 FERC ¶ 61,104 (2015) (*Wisconsin*).

[82] *Public Serv. Comm'n of Wisconsin v. Midcontinent Ind. Sys. Op., Inc.*, 156 FERC ¶ 61,205 (2016) (*Wisconsin*).

[83] *Id.* P 45.

[84] *Id.* PP 47, 51.

[85] *Id.* P 54.

below.[86] Finally, *Wisconsin* concerned mandatory, short-term agreements, and the Commission found that, if relief were granted only on a prospective basis, the customers that had been allocated unjust and unreasonable costs under those agreements would likely receive no compensation.[87] Under those factual circumstances, when considered as a whole, the Commission in *Wisconsin* found that the equitable considerations warranted refunds.[88]

43. The Louisiana Commission maintains that seven cases under FPA section 205 cited in the Order on Remand do not support the refund policy described there. It states that six of the seven cases do not provide support because "there was no *prior notice* that the rates might be changed so as to justify applying the rate change retroactively."[89]

44. However, in all six of these cases, the Commission applied the same policy it is applying here and denied refunds because the cases involved cost allocation and rate design. The Commission did not deny refunds based on a lack of notice. In fact, under FPA section

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[86] *Id.* P 51; *see infra* P 58.

[87] *Wisconsin*, 156 FERC ¶ 61,205 at P 53.

[88] *Id.* PP 51, 56.

[89] Rehearing Request at 35. These cases are *Consumers Energy Co.*, 89 FERC ¶ 61,138 (1999) (*Consumers*); *Union Elec. Co.*, 58 FERC ¶ 61,247 (1992) (*Union Elec.*); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323 (1983) (*Commonwealth 2*); *Second Taxing Dist. of Norwalk v. FERC*, 683 F.2d 477 (D.C. Cir. 1982) (*Second Taxing Dist.*); *Cities of Batavia*, 672 F2d 64; *Commonwealth Edison Co.*, 8 FERC ¶ 61,277 (1979) (*Commonwealth 1*).

205(d) proper notice of the filing was made and the Commission accepted and suspended the rates in question subject to refund.[90] The Commission did not impose refunds because to do so would have resulted in the utility being unable to collect its just and reasonable revenue requirement. As the Commission has explained, the refund provisions of FPA sections 205 and 206 do not permit the utility retroactively to surcharge those customers paying rates lower than the just and reasonable rate ultimately determined. The Louisiana Commission is thus incorrect in arguing that an absence of notice justified a denial of refunds in these six cases.

45. The Louisiana Commission contends that in the seventh case[91] the Commission "simply allowed [the rate] to take effect pursuant to the statutory requirement,"[92] implying the case does not support the Commission' s policy of not ordering refunds in rate design and cost allocation cases. In this case, an intervenor requested waiver of the prior notice requirement, contending that earlier implementation of the cost allocation filing would reduce its rates. The Commission

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[90] *See Consumers Energy Co.*, 85 FERC ¶ 61,100, at 61,359 (1998) (relating to *Consumers*); *Union Elec.*, 58 FERC ¶ 61,247 at 61,817-8; *Commonwealth Edison Co.*, 23 FERC ¶ 61,219, at 61,464 (1983) (relating to *Commonwealth 2*); *Connecticut Light and Power Co.*, 13 FERC ¶ 61,155, at 61,330-31 (1980) (relating to *Second Taxing Dist.*); *Cities of Batavia*, 672 F.2d at 68; *Commonwealth 1*, 8 FERC ¶ 61,277 at 61,837.

[91] *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193 (2004) (*Portland*).

[92] Rehearing Request at 35.

properly denied the request, because only the utility itself can request such a waiver under section 205(d). In the order, however, the Commission noted that, in any event, under its policy, any changed rates in cost allocation proceedings would be prospective only.[93] This statement of Commission policy is consistent with the description of Commission policy set forth in the Order on Remand.

46. The Louisiana Commission appears to conclude that the Commission cited these cases to argue that the absence of overcollection by itself was a justification for denying refunds.[94] In fact, the Commission cited them to support its long-standing policy of denying refunds in cost allocation and rate design cases where overcollection had not occurred. The Commission went on to explain why this was the case, i.e., refunds could lead to under-recovery by the utility in such cases or it was too late for the utility or customers to alter decisions they had made under the prior cost allocation.[95] All of the cases in question deny refunds for such reasons, not because of the mere absence of overcollection.[96]

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[93] *Portland*, 106 FERC ¶ 61,193 at PP 4-5.

[94] *See* Rehearing Request at 34-35.

[95] Order on Remand, 155 FERC ¶ 61,120 at P 28.

[96] *Consumers Energy Company*, 85 FERC ¶ 61,100 at 61,359 and *Consumers Power Co.*, 89 FERC ¶ 61,138, at 61,397 (denying refunds on the grounds that customers cannot revisit past decisions); *Union Elec.*, 58 FERC ¶ 61,247 at 61,818 (stating that refunds would lead to under-collection by the utility and customers could not revisit their past economic decisions); *Commonwealth*

47. The Louisiana Commission acknowledges in its rehearing request that the Commission has denied refunds for the reasons described here,[97] but it maintains that the Commission has done this only in rate design, and not in cost allocation, cases.[98] This is incorrect. In fact, one of the cases that the Louisiana Commission cites as expressing the policy in question specifically notes that the policy applies in both cost-allocation and rate design cases.[99]

48. The Louisiana Commission bases its argument that the policy does not apply in cost allocation cases on *Entergy Services, Inc. v. FERC*. This case involved the allocation of the output of qualifying facilities (QFs) that provided power to a host industrial facility. In instances where a QF scheduled a wholesale sale,

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2, 25 FERC ¶ 61,323 at 61,732 (denying refunds on the grounds that they could lead to undercollection by the utility, customers cannot alter past demand in light of new rate, and the existing rate was long-standing); *Second Taxing Dist.*, 683 F.2d at 490 (stating that refunds were denied because they could lead to undercolletion by the utility and retroactive changes in rates cannot affect customer demand); *Cities of Batavia*, 672 F.2d at 85 (refunds denied because of potential undercollection and customer usage can be affected only prospectively); *Commonwealth 1*, 8 FERC ¶ 61,277 at 61,844 (refunds denied because of potential undercollection and customer usage can be affected only prospectively); *Portland*, 106 FERC ¶ 61,193 at P 5 (citing *Consumers*, 89 FERC ¶ 61,138 at 61,397 and *Commonwealth 2*, 25 FERC ¶ 61,323 at 61,732).

[97] *See* Rehearing Request at 36 (citing *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,378 (2005) (*Occidental*); *Black Oak*, 136 FERC ¶ 61,040).

[98] Rehearing Request at 36.

[99] *Black Oak*, 136 FERC ¶ 61,040 at P 10.

i.e., a sale other than to the industrial facility, Entergy would deem the QF's output to go first to the scheduled transaction, with the remainder deemed to serve the host load. To the extent there was insufficient QF power to serve the host in these situations, Entergy would supply the host at much higher retail rates. The Commission found this to be unduly discriminatory, imposed a "host loads first" allocation methodology for QF power, and ordered refunds.[100]

49. On rehearing, Entergy argued that the host loads first allocation methodology constituted a change in rate design, and the Commission had failed to explain its departure from its policy of not awarding refunds in such cases. The Commission responded that there had been no change in rate design; Entergy had simply "billed the wrong customers at the wrong rates."[101] "In other words," the court explained "there were no rate design changes in this case."[102] In short, this case involved a tariff violation – billing the wrong customers at the wrong rates – and as such it does not speak to the Commission's refund policy in cost allocation and rate design cases that applies when a tariff violation has not occurred.

[100] *Entergy Servs., Inc. v. FERC*, 400 F.3d 5, 7 (D.C. Cir. 2005).

[101] *Id.* at 8 (quoting *Entergy Servs., Inc.*, 104 FERC ¶ 61,061, at 61,212 (2003)).

[102] *Id.*

3. Legislative History

50. The Louisiana Commission argues that the refund policy described in the Order on Remand conflicts with testimony by Commission Chairman Martha O. Hesse and one of her advisors before Congress in 1988 concerning the Regulatory Fairness Act (RFA), which revised FPA section 206 to include its current refund provisions. We disagree.

51. The only statement in this testimony cited by the Louisiana Commission that is relevant here comes from Chairman Hesse. When asked about the applicability of FPA section 206 to interconnection, power-pooling, intra-system, coordination, or joint ownership agreements, a class of agreements that would include the Entergy System Agreement, she stated:

> If a complaint is filed which alleges that *excessive revenues are being collected* pursuant to a coordination transaction or power pooling arrangement, the same arguments that would support the imposition of section 206 refund protection to traditional wholesale electric power relationships also appears to support the imposition of section 206 refund protection for non-traditional, interchange transactions. Moreover, when a coordination or power pooling arrangement is originally filed under section 205, refund protection attaches. If the intent of the proposed legislation is to parallel the refund protection accorded under section 205, then refund protection should also attach to section 206 complaints involving interchange transactions. Under section 205 or

> [the proposed legislation], the Commission would retain ultimate discretion as to whether refunds would be in the public interest.[103]

52. Situations in which "excessive revenues are being collected" are precisely the situations in which it is Commission policy to award refunds. Chairman Hesse's remarks do not support the Louisiana Commission's position. In fact, one could read them to imply that the Commission could have a different policy where excessive revenues have not been collected.[104]

53. Indeed, Congress recognized that cost allocation presents special problems that may require different approaches to refunds. The Senate Report on the RFA stated:

> The Committee is aware that there may be challenges to power pooling and system integration agreements brought under section 206 of the Federal Power Act in which refunds might not be appropriate, for example, where the issue relates to cost allocation among

[103] S. Rep. No. 100-491, at 154 (1988) (emphasis added).

[104] The Louisiana Commission also quotes remarks by Chairman Hesse's assistant, Cynthia A. Marlette, stating that "[u]nder section 205 the commission normally orders refunds where rates are found to be unjust and unreasonable," and the Louisiana Commission interprets this statement as inconsistent with the refund policy described in the Order on Remand. Rehearing Request at 24 (quoting S. Rep. No. 100-491 at 17). However, this statement was made after section 205 cases such as *Commonwealth 2*; *Second Taxing Dist.*; *Cities of Batavia*; and *Commonwealth 1*, where refunds were not awarded. The precise meaning that this statement has for this proceeding is thus unclear.

> utilities, and the bill as reported by the Committee is intended to provide the Commission with the discretion needed to deal with individual instances in which refunds would not be in the public interest.[105]

54. This proceeding involves cost allocation among utilities, and the Commission's decision regarding that cost allocation is consistent with the expectations expressed in the legislative history. Indeed, the Senate Committee stated that with respect to power pooling, it expected, among other things, "the Commission to consider whether, and the extent to which, a refund would adversely affect decisions made on the basis of energy pricing provisions of such pooling agreements."[106] This is precisely the type of consideration the Commission has incorporated into its refund policy.

55. Finally, the Louisiana Commission states that the legislative history shows that Congress took the position that the absence of overcollection by a holding company would not be an equitable consideration justifying the denial of refunds.[107] However, as noted above, the Commission did not say in the Order on Remand that the absence of overcollection was a justification for denying refunds. It stated that "in cases where a cost allocation or rate design has been found unjust and unreasonable, but where no over-collection

[105] S. Rep. No. 100-491 at 6.

[106] *Id.*

[107] Rehearing Request at 27 (citing S. Rep. No. 100-491 at 7).

of revenue has occurred, *other factors* come into play."[108] The Commission explained those other factors in the Order on Remand,[109] and, as discussed above, those factors are consistent with Congressional expectations.

4. **Notice Issues**

56. The Louisiana Commission argues that the Commission's reliance in the Order on Remand on possible undercollection of revenues and the inability of Entergy to revisit past decisions as equitable reasons for denying refunds is arbitrary because it fails to recognize the notice provided in the complaint. The Louisiana Commission states that "[n]otice eliminates concerns that refunds would violate the rule against retroactive ratemaking and that the utility or customers may have relied on the prior rate."[110]

57. We disagree that notice resulting from the filing of the complaint warrants providing refunds here. As the Commission found in the Order on Remand, the facts of this case show that there is some likelihood that Energy Arkansas would not be able to recover any refunds paid to Entergy Louisiana. This finding is sufficient for the Commission to deny refunds under section 206(c), since the Commission cannot determine that Entergy, the registered holding company, "[will]

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[108] Order on Remand, 155 FERC ¶ 61,120 at P 27 (emphasis supplied).

[109] *Id.*

[110] Rehearing Request at 38.

not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs."[111]

58. Moreover, whatever notice is provided to wholesale customers from the filing of the complaint, would not necessarily provide notice to retail customers sufficient to permit Entergy Arkansas to recover through surcharges the refunds it would pay to Entergy Louisiana. The Commission made clear in the Order on Remand that reliance by these ratepayers was an important concern.[112] None of the cases the Louisiana Commission cites on the issue of notice find that the notice provided by filing of a complaint is sufficient for the Commission to retroactively raise the rates of customers under FPA section 206(b). For instance, the Louisiana Commission cites *Oxy USA, Inc. v. FERC*,[113] for the proposition that " '[t]he goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed.' "[114] However, the Louisiana Commission omits reference to the immediately preceding statement by the court finding that "[t]he rule against retroactive ratemaking, however, 'does not extend to cases in which [customers] are on *adequate* notice that resolution of some *specific*

[111] 16 U.S.C. § 824e(c).

[112] Order on Remand, 155 FERC ¶ 61,120 at P 36.

[113] 64 F.3d 679 (D.C. Cir. 1995) (*Oxy USA*).

[114] Rehearing Request at 38 (quoting *Oxy USA*, 64 F.3d at 699)

issue may cause a later adjustment to the rate being collected at the time of service.' "[115] We have inadequate basis on this record to conclude that the complaint in this case gave the retail customers who would be assessed surcharges adequate notice that the resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.

59. The Louisiana Commission cites *Transcontinental Gas Pipe Line Corp. v. FERC* for the proposition that "after notice, '[t]he expectations of those who act in anticipation of the right rate are protected, and they would seem presumptively the most deserving,' "[116] but *Transcontinental* was a case in which the court found the Commission had committed legal error. In such a circumstance, the courts have permitted the Commission to require both refunds and surcharges to correct that legal error.[117] The Louisiana Commission cites *Westar Energy, Inc. v. FERC*[118] as supporting its position on notice, but that case involved a section 205 rate filing, which the Commission rejected and required the

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[115] *Oxy USA Inc.*, 64 F.3d at 699 (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) (*Natural Gas Clearinghouse*)) (emphasis supplied).

[116] Rehearing Request at 38-39 (quoting *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 899 899 (D.C. Cir. 1995) (*Transcontinental*)).

[117] *See, e.g., Pub. Utils. Comm'n of Cal.v. FERC,* 988 F.2d 154, 162 (D.C.Cir.1993) (*CAPUC*) (stating "[t]his court has previously recognized FERC's authority to order retroactive rate adjustments when its earlier order disallowing a rate is reversed on appeal").

[118] 568 F.3d 985 (D.C. Cir. 2009).

payment of refunds as permitted under section 205. However, that case does not establish that the Commission has authority to authorize retroactive rate increases under either section 205 or 206(b). In *NSTAR Elec. & Gas Corp. v. FERC*,[119] which the Louisiana Commission cites, the court found that a market rule gave actual market participants adequate notice that a rate was subject to change,[120] but that case again is not applicable to the issue of authorizing retroactive rate increases under section 206(b). None of these cases present facts regarding notice and customer expectations that resemble the facts of this case.

5. <u>Revisiting Past Decisions</u>

60. The Commission has noted in this proceeding that consumers and utilities are unable to revisit decisions based on cost allocations or rate designs in effect in the past,[121] and the Commission has held that this inability to revisit past decisions is an equitable reason for denying refunds.[122] The court noted this fact in its Remand Order, but it also stated that, nonetheless, "[t]he Commission did not identify any particular decisions made by Entergy in reliance on the inclusion of interruptible load in its cost allocation that in some

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[119] 481 F.3d 794 (D.C. Cir. 2007).

[120] *Id.* at 801.

[121] Order on Remand, 155 FERC ¶ 61,120 at P 28; March 2013 Order, 142 FERC ¶ 61,211 at P 63, n.142.

[122] *Id.*

way particularly weakened the case for refunds."[123] The Commission explained in the Order on Remand that the Entergy Operating Companies acted in accordance with standard economic principles and avoided transactions that would raise their costs. Specifically, their decisions were designed to avoid the additional costs that the inclusion of interruptible load in the cost allocation created for companies that made interruptible sales.[124] This is a necessary conclusion because the central premise of the argument that the cost allocation was unjust and unreasonable was that it discouraged sales of interruptible service.

61. The Louisiana Commission maintains that the Commission's conclusion regarding Entergy's inability to revisit past decisions constitutes a "generic possibility," and that the D.C. Circuit has taken issue with such reasoning.[125] However, in criticizing the Commission for reliance on generic possibilities, the court's central point was that "'past decisions' in the abstract cannot be the *only* factor against refunds," as "some amount of reliance [on a rate] is likely to be present every time the Commission considers ordering refunds."[126] To be clear, we do not make past decisions the only factor counseling against refunds. As discussed in this order, we also rely on other factors in finding that

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[123] Remand Order, 772 F.3d at 1306.

[124] Order on Remand, 155 FERC ¶ 61,120 at PP 34-35.

[125] Rehearing Request at 41 (quoting Remand Order, 772 F.3d at 1306).

[126] Remand Order, 772 F.3d at 1305-1306 (emphasis in original).

the equities of this case do not support refunds, including a possibility of underrecovery.

62. There is nothing generic about the Commission's finding that Entergy operating companies made decisions to avoid the additional costs that the inclusion of interruptible load in the cost allocation created for companies that made interruptible sales. The Louisiana Commission contends that there is no evidence that the Entergy operating companies acted based on the incentive described and that it "never attempted to prove that Entergy ever acted, or did not act, based on the disincentive."[127] However, the Commission may reasonably assume that parties do act on the basis of economic incentives.[128] In fact, the Louisiana Commission argued, and the Commission found, that the Entergy cost allocation was unjust and unreasonable precisely because the operating companies would act on the basis of economic incentives and including curtailable load as part of the cost allocation sent improper incentives. The conclusion that the rate was unjust and unreasonable necessarily relies on generally accepted principles regarding economic decision making, i.e., principles rooted in assumptions about how persons and companies can be expected to act when presented with certain facts. Such reasoning is

[127] Rehearing Request at 42.

[128] *Associated Gas Distributors v. FERC*, 824 F. 2d 981, 1009 (D.C. Cir. 1987) (agencies need not prove the "prediction that an unsupported stone will fall").

no less appropriate for explaining decisions by Entergy operating companies that cannot be revisited.

63. The Louisiana Commission states that "[t]he Commission finds that Entergy blithely imposed an uneconomic, artificial disincentive upon itself so that it would not enter sales that would avoid the need to build generation that would have lowered rates."[129] There is no basis for such a conclusion. At the time the initial complaint was filed in this proceeding on March 15, 1995, the System Agreement had included interruptible loads in the calculation of peak load responsibility for 44 years.[130] The complaint alleged that changed circumstances had caused this aspect of the System Agreement to become unjust and unreasonable, and the Commission initially dismissed the complaint on the grounds that this had not been shown.[131] The subsequent complex proceedings in this matter constitute, in part, a process for determining what the implications of the provision complained of were. There is nothing in the record to support the Louisiana Commission's claim that this Commission has found that that Entergy blithely imposed an uneconomic, artificial disincentive upon itself. That an action was done in response to economic incentives that are subsequently shown to be less than optimal does not imply that the action was done in bad faith. Indeed, it was not uncommon in the electric power industry to require

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[129] Rehearing Request at 41.

[130] *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinioin No. 468, 106 FERC ¶ 61,228, at P 6 (2004).

[131] *Id.*

transmission payment for interruptible load on the assumption that the system should be designed to support both firm and interruptible load.[132] The treatment of interruptible load in the calculation of peak load, therefore, was a matter on which reasonable persons could disagree.[133] These facts apply equally to the Louisiana Commission's argument that "Entergy at all times had the power to change its own uneconomic tariff to remove any disincentive to acting in the public interest" through a FPA section 205 filing.[134] This argument assumes what had yet to be proven, i.e., that the provision was not in the public interest.

6. Under-Recovery of Revenues and Source of Refunds

64. The Louisiana Commission states that the Commission erred in the Order on Remand in finding that potential litigation at the state level could prevent surcharges and lead to under-recovery in this case. The Louisiana Commission argues that the finding is in error because in making it the Commission failed to explain its departure from its prior finding that the Supremacy Clause of the U.S. Constitution would require pass-through of Commission-ordered refunds to

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[132] *Occidental*, 110 FERC ¶ 61,378 (finding PJM's add-back of interruptible load to determine charges based on coincident peak was unjust and unreasonable).

[133] Opinion No. 468, 106 FERC ¶ 61,228 at PP 60-77.

[134] Rehearing Request at 41.

retail rates.[135] However, the Commission has not departed from that finding. The issue here is whether the Commission should apply its general policy of not ordering refunds in cost allocation and rate design cases. As discussed earlier, this policy is based on the Commission's inability to order surcharges under FPA section 206(b) to ensure that the utility does not underrecover its revenue requirement. We continue to find that, as a result, the Entergy system would not be made whole if the Commission were to require refunds.

65. Moreover, as the Commission discussed in the Order on Remand, there is some question as to whether Entergy would be able retroactively to recover the cost of any refunds from departing load. Commission precedent on under-recovery refers to a possibility, not a certainty, of under-recovery as a basis for denying refunds.[136]

66. The Louisiana Commission argues that the Commission was incorrect in finding that the source of refunds in this case is unclear given the disappearance of wholesale load that would have been a source of surcharges. The Louisiana Commission states the source of refunds is clear, i.e., it is current customers. It states that this is standard ratemaking practice and that it has been applied in the Entergy bandwidth cases, as

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[135] *Id.* at 45-46 (citing *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,133, at PP 22, 24 (2011)).

[136] *Occidental*, 110 FERC ¶ 61,378 at P 10 (stating that "retroactive implementation of such a rate design might result in an under-recovery of legitimate costs"); *Black Oak*, 136 FERC ¶ 61,040 at P 26 (same).

well as refunds and surcharges that Entergy imposes itself for error corrections.[137]

67. Generally, when the Commission is authorized to require surcharges, for example when the Commission is found to have committed legal error or the utility violates the rate on file, the utility seeks those funds from the customers who paid too little under the prior rate design or cost allocation.[138] While the examples used by the Louisiana Commission may be used in some cases with respect to retail load, that fact does not indicate that retail load in Arkansas needs to subsidize refunds being paid to Louisiana retail load. Indeed, the Commission has previously found that a requirement that current load would have to pay for charges incurred by past customers, or a prior generation of customers, is an equitable consideration that supports denial of refunds in such cases.[139]

C. Request to Consider New Argument

68. On rehearing, the Louisiana Commission argues for the first time that the Commission should order four years of refunds on the grounds that the Commission erred in dismissing its complaint in 1996.[140] The

[137] Rehearing Request at 47-48.

[138] *Panhandle Eastern Pipe Line Co. v. FERC*, 95 F.3d 62, 73-74 (D.C. Cir. 1996) (*Panhandle*).

[139] *Am. Elec. Power Serv. Corp.*, Opinion No. 311-B, 46 FERC ¶ 61,382, at 62,195 (1989).

[140] *See La. Pub. Serv. Comm'n v. FERC*, 522 F. 3d 378, 398 (D.C. Cir. 2008) (considering refunds under section 206(b) of the

Louisiana Commission states that when a court of appeals remands a case, the Commission has the authority to reconsider the whole of its original decision.[141] The Louisiana Commission goes on to state that, given this authority, the Commission has "an equitable obligation to correct the harm caused" by its error in dismissing the complaint in 1996.[142] The Louisiana Commission maintains the Commission should "order that Entergy provide refunds for the period from April 1, 2000 to March 31, 2004," the date the Commission's order in this proceeding became effective.[143]

69. We deny this request. While the Commission does have the authority to reconsider its original decision on remand, the Louisiana Commission failed to make a filing seeking to broaden the remanded issue to include four years of potential refunds due to the

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FPA); *La. Pub. Serv. Comm'n v. FERC*, 772 F. 3d 1297, 1299 (D.C. Cir. 2014) (same).

[141] Rehearing Request at 10 (citing *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289, at P 22 (2008); *Southeastern Mich. Gas Co. v. FERC*, 133 F.3d 34, 38 (D.C. Cir. 1998) (*Southeastern Mich.*); *Process Gas Consumers Group v. FERC*, 292 F.3d 831, 834 (D.C. Cir. 2002)).

[142] Rehearing Request at 11, 13 (*citing Tennessee Valley Municipal Gas Assoc. v. FPC*, 470 F.2d 446 (D.C. Cir. 1972) (*Tennessee Valley*); *Exxon Co. U.S.A. v. FERC*, 182 F.3d 30 (D.C. Cir. 1999); *CAPUC*, 988 F.2d 154; *Natural Gas Clearinghouse*, 965 F.2d 1066; *Southeastern Mich. Gas Co. v. FERC*, 133 F.3d 34 (1998).

[143] Rehearing Request at 11. The Louisiana Commission computes the four year delay based on the period from August 5, 1996, the date on which the Commission dismissed the complaint, and August 22, 2000, the date on which the Commission set the matter for hearing.

Commission's legal error in dismissing the initial complaint until its rehearing of the third remand order.[144] This case has been in process for 16 years, through two prior court remands, and the Louisiana Commission has failed to raise this argument when it had the opportunity. Indeed, the Louisiana Commission points out that the section 206(b) refund issue has been briefed 14 times in the case,[145] and rejected the suggestion of further briefing on this remand, asking the Commission act promptly and issue an order requiring refunds.[146] We, therefore, conclude that the Louisiana Commission has failed to preserve this issue, and we decline to re-open the record to consider the issue now.

70. Even if the Louisiana Commission's request were appropriate at this time, we deny it on the merits. When the Commission commits legal error, however, it

[144] We reject rehearing requests based on new issues that could properly have been raised at an earlier stage of the proceeding. *Dominion Transmission, Inc.*, 155 FERC ¶ 61,234, at P 10 (2016) (stating "we reject requests for rehearing that raise a new issue, unless we find that the issue could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances"); *Texas Gas Transmission, LLC*, 155 FERC ¶ 61,099, at P 23 (2016) (same); 18 C.F.R. § 385.713 (c)(3) (requiring justification that matters were not available for consideration at the time of the final decision). *See also NO Gas Pipeline v. FERC*, 756 F.3d 764, 770 (D.C. Cir. 2014) (stating that "FERC regularly rejects requests for rehearing that raise issues not previously presented where there is no showing that the issue is 'based on matters not available for consideration . . . at the time of the final decision' ").

[145] Opposition Motion at 1-2

[146] *Id.* at 1.

can seek to correct that legal error by requiring refunds and authorizing the utility to seek surcharges to place the parties in the position in which they would have been if the error had not occurred.[147] The courts have found that the correction of legal error, including the retroactive collection of higher rates from some customers, is justified because the parties would be on notice from the rehearing petition that the Commission's order might change.[148] The issue here is whether the Commission should order refunds for the four year delay occasioned by the Commission's initial order dismissing the complaint.

71. FPA section 206 does not permit the Commission to adjust rates retroactively, which the exception of the 15 month refund period provided for in section 206(b). The statute requires that any action of the Commission must be prospective from the date on which the Commission establishes the rate "to be thereafter observed and enforced."[149] Moreover, in passing section 206(b), Congress found that any refund under section

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[147] *Southwest Power Pool, Inc.*, 156 FERC ¶ 61,057 (2016); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,231 (2015). *See Panhandle*, 95 F.3d 62, 73-74 (D.C. Cir. 1996); *Panhandle Eastern Pipe Line Co. v. Mich. Consol. Gas Co.*, 937 F. Supp. 641, 646 (E.D. Michigan 1996) (finding an obligation to pay based on the parties' contractual relationship and 15 U.S.C. § 717u providing courts with jurisdiction over " . . . all suits . . . brought to enforce any liability or duty created by . . . any . . . order thereunder"); *Panhandle Eastern Pipe Line Co. v. Utilicorp United Inc.*, 928 F. Supp. 466, 472 (D. Delaware 1996) (finding an obligation under 15 U.SC. § 717u).

[148] *Transcontinental*, 54 F.3d at 899.

[149] 16 U.S.C. § 824e(a).

206 be limited to 15 months; Congress made no distinction based on the length of the proceeding.

72. The Louisiana Commission argues that *Tennessee Valley* governs this situation and requires the Commission to reach back four years from the date of the order making the revised rate effective and require refunds for the delay that the Commission's initial order dismissing the complaint caused. In *Tennessee Valley*, the Federal Power Commission dismissed a complaint under section 5(a) of the NGA claiming that existing rates for natural gas were excessive on the grounds that the record was too stale to form the basis for a prospective ruling, and also because it appeared highly conjectural that initiation of a new section 5 proceeding at that time would be in the public interest. One hundred twelve days later, the Commission vacated the dismissal, reopened the proceedings, and established a hearing to update the record and compile figures for a more recent test period.[150]

73. The court found that the Commission had come "very close to an admission that it did err in refusing to order reopening and updating, of an admittedly stale record." Based on what the court found to be the Commission's illegal action,[151] it "command[ed]" that the Commission provide retroactive relief to put the complainant in the same position it would have occupied if the Commission had acted 112 days earlier.[152] The

[150] *Tennessee Valley*, 470 F.2d at 449-450.

[151] *Id.* at 452.

[152] *Id.* at 453.

court essentially required that the Commission assume that all stages of the proceeding remained constant, so that the resulting order would have occurred 112 days earlier without the legal error.

74. This proceeding is not similar to *Tennessee Valley.* Here, the Commission did not itself recognize relatively quickly that it committed error. The court's initial remand found only that the Commission had failed to justify its order dismissing the complaint in light of precedent, and it permitted the Commission to provide an alternate dismissal of the complaint based on a reasoned explanation. The fact that the Commission instead chose to establish a section 206 hearing does not reveal a legal error of the type the court found dispositive in *Tennessee Valley.* Moreover, there is a vast difference between the Commission's correction of its own error in 112 days and the 1,460 days of retroactive relief requested here. With a four-year time delay, it is difficult to assume that the case timing would have remained constant and that the proceeding would have taken the same path and reached the same conclusion that it would have if it had begun four years earlier. The additional four years provides an opportunity for parties to update the record and Commission jurisprudence itself can change, and has sometimes dramatically changed, over a four-year period. All of this may influence the outcome of the Commission order on remand.[153]

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[153] *See*Opinion No. 468, 106 FERC ¶ 61,228, at P 69 (relying on data from the year 2000). The Commission's precedent also

75. While the Commission's initial dismissal of the complaint contributed to the delay, section 206(b) proceedings can and often do last for extended periods of time due to a variety of factors, and customers are not protected from excessive charges during that period, with the potential exception of the 15-month refund period provided for in section 206(b).[154] In addition, while one could argue that parties had notice that the Commission's dismissal of the complaint might be overturned, there was no notice as to when during the period of appeal and remand their transactions might be subject to correction. As the court in *CAPUC*

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changed during this time period. For example, in 2002, prior to Opinion No. 468, the Commission found that adding back curtailed interruptible load to a system peak was unjust and unreasonable because adding interruptible load is inconsistent with the underlying rationale for allocating costs based on a system peak, and it would create a disincentive for customers to implement a load response program on their own systems because they will be charged for system costs regardless of whether they curtail load during system peaks. *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,005 (2002), *reh'g denied*, 102 FERC ¶ 61,275 (2003). After a voluntary remand, however, the Commission determined, as it did here, that retroactive refunds should not be permitted because ordering refunds would result in the transmission owners being unable to recover their legitimately incurred costs and because they could not alter decisions made in reliance on the previously accepted rate design. *Occidental*, 110 FERC ¶ 61,378.

[154] *Cf. Atlantic Refining Co. v. Public Service Commission of NY*, 360 U.S. 378, 389 (1959) (stating that purchasers "have no protection from excessive charges collected during the pendency of a § 5 proceeding").

recognized, at some point the notice required to correct legal error becomes "more atmospheric than explicit."[155]

76. While other cases cite *Tennessee Valley* for the proposition that the Commission can act retroactively to correct its legal error, none of the other cases that the Louisiana Commission cites utilize a hypothetically created effective date, much less one that is four years earlier. Other decisions indicate that for a remedy to be prospective, the starting date for the remedy must be determined by the date on which the Commission has found the rate or practice to be unjust and unreasonable. In *Office of Consumers' Counsel v. FERC*,[156] the court affirmed the Commission's finding that certain pipeline practices were imprudent under NGA section 5, but it found that the Commission erred in failing to impose a remedy for these violations. On remand, the Commission did not impose a retroactive remedy, contending that because NGA section 5 is prospective, the Commission could not determine what remedies to impose for the pipeline's section 5 violations until it first held a hearing to determine whether

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[155] *CAPUC*, 988 F.2d at 164. In other cases involving correction of legal error, the determination of the period over which refunds, and particularly surcharges, would be owed is not so indeterminate. In cases under NGA section 4 or FPA section 205, parties have clear notice when the disputed rate design or cost allocation takes effect. *See Transcontinental*, 54 F.3d 893 (date on which the pipeline initiated service); *Natural Gas Clearinghouse*, 965 F.2d 1066 (date on which rate took effect subject to notice). *CAPUC*, 988 F.2d at 164.

[156] 826 F.2d 1136 (D.C. Cir. 1987).

those violations continue at the present time. The court, however, determined that the Commission had misinterpreted the statutory language and that the prospective nature of the act would be honored as long as the Commission imposed remedies for the section 5 violations it had found as of the date of its opinion finding the violation.[157] In contrast, in this proceeding, it was not until Opinion No. 468, i.e., March 8, 2004, that the Commission ruled Entergy's inclusion of interruptible service in allocating costs was unjust and unreasonable.

77. Moreover, the courts have recognized that, in correcting legal error, the Commission not only can authorize refunds to customers that paid too much, but also authorize the pipeline or public utility to surcharge those customers that may have paid too little.[158] While the Louisiana Commission requests four years of refunds, it does not address whether the cost of those refunds could be recovered through retroactive surcharges and to whom. As discussed earlier, the ability of Entergy Arkansas retroactively to recover through surcharges the 15 months' worth of refunds is in

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[157] *Id.* at 1139 (agreeing with the interpretation that a remedy imposed as of the date of the Commission opinion finding a violation is a prospective remedy within the meaning of section 5).

[158] *See Panhandle*, 95 F.3d 62, 73-74 (authorizing the Commission to surcharge customers that no longer shipped on the pipeline); *Transcontinental*, 54 F.3d at 899 (finding that the Commission could correct its legal error by allowing the pipeline to retroactively put into effect a rate design resulting in refunds to some customers and surcharges to others).

question. Collection of over four years would be even more problematic, as are the customers' inability to revisit their past decisions.

78. In exercising our discretion as to whether to order refunds, we find for all the foregoing reasons that, under the facts of this case, refunds should not be paid for the hypothetical period starting four years earlier than the Commission's decision in Opinion No. 468.

The Commission orders:

The Louisiana Commission's requests for rehearing and for consideration of a new argument are denied, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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155 FERC ¶ 61,120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation	Docket Nos. EL00-66-019
Louisiana Public Service Commission v. Entergy Services, Inc.	EL95-33-013

ORDER ON REMAND

(Issued April 29, 2016)

1. In response to a petition for review of a Commission order issued on March 21, 2013 in this proceeding,[1] the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an order on December 5, 2014 remanding the matter, in part, to the Commission for further proceedings.[2] At issue is the Commission's reasoning in denying refunds in the March 2013 Order. The court found that the line of precedent that the Commission relied on in denying refunds involved rationales that the Commission

[1] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,211 (2013) (March 2013 Order).

[2] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014).

concluded were not present here. The court also found that the existence of the equitable factor that the Commission identified in denying refunds is unclear and that the Commission inadequately explained its relevance. The court instructed the Commission to consider on remand the relevant factors for ruling on the question of refunds, to weigh the relevant factors against one another, and to strike a reasonable accommodation among them.[3] In this order, we clarify our policy on refunds and find that refunds should be denied in this case.

I. <u>Background</u>

2. This proceeding began on March 15, 1995, when the Louisiana Public Service Commission (Louisiana Commission) filed a complaint alleging that certain cost allocation calculations by Entergy Services, Inc. (Entergy) under the Entergy System Agreement (System Agreement) were unjust and unreasonable and seeking revision of the System Agreement to exclude interruptible load from the calculation of peak load responsibility.[4] The Commission issued an order finding that including interruptible load in such calculations

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[3] *Id.* at 1306.

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

was reasonable, noting that the System Agreement had included interruptible load in the calculation of peak load responsibility since the parties entered into the System Agreement in 1951.[5]

3. However, on appeal, the D.C. Circuit found that the Commission had failed to explain its departure from certain Commission precedent, including, in particular, *Kentucky Utilities Company*.[6] *Kentucky Utilities* involved the Commission's rejection of the inclusion of interruptible load in allocating capacity costs since the utility, by interrupting supply, could keep the interruptible customer from imposing demand on the system during peak periods and could thus control its capacity costs. The court directed the Commission either to adhere to the principles that it had articulated in *Kentucky Utilities* or to provide a reason for including interruptible load in the allocation of capacity costs.[7]

4. On remand, the Commission held in Opinion No. 468 that Entergy must exclude interruptible load from its computation of peak load responsibility used to allocate certain costs among the Operating Companies

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[5] *La. Pub. Serv. Comm'n v. Entergy Serv., Inc.*, 76 FERC ¶ 61,168, at 61,955 (1996), *reh'g denied*, 80 FERC ¶ 61,282 (1997).

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

[7] *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897, 900 (D.C. Cir. 1999).

under the System Agreement.[8] The Commission also held that the new allocation method could be phased in over 12 months and that while the existing cost allocation had resulted in unjust and unreasonable rates, section 206(c) of the Federal Power Act (FPA) precluded refunds for the 15-month period following the filing of the complaint (refund period).[9]

5. On appeal of Opinion No. 468, the D.C. Circuit held, *inter alia*, that the Commission had failed to explain sufficiently why FPA section 206(c) barred refunds in this case, and remanded that issue "for a more considered determination."[10] In its subsequent order,

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

[9] The refund period runs from May 14, 1995 through August 13, 1996. 16 U.S.C. § 824e(c) (2012). Section 206(c) provides that in a proceeding under section 206 involving two or more electric utility companies of a registered holding company system

> refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order.

Entergy was a registered holding company during the refund period.

[10] *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007).

the Commission determined that refunds were both legal and appropriate, and it ordered that they be paid.[11]

6. The Arkansas Public Service Commission (Arkansas Commission) and Entergy appealed this decision to the D.C. Circuit.[12] However, on June 24, 2009, in response to a Commission motion, the court remanded the refund issue so that the agency could address it more fully.

7. On August 13, 2010, the Commission issued an amended order on remand holding that: (1) the Commission was authorized to order refunds in this case in spite of the strictures of section 206(c) of the FPA; and (2) the Commission was ordering refunds pursuant to its discretionary remedial authority.[13] In ordering refunds, the Commission explained that it has a policy of granting full refunds to correct unjust and unreasonable rates and that "[t]he only issue is whether Arkansas/Mississippi and Entergy have demonstrated any reason here for the Commission to deviate from its policy of granting full refunds."[14] The Commission held that they had not demonstrated such a reason, and it further explained that "there is no doubt that Entergy's inclusion of interruptible load affected the Operating Companies' cost of service, led to an overcharge

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[11] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 120 FERC ¶ 61,241, at P 8 (2007), *reh'g denied*, 124 FERC ¶ 61,275 (2008).

[12] *Ark. Pub. Serv. Comm'n v. FERC*, Nos. 08-1330, *et al.* (D.C. Cir. October 14, 2008).

[13] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,133 (2010) (August 2010 Remand Order).

[14] *Id.* P 31.

to Louisiana customers, and resulted in unjust and unreasonable rates."[15] In addition, the Commission held that this was not a rate design case where customer usage patterns are relevant, but rather involved misallocation of costs, so that one group of customers was paying too much, while others paid too little. The Commission found that, under the facts of the case, it did not consider the length of time since the complaint was filed to be a relevant factor "one way or the other" in whether refunds were warranted.[16]

8. On June 9, 2011, the Commission issued an order granting, in part, rehearing of the August 2010 Remand Order, affirming its interpretation of FPA section 206(c), but now invoking its equitable discretion to deny refunds in accordance with Commission precedent denying refunds in cost allocation and rate design cases.[17] The Commission determined that the Entergy system as a whole collected the proper level of revenue, but that Entergy incorrectly allocated peak load responsibility among the various Entergy Operating Companies, and that Entergy therefore did not engage in an over-collection of revenue that would justify refunds.[18] The Commission explained that it would therefore "apply here our usual practice in such cases, invoking our equitable discretion to not order refunds,

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[15] *Id.* P 32.

[16] *Id.*

[17] *La Pub Serv. Comm'n v. Entergy Corp.*, 135 FERC ¶ 61,218, at P 25 (2011).

[18] *Id.* P 24.

notwithstanding our authority to do so."[19] As a result, the amounts previously refunded were reversed on July 5, 2011.[20]

9. On July 11, 2011, the Louisiana Commission filed a request for rehearing that challenged the Commission's finding that refunds were not warranted. On March 21, 2013, the Commission issued an order denying rehearing and upholding its decision to deny refunds. The Commission stated that all parties recognized that this case involves an improper allocation of costs among the Operating Companies. In addition, the Entergy System as a whole did not recover an amount in excess of its cost of service, and there had been no violation of a tariff or filed rate.[21] The Commission thus found that it was appropriate to follow its general practice of finding that new cost allocations or rate designs that do not reflect over-recoveries or other special circumstances will run prospectively from the date of the issuance of the order, and that as a result it would not order refunds.[22]

10. The Commission stated that it has broad equitable discretion in determining whether and how to apply remedies,[23] and that in exercising this discretion it

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[19] *Id.*

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

[21] March 2013 Order, 142 FERC ¶ 61,211 at P 50.

[22] *Id.* P 51.

[23] *Id.* P 53 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (noting that the Commission's breadth of discretion is "at its zenith" when fashioning remedies)).

had drawn a distinction between rate design and cost allocation cases, on the one hand, for which refunds are generally not ordered, and cases involving over-recovery, for which refunds are generally ordered.[24]

11. The Commission stated that refunds are not ordered in rate design and cost allocation cases for two reasons. First, refunds would potentially result in under-recovery in such cases, and second, a different allocation would have resulted in a different decision by consumers or the utility had it been instituted at the time of the facts at issue, but it is simply too late to alter the result. The Commission stated that these considerations do not exist in over-recovery cases.[25]

12. The Commission concluded that its precedent denying refunds in rate design and cost allocation cases should apply in this proceeding. It stated:

> . . . we view the issues of inclusion or exclusion of interruptible load in allocating costs as a demand allocation dispute, rather than a case of cost over-recovery. And the allocation of demand-related reserve costs under [the applicable System Agreement provision] is a zero-sum game in which the Entergy System receives no excess revenues. There is no dispute as to the appropriate level of production capacity costs and revenues subject to the demand allocator at issue in this proceeding,

[24] *Id.* P 54 (citing *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040, at P 25 (2011) (*Black Oak*), *reh'g denied*, 139 FERC ¶ 61,111 (2012)).

[25] *Id.* P 55.

> only their apportionment among the Operating Companies.[26]

13. The Commission stated that the danger of under-recovery of costs is not present in this case based on the Commission's earlier finding that state retail proceedings would not block recovery of the costs of surcharges at the retail level.[27] However, the Commission also found that an equitable ground disfavoring refunds is the fact that Entergy cannot review and revisit past decisions were the Commission to order a refund. The Commission noted that it had previously found that when dealing with affiliated operating companies within a holding company context, refunds may not be appropriate because system operating decisions cannot be revisited and redone.[28]

14. The Louisiana Commission petitioned the D.C. Circuit for review of the March 2013 Order, and the D.C. Circuit remanded the matter to the Commission for further proceedings on the issue of refunds. In its remand order, the court agreed with the Louisiana Commission that "the Commission 'did not reasonably explain the departure' from its 'general policy' of ordering refunds when consumers have paid unjust and unreasonable rates."[29] The court stated that while the

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[26] *Id.* P 61 (internal citations omitted).

[27] March 2013 Order, 142 FERC ¶ 61,211 at PP 62-63 (citing August 2010 Remand Order, 132 FERC ¶ 61,133 at P 26).

[28] *Id.* P 63 (citing *Southern Co. Servs., Inc.*, 64 FERC ¶ 61,033, at 61,332 (1993) (*Southern Co.*)).

[29] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1303 (internal citations omitted).

Commission had argued that it had relied on a different "general policy" in which refunds are denied in both cost allocation and rate design cases, "[i]n fact, the Commission's decisions have relied on specific factors rather than such a broad policy."[30] The court noted that the Commission had awarded refunds in cost allocation decisions where the utility had over-recovered or had violated the filed rate.[31] The court stated that decisions denying refunds have generally involved the possibility of under-recovery.[32]

15. The court stated that a further problem with the Commission's reasoning is that the equitable factors it relied on in previous refund denials were largely absent in this case. The court stated that the Commission had not mentioned here many of the reasons for denying refunds it had given in the past.[33] The court noted that the Commission based its denial of refunds in this case on two considerations: the lack of over-recovery by

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[30] *Id.* at 1303.

[31] *Id.* at 1303-1304 (citing March 2013 Order, 142 FERC ¶ 61,211 at PP 65, 69, 73 (citing *Nantahala Power and Light Co.*, 19 FERC ¶ 61,152, at 61,280 (1982) (over-recovery); *Blue Ridge Power Agency v. Appalachian Power Co.*, 58 FERC ¶ 61,193, at 61,603 (1992) (filed rate violation))).

[32] *Id.* at 1304 (citing *Black Oak*, 136 FERC ¶ 61,040 at P 28; *Occidental Chemical Corp. v. PJM Interconnection, LLC*, 110 FERC ¶ 61,378, at P 10 (2005) (*Occidental*)).

[33] *Id.* (noting that the Commission had given as possible reasons for denying refunds consumers' inability to revisit past decisions, detrimental effects on organized markets, different generations of consumers paying the surcharges and receiving the past benefits, and the complication and cost of rerunning markets, but the Commission did not apply them here).

Entergy and Entergy's inability to review and revisit past decisions, but the court ruled that neither consideration carries the Commission's burden of reasoned explanation or ties this case to the long-standing refund policy.[34] The court stated that the Commission did not explain why the absence of over-recovery "should automatically negate refunds," and the Commission neither identified any specific past decisions that Entergy could not revisit, nor explained why that fact was more significant in this case than in other decisions in which the Commission orders refunds.[35] The court stated that invoking Commission policy on refunds did not eliminate the need to consider the fact that an unjust and unreasonable cost allocation had caused consumers in Louisiana to pay their utility companies too much and consumers in other states to pay too little and that refunds, if ordered, would transfer a subset of the total overpayment to Entergy's Louisiana operating companies from its other operating companies.[36]

16. Finally, the court criticized the Commission's conclusion that Entergy's inability to review and revisit past decisions made in reliance on pricing in effect at the time constituted "an equitable ground disfavoring refunds."[37] The court stated that some amount of reliance will likely be present every time the Commission considers ordering refunds, and therefore " 'past

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[34] *Id.*

[35] *Id.*

[36] *Id.* at 1305.

[37] *Id.* (quoting March 2013 Order, 142 FERC ¶ 61,211 at P 63).

decisions' in the abstract cannot be the *only* factor against refunds," as "the same factor is present whenever the Commission *does* order refunds."[38] The court stated that the Commission did not identify any particular decisions that Entergy made "in reliance on the inclusion of interruptible load in its cost allocation that in some way particularly weakened the case for refunds."[39]

II. <u>Discussion</u>

17. In remanding this case to the Commission, the court agreed with the Louisiana Commission that "the Commission 'did not reasonably explain the departure' from its 'general policy' of ordering refunds when consumers have paid unjust and unreasonable rates."[40] However, as explained further below, this description of the Commission's refund policy under the FPA is based on statements made by the Commission in this proceeding that do not accurately represent that policy as both the Commission and the courts have described it in the past. Thus to fulfill the task the court has set for us on remand, it is necessary first to explain why this description of Commission policy under the FPA is inaccurate and then to explain the Commission's long-established approach to refunds under the FPA.

18. On reflection, certain references to the Commission's "general policy" on refunds in this proceeding fail

[38] *Id.* at 1305-1306 (emphasis in original).

[39] *Id.* at 1306.

[40] *Id.* at 1303 (quoting Petitioner's Brief at 48).

to accurately describe the scope of that policy. In fact, only two Commission orders, both of which have been issued in this proceeding, refer to a general policy of ordering refunds when consumers have paid unjust and unreasonable rates.[41] Moreover, the Commission described its refund policy – in hindsight imprecisely – in these terms in only one of these orders, with the cases it cited in doing so all referring, in fact, to a narrower policy of awarding refunds as a remedy for utility overcharges that result in the over-collection of revenue.[42] In the other order, the Commission only noted that the Louisiana Commission had stated that "Commission and D.C. Circuit decisions have recognized that the Commission has a general policy requiring refunds for unjust and unreasonable rates."[43] The Commission did not accept this description, however, and it went on in the order to describe in considerable detail how its approach to refunds was made up of two

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[41] August 2010 Remand Order, 132 FERC ¶ 61,133 at P 31; March 2013 Order, 142 FERC ¶ 61,211 at P 34.

[42] August 2010 Remand Order, 132 FERC ¶ 61,133 at P 31, n.62. The Commission does refer at this point in the August 2010 Remand Order to *Westar Energy, Inc. v. FERC*, 568 F.3d 985 (2009) (*Westar*) as supporting a "policy," although not a "general policy," of refunds in cases of unjust and unreasonable rates. However, *Westar* concerns refunds on sales by two wholesale sellers who possessed market power at the point of sale. An exercise of market power allows the entity exercising that power to receive a higher price than would prevail under competitive market conditions. As a result, *Westar* should be viewed as a variant of the Commission's policy on refunds in over-collection cases.

[43] March 2013 Order, 142 FERC ¶ 61,211 at P 34; *see also id.* P 39.

separate lines of precedent, each of which applies to different types of fact patterns.[44]

19. The situation is the same with the courts. With the exception of the statement by the court in remanding this matter quoted above, no court has ascribed to the Commission a general policy of ordering refunds whenever consumers have paid unjust and unreasonable rates. Descriptions of the Commission's refund policy under the FPA by the courts have generally referred to specific types of fact patterns, with refunds being ordered or not ordered in a particular case depending on the fact pattern presented in that case. Indeed, in remanding this matter, the court stated that in dealing with refunds, "the Commission's decisions have relied on specific factors rather than such a broad policy,"[45] an observation that correctly captures Commission practice.

20. In short, notwithstanding the statements made by the Commission in this proceeding that indicated to the contrary, the Commission has never enunciated a single, general policy on refunds that applies to all instances where it has found rates to be unjust and unreasonable under the FPA. The Commission's approach to refunds has instead been shaped by the way certain equitable considerations are typically associated with certain specific fact patterns. The term "general policy" does appear in Commission discussions of refunds, but it has not been used to refer to a broad

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[44] *Id.* PP 54-60.

[45] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1303.

policy that applies to refunds generally. Instead, it is a term that has always been associated with one specific factor that the Commission has considered when dealing with refunds, i.e., the presence or absence of overcharges that result in over-collection of revenue by the utility.[46] This can be seen by examining the origin of references to a Commission "general policy" on refunds.

21. The earliest reference to a general policy on refunds appears to be *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*.[47] In that case, the court refers to "[t]he Commission's general policy of granting full refunds."[48] However, the statement, by itself, is incomplete, as it does not indicate when or how the policy is applied. The court in *Towns of Concord* supports its reference to a general policy by citing *Illinois Power Co.*,[49]

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[46] *See Consol. Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (stating that the Commission has a " 'general policy of granting full refunds' for overcharges" (internal citations omitted); *Entergy Serv., Inc.*, 82 FERC ¶ 61,098, at 61,369 (1998) (stating that "the Commission's general policy is to order refunds to remedy overcharges"), *aff'd*, 174 F.3d 218 (D.C. Cir. 1999) (stating that "the Commission's self-described general policy is to provide refunds to remedy overcharges"); *Corporation Comm'n of the State of Oklahoma v. American Electric Power Co. Inc.*, 125 FERC ¶ 61,237, at P 33 (2008) (stating that "the Commission's general policy is to order refunds for overcharges").

[47] 955 F.2d 67, 75 (D.C. Cir. 1992) (*Towns of Concord*).

[48] *Id.* at 76.

[49] *Illinois Power Co.*, 52 FERC ¶ 61,162, at 61,625 (1990) (*Illinois Power*).

and to ascertain the content of the policy the court was referring to, one must consider that case.

22. In *Illinois Power*, Illinois Power Company (Illinois Power) sought approval to recover, through its fuel adjustment clause, amounts that it had paid to obtain releases from certain coal supply and transportation contracts. The Commission's regulations specified the types of costs or charges that were eligible for recovery through a fuel adjustment clause, and the regulations also specified that a waiver was required to recover any other costs in this way. The Commission found that a waiver was required to pass contract buyout costs through a fuel adjustment clause, and Illinois Power had not obtained one.[50] The Commission found that as a result, Illinois Power had overcharged its customers, i.e., collected unauthorized charges, and the Commission thus directed it to refund to customers the contract buyout costs it had recovered.[51]

23. *Towns of Concord* also dealt with costs passed through a fuel adjustment clause, in that instance costs associated with the disposal of spent nuclear fuel. The Commission had sought to address confusion that changes in national policy on spent nuclear fuel had created concerning recovery of disposal costs for such fuel through fuel adjustment clauses.[52] In connection with these efforts, the Commission had urged utilities that had improperly collected spent nuclear fuel

[50] *Id.* at 61,623.

[51] *Id.* at 61,621.

[52] *Towns of Concord*, 955 F.3d at 69-70.

disposal costs through their fuel adjustment clauses to come forward. As part of this process, the Commission promised that any utility that did come forward would not have to make refunds if it could satisfy a four-part test designed to ensure that the company was not "unjustly enriched by the improper collection" and if denying refunds would not otherwise be contrary to the public interest.[53] Boston Edison Company had met these requirements, and some of its customers objected to the absence of refunds.[54] On appeal, the court held that the Commission's authority to award refunds was discretionary, that the Commission had appropriately justified its discretionary action of withholding refunds in this case, and that otherwise "[t]he Commission's general policy of granting full refunds" as stated in *Illinois Power*, "remains in effect."[55]

24. The policy in question has, of course, not been limited to cases involving fuel adjustment clauses, but it has been limited to cases involving utility overcollection.[56] It is described as a "general policy" because

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[53] *Id.* at 70.

[54] *Id.* at 72.

[55] *Id.* at 76 (citing *Illinois Power*, 52 FERC ¶ 61,162, at 61,625).

[56] *See, e.g.*, *Consol. Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 972 (stating that the Commission has a " 'general policy of granting full refunds' for overcharges" and citing as support *Towns of Concord*, 955 F.2d at 76) (*Con. Ed.*); *Corporation Comm'n of the State of Oklahoma v. Am. Elec. Power Co.*, 125 FERC ¶ 61,237 at P 33 (stating that "the Commission's general policy is to order refunds for overcharges" and citing to language in *Con. Ed.* supported by *Towns of Concord*); *see also Central Power and*

it is a policy that applies generally to cases of utility over-collection, but the Commission has never treated it as a policy that encompasses *all* cases involving unjust and unreasonable rates.[57]

25. The Commission takes a different approach when addressing refund requests in cases where a cost allocation or rate design has been found to be unjust and unreasonable. Specifically, "in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds."[58]

Light Co., 97 FERC ¶ 61,157, at 61,698, n.24 (2001); *Ameren Corp.*, 147 FERC ¶ 61,225, at P 28, n.39 (2014).

[57] *Black Oak*, 136 FERC ¶ 61,040 at P 25 (stating that "[w]hen a case involves a company overcollecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers").

[58] *Id.*; *see also Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193, at P 5 (2004) (accepting rate design change on a prospective basis); *Consumers Energy Co.*, 89 FERC ¶ 61,138, at 61,397 (1999) (same); *Union Elec. Co.*, 58 FERC ¶ 61,247, at 61,818 (1992) (*Union Elec.*) (same); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983) (*Comm. Ed.*); *accord Second Taxing Dist. of City of Norwalk v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (*Norwalk*) (affirming determination to make rate design changes prospective only); *Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982) (*Batavia*) (same)); *Occidental*, 110 FERC ¶ 61,378 at P 10 (stating that the "Commission's longstanding policy is that when a Commission action under Section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively"); *Commonwealth Edison Co*, 8 FERC ¶ 61,277, at 61,844 (1979) (stating that "any change of rate form due to modification in the demand ratchet or in the form of energy charging . . . should not be given effect in computing

26. To explain why this distinction exists, it is necessary to consider briefly the nature of the Commission's refund authority. This authority is discretionary, and refund decisions are to be guided by equitable principles. The courts have held that

> [c]ustomer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.[59]

27. In short, the basic consideration in ruling on refunds is one of fairness. From this perspective, the Commission's practice of awarding refunds in over-collection cases is readily explainable. If a utility has collected revenues from its customers that it is not entitled to under its tariff, fairness dictates that the excess revenues should be refunded to customers. On the other hand, in cases where a cost allocation or rate design has been found unjust and unreasonable, but where no over-collection of revenue has occurred, other factors come into play.

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refunds, if any, due under this decision" because the utility "cannot retroactively collect more from any customer than has already been collected subject to refund, even though a redesigned rate presumably would show some customers should be charged more and others less than under the rates in effect subject to refund").

[59] *Towns of Concord*, 955 F.3d at 75 (internal quotation marks omitted).

28. If the utility collected no more than it was entitled to, refunds would potentially result in under-recovery. This "would be unfair because it would result in a loss of revenue from the reallocation when the utility would not have the opportunity to file a new rate case to recover those revenues."[60] In addition, in cost allocation and rate design cases, a different cost allocation or rate design could have led to different decisions by consumers or a utility, including utility operating companies within a holding company system,[61] but it is now too late to alter the decisions that were in fact made.[62] In other words, retroactive implementation of the new rate may be unfair to utilities or customers who cannot alter their past purchase or sale decisions in light of that new rate.[63]

29. We now turn to the application of these considerations to this proceeding. We begin with the Commission's finding in the March 2013 Order that "we view the issues of inclusion or exclusion of interruptible load in allocating costs as a demand allocation dispute, rather than a case of cost over-recovery."[64] The Commission went on to say that there "is no dispute as

[60] *Black Oak*, 136 FERC ¶ 61,040 at P 26; *see also Occidental*, 110 FERC ¶ 61,378 at P 10; *Union Elec.*, 58 FERC ¶ 61,247 at 61,818.

[61] *See Southern Co.*, 64 FERC ¶ 61,033 at 61,332 (denying refunds in part because "operational decisions made while the operating companies' proposed cost classification was in effect, and thus made in reliance on that classification, cannot be undone")

[62] *Comm. Ed.*, 25 FERC ¶ 61,323 at 61,732.

[63] *See, e.g.*, *Union Elec. Co.*, 64 FERC ¶ 61,355, at 63,468 (1993).

[64] March 2013 Order, 142 FERC ¶ 61,211 at P 61.

to the appropriate level of production capacity costs and revenues subject to the demand allocator at issue in this proceeding, only their apportionment among the Operating Companies."[65] Indeed, the Louisiana Commission initiated this proceeding by arguing that changed circumstances had made the cost allocation under the Entergy System Agreement unjust and unreasonable and that the System Agreement should be modified as a result. Specifically, the Louisiana Commission stated that its

> Complaint seeks revision of the Entergy System Agreement, because due to changed circumstances, the terms of that agreement are unjust and unreasonable, and because the rough equalization previously established . . . for the Entergy System has been upset. Specifically, the absence of any provision excluding curtailable load from the determination of a company's load responsibility under the

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[65] *Id.*; see also *id.* P 50. In response to the court's comments on the significance the Commission attributed to the absence of over-recovery, *see La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1304, we note that the absence of over-recovery is not an independent reason for denying refunds. It is, however, a precondition for applying Commission precedent on refunds in cost allocation cases. As the court noted, the Commission has awarded refunds in cost allocation cases where the utility did over-recover revenues, *id.* at 1303-04, as the presence of over-recovery eliminates the primary grounds for denying refunds in cost allocation and rate design cases, namely the possibility of under-recovery and unfairness resulting from retroactive implementation of a new rate. If over-recovery has occurred, refunds of the excess amounts will not cause under-recovery, and fairness dictates that the excess amounts be refunded.

> System Agreement results in an unjust and unreasonable cost allocation. . . . The inclusion of curtailable loads in calculating load responsibilities artificially penalizes individual companies for engaging in sales that benefit the System as a whole, creating an unreasonable disincentive to economic transactions.[66]

30. Given that this is a cost allocation case, the "general policy" of awarding refunds in over-collection cases does not apply here, and the question becomes whether the facts presented support following here the Commission's established practice of not awarding refunds in cost allocation cases. We conclude that they do. The facts presented here evidence the two primary grounds the Commission has cited in denying refunds in cost allocation cases, the potential for under-recovery and the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past actions in light of that new rate.

31. Both Commission and court precedent refer to a potential for, or possibility of, under-recovery as a reason for denying refunds,[67] and that possibility arises here from two sources. First, there is a significant possibility that Entergy could not recover the portion of

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[66] Louisiana Public Service Commission, Third Amended Complaint, Docket No. EL95-33-000, at 2 (filed October 27, 1999) (Third Amended Complaint).

[67] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1304 (citing March 2013 Order, 142 FERC ¶ 61,211, at P 55 & n.127); *Norwalk*, 683 F.2d at 490; *Occidental*, 110 FERC ¶ 61,378 at P 10.

necessary surcharges that would be attributed to wholesale customers during the refund period. As Entergy previously explained in this proceeding, 15 percent of Entergy Arkansas' peak load during the refund period was made up of wholesale customers, but none of those entities are currently Entergy Arkansas customers. In addition, at the time Entergy provided these facts, Entergy Arkansas had only one wholesale customer, which made up .002 percent of its load. This customer was not a wholesale customer during the refund period.[68] Given this situation, the source of surcharges is unclear, and if these surcharges cannot be assessed, refunds would lead to under-recovery to that extent. There is no basis to conclude that these surcharges could be assessed on retail customers. In addition, as the court found in *City of Anaheim, Cal. v. FERC*,[69] "§ 206(b) authorizes only retroactive refunds (rate decreases), not retroactive rate increases" such as those that Entergy would have to assess on any wholesale customers subject to surcharges needed to cover the refunds.

32. Second, there is a possibility of under-recovery based on potential litigation, as demonstrated by proceedings before the Arkansas Commission in which Entergy has sought approval to collect surcharges to pay for the refunds the Commission previously imposed in this case. The Arkansas Commission rejected

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[68] *See* Entergy Services, Inc., Initial Brief on Remanded Refund Issues, Docket Nos. EL00-66-013 and EL95-33-009, at 14-15 (filed Jan. 19, 2010).

[69] 558 F.3d 521 (D.C. Cir. 2009) (*City of Anaheim*).

Entergy's request to recover surcharges from its retail customers, concluding that the surcharges would violate the filed rate doctrine and rule against retroactive ratemaking under Arkansas law and that federal preemption does not require the Arkansas Commission to pass-through those costs to Arkansas retail customers.[70] The ultimate outcome of this decision, of course, remains uncertain, but it represents a second potential risk of under-recovery.

33. These facts also bring FPA section 206(c) to bear in this proceeding. As noted above,[71] section 206(c) provides that in a proceeding under section 206 involving two or more electric utility companies of a registered holding company system, the Commission may order refunds only if it determines that the refunds would not cause the registered holding company to experience any reduction in revenues resulting from an inability of an electric utility company in the system to recover the resulting increase in costs. Entergy Corporation was a registered holding company during the refund period, and the inability of an Entergy Operating Company to recover surcharges for one or more of the reasons described above would trigger the prohibition on refunds set forth in section 206(c). We are not able to find that the Entergy system would not experience a reduction in revenues if refunds were awarded here. This is because of the impediments to assessing the

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[70] Entergy Services, Inc., Brief Opposing Refunds, Docket Nos. EL00-66-017 and EL95-33-0011, at 18-19 (filed November 7, 2011).

[71] *See supra* note 9.

surcharges that would be necessary to prevent reduction of the holding company's revenues, i.e., the absence of wholesale customers in the proportion that existed during the refund period, litigation challenging surcharges, and the prohibition on retroactive rate increases under section 206(b) identified in *City of Anaheim*.

34. This case also presents past decisions that cannot be undone and this represents an equitable basis for denying refunds. Specifically, the complaint in this proceeding indicates that the tariff provision challenged here created incentives for the Entergy Operating Companies that resulted in decisions that cannot now be undone. Specifically, the Louisiana Commission argues that the Entergy Operating Companies, in particular Entergy Louisiana, "have engaged in sales to curtailable customers at extremely low prices," and these sales "provide system benefits" and "avoid the need for generating capacity." However, "by assigning generation and transmission costs to a company for its curtailable load, the System Agreement allocates *additional* costs to an individual company for entering curtailable contracts, which may render the sales uneconomic from an individual company perspective."[72] As a result, "the System Agreement provides an artificial disincentive – one that is not cost justified – for an individual company to make curtailable sales."[73] The Louisiana Commission asserted that the "imposition of

[72] Third Amended Complaint at 6 (emphasis in original).

[73] *Id.* at 6-7.

a penalty on a company that reacts to competitive forces by lowering rates to a customer through tariffs that permit curtailment is inconsistent with economic reality and an undue deterrent to competitive conduct."[74]

35. These points address the court's statement in remanding this matter that "[t]he Commission did not identify any particular decisions made by Entergy in reliance on the inclusion of interruptible load in its cost allocation that in some way particularly weakened the case for refunds."[75] The incentives that the System

[74] *Id.* at 7. These points address the court's statement that the contention that the Entergy Operating Companies' decision "not to shave their peak load," which they might have done under a different cost allocation, was "a generic possibility of reliance" on the challenged cost allocation, and once the complaint was filed, "Entergy was on notice that interruptible load could be ordered removed from the calculation of peak load." *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1306. Entergy was indeed on notice that the cost allocation could change. However, the presence of notice does not alter the fact that to avoid a possible refund requirement in this situation, the Entergy Operating Companies would have had to enter into uneconomic transactions – i.e., curtailable sales that impose additional costs under the System Agreement – that the System Agreement did not require and, in fact, discouraged through its cost allocation provisions. The existence of notice does not override the equities involved in requiring refunds for transactions that were authorized under the System Agreement. This conclusion is consistent with the court's observation in remanding this matter that in *Am. Elec. Power Serv. Corp.*, 114 FERC ¶ 61,288 (2006), "the Commission unsurprisingly did not award refunds with respect to the lawful rates previously in effect." *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1304.

[75] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1306.

Agreement created produced a disincentive to make curtailable sales because those sales created a penalty in terms of costs to an Operating Company that lowered rates to make those sales. Refunds would serve to impose potentially unrecoverable costs on Operating Companies that, based on the incentives that the System Agreement created, chose to engage in firm sales that cannot now be undone instead of curtailable sales that the System Agreement discouraged from their perspective. It is well recognized that the Commission may conclude that this disincentive that the filed rate created has resulted in decisions not to enter into transactions without specific findings concerning individual actions.[76] In addition, the Commission has previously found that reliance on curtailed loads can create disincentives of the type discussed here,[77] and it has denied refunds after removing interruptible load from an allocation of transmission costs, in part, on the grounds that it would not permit the utilities in

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[76] *Batavia*, 672 F.2d at 83-84 (accepting Commission inferences about the effect of demand ratchets on ratepayer conduct); *Norwalk*, 683 F.2d 477 (finding generalizations regarding customer conduct sufficient to support a determination that a rate ratchet would prove useful in encouraging reductions in demand at the time of the system peak); *see also Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008-09 (D.C. Cir. 1987) (stating that "[a]gencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall").

[77] *Occidental*, 110 FERC ¶ 61,378 at P 3 n.3 (stating that "relying on curtailed loads to allocate PJM's access charge costs may create a disincentive for load serving entities (LSEs) to implement load response programs on their own systems, since LSEs would be charged for system costs regardless of whether they curtail load during system peaks").

question to alter their decisions made in reliance on the rate in effect at the time.[78]

36. We are mindful of the court's statement, in remanding this case, that invoking a Commission policy on refunds does not eliminate the need to consider the fact that an unjust and unreasonable cost allocation caused consumers in Louisiana to pay too much and consumers in other states to pay too little and that refunds, if ordered, would transfer monies to Entergy's Louisiana operating companies from its other operating companies.[79] We agree that this is an important consideration in determining whether refunds are warranted, and one the Commission has considered as part of its refund precedent. However, refunds in cost allocation cases where over-recovery has not occurred must be implemented through surcharges, which create a zero sum game in which customers, not regulated public utilities, are the source of refunds made to other customers. While it may be inequitable that some customers paid too much under the filed rate, the Commission also considers the equities involved in assessing additional charges on other customers who were not responsible for the misallocation but who would be required to make additional payments for past purchases they reasonably concluded were final and cannot revisit. In balancing these equities, the Commission has traditionally denied refunds and made the new, corrected rate applicable prospectively.

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[78] *Id.* P 12.

[79] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d at 1305.

37. Therefore, upon consideration of the refund issue remanded to the Commission, we affirm our finding that refunds should be denied in this proceeding.

The Commission orders:

The Commission hereby finds that refunds should be denied in this proceeding, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(SEAL)

Kimberly D. Bose,
Secretary.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 18, 2014 Decided December 5, 2014

No. 131155

LOUISIANA PUBLIC SERVICE COMMISSION,
PETITIONER

V.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

ARKANSAS PUBLIC SERVICE COMMISSION, ET AL.,
INTERVENORS

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Michael R. Fontham argued the cause for petitioner. With him on the briefs were *Paul L. Zimmering*, *Noel J. Darce*, *Dana M. Shelton*, and *Stephen Kebel.*

Holly E. Cafer, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were *David L. Morenoff*, Acting General Counsel, and *Robert H. Solomon*, Solicitor.

John S. Moot argued the cause for intervenors. With him on the brief were *Gerard A. Clark, John L. Shepherd*, *Jr.*, *Andrea Weinstein*, *Dennis Lane*, *Glen L.*

Ortman, *Paul Randolph Hightower*, and *Chad James Reynolds.*

Before: ROGERS and WILKINS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge.*

ROGERS, *Circuit Judge*: The Louisiana Public Service Commission ("LaPSC") petitions for review of an order of the Federal Energy Regulatory Commission denying refunds to certain Louisiana-based utility companies for payments they made pursuant to a cost classification later found to be "unjust and unreasonable." The Commission failed, LaPSC contends, adequately to explain its reasoning in departing from its "general policy" of ordering refunds when consumers have paid unjust and unreasonable rates. We agree. Although the Commission enjoys broad discretion in fashioning remedies, *see, e.g.*, *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008), it must rationally explain its decision, *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) ("*Town of Concord*"). In denying LaPSC' s refund request, the Commission relied on precedent it characterized as a policy to deny refunds in cost allocation cases, yet the precedent on which it relied is based largely on considerations the Commission did not find applicable. Otherwise the Commission relied on the holding company's inability to "revisit" past decisions, seemingly a universally true circumstance. Accordingly, we grant the petition and remand.

I.

Section 206(a) of the Federal Power Act ("FPA"), 16 U.S.C. § 824e(a), requires the Commission to reform any public utility wholesale electricity rate that it determines is "unjust, unreasonable, unduly discriminatory or preferential."[1] *See also La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999) ("*Louisiana 1*"). Originally, section 206 allowed a party seeking lower rates to obtain only prospective relief at the conclusion of a FERC rate-reform proceeding—often several years after the initial filing of the complaint. *See* S. REP. NO. 100-491, at 3 (1988). By contrast, under section 205 of the FPA, utility companies seeking to raise their rates could receive nearly immediate relief, subject to refund only where the Commission declined to approve the increase. *See* 16 U.S.C. § 824d. In 1988, Congress enacted the Regulatory Fairness Act, Pub. L. No. 100-473, which amended section 206 to authorize the Commission to order refunds for certain overpayments made during the pendency of a rate-reform proceeding.

Section 206(b), as amended, requires the Commission to set a "refund effective date," which is "no[t] later than 5 months after the filing of [the] complaint." 16 U.S.C. § 824e(b). At the conclusion of the proceeding,

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[1] Section 206(a) requires the reform of "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or . . . any rule, regulation, practice, or contract affecting such rate, charge, or classification." 16 U.S.C. § 824e(a).

“the Commission may order refunds of any amounts paid” during the first 15 months following the refund effective date “in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force.” *Id.* An exception provides that in a rate reform proceeding

> involving two or more electric utility companies of a *registered holding company,* refunds which might otherwise be payable under subsection (b) of [section 206] *shall not be ordered* to the extent that such refunds would result from any portion of a Commission order that (1) requires a *decrease* in system production or transmission costs to be paid by *one or more of such electric companies*; and (2) is based upon a determination that the amount of such decrease should be paid through an *increase* in the costs to be paid by *other electric utility companies of such registered holding company*[.]

16 U.S.C. § 824e(c) (emphases added). This is subject to a proviso “[t]hat refunds, in whole or in part, may be ordered by the Commission”

> if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and effective date of the Commission’s order.

Id. § 824e(c)(2).

LaPSC's petition for review concerns the last remaining issue in litigation this court has previously addressed. *See Louisiana I*, 184 F.3d 892; *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) ("*Louisiana II*"). In the State of Louisiana, electricity is supplied to consumers by, among others, three "Entergy"-branded public utility companies: Entergy Louisiana, LLC, Entergy Gulf States Louisiana, LLC, and Entergy New Orleans, Inc. These companies are owned, alongside several other Entergy operating companies in neighboring states, by a single holding company, Entergy Corporation ("Entergy"). Transactions among Entergy operating companies are governed by a Commission-approved system agreement, which enables the operating companies "to act as a single economic unit." *Louisiana I*, 184 F.3d at 894. Under the agreement, the operating companies share electricity with each other and allocate costs among themselves with the aim of "equalizing . . . any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the [c]ompanies." *Id.* (quoting System Agreement § 3.01). This court has explained:

> The system agreement allocates capacity (or demand) costs to each operating company in direct proportion to the power that it takes when total demand upon the Entergy system peaks each month. If, at the monthly system peak, a company takes more energy than it generates, then it is considered "short" and must make an equalizing payment to the "long" companies that have provided the

> excess capacity. This arrangement is mutually beneficial because companies that are long have a ready outlet for their surplus energy and are thereby compensated for carrying excess capacity, while companies that are short enjoy the benefit of a low cost and dependable way of meeting their energy requirements.

Id. at 894–95.

In March 1995, LaPSC filed a complaint under section 206 "alleging that, due to changed circumstances, the allocation of capacity costs [under the system agreement] had become unjust and unreasonable." *Louisiana I*, 184 F.3d at 895. In particular, it objected to the inclusion of "interruptible load" when calculating an operating company's capacity charge. *See id.* at 895–96. The Commission dismissed the complaint. *See La. Pub. Serv. Comm'n v. Entergy Serv., Inc.,* 76 F.E.R.C. ¶ 61,168 (1996), *reh'g denied*, 80 F.E.R.C. ¶ 61,282 (1997). After the court remanded for further explanation, *see Louisiana I*, 184 F.3d at 900, the Commission determined that Entergy' s inclusion of interruptible load in assessing capacity costs was unjust and unreasonable. *See* Opinion No. 468, 106 F.E.R.C. ¶ 61,228, at PP 60-77 (2004). Entergy was ordered to adjust its rates beginning April 1, 2004, but the Commission declined to order refunds for any overcharges incurred during the pendency of the proceeding because it could not "find, as [it] must under Section 206(c) of the FPA, that the Operating Companies that would pay refunds as a result of a reallocation of costs

would be able to collect those refunds from their ratepayers." *Id.* at P 88.

LaPSC again petitioned for review, and the court again remanded the case, holding that the Commission had not adequately explained why it could not make the requisite section 206(c) finding. *See Louisiana II*, 482 F.3d at 520. On remand, the Commission eventually concluded that refunds were unwarranted. But its path to that conclusion was somewhat circuitous. *See Order Denying Rehearing*, 142 F.E.R.C. ¶ 61,211, at PP 7–13 (2013).

On remand from *Louisiana II*, the Commission ordered refunds, citing the determination by the Administrative Law Judge ("ALP) that the non-Louisiana operating companies could, in fact, recover surcharges prospectively. *Order on Remand*, 120 F.E.R.C. ¶ 61,241 (2007) ("*First Order*") (citing *La. Pub. Serv. Comm'n v. Entergy Corp.* 96 F.E.R.C. ¶ 63,002, at 65,023-24 (2001)), *reh'g denied*, *Order Denying Rehearing*, 124 F.E.R.C. ¶ 61,275 (2008) ("*Second Order*"). In August 2010, after Entergy petitioned for review and the Commission requested a remand, it amended the refund order to provide further explanation. *See Amended Order on Remand*, 132 F.E.R.C. ¶ 61,133 (2010) ("*Third Order*"). "There is no question," the Commission acknowledged, "that the Commission has a policy of granting full refunds to correct unjust and unreasonable rates." *Id.* at P 31. It also rejected several equitable reasons for deviating from the general policy. For one, the fact that the mis-allocation "was not undertaken in bad faith does not militate against applying the Commission's

general refund policy here. . . ." *Id.* at P 32. For another, because customer usage patterns were not at issue, the Commission did "not see the passage of time as affecting the equities one way or the other." *Id.*

Upon rehearing, the Commission reversed itself. *See Order Granting Rehearing in Part and Denying Rehearing in Part* ("*Fourth Order*"), 135 F.E.R.C. ¶ 61,218 (2011). Although confirming that section 206(c) did not bar the refunds LaPSC requested, the Commission declined to order them. *Id.* at P 2. "[D]isavow[ing] the distinction" it had "attempted to draw" in the earlier orders "between the treatment of refunds in rate design and cost allocation cases," *id.* at P 23, the Commission concluded that the critical consideration was that "the Entergy system as a whole collected the proper level of revenue." *Id.* at P 24.

In denying further rehearing, the Commission explained that it had "two lines of precedent on refunds, each dealing with a different situation." *See Order Denying Rehearing* ("*Fifth Order*"), 142 F.E.R.C. ¶ 61,211 at P 54 (2013) (quoting *Black Oak Energy, L.L.C.*, 136 F.E.R.C. ¶ 61,040, at P 25 (2011), *reh'g denied*, 139 F.E.R.C. ¶ 61,111 (2012)):

> When a case involves a company over collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers. By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the

> Commission traditionally has declined to order refunds.

Id. This case fell into the latter category because the Entergy system had simply mis-allocated costs and did not over-recover. *See id.* at P 61. The Commission also discussed the precedent underlying its policy. In previous rate design and cost allocation decisions, it had reasoned that: "refunds would potentially result in under-recovery"; "a different [cost] allocation would have resulted in a different decision by consumers or the utility had it been instituted at the time of the facts at issue, but it is simply too late to alter the result"; there may be a "detrimental effect upon an organized market"; the surcharge resulting from refunds would fall on the current generation of ratepayers who were not the same ratepayers that received the benefits" (internal quotation marks omitted); and the "complication and cost of rerunning markets" may be unjustified. *Id.* at P 55 & n.127. Acknowledging that the first factor (the potential for under-recovery of costs) "is not present," *id.* at P 63, the Commission claimed to follow its "long-standing policy" of denying refunds in cost allocation cases, *id.* at P 57 (quoting *Occidental Chem. Corp.*, 110 F.E.R.C. ¶ 61,378, at P 10 (2005)). The Commission stated it would, however, "continue to allow for . . . discretion" in particular cases "to determine whether refunds are appropriate." *Id.* at P 51. In addition, it noted that an equitable consideration "disfavor[ed]" refunds here: "Entergy cannot review and revisit past decisions were we to order a refund." *Id.* at P 63. LaPSC petitions for review.

II.

"[W]hen a federal court of appeals reviews an administrative agency's choice of remedies to correct a violation of a law the agency is charged with enforcing, the scope of judicial review is particularly narrow." *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 224 (D.C. Cir. 1999) (quoting *Nat'l Treasury Emps. Union v. FLRA*, 910 F.2d 964, 966–67 (D.C. Cir. 1990)). Thus, this court generally "defer[s] to [the Commission's] decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the Commission with full knowledge that this judgment requires a great deal of discretion." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) (internal quotation marks omitted). The court has often noted that the breadth of the Commission's discretion is "at its zenith" when fashioning remedies. *La. Pub. Serv. Comm'n*, 174 F.3d at 225 (internal alterations and quotation marks omitted).

At the same time, "[a]s an administrative agency, [the Commission] is subject to the constraints of the Administrative Procedure Act and consequently is forbidden from acting in a way that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Koch Gateway Pipeline Co.*, 136 F.3d at 815 (quoting 5 U.S.C. § 706(2)(A)). In the present context, the Commission must "show that it considered relevant factors and struck a reasonable accommodation among them, and that its order granting or denying refunds was equitable in the circumstances

of th[e] litigation." *Town of Concord*, 955 F.2d at 76 (internal quotation marks, alterations, and citations omitted). To the extent the Commission relies upon factual findings to support its exercise of discretion, its findings must be supported by substantial evidence. *See La. Pub. Serv. Comm'n*, 174 F.3d at 225.

A.

LaPSC contends that the denial of refunds conflicts with the core purpose of the Federal Power Act, namely, "the protection of consumers from excessive rates and charges," *Mun. Light Bds. of Reading & Wakefield v. Fed. Power Comm'n*, 450 F.2d 1341, 1348 (D.C. Cir. 1971). The court does assess the Commission's remedial decisions in light of the underlying aims of the FPA and will set aside a remedy that "thwart[s] the core purposes . . . of the statute." *Town of Concord*, 955 F.2d at 75; *see also id.* at 74. Yet even assuming the "primary aim" of the FPA is to "protect[ ] . . . consumers from excessive rates and charges," *Municipal Light Bds.*, 450 F.2d at 1348, there is no conflict with that purpose here. The FPA did not authorize refunds in section 206 proceedings until the 1988 amendments made by the Regulatory Fairness Act. Even then, Congress barred refunds in holding company cost allocation cases unless it can be shown that the utility will not suffer an under-recovery. *See* 16 U.S.C. § 824e(c). To hold that refunds are mandatory every time there is an unjust or unreasonable rate would be contrary to Congress's use of the permissive "may" in section 206(b), and to this court's rejection of the

argument that the amendments create a presumption in favor of refunds, *see Town of Concord*, 955 F.2d at 76. Section 205 of the FPA declares unjust and unreasonable rates to be "unlawful," 16 U.S.C. § 824d(a), and section 206 requires the Commission to reform any such rates, *see id.* § 824e(a). Whether a party should receive refunds for past payments of excessive charges is a separate issue. *See Town of Concord*, 955 F.2d at 73

Relying on *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999), and *Public Service Co. of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996), LaPSC insists that there is "a strong equitable presumption" in support of "making parties whole" through refunds. Its reliance is misplaced. Under *Exxon*, the "presumption" urged by LaPSC applies "when the Commission [has] commit[ted] legal error." *Exxon Co., U.S.A.*, 182 F.3d at 49 (internal quotation marks omitted). LaPSC has not identified an analogous legal error; the Commission's initial dismissal of LaPSC's complaint is not what caused Entergy's rates to become unjust and unreasonable. And *Colorado* supports refunds where producers would otherwise keep unlawful overcharges. *See Pub. Serv. Co. of Colorado*, 91 F.3d at 1490. Here, the Commission's denial was based principally on the fact that the Entergy system, as a whole, did not retain unlawful overcharges. "[A]bsent some conflict with the explicit requirements or core purposes of a statute, [the court] ha[s] refused to constrain agency discretion by imposing a

presumption in favor of refunds." *Town of Concord*, 955 F.2d at 76.

LaPSC also contends that the Commission's decision to deny refunds institutes a "policy" that "impermissibly denies consumers any practical remedy for unjust and unreasonable rates" "in cases where costs are allocated among a parent's subsidiaries." Pet'r Br. 43. The Commission, however, did not announce "[t]he elimination of Section 206 as a vehicle to remedy unlawful rates," *id.* at 30, because even under the policy as described, the Commission would allow refunds where there is system over-recovery or a filed rate violation.

B.

LaPSC more persuasively contends that the Commission "did not reasonably explain the departure" from its "general policy" of ordering refunds when consumers have paid unjust and unreasonable rates. *Id.* at 48; *cf. Third Order*, 132 F.E.R.C. ¶ 61,133, at P 31 & n.62 (citing approval of the refund policy in *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009)). The Commission can depart from a prior policy or line of precedent, but it must acknowledge that it is doing so and provide a reasoned explanation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

The Commission's primary explanation for denying LaPSC's refund request was that a different "general policy" applied in which refunds are denied in both cost allocation and rate design cases. *Fifth Order*, 142 F.E.R.C. ¶ 61,211, at P 57; *see id.* at PP 49–75. The Commission stated that it saw no reason not to follow the "same approach here" because it viewed "the issues of inclusion or exclusion of interruptible load in allocating costs as a demand allocation dispute"—"a zero-sum game" for the Entergy system—"rather than a case of cost over-recovery." *Id.* at P 61. In fact, the Commission's decisions have relied on specific factors rather than such a broad policy. For instance, in cost allocation decisions where the utility over-recovered or violated the filed rate, the Commission has ordered refunds. *See, e.g., Fifth Order*, 142 F.E.R.C. ¶ 61,211, at PP 65, 69, 73 (citing *Nantahala Power & Light Co.*, 19 F.E.R.C. ¶ 61,152, at 61,280 (1982) (over-recovery)); *Blue Ridge Power Agency v. Appalachian Power Co.*, 58 F.E.R.C. ¶ 61,193, at 61,603 (1992) (filed rate violation). Decisions denying refunds have generally involved the possibility of under-recovery. *See, e.g., Black Oak Energy, LLC*, 136 F.E.R.C. ¶ 61,040, at P 28 (2011); *Occidental Chemical Corp.*, 110 F.E.R.C. 61,378, at P 10 (2005). The Commission's citation of *American Electric Power Service Corp.*, 114 F.E.R.C. ¶ 61,288 (2006)—where, on accepting a rate filed under FPA § 205, the Commission unsurprisingly did not award refunds with respect to the lawful rates previously in effect, *id.* at P 26—hardly advances its explanation.

The Commission also relies on *Southern Company Services, Inc.*, 64 F.E.R.C. ¶ 61,033 (1993), in which, after finding Southern had not met its burden under FPA § 205 to show that its proposed cost classification would be just and reasonable, it denied refunds because there were no "excess revenues to the Southern System" and past "operational decisions . . . cannot be undone." *Id.* at 61,332. But one decision does not constitute a "line[ ] of precedent," *Fifth Order*, 142 F.E.R.C. ¶ 61,211, at PP 11, 54 (internal quotation marks omitted), much less offer a comprehensive theory. The Commission has not pointed to such a theory in *Southern Company* or any other decisions. The premise of a "general policy of denial of refunds," *id.* at P 57, suggests a broader rule than the Commission's decisions establish. As Commission counsel acknowledged during oral argument, its previous decisions do not speak directly to the circumstances of this case. *See* Oral Arg. Tr. 15–16, 23–24. Consequently, the Commission's reliance on its "policy" does not suffice to explain its decision.

A further problem is that the equitable factors relied on by the Commission in previous refund denials were largely absent here. In identifying its "policy," the Commission pointed to the following reasons for denying refunds: potential under-recovery by the utility; consumers' and utilities' inability to revisit past decisions; a "detrimental effect upon an organized market"; different generations of consumers paying the surcharges and receiving the past benefits; and the "complication and cost of rerunning markets." *Fifth Order*, 142 F.E.R.C. ¶ 61,211, at P 55 & n.127. The

Commission recognized that "the danger of under-recovery of costs in this case is not present." *Id.* at P 63. It made no mention of any "past decisions" by consumers, *see id.* at PP 63–64, or of inequities among different generations, or of detrimental effects on any market.

The Commission identified two considerations as warranting the denial of refunds in LaPSC's case: the lack of over-recovery by Entergy and "the fact that Entergy cannot review and revisit past decisions were [the Commission] to order a refund," *id.* at P 63. Neither consideration carries the Commission's burden of reasoned explanation or ties this case to the "long-standing policy," *id.* at P 57 (quoting *Occidental Chemical Corp.*, 110 F.E.R.C. ¶ 61,378, at P 10 (2005)). The Commission did not explain why a lack of over recovery should automatically negate refunds. And it neither identified any specific "past decisions" that Entergy could not revisit, nor explained why that fact—presumably true in every refund decision—was more significant here than in other decisions in which it orders refunds.

To the extent the Commission maintains that it relied on *all* the factors in its cited decisions (except under-recovery, which it had explicitly rejected), the *Fifth Order* reveals otherwise. In paragraph 55 and footnote 127, the Commission listed "equitable considerations that [it] has examined" when denying refunds in cost allocation and rate design decisions. *See Fifth Order*, 142 F.E.R.C. ¶ 61,211. Those considerations explained why the "policy" *existed*, not why it applied to *this case.* Beyond reliance by Entergy and its lack of

over-recovery, the Commission did not state that any other consideration mentioned in its precedent was present here.

Although the Commission can "adher[e] to its standard approach," *Westar Energy*, 568 F.3d at 989, it cannot reasonably apply a policy that is based on factors that it acknowledges are not present in a given case. Invocation of its "policy" did not eliminate the need for the Commission to consider the factual circumstances here: As a result of an unjust and unreasonable cost allocation, consumers in Louisiana paid their utility companies too much while consumers in other states paid too little, and refunds, if ordered, would transfer a subset of the total overpayment to Entergy's Louisiana operating companies from other Entergy operating companies.

C.

The Commission maintains that it did weigh the equities when it relied on Entergy's lack of over recovery and inability to revisit past decisions. *See Fifth Order*, 142 F.E.R.C. ¶ 61,211, at PP 61-64. Yet its analysis fails to provide an adequate explanation for denying LaPSC's refund request. The Commission relied on the fact that Entergy did not receive more revenue than it was entitled to receive in the aggregate, stating that "the allocation of demand-related reserve costs . . . is a zero-sum game in which the Entergy System receives no excess revenues." *Id.* at P 61. Intervenor Entergy Services, the agent for Entergy's

operating companies, maintains that a lack of over-recovery or filed rate violation is the *only* factor the Commission need consider. It suggests that "where, as here, there is no tariff violation or over recovery by utility shareholders, no 'wrong' exists to be rectified with refunds." Intervenor's Br. 13. Pointing to the statement in *Town of Concord* that refunds are "akin to restitution," 955 F.2d at 75, Entergy Services concludes that the Commission need only order refunds where a utility has been unjustly enriched. This is not the rationale adopted by the Commission in denying LaPSC's refund requests, and the agency's "action cannot be upheld merely because findings *might* have been made and considerations disclosed which *would* justify" the decision. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (emphasis added). Entergy Services' analysis is also contrary to the Commission's apparent practice of analyzing factors beyond over-recovery. The statement in *Town of Concord* does little to advance Entergy Services' suggested approach inasmuch as that case involved a filed rate violation "of the most minor, technical sort," 955 F.2d at 75, where the charges at issue were recoverable but not through the accounting mechanism the utility had employed, *id.* at 69.

The Commission concluded that "an equitable ground disfavoring refunds" was "the fact that Entergy cannot review and revisit past decisions were we to order a refund." *Fifth Order*, 142 F.E.R.C. ¶ 61,211, at P 63. It stated that "operational decisions made while the operating companies' proposed cost classification was in effect, and thus made in reliance on that

classification, cannot be undone." *Id.* (quoting *Southern Co. Services, Inc.*, 64 F.E.R.C. ¶ 61,033, at 61,332 (1992)). Yet some amount of reliance is likely to be present every time the Commission considers ordering refunds. As long as decisions by consumers and utilities respond to price, it is possible that they would have altered their consumption or production decisions, respectively, had they been faced with different price signals. Because that is always true, "past decisions" in the abstract cannot be the *only* factor against refunds. Phrased at that level of generality, the same factor is present whenever the Commission *does* order refunds.

The Commission did not identify any particular decisions made by Entergy in reliance on the inclusion of interruptible load in its cost allocation that in some way particularly weakened the case for refunds. *See Fifth Order*, 142 F.E.R.C. ¶ 61,211, at PP 63-64. Neither did Entergy Services. *See* Intervenor's Br. 18. During oral argument, Commission counsel mentioned the decision by Entergy's subsidiaries "not to shave their peak load," which they might have done under a different cost allocation, *see* Oral Arg. Tr. 18–19, but this too is a generic possibility of reliance insufficient to distinguish other decisions in which the Commission awards refunds based on unjust and unreasonable rates. Once LaPSC filed its section 206 complaint in 1995, Entergy was on notice that interruptible load could be ordered removed from the calculation of peak load. *See Exxon Co.,* 182 F.3d at 49–50; *Pub. Serv. Co. of Colorado*, F.3d at 1490. Unrebutted expert evidence of record offered by LaPSC indicated that refunds between

operating companies in the context of billing errors were routine and not disruptive. *See* Affidavit of Stephen J. Baron, ¶¶ 12, 13 (Jan. 19, 2010).

Accordingly, because the line of precedent on which the Commission relied involved rationales that it concluded were not present in LaPSC's case, and because the existence of the identified equitable factor is unclear and its relevance inadequately explained, we grant the petition and remand the matter to the Commission. It remains for the Commission on remand to consider the relevant factors and weigh them against one another, striking "a reasonable accommodation among them." *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981); *see Town of Concord*, 955 F.2d at 76.

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

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

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

ORDER DENYING REHEARING

(Issued March 21, 2013)

1. On June 9, 2011, the Commission issued an order finding that, while it had statutory authority to order refunds for the 15-month refund period that followed the Louisiana Public Service Commission's (Louisiana Commission) filing of a complaint in March 1995 opposing Entergy Services, Inc.'s (Entergy) inclusion of interruptible load in certain rate calculations under the Entergy System Agreement (System Agreement), and while it had earlier directed Entergy to remove

interruptible load from these calculations, it would invoke its equitable discretion to deny refunds.[1]

2. The Louisiana Commission then filed a request for rehearing of the Rehearing Order, challenging the Commission's finding that no refunds were warranted. Upon consideration of the Louisiana Commission's rehearing request, the Commission issued an order establishing a paper hearing, limited to the Commission's exercise of equitable discretion to deny refunds.[2]

3. Having reviewed the Louisiana Commission's request for rehearing in Docket Nos. EL00-66-017 and EL95-33-011, along with the briefs opposing refunds, and the Louisiana Commission's reply brief, the Commission denies the Louisiana Commission's request for rehearing. We will also dismiss, as moot, the Louisiana Commission's request for rehearing in Docket No. EL00-66-016.

I. Background

4. This proceeding began on March 15, 1995, when the Louisiana Commission filed a complaint alleging that certain cost allocation calculations by Entergy under the System Agreement were unjust and unreasonable and seeking revision of the System Agreement

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

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

to exclude interruptible load from calculation of peak load responsibility.[3] The Commission issued an order finding that inclusion of interruptible load in such calculations was reasonable, noting that the System Agreement had included interruptible load in the calculation of peak load responsibility since the parties entered into the System Agreement in 1951.[4]

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

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

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

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

Kentucky Utilities or provide a reason for including interruptible load in the allocation of capacity costs.[6]

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

7. On appeal of Opinion No. 468, the D.C. Circuit, *inter alia*, held that the Commission had failed to sufficiently explain why FPA section 206(c) barred refunds in this case, and remanded that issue "for a more considered determination."[9] The Commission issued an order in response to the court's remand, determining

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

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

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

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

that refunds were both legal and appropriate.[10] After determining that FPA section 206(c) did not bar refunds, the Commission explained that refunds were warranted:

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

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

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

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

[11] *Id.* P 8.

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

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

10. On August 13, 2010, the Commission issued an amended order on remand, holding that: (1) it was authorized to order refunds in this case in spite of the strictures of section 206(c) of the FPA; and (2) it was ordering refunds pursuant to its discretionary remedial authority.[16] In ordering refunds, the Commission explained that it has a policy of granting full refunds to correct unjust and unreasonable rates and that "[t]he only issue is whether Arkansas/Mississippi and Entergy have demonstrated any reason here for the Commission to deviate from its policy of granting full refunds."[17] The Commission held that there was not, and further explained that "there is no doubt that Entergy's inclusion of interruptible load affected the

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

[14] *Id.* P 15.

[15] *Id.* P 16.

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

[17] *Id.* P 31.

Operating Companies' cost of service, led to an overcharge to Louisiana customers, and resulted in unjust and unreasonable rates."[18] Second, the Commission held that this was not a rate design case where customer usage patterns are relevant, but rather involved misallocation of costs, so that one group of customers was paying too much, while others paid too little. The Commission found that, under the facts of the case, it did not consider the length of time since the complaint was filed to be a relevant factor "one way or the other" in whether refunds were warranted.[19]

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

> On the question of refunds, the Commission has two lines of precedent, each dealing with a different situation. When a case involves a company over collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers. [FN40] By contrast, in a case where the company collected the proper level of revenues, but it is later determined

[18] *Id.* P 32.

[19] *Id.*

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

> that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds. [FN41] Reconsidering the matter, the Commission disavows the distinction we attempted to draw in the Amended Rehearing Order between the treatment of refunds in rate design and cost allocation cases.
>
> FN40. *See, e.g.*, *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009); *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).
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> FN41. *See, e.g.*, *Portland General Electric Co.*, 106 FERC ¶ 61,193; *Union Electric Co.*, 58 FERC ¶ 61,247; *Commonwealth Edison Co.*, 25 FERC ¶ 61,335.[21]

12. The Commission determined that the Entergy System as a whole collected the proper level of revenue, but incorrectly allocated peak load responsibility among the various Entergy Operating Companies and therefore did not engage in an over-collection of revenue that would justify refunds.[22] It explained it therefore would "apply here our usual practice in such cases, invoking our equitable discretion to not order refunds, notwithstanding our authority to do so."[23] In response

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[21] *Id.* P 23.

[22] *Id.* P 24.

[23] *Id.*

to this holding, the amounts previously refunded were reversed on July 5, 2011.[24]

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

II. Procedural Matters

14. In response to the Briefing Order, Entergy[26] and the Arkansas Commission each filed briefs opposing refunds.[27] On November 28, 2011, the Louisiana Commission filed its reply brief on the issue. On December 2, 2011, the Arkansas Commission filed a motion to strike the Louisiana Commission's reply brief on the

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

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

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

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

ground that it exceeded the 30-page limit on briefs established by the Commission's Briefing Order. On December 5, 2011, the Louisiana Commission responded to the Arkansas Commission's motion by moving to resubmit a redacted brief that complies with the 30-page limit and simultaneously submitting the redacted brief. On December 8, 2011, the Louisiana Commission filed a supplemental answer to the motion to strike. On May 14, 2012, the Louisiana Commission filed a motion to lodge three recent Commission decisions. On May 29, 2012, the Arkansas Commission filed a motion to reject the motion to lodge.

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

III. Request for Rehearing, Briefs in Opposition, and Reply Brief Louisiana Commission's Rehearing Request

16. In its rehearing request, the Louisiana Commission argues that the Rehearing Order erroneously applied a "'rate design' policy" intended to prevent a utility from under collecting its legitimate revenue requirement in cases "where the Commission, without any prior notice, determined that the utility's rate

design was faulty and imposed a new one."[28] It contends that the Commission required refunds even for rate design changes in section 205 cases prior to the late 1970s.[29] It contends that subsequent exercises of discretion to not order refunds in section 205 cases reflected instances where a rate design change would cause the utility to undercollect its costs.[30] These cases, it avers, reflected policy choices regarding rate design and did not necessarily involve a determination that the preexisting rate design was unjust and unreasonable.

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

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[28] Louisiana Commission Request for Rehearing at 10.

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

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

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

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

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

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

[33] *Id.* at 15.

[34] *Id.* at 16.

[35] *Id.* (emphasis in original).

[36] *Id.*

[37] *Id.*

19. The Louisiana Commission further maintains that, in cases where costs are allocated among affiliated jurisdictional entities, including those involving the Entergy System, the Commission has required refunds for unjust and unreasonable cost allocations.[38] The Louisiana Commission states that in *Middle South Services, Inc.*[39] the Commission found that Entergy improperly used "target" capital structure ratios and failed to deduct accumulated deferred income taxes from the rate base of Operating Companies in the System Agreement cost allocations and ordered refunds.[40] It claims that in a recent Entergy case the Commission granted refunds.[41] It notes that in another Entergy case the Commission established a refund effective date with respect to a Louisiana Commission complaint and accepted a settlement by the parties that included refunds of amounts collected in excess of the settlement rates.[42]

20. The Louisiana Commission contends that other holding company cases do not establish any policy

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

[39] 16 FERC ¶ 61,101 (1981).

[40] Louisiana Commission Request for Rehearing at 17.

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

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

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

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

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

[44] Louisiana Commission Request for Rehearing at 19.

[45] *Id.* at 20.

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

[47] *Id.* at 24.

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

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

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

[50] *Id.* at 26.

[51] *Id.*

would exercise discretion not to order some Entergy Operating Companies to make refunds to other Entergy Operating Companies.[52]

Entergy's Brief in Opposition

23. Entergy argues that the Commission should continue to invoke its equitable discretion to deny refunds. Entergy states that the Commission has a policy of ordering refunds for overcharges of a customer and over-collections of revenues, but denying refunds for misallocations of costs among different groups of customers.[53] In Entergy's view, "[l]ike a rate design issue, a holding company cost allocation that implicates FPA section 206(c) involves purely a question regarding allocation of costs among customers (i.e., the affected companies and their ratepayers), not an overcollection of revenues."[54] Entergy believes that the Commission has recognized this principle in *Southern* and other cases.[55]

24. Entergy asserts that the equitable considerations for denying refunds in rate design cases are applicable in a holding company cost allocation case under FPA

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

[53] Entergy Brief at 10.

[54] *Id.* at 13.

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

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

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[56] *Id.* at 15 (footnote omitted).

[57] *Id.* at 16.

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

[59] *Id.*

25. Entergy further argues that its risk of under-recovery of costs, the "primary reason why Congress added FPA section 206(c)," supports the Commission denying refunds, as that section "makes clear that, even if the Commission makes the statutorily required finding that there will be no loss of revenues," it retains equitable discretion to deny refunds.[60]

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

[60] *Id.* at 18.

[61] *Id.* at 19-20.

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

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

allocations between operating companies, as incentives to delay proper allocation of revenue are not present because holding company retention of excessive revenues is not at issue.[64]

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

28. Entergy further asserts that all of the cases cited by the Louisiana Commission in which the Commission allowed refunds "involving unjust and unreasonable allocations by a holding company system" are distinguishable.[66] Entergy states that, in all of the cases cited by the Louisiana Commission, the refund issue was not discussed or analyzed in any detail and that many cases cited were the result of settlements or voluntary actions by the holding company.[67] And Entergy challenges the Louisiana Commission's citation of *Nantahala.*[68] as allowing refunds in a holding company context, contending there were special circumstances in that case. Entergy states that the fact that the public utility did not file the agreement containing

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[64] *Id.* at 22.

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

[66] *Id.* at 24.

[67] *Id.*

[68] *Nantahala*, 19 FERC ¶ 61,152.

the challenged cost allocation (even though such a filing was required by section 205) of the filing resulted in the cost allocation in that case never being accepted for filing by the Commission.[69]

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

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[69] Entergy Brief at 25.

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

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

the System Agreement reflected voluntary refund payments, rather than Commission rulings.[72]

Arkansas Commission's Brief in Opposition

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

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

[73] Arkansas Commission Brief at 3.

[74] *Id.* at 3-4.

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

are found, refunds will be ordered in cost allocation and rate design cases.[76]

31. The Arkansas Commission contends that, contrary to the Louisiana Commission's statements, prospective relief is the norm where an existing rate design is found to be unjust and unreasonable.[77] The Arkansas Commission asserts that refunds are not appropriate because, as the Commission found, the Entergy System has collected the proper level of revenue.[78] The Arkansas Commission disputes the Louisiana Commission's view that the Commission should evaluate the revenues collected by the individual Operating Companies, as "the Commission's system-wide analysis of revenue recovery properly reflects the actual situation and the complained of problems."[79] It asserts that *Southern* does not stand for the Louisiana Commission's asserted proposition that denying refunds in rate design cases does not apply when rates are found unreasonable or unduly discriminatory, as the refunds in that case reflected a settlement and are therefore not a Commission determination.[80]

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

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

[78] *Id.* at 7.

[79] *Id.* at 8.

[80] *Id.*

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

Louisiana Commission's Reply Brief

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

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[81] *Id.* at 9.

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

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

34. The Louisiana Commission further asserts that the Commission's remedial discretion must be "exercised to fulfill the purposes of the enabling statute."[84] In this case, the Louisiana Commission maintains, providing a remedy for "[t]he excessive rates . . . charged by some operating companies to other operating companies," which were "in turn . . . passed through to consumers . . . would serve the core purposes of the [FPA], while denying relief conflicts with these purposes."[85] The Louisiana Commission states that the Commission and D.C. Circuit decisions have recognized that the Commission has a general policy requiring refunds for unjust and unreasonable rates.[86] It notes that in *Towns of Concord v. FERC*, 955 F.2d 67, 67 (D.C. Cir. 1992), the D.C. Circuit noted "the Commission's general policy of granting full refunds remains in effect." It adds that the D.C. Circuit later held in *Consolidated Edison Co. of New York v. FERC* that "we will remand to FERC for it either to follow its 'general policy' of providing refunds, or to explain, in accordance with *Towns of Concord*, 955 F.2d at 76, its divergence from this policy."[87] The Louisiana Commission also cites Commission precedent for the proposition that the

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

[85] *Id.* at 6.

[86] *Id.* at 7-8.

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

Commission has relied in the past upon its general policy to grant refunds.[88]

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

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

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

[89] *Id*. at 8.

[90] *Id*. at 9.

[91] *Id*. at 10.

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

37. It claims that other holding company cases do not establish any policy against refunds. It states that the Commission required refunds with respect to the unreasonably high return on equity included in cost allocations, but exercised discretion to deny refunds with respect to the allocation of O&M costs in *Southern.*[94] The Louisiana Commission rejects Entergy's citation of *American Electric Power Services Corp.*[95] for the proposition that refunds should be denied in a cost allocation case, stating that that decision merely left in place a phase-in of a proposed rate design change that took place prior to the Commission's order.[96] It states the Commission relied upon the filed rate doctrine to

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

[93] *Id.* at 11.

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

[95] Opinion No. 311, 44 FERC ¶ 61,206.

[96] Louisiana Commission Reply Brief at 12.

prevent collection of the surcharges, a concern it contends has been eliminated from this case. It also seeks to distinguish that case, in that the Commission made no finding that the phase-in rates were unjust and unreasonable[97] and states that in another case involving the same company, the Commission did grant refunds.[98]

38. The Louisiana Commission contends that correcting unjust and unreasonable cost allocations among affiliates results in no wholesale revenue impact upon the parent, and contends that the Commission traditionally has required refunds to correct cost allocations that it has found unjust and unreasonable.[99]

39. The Louisiana Commission states that a no-refund policy would undermine the Commission's policy in Entergy bandwidth cases of allowing challenges by parties to the justness and reasonableness of the bandwidth remedy through section 206 complaint proceedings. The Louisiana Commission contends that the Commission has granted refunds in bandwidth remedy cases under both section 205 and section 206, even though they are cost allocation cases.[100] It contends

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[97] *Id.* at 12-13.

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

[99] *Id.* at 13-14.

[100] *Id.* at 14-16 (citing Opinion No. 509, 132 FERC ¶ 61,253: *Louisiana Public Service Commission v. Entergy Corp.*, 124 FERC

that both Entergy and the Arkansas Commission have adopted positions in bandwidth remedy cases supporting such refunds and that these positions conflict with their stance in this proceeding.[101] The Louisiana Commission contends that exceptions to the Commission's general policy favoring refunds for unjust and unreasonable rates are not applicable because they were created for special circumstances not applicable to this proceeding.[102] The Louisiana Commission states that the rate design exception applies only to unique circumstances – where a utility files new rates and chooses a rate design, but the Commission later adopts a different rate design without prior notice.[103] It states that this exception is generally inapplicable in section 206 cases.

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

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¶ 61,010 (2008); *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010)).

[101] *Id.* at 16-18.

[102] *Id.* at 18.

[103] *Id.* at 19

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

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

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[104] *Id.* at 23-24.

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

[106] *Id.* at 25.

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

and there are no market complications. The Louisiana Commission also contends that cases where the Commission has declined to order refunds because of concerns of disruptions of orderly operation of the market are inapplicable.[108]

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

43. The Louisiana Commission contends that, while the Commission has decided that section 206(c) does not bar refunds in this case, Entergy repackages potential underrecovery by the holding company as a so-called equitable factor.[110] It contends that this claim is meritless "because the Commission has already decided that the Operating Companies do not have an inability to pass through refunds and surcharges. Moreover, all the active parties have settled the refund and surcharge issues."[111]

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

[109] *Id.* at 27.

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

[111] *Id.*

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

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

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

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

notwithstanding possible objections by individual state commissions.[114]

Louisiana Commission's Motion to Lodge

46. On May 14, 2012, the Louisiana Commission filed a motion to lodge three recent decisions by the Commission ordering Entergy to pay refunds to the Louisiana Commission. The first case, *Entergy Services, Inc.*, 139 FERC ¶ 61,106 (2012), involved acceptance of a compliance filing to implement Opinion No. 509, which held that the Spindletop Regulatory Asset costs should be included in the bandwidth formula as of the refund effective date established in that complaint proceeding.[115] A second case, *Entergy Services, Inc.*, 139 FERC ¶ 61,104 (2012), involved a compliance filing to implement Opinion No. 505, which addressed the first year implementation filing for the bandwidth formula. The third case, *Louisiana Pub. Serv. Comm'n v. Entergy*, 139 FERC ¶ 61,100, at P 27 (2012), relates to the instant proceeding and required refunds for inter ruptible load included in System Agreement Service Schedule MSS-3 calculations – as opposed to the Service Schedule MSS-1 calculations at issue in this proceeding – for the 15 months following the refund effective date in that proceeding.

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

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

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

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

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

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[116] Louisiana Commission Motion to Lodge at 3.

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

adjustments to refund amounts that may result from later procedures.

IV. <u>Discussion</u>

49. Our analysis of the appropriate remedy begins, as it must, with an assessment of the wrong it is intended to address. It has been established in this case that "it was unjust and unreasonable for Entergy to include interruptible load in its calculation of peak load responsibility because the Operating Companies could control capacity costs by curtailing interruptible service during times of peak demand."[118] As a result of this improper allocation of costs among the Operating Companies, the Louisiana Commission states that Entergy Louisiana's ratepayers have paid amounts that should have been charged to the ratepayers of the other Entergy Operating Companies for the applicable 15-month refund period.

50. Save for one unsupported and largely irrelevant assertion, which we will discuss further below, the Louisiana Commission agrees that this overcharge did not result in the Entergy System as a whole recovering an amount in excess of its cost of service.[119] Nor does the Louisiana Commission point to any violation of a tariff

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

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

or filed rate. Rather, the Louisiana Commission and the other parties recognize that this case involves an improper allocation of costs among the Entergy Operating Companies.[120]

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

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[120] Louisiana Commission Request for Rehearing at 10-16.

52. The Louisiana Commission argues that the Commission's mandate under the FPA to protect consumers from unreasonable rates and charges requires that the Commission must order refunds.[121] However, as Entergy notes, this general statutory mandate does not equate to an obligation to order refunds whenever a rate or practice is found to be unjust and unreasonable. This is embodied in the language of the statute: "At the conclusion of any proceeding under this section, the Commission *may* order refunds of any amounts paid. . . ."[122] As the Commission noted in *California ISO*:

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

53. The Commission has broad equitable discretion in determining whether and how to apply remedies.[124] The Commission has exercised its remedial discretion,

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[121] *See* Louisiana Commission Reply Brief at 3-7.

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

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

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

as relevant here, through its development of a series of distinctions based upon the nature of the underlying matter at issue that help determine the advisability of ordering refunds. An examination of these distinctions will help clarify why we deny refunds in this matter and will address and refute the various arguments made by the Louisiana Commission that it maintains show that refunds are warranted in the instant proceeding.

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

> The Commission has two lines of precedent on refunds, each dealing with a different situation. When a case involves a company over-collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers. [FN35] By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenue should have been allocated differently, the Commission traditionally has declined to order refunds. [FN36]
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> FN35. *See, e.g.*, *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009); *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).

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

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

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

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

[127] These are not the only equitable considerations that the Commission has examined. *See, e.g., Ameren*, 127 FERC at 61,522 (detrimental effect upon an organized market); Opinion No. 311-B, 46 FERC at 62,195 (declining to order refunds in a holding

overcharges, the considerations described above do not exist.

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

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company cost allocation case, *inter alia*, because the "surcharge" resulting from refunds "would fall on the current generation of ratepayers" who were not the same ratepayers that received the benefits."); *California ISO*, 120 FERC ¶ 61,271 (complication and cost of rerunning markets).

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

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

rates that recovered in excess of its revenue requirement.[130]

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

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

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

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[130] *Id.* at 63,468.

[131] 110 FERC ¶ 61,378.

[132] *Id.* P 10

original order in that proceeding, Opinion No. 377, at first ordered refunds:

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

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

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[133] *Southern*, 64 FERC at 61,328.

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

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

[134] *Id.* at 61,332. While in the same proceeding Southern did agree to refund excess amounts to remedy an excessive rate of return, Southern made these refunds voluntarily as part of a settlement and the Commission has held that approval of an uncontested settlement does not have precedential effect. *See, e.g.*, *Tampa Electric Company*, 140 FERC ¶ 61,046, at P 31 (2012); *Old Dominion Electric Cooperative and North Carolina Electric Membership Corp. v. Virginia Electric and Power Co., PJM Interconnection, L.L.C. and Virginia Electric and Power Co.*, 139 FERC ¶ 61,137, at P 12 (2012). The Louisiana Commission also points to a settlement approved by the Commission in *System Energy Resources, Inc.*, 56 FERC ¶ 61,465, which authorized refunds. But in that order, the Commission, as in other orders approving uncontested settlements, similarly included language that its "approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding." *Id.* at 62,643.

[135] 114 FERC ¶ 61,288 (2006).

companies.[136] The Commission again declined to impose refunds and instead implemented the change prospectively:

> We agree with AEP's proposed effective dates. Its proposal to maintain the currently-effective allocation methodology under Schedule D, without retroactive refunds, until the first day of the following month following the issuance of this order approving the new methodology without suspension or potential refund is consistent with Commission precedent. n9
>
> [FN9] *See, e.g., Southern Company Services, Inc.*, 64 FERC 61,033 (1993).
>
> . . . .
>
> In the past, the Commission exercised discretion by not ordering refunds in analogous cases involving allocation of costs among the operating companies of holding company systems. AEP's proposal is consistent with this practice, and we find no reason to deviate from this here.[137]

61. We see no reason not to follow this same approach here, as we view the issues of inclusion or exclusion of interruptible load in allocating costs as a demand allocation dispute, rather than a case of cost over-recovery.

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

[137] *Id.* at 61,975.

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

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

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[138] Entergy Brief at 16.

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

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

1995-96 should not have prevented Entergy Operating companies from recovering any increased costs in other jurisdictions outside of Louisiana.

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

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

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

[142] *See, e.g. NYISO*, 92 FERC ¶ 61,073, at 61,307 (2000); *Union Electric Co.*, 58 FERC at 61,818; *Ameren*, 127 FERC ¶ 61,121 at P 155; *Connecticut Light & Power*, 15 FERC ¶ 61,056 (1981), *aff'd sub nom. Second Tax Dist. of Norwalk v. FERC*, 683 F.3d 477, 790 (D.C. Cir. 1983) ("A rate design affects, to some degree, customers' consumption patterns. A change in that design by Commission order cannot affect that pattern retroactively since the customers' energy usage was based on the rate design in effect during the period."); *Commonwealth Edison Co.*, 8 FERC ¶ 61,277 (1979) (noting that customers can only modify their consumption patterns prospectively).

[143] *Southern*, 64 FERC at 61,332.

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

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

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

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

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

refunds.[146] However, in *Nantahala*, the Commission authorized refunds to the extent that the utility had charged its customers an excessive amount under its filed purchase power adjustment clause.[147] Thus, it represents an overrecovery case. In contrast, the issue at hand involves a comparatively straightforward dispute over cost allocation.

66. The Louisiana Commission also contends that the Rehearing Order wrongly focuses on the consequences for a parent holding company rather than the jurisdictional Operating Companies. This relates to another contention of the Louisiana Commission: that the Commission's policy of no refunds for rate design or cost allocation matters should not be, and has not been applied in cases, like this one, where costs are allocated among affiliated jurisdictional companies operating in a coordinated system. However, as demonstrated above, notably in the Commission's *Southern* and *American Electric Power* decisions, that assertion is incorrect. As those cases reveal, the Commission has treated coordinated holding company systems (like that of Entergy) effectively as a single utility, with the operating companies as its customer groups. This accurately reflects the coordinated nature of Entergy's integrated operating system, long recognized by both

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

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

the courts and the Commission.[148] In such contexts, excessive recoveries may logically accrue to an individual Operating Company or the system as a whole, making it a legitimate target of Commission scrutiny. And, independently, the Louisiana Commission presents no persuasive reason why – in this context – a multi-utility system like Entergy's should be treated differently than multi-utility coordinated RTO/ISO systems like PJM.

67. The Louisiana Commission similarly contends that the Commission has not applied the cost allocation/rate design versus over-recovery distinction to section 206 cases. This is incorrect. While this policy has been applied more often in section 205 cases (the vast majority of cases filed with the Commission are section 205 cases), several of the decisions that have applied the policy and denied retroactive refunds have involved section 206 complaints. *Occidental*,[149] for example, originally arose as a section 206 complaint in which refunds were ultimately denied (on rehearing) due to a Commission finding that they would run afoul of the policy barring refunds in rate design matters. *Black Oak*[150] represents yet another case in which refunds were denied in the context of a section 206 complaint. A third section 206 case in which refunds were denied is *Ameren*.[151] While the Louisiana Commission

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

[149] 110 FERC ¶ 61,378.

[150] 136 FERC ¶ 61,040.

[151] 127 FERC ¶ 61,121 at P 157.

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

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

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

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

Oklahoma Commission v. AEP proceeding, which the Louisiana Commission points to, involved a tariff violation – a deviation from the filed rate during the period refunds were at issue.

70. The Louisiana Commission cites other cases where refunds have been ordered to support its claim that they should be ordered in this matter as well. We find these cases can be distinguished or at least lack clarity with respect to why refunds were imposed. We can find no clear Commission statement of why, more than 30 years ago, refunds were ordered in *Middle South Services, Inc.*[153], and so do not accord it significant weight. We also find that other examples cited by the Louisiana Commission where refunds were awarded are inapposite to the facts involved in this case. The Louisiana Commission concedes, for example, that another case it cites[154] allowing refunds did not involve a rate design change.[155] And a number of the cases that Louisiana Commission cites involve uncontested settlements, which have no precedential weight.[156]

[153] 16 FERC ¶ 61,101.

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

[155] *See* Louisiana Commission Reply Brief at 20.

[156] *See, e.g.*, *System Energy Resources, Inc.*, 56 FERC ¶ 61,465 (1991); *Southern Co. Svc.*, Opinion No. 377, 61 FERC, at 61,306 n.6 (1992). The Louisiana Commission's assertion that the fact active parties have settled refund and surcharge issues demonstrates refunds are feasible shares the same flaw; such

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

72. The Louisiana Commission also contends that several of the Commission's orders directing refunds in cases involving Entergy filings or related complaints concerning the bandwidth remedy ordered in Opinion No. 480 conflict with the distinctions that we draw above.[158] The Louisiana Commission first contends that application of a no-refund policy would undermine the Commission's policy in Entergy bandwidth remedy cases of allowing challenges to Entergy's bandwidth remedy formula[159] pursuant to section 206

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arguments are not precedential. *Id.*; *see* Louisiana Commission Reply Brief at 28.

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

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

[159] In Opinion Nos. 480 and 480-A, the Commission established a bandwidth remedy to ensure rough production cost

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

73. Some of the Commission orders cited by the Louisiana Commission pertain to Entergy's annual filings to implement the bandwidth formula to calculate the annual bandwidth remedy payments and receipts.[162] These implementation proceedings, ordered by the Commission to roughly equalize production costs between the Entergy Operating Companies, involve implementation of the filed formula rate and refunds are

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

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

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

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

appropriate consistent with our policy of generally ordering refunds where a utility violates the filed rate.[163]

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

75. We note that some recent bandwidth remedy decisions involving complaints to change the formula have not followed this approach because, in light of the remand from the D.C. Circuit in this proceeding, the Commission had initially doubted its authority to deny refunds based on equitable considerations in matters involving holding company systems. Some of the section 206 decisions that the Louisiana Commission cites, including Docket No. EL08-51-000 (resulting in exclusion of Waterford 3 capital lease amounts in production costs in the plant ratios) and Docket No. EL08-51-002 (involving addition of Spindletop Regulatory Asset production costs to the bandwidth formula) were decided prior to our June 2011 findings in the Amended Remand Order that clarified our approach in this area. And while our decision in EL07-52-001

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

(removing interruptible load from determinations of Service Schedule MSS-3 load used in bandwidth remedy calculations) came after the Amended Remand Order, we note that our policy in this area was still under consideration and evolving, as evidenced by the fact that we sought further input from the parties on this issue through a second paper hearing on the equitable discretion issue.[164] Indeed, the Commission did not consider exercising its discretion and denying refunds in these orders.

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

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

The Commission orders:

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

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

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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135 FERC ¶ 61,218
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation	Docket No. EL00-66-014
Louisiana Public Service Commission v. Entergy Services, Inc.	Docket No. EL95-33-010

ORDER GRANTING REHEARING IN PART
AND DENYING REHEARING IN PART

(Issued June 9, 2011)

1. On August 13, 2010, the Commission issued its amended order on remand in this proceeding, holding that section 206(c) of the Federal Power Act (FPA), 16 U.S.C. § 824e(c) (2006), did not preclude the granting of refunds in this case, and that, pursuant to our discretionary remedial authority, refunds would be appropriate.[1] Timely requests for rehearing were filed by the

[1] *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 132 FERC ¶ 61,133 (2010) (Amended Remand Order). This case is before us on voluntary remand from the United States Court of Appeals of the District of Columbia Circuit. *Arkansas Public Service Commission, et al. v. FERC*, No. 08-1330, *et al.* (D.C. Cir. June 24, 2009). The convoluted history of this case is described in greater detail in the Amended Remand Order, and will not be repeated here except as necessary to explain today's decision.

Arkansas Public Service Commission and the Mississippi Public Service Commission (jointly) (Arkansas/Mississippi) and Entergy Services, Inc. (Entergy), contesting both conclusions.

2. We deny rehearing with respect to our interpretation of section 206(c), but grant rehearing on the issue of whether refunds should be ordered. Thus, we conclude that, while we have authority to grant refunds in this case, the better course is to invoke our equitable discretion to deny them.[2]

DISCUSSION

1. **Section 206(c) Authority**

3. Because the Commission is invoking its discretion to deny refunds in this order, the parties' argument concerning our authority pursuant to FPA section 206(c) is, as a practical matter, moot. Nonetheless, we believe that, as a matter of policy, it is important to fully confront this question.

4. In the Amended Remand Order, the Commission's interpretation of section 206(c) was significantly informed by the court's decision in *Louisiana Public Service Commission v. FERC* (*Louisiana Public Service*

[2] A pending partial settlement that quantifies the amount of refunds to be paid, while leaving open the issues being decided in this order (i.e., whether the Commission has authority to order refunds and whether, if the Commission has such authority, refunds are appropriate under the circumstances of this case), will be addressed in a separate order.

Commission),[3] which held that the Commission had failed to sufficiently explain why that provision barred refunds in this case. Thus, we held that: (1) the filed rate doctrine did not prevent refunds from being awarded in this case; (2) the Supremacy Clause of the United States Constitution (as interpreted by the Supreme Court in *Miss. Power & Light Co. v. Mississippi ex rel. Moore*[4] and *Nantahala Power & Light Co. v. Thornburg*[5]) prohibits state commissions from preventing Commission-ordered refunds from being flowed through at the retail level; (3) alleged practical problems at the retail level that would impede Entergy's full recovery of costs could not prevail over this constitutional doctrine; and (4) refunds were not barred by the court's decision in *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009).[6]

5. On rehearing, Entergy does not appear to contest the logic of the Commission's position that the Supremacy Clause prevents the trapping of the costs at the retail level of Commission-ordered refunds. Entergy nonetheless claims that the Commission must more fully "explain[] how the Entergy Operating Companies will be able to overcome potential obstacles to full retail rate recovery of the cost of refunds made to other operating companies;"[7] Entergy maintains that

[3] 482 F.3d 510 (D.C. Cir. 2007).

[4] 487 U.S. 354 (1988).

[5] 476 U.S. 953 (1986).

[6] Amended Remand Order, 132 FERC ¶ 61,133 at P 20-30.

[7] Entergy Request for Rehearing at 5 (heading format and capitals omitted).

state regulation poses practical difficulties that would prevent such recovery.

6. The Commission rejects Entergy's argument. As the court stated in *Louisiana Public Service Commission*, the Commission had previously failed to "explain why, under the Supremacy Clause, a rate increase ordered by the Commission may be recovered through retail rates but a refund ordered by the Commission may not be," citing *Mississippi Power*, 487 U.S. at 369-72.[8] In the pages referenced, the Supreme Court held that "FERC allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates."[9] This means, the Court explained, that "States may not bar regulated entities from passing through to retail customers FERC-mandated wholesale rates."[10] We see no basis on which to distinguish this principle with regard to the ordering of refunds, which may, under particular circumstances, require the payment of a Commission-mandated rate to recover from other ratepayers the amounts being refunded.[11] Furthermore, we find that the Supremacy Clause provides a legal basis to

[8] 482 F.3d at 520.

[9] 487 U.S. at 371.

[10] *Id.* at 372.

[11] As we explained in the Amended Rehearing Order, the recovery of amounts refunded to some ratepayers from other ratepayers may be warranted in some instances, but not others. *E.g.*, Amended Remand Order, 132 FERC ¶ 61,133 at P 21 n.43 (citing and discussing, *e.g.*, *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, Opinion No. 468, 106 FERC ¶ 61,228, at P 84 & n.156 (2004)).

overcome any state regulatory stumbling blocks to flowing through the cost effects of any such federally ordered rate refunds.

7. Entergy also asserts that our denial of its "practical difficulty" defense is inconsistent with *Entergy Services, Inc.*, 127 FERC ¶ 61,126 (2009), *reh'g denied*, 131 FERC ¶ 61,227 (2010), "where the Commission took a position" that "the Supremacy Clause did not protect Entergy" from a "loss of revenues that arose due to decisions by retail regulators."[12] We disagree. In that case, the Commission rejected Entergy's request that it review the decision of the Public Utilities Commission of Texas (Texas Commission) concerning the allocation of Entergy-system payments to retail customers as beyond the Commission's FPA jurisdiction.[13] To the extent that the state regulator's decision allegedly trapped costs in violation of the Supremacy Clause, we concluded, the remedy was not a matter for the Commission to itself address,[14] but rather was "a matter for the courts to review in the pending appeals of the Texas Commission's decision brought by Entergy in both state and federal court."[15] That holding is fully

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[12] Entergy Rehearing at 10 (citing Amended Remand Order, 132 FERC ¶ 61,133 at P 25).

[13] *Entergy Services, Inc.*, 127 FERC ¶ 61,126 at P 23.

[14] For the Commission to have decided this issue, it would have had to decide for itself what percentage of the costs at issue should be borne by some retail customers and what percentage by other retail ratepayers. The Commission is not authorized by the FPA to do that. *Id.*; *cf. id.* P 24.

[15] *Id.* P 23.

consistent with our decision here that the Commission may order refunds under section 206(c), notwithstanding any alleged practical difficulties.[16]

8. Entergy objects to the Commission's assertion that Congress intended FPA section 206(c) solely to remedy an operating company's loss of revenues due to the operation of the filed rate doctrine. Entergy emphasizes that the statute "states that the Commission must find that the holding company will not experience 'any reduction' in revenues," not just "revenues lost due to the operation of the filed rate doctrine."[17]

9. Entergy is correct that the statutory text does not expressly reference the filed rate doctrine. But the language of section 206(c) is sufficiently ambiguous in this regard to warrant recourse to extrinsic interpretative aids, and the relevant legislative history focuses solely on potential revenue loss to an operating company because of the operation of the filed rate doctrine.[18] Therefore, we believe our interpretation of section

[16] *Id.* P 24 (noting that the Texas Commission decision at issue accepted this Commission's allocation of bandwidth receipts to Entergy Gulf States, as did the Louisiana Commission; hence there was no conflict between what this Commission ordered and what the two state commissions did – the conflict was between those two commissions as to how the Commission-allocated costs should be shared between them); *see also id.* P 25 & n.21 (describing precedent on cost allocation when more than one jurisdiction is involved).

[17] Entergy Rehearing at 11 (quoting 16 U.S.C. § 824e(c) (2006) (emphasis Entergy's)).

[18] Amended Remand Order, 132 FERC ¶ 61,133 at P 26 & n.52.

206(c) to this effect is reasonable, especially in light of the court's decision in *Louisiana Public Service Commission*.[19]

10. Entergy also raises the interesting question that the Commission's reading of the statute "would mean that FPA section 206(c) would never bar refunds in holding company cost allocation cases."[20] In the Amended Remand Order, we responded to this point by stating that our decision was ruling on this particular case;[21] we did not rule on other future cases not yet before us. We are still unwilling to be drawn into speculation about the potential application of section 206(c). We acknowledge that there is some logic to Entergy's assertion, but the Commission is constrained by the language of the statute and by its legislative history, as well as by the mandate of the D.C. Circuit to reach the legal result that it has reached. And, indeed, if we were to rule otherwise, the other side could equally argue that FPA section 206(c) would never allow refunds in holding company cost allocation cases, notwithstanding what the D.C. Circuit has said on this question in *Louisiana Public Service Commission*.[22] However, we will return to the issue of refunds below, in the context of invoking our equitable discretion with respect to refunds.

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[19] *Louisiana Public Service Commission*, 482 F.3d 519-20.

[20] *Id.*

[21] Amended Remand Order, 132 FERC ¶ 61,133 at P 28.

[22] *Louisiana Public Service Commission*, 482 F.3d at 519-20.

11. Finally, Entergy asks that we clarify that our statement in footnote 42 of the Amended Remand Order was *dicta*, or, alternatively, concede it is incorrect.[23] That footnote pointed out that section 206(c) refers to electric utility companies of a "registered holding company," and with the repeal in 2005 of the Public Utility Holding Company Act of 1935 (PUHCA 1935) there are now no longer any registered holding companies; thus, the reach of section 206(c) will be increasingly limited as the Commission works its way through the pending cases that date from before 2005. We see no reason to disavow the footnote, as it is accurate, reflecting that Congress expressly limited section 206(c) to registered holding companies, and Congress' repeal of PUHCA 1935 means there are now no longer any such companies.

12. Entergy, in this regard, first argued that repeal of PUHCA 1935 did not change Congress' intent in enacting section 206(c). But this argument would have the Commission rewrite section 206(c) to delete the word "registered" any time it appears in that section, as well as delete the last phrase of section 206(c), i.e., that "registered holding company"; shall have the same meaning [] as provided in [PUHCA 1935], as amended.[24] Rewriting a statute is beyond our

[23] Amended Remand Order, 132 FERC ¶ 61,133 at P 21 n.42.

[24] To be a registered holding company under PUHCA 1935 required that a holding company have a "registration" that was "in effect under section 5" of PUHCA 1935. 15 U.S.C. § 79b(a)(12) (2000). Section 5, in turn, required filings with the Securities and Exchange Commission (SEC), and PUHCA 1935 subjected a registered holding company to a range of regulatory and reporting

authority, however. And, if Congress had intended that section 206(c) would apply to non-registered holding companies, it could have revised section 206(c) when it repealed PUHCA, but it did not do so.

13. Entergy next argues that Congress never intended, in 2005, to limit the reach of section 206(c). But Entergy's argument ignores that section 206(c), by its express terms, applies to registered holding companies and, with Congress' repeal of PUHCA 1935 in 2005, there are no longer any such companies. Congress, in 2005, did not need to expressly limit the reach of section 206(c), because that limit was already written into section 206(c).

14. Entergy next argues that Congress did not intend, in 2005, to alter the Commission's responsibilities under the FPA – pointing to "saving" provisions in section 1267 of the Energy Policy Act of 2005.[25] But those provisions speak of the Commission's authority under the FPA to require that jurisdictional rates be just and reasonable, and the Commission's exercising its jurisdiction to determine whether a public utility may recover in rates the costs of activities of associate companies or the costs of goods or services acquired

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requirements. 15 U.S.C. § 79e (2000); *see* 15 U.S.C. § 79f—79q (2000). We are hard-pressed to conclude, in light of the repeal of PUHCA 1935, that Congress *sub silentio* intended that holding companies could continue to claim the benefits of registered holding company status long after that status had been abolished, but not be subject to the corresponding regulatory oversight that was associated with that status.

[25] *See* 42 U.S.C. § 16455 (2006).

from associate companies. They do not address whether section 206(c) would now reach beyond registered holding companies to all holding companies in light of the repeal of PUHCA 1935. Indeed, the saving provisions Entergy cites demonstrate that Congress knew how to create a savings provision when Congress felt it appropriate to do so, but Congress crafted no such provision stating that section 206(c) would continue to apply to holding companies even though PUHCA 1935 had been repealed and there were now no longer any registered holding companies.

15. Arkansas/Mississippi's request for rehearing on the issue of the applicability of section 206(c) focuses on the manner in which refunds would be accomplished. Arkansas/Mississippi maintains that "the only refund proposal presented in this case" would "incorporate rate increase surcharges to past underpayments in the FERC-jurisdictional wholesale rate . . . to avoid the prohibition against retroactive ratemaking at the retail level."[26] As we understand it, Arkansas/Mississippi appears to believe that this would possibly lead to impermissible trapped costs because of "federal and state law disallowing retroactive increases to be collected by surcharges."[27]

16. The Commission denies rehearing on this argument. First, the mechanics of any refund here (whether

[26] Arkansas/Mississippi Rehearing Request at 8 (citing *Louisiana Public Service Comm. v. Entergy Corp.*, 96 FERC ¶ 63,002, at 65,024 (2002) (the original Initial Decision in this proceeding)).

[27] *Id.* 10.

or not involving the refund proposal cited) would be matters for a compliance proceeding. In this order, we are dealing solely with the legality of such refunds.

17. Second, we reject Arkansas/Mississippi's apparent understanding that any refund involving a surcharge would be illegal under state and federal law. With respect to state law, we have explained in our earlier order and above that the Supremacy Clause prevails, to ensure the retail pass through of federally-mandated costs. The use of a surcharge mechanism in this context would provide no basis for ignoring the constitutional rule. As to federal law, the Commission denies Arkansas/Mississippi's claim that *City of Anaheim* prohibits any remedial action employing rate surcharges. *City of Anaheim* holds that FPA section 206(a) "prohibits FERC from setting rates *retroactively*."[28] But, as we explained previously, where, as here, the Commission has properly set a refund effective date, section 206 specifically prescribes the Commission's refund authority for a fifteen month period.[29] As *Louisiana Public Service Commission* recognized, refunds pursuant to this authority cannot be considered retroactive ratemaking.[30] We do not read *City of Anaheim* as restricting the Commission's remedial discretion (including the use of surcharges as a remedial mechanism) for statutorily-authorized refunds.

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[28] 558 F.3d at 522 (emphasis in original).

[29] Amended Remand Order, 132 FERC ¶ 61,133 at P 29-30.

[30] 482 F.3d at 520.

18. Next, Arkansas/Mississippi maintains that the Commission's Amended Remand Order failed to adequately deal with *Nantahala* and *Mississippi Power*, which they believe Congress must be presumed to have taken into account in enacting section 206(c).[31] However, petitioners fail to confront the fundamental problem posed by those cases vis-à-vis their interpretation of section 206(c), namely, that Congress could not by statute overrule the Supreme Court's decision that, under the Supremacy Clause, state ratemaking must conform to the dictates of federal ratemaking.

19. Finally, Arkansas/Mississippi argues that the Louisiana Public Service Commission's original complaint in this proceeding "does not constitute the requisite 'notice'" to avoid application of the filed rate doctrine.[32] But this argument runs directly afoul of the court's observation in *Louisiana Public Service Commission* that the opposite is true.[33]

2. Equitable Discretion

20. Having established the Commission's authority to issue refunds under section 206(c) in this case, the Amended Remand Order went on to hold that Arkansas/Mississippi and Entergy had not "demonstrated any reason . . . for the Commission to deviate

[31] Arkansas/Mississippi Rehearing Request at 14.

[32] *Id.* at 16 (heading format and capitals omitted).

[33] *Louisiana Public Service Commission*, 482 F.3d at 520.

from its policy of granting full refunds."[34] In this regard, we held that neither the parties' good faith nor the passage of time militated against refunds here. More significantly, for present purposes, we held that "contrary to Arkansas/Mississippi's position, this is not a rate design case where customer usage patterns are relevant" and provide a reason to withhold refunds.[35] To the contrary, we maintained that this case "involves a misallocation of costs, so that one group of customers was paying too much, to the benefit of other customer groups."[36]

21. In their requests for rehearing, both Arkansas/Mississippi and Entergy seek to provide further support for their contention that circumstances present in this case do not warrant the imposition of refunds. In this regard Arkansas/Mississippi asserts that the Commission erred by not applying "its long-standing policy disallowing refunds or surcharges in cases where costs are reallocated among different customer classes."[37]

22. Entergy likewise contends that the Commission's general policy in favor of refunds "does *not* apply in

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[34] Amended Remand Order, 132 FERC ¶ 61,133 at P 31 (footnote omitted).

[35] *Id.*

[36] *Id.*

[37] Arkansas/Mississippi Rehearing Request at 7 (citing *Portland General Electric Co.*, 106 FERC ¶ 61,193 (2004); *Union Electric Co.*, 64 FERC ¶ 61,355 (1993); *Union Electric Co.*, 58 FERC ¶ 61,247 (1990); and *Commonwealth Edison Co.*, 25 FERC ¶ 61,323 (1983)).

rate design cases like this one where the issue is not whether the utility has been unjustly enriched by over-collecting revenues, but rather whether the rate design employed to allocate revenues to different customers or customer classes results in some customers paying too much and others not paying enough."[38] Entergy particularly relies on our recent decision in *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,378 (2005) (*Oxy v. PJM*), where we described as a "long-standing policy" under section 206 of the FPA that when the agency "requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively" – i.e., without refunds.[39]

23. On the question of refunds, the Commission has two lines of precedent, each dealing with a different situation. When a case involves a company over collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers.[40] By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission

[38] Entergy Rehearing at 15 (emphasis in original).

[39] *Oxy v. PJM*, 110 FERC ¶ 61,378 at P 10.

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

traditionally has declined to order refunds.[41] Reconsidering the matter, the Commission disavows the distinction we attempted to draw in the Amended Rehearing Order between the treatment of refunds in rate design and cost allocation cases.

24. Here, upon reflection, we agree with Entergy and Arkansas/Mississippi that, in this case, the Entergy system as a whole collected the proper level of revenue, but, as was later established, incorrectly allocated peak load responsibility among the various Entergy operating companies. Thus, whether classified as a rate design or cost allocation matter (albeit among operating companies, rather than among customer classes), it does not present a straightforward instance of a utility over-collecting revenue.

25. In view of the foregoing, the Commission will apply here our usual practice in such cases, invoking our equitable discretion to not order refunds, notwithstanding our authority to do so.

The Commission orders:

The requests for rehearing of the Amended Remand Order filed by Arkansas/Mississippi and by Entergy are hereby granted, in part, and denied, in part, as discussed in the body of this order.

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

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

132 FERC ¶ 61,133
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation	Docket No. EL00-66-013
Louisiana Public Service Commission v. Entergy Services, Inc.	Docket No. EL95-33-009

AMENDED ORDER ON REMAND

(Issued August 13, 2010)

1. This case, which involves the calculation of charges for the Entergy system,[1] is on remand from the United States Court of Appeals for the District of Columbia Circuit.[2] In its earlier orders, the Commission held that, while Entergy must exclude interruptible load from its computation of peak load responsibility for its Operating Companies, the new allocation

[1] The Entergy system consists of Entergy Services, Inc. (Entergy), and its various public utility operating companies: Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas; and Entergy Gulf States, Inc. (Operating Companies).

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

method could be phased in over twelve months. The Commission further held that, while the company's cost allocation resulted in unjust and unreasonable rates, refunds were precluded here by section 206(c) of the Federal Power Act (FPA), 16 U.S.C. § 824e(c) (2006).[3] On appeal, the court held that the Commission had erred by allowing the new allocation method to be phased in over twelve months, rather than being fully implemented immediately.[4] The court also held that the Commission had failed to sufficiently explain why FPA section 206(c) barred refunds in this case, and remanded that issue "for a more considered determination."[5]

2. The Commission subsequently issued orders in response to the court's remand, determining that refunds were both legal and appropriate.[6] These orders were in turn appealed to the D.C. Circuit by the Arkansas Public Service Commission (Arkansas) and Entergy.[7] However, on June 24, 2009, in response to a motion by the Commission, the court remanded the refund issue so that the agency could address it more fully. The

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

[4] 482 F.3d at 518.

[5] *Id.* at 520.

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

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

Commission then issued an order asking the parties to file further briefs and evidentiary submissions on this issue.[8]

3. As discussed further below, the Commission finds in this order that, given the D.C. Circuit's decision and the specific circumstances presented in this case, FPA section 206(c) does not bar refunds and refunds would be appropriate.

BACKGROUND

4. This case originally arose from a complaint filed with the Commission by the Louisiana Public Service Commission (Louisiana) in 1995, alleging that the formula for peak load responsibility used by Entergy was unjust and unreasonable because it allocated capacity costs to its Operating Companies based upon peak demand for both firm and interruptible load, to the detriment of Louisiana ratepayers. The Commission initially upheld Entergy's cost allocation method.[9] On appeal, however, the D.C. Circuit reversed, holding that the Commission had not adequately explained its decision.[10]

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[8] *Louisiana Public Service Commission v. Entergy Corp.,* 129 FERC ¶ 61,237 (2009) (Remand Order).,

[9] *Louisiana Public Service Commission v. Entergy Services, Inc.*, 76 FERC ¶ 61,168 (1996), *reh'g denied*, 80 FERC ¶ 61,282 (1997).

[10] *Louisiana Public Service Commission v. FERC*, 184 F.3d 892 (D.C. Cir. 1999).

5. On remand, the Commission instituted a proceeding under FPA section 206 and established May 14, 1995 as the refund effective date.[11] Subsequently, in Opinion No. 468, the Commission held that Entergy's inclusion of interruptible load when calculating each Operating Company's load responsibility was unjust and unreasonable. However, the Commission went on to hold that, consistent with the System Agreement, this should be accomplished over a twelve-month period.[12] In addition, the Commission concluded that it was constrained from ordering refunds by FPA section 206(c).[13]

6. As explained above, the court determined that the Commission, having found that it was not just and reasonable to allow Entergy to consider interruptible load in assigning cost responsibility, could not delay implementation of that decision over a 12-month phase-in period.[14] In the Commission's earlier remand orders, the Commission complied with this aspect of the court's mandate. Thus, the only remaining matter involves refunds. The court rejected the Commission's decision that FPA section 206(c) barred the agency from granting refunds in this case, based on the operation of the filed rate doctrine.[15] The court also found that the Commission did not exercise its equitable

[11] *Louisiana Public Service Commission v. Entergy Corp.*, 93 FERC ¶ 61,013 (2000).

[12] Opinion No. 468, 106 FERC ¶ 61,228 at P 60-77.

[13] *Id.* P 82-89.

[14] 482 F.3d at 518.

[15] *Id.* at 520.

discretion to deny refunds, as the Commission's order did not expressly make such a finding.[16] In this order, the Commission supplements its earlier orders and further addresses these two issues.

7. In response to the Remand Order, the Arkansas Public Service Commission and the Mississippi Public Service Commission (collectively Arkansas/Mississippi) jointly filed a brief opposing refunds, as did Entergy. Louisiana filed a brief and evidentiary submission supporting refunds. Reply briefs were filed by the same parties. Additionally, Louisiana filed a Motion for Leave to File Response and Responsive Evidentiary Submission to Address New Evidence Attached to Reply Brief of Entergy Services, Inc., to which Entergy filed an opposition, and, alternatively, an answer.

8. In addition, Union Electric Company d/b/a AmerenUE (AmerenUE) filed a motion to intervene out-of-time. AmerenUE ties its motion to its involvement in another proceeding, in Docket No. EL01-88-000. AmerenUE also states that (1) it has a substantial interest in the outcome of this proceeding; (2) its participation will not unduly prejudice other parties; (3) it agrees to accept the record of the proceeding as it currently stands; and (4) it does not seek to raise any new arguments or submit any new evidence at this time.

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[16] *Id.*

DISCUSSION

A. Procedural Matters

9. We deny Louisiana's motion for leave to file a response, as the proffered material is unnecessary for us to make our decision. Therefore, we also deny Entergy's motion to file an answer to the response as moot.

10. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.[17] AmerenUE has not met this higher burden of justifying its very late intervention after multiple Commission orders and also two separate appeals to the D.C. Circuit and, accordingly, we deny its motion to intervene. As we stated in *Florida Power & Light Company,* 99 FERC ¶ 61,318, at 62,358 (2002), a potential party must take appropriate steps to protect its interests in a timely manner, and taking a "wait and see" approach falls short. AmerenUE, by waiting until this late date to intervene, failed to protect its interests in a timely manner. The Commission, moreover, established the paper hearing to add to the record. By its own admission, AmerenUE's intervention adds nothing to the record.[18]

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[17] *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

[18] AmerenUE argues that allowing its intervention will aid the Commission in its decision-making process. At the same time,

It appears to be positioning itself to file a request for rehearing if it prefers a different outcome, and if such is the case, it is yet another reason for denying AmerenUE's unusually late intervention.

B. The Refund Issue

1. Parties' Arguments

11. Arkansas/Mississippi argue that enabling Louisiana to receive a refund would require adding a surcharge to Commission jurisdictional wholesale rates, which would amount to impermissible retroactive ratemaking.[19] The parties further assert that Arkansas law, paralleling federal law, does not allow for recovery of past costs through future surcharges.[20]

12. Arkansas/Mississippi focus on the language of FPA section 206, under which "retroactive refunds are allowed only for a 15-month period and only if specific conditions are met."[21] In this regard, they cite *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009), which states that "[section] 206(b) authorizes only retroactive refunds (rate decreases), not retroactive rate

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however, it states that it will accept the record as it stands and it "will not be presenting any new arguments or submit any new evidence at this time." AmerenUE Motion at 12. Given that AmerenUE does not intend to present any new arguments or evidence, we fail to see how allowing this intervention will aid the Commission in its decision-making.

[19] Arkansas/Mississippi Initial Brief at 4-5.

[20] *Id.* at 6.

[21] *Id.* at 7.

increases."[22] Accordingly, they argue, section 206(b) does not permit a refund in this situation, as it would violate the filed-rate doctrine. In their view, even before section 206(c) was adopted, it was "settled law" that the FPA did not allow retroactive rate increases to be paid by some customers to offset the refunds issued to others.[23]

13. In any event, Arkansas/Mississippi argue that section 206(c) prohibits issuing refunds to affiliated entities when doing so requires other affiliated entities of the same holding company to pay increases to offset them.[24] Essentially, they argue that the statute creates a presumption that refunds will not be issued absent a showing that those operating companies liable for a surcharge could recover the increased cost through their retail rates. In their view, because the record indicates that the relevant states would not allow the Operating Companies to surcharge their ratepayers for retroactive refunds, the Commission cannot make the requisite showing to permit refunds.[25] Arkansas/Mississippi maintain that Supreme Court cases requiring states to flow through FERC-approved wholesale

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[22] *Id.*

[23] *Id.* at 12.

[24] *Id.* at 12-13.

[25] *Id.* at 15.

costs in retail rates are irrelevant in view of Congress subsequently enacting section 206(c).[26]

14. Finally, Arkansas/Mississippi argue that there are no equitable grounds for authorizing refunds, even if legally permissible, because of the Commission's policy not to require refunds in rate design cases.[27] These parties further contend that refunds would be inequitable because a substantial period of time has elapsed since the overcharges, so that the likelihood is that today's customers, who would be the ones who would pay the refunds or reap their benefits, would not be the same customers served by Entergy in 1995-96.[28]

15. Entergy also argues that FPA section 206(c) prohibits the Commission from ordering refunds here. Before ordering refunds, Entergy asserts, "the Commission must make an express finding that the Operating Companies making the refunds will be able to fully recover the cost of those refunds through surcharges added to wholesale and retail rates,"[29] so that the holding company is kept whole.[30] Entergy further

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[26] *Id.* at 14 (citing *Nantahala P & L Co. v. Thornberg*, 476 U.S. 953 (1986) (*Nantahala*); *Mississippi P & L Co. v. Moore*, 487 U.S. 354 (1988) (*Mississippi Power*)).

[27] *Id.* at 19 (citing *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983); *Union Electric Co.*, 58 FERC ¶ 61,247, at 61,818 (1990); *Union Electric Co.*, 64 FERC ¶ 61,355 at 63,468 (1993); *Portland General Electric Co.*, 106 FERC ¶ 61,193, at P 5 & n.4 (2004)).

[28] *Id.*

[29] Entergy Brief at 7.

[30] *Id.* at 9.

maintains that the Commission cannot order refunds unless it rejects "the possibility that practical barriers to full recovery of the refunds through surcharges might arise, even if federal preemption and the filed rate doctrine are found to apply."[31] Therefore, to order refunds here, Entergy believes that the Commission must "must expressly find that state regulators" will allow Entergy to fully recover its costs.[32]

16. Alternatively, Entergy argues that, even if the Commission finds that section 206(c) authorizes refunds in this proceeding, the Commission should exercise its discretion to deny them.[33] In Entergy's view, a refund order will not require it to "disgorge excess revenues," but rather would effectively require a payment by one group of customers to another.[34] Entergy goes on to assert that, because it received no net gain, refunds are inappropriate.[35] Further militating against refunds, in Entergy's view, is its good faith in interpreting the System Agreement and the administrative burdens of implementing refunds.[36]

17. By contrast, Louisiana argues that refunds are both legal and appropriate here. In Louisiana's view, the D.C. Circuit's opinion in *Louisiana Public Service*

[31] *Id.* at 10.

[32] *Id.* at 13.

[33] *Id.* at 16.

[34] *Id.* at 20.

[35] *Id.* at 21 (citing *Southern Co. Servs., Inc.*, 64 FERC ¶ 61,033, at 61,332 (1993)).

[36] Entergy Initial Brief at 23.

Commission forecloses arguments that the filed rate doctrine is a barrier to refunds or that the Supremacy Clause does not guarantee a pass-through of costs incurred to retail rates.[37] Louisiana also argues that, as *City of Anaheim* involved a filing by a seller under a typical wholesale contract, it has no application here.[38]

18. Louisiana further maintains that alleged practical barriers to Entergy's recovery of Commission-ordered cost reallocations should not prevent refunds. In any event, Louisiana observes, the fact that Entergy has already collected both refunds and surcharges in this case demonstrates that no such practical barriers exist.[39]

19. Finally, Louisiana argues strenuously that the equities favor providing refunds to Louisiana consumers who were subject to an unjust and unreasonable rate for nearly a decade after the filing of the complaint.[40]

2. Commission Determination

a. Section 206(c) Authority

20. In determining the scope of the Commission's refund authority under section 206(c), our first question

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[37] Louisiana Initial Brief at 12-15.

[38] *Id.* at 26-28.

[39] *Id.* at 20.

[40] *Id.* at 30.

is, naturally, "[w]hat says the statute?"[41] Section 206(c) states, as relevant here, that, in a section 206 case involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of section 206 "shall not be ordered" to the extent that such refunds would result from a Commission order that "(1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company," but that refunds, in whole or in part, may be ordered by the Commission if it determines that "the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order."

21. On its face, section 206(c) appears to prohibit the Commission from ordering refunds in a case involving two or more utilities of a registered holding company, when such refunds would both result from reallocation of cost responsibility among the utilities of such registered holding company and result in a reduction of overall system revenues due to the inability of one or more of the utilities to recover the refunds from their

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[41] *Towns of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992).

respective customers.[42] However, the statute alternatively provides that the exemption does not apply if the Commission can determine that the registered holding company would not experience a reduction in revenues. In that case, the Commission retains its usual discretion under section 206 to decide whether to order refunds.[43]

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[42] *See* 482 F.3d at 518-19. The limitation in section 206(c) on the Commission's ordering refunds was itself limited to a circumstance where there were two or more electric utility companies of a "registered holding company" as that term was defined in the Public Utility Holding Company Act of 1935 (PUHCA 1935). 16 U.S.C. § 824e(c) (2006); *see* 15 U.S.C. §§ 79b(a)(7) and (a)(12), 79e (2006). However, the Public Utility Holding Company Act of 1935 was repealed by section 1263 of the Energy Policy Act of 2005, and so there are no longer any "registered holding companies." Energy Policy Act of 2005, Pub. L. No. 109-58, § 1263, 119 Stat. 594, 974 (2005). As a result, section 206(c) has and over time will have an increasingly limited reach as the Commission works through pending cases that date back to when there were registered holding companies.

[43] *Cf.* 482 F.3d at 520 (discussing Commission's view in its earlier orders of legislative history); S. Rep. No. 100-491 at 6-7; 1998 U.S.C.C.A.N. at 2688. While Entergy during the relevant time period was a registered holding company, as we noted in Opinion No. 468 we have ordered refunds even then when faced with what we characterized as "the more typical case," i.e., the case of rates that we found to be excessive – notwithstanding the presence of a registered holding company and section 206(c). *See* Opinion No. 468, 106 FERC ¶ 61,228 at P 84 & n.156, and cases cited therein. In this regard, not every refund made by a utility necessarily means that a sister utility in the same holding company has to make up the difference. Rather, the monies refunded can come from monies that otherwise would be paid out as dividends to shareholders. In fact, this is the typical source of monies refunded by public utilities, especially in the case of those public utilities that are not part of holding companies and thus would

22. However, the Commission must read section 206(c) in light of the court's decision in *Louisiana Public Service Commission*, which rejected the Commission's explanation that the Commission was barred from ordering refunds in this case. The court made two basic points. First, it held that the Commission had "fail[ed] to explain why the requirements of the filed rate doctrine would not be satisfied with respect to the refunds at issue considering that all parties were on notice as of the filing of Louisiana's complaint in 1995 that Entergy's calculation of peak load responsibility might be held unjust or unreasonable."[44] Second, it

have no sister utility, and per the cases cited in Opinion No. 468 even in the case of public utilities that are part of holding companies. *See id.* In this regard, we emphasize that public utilities, such as the Operating Companies, are not guaranteed a profit, but only an opportunity to make a profit. *See, e.g., California Independent System Operator Corp.*, 119 FERC ¶ 61,076, at P 501, *order on reh'g*, 120 FERC ¶ 61,271 (2007); *accord FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-54 (1962) (explaining that the "hazard of not making a profit" rests with the company); *Transwestern Pipeline Co.*, Opinion No. 238-A, 36 FERC ¶ 61,175 at 61,444 (1986) ("Investors in the natural gas industry . . . are by no means guaranteed freedom from risk or competition").

[44] 482 F.3d at 520. While the Commission, in Opinion No. 468, referenced the legislative history of section 206(c) in support of its argument at that time that it could not make the finding required by section 206(c) before refunds could be ordered, *see* Opinion No. 468, 106 FERC ¶ 61,228 at P 84 & n.157; S. Rep. No. 100-491 at 6-7, the court found this legislative history essentially irrelevant, finding that the filed rate doctrine has been satisfied because "all parties were on notice as of the filing of Louisiana's complaint in 1995 that Entergy's calculation of peak load responsibility might be held unjust and unreasonable." 482 F.3d at 520. The Commission agrees that all parties were on notice, as of the

concluded that the Commission had failed to explain "why, under the Supremacy Clause, a rate increase ordered by the Commission may be recovered through retail rates but a refund ordered by the Commission may not be."[45]

23. Having reexamined the issue, the Commission finds that the court's reasoning on the filed rate doctrine cannot here be refuted. Arkansas/Mississippi's argument that refunds here would be retroactive ratemaking is mistaken. Section 206 gives the Commission the specific authority to order refunds prospectively from a set date, the refund effective date, for a fifteen-month period. Pursuant to section 206, the Commission here established May 14, 1995 as the refund effective date, which put the parties on notice that refunds from that date forward were possible.[46] This is distinguishable from a true retroactive ratemaking scenario. Indeed, under Arkansas/ Mississippi's reasoning, the Commission would never be able to order refunds in a section 206 proceeding, which is an erroneous result

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filing of Louisiana's complaint in 1995, that Entergy's rates might be found unjust and unreasonable.

[45] *Id.* (citing *Mississippi Power*, 487 U.S. at 369-72).

[46] We note that on November 19, 2007, in Docket No. EL00-66-012, Entergy submitted a refund report that summarized the refunds for the 15-month period of May 14, 1995 through August 13, 1996. Entergy also calculated the amount of refunds due as a result of eliminating the phase-in of the interruptible load for the period April 1, 2004 through March 31, 2005. In its report, Entergy states that the amounts for the period April 1, 2004 through March 31, 2005 have already been included on its Intra-System Bill, and therefore, the refunds have been paid.

inconsistent with the express language of section 206 that authorizes refunds.

24. The Commission similarly has identified no way to reasonably distinguish the Supreme Court's reasoning in *Nantahala* and *Mississippi Power* from the situation presented here. Those cases hold that the Supremacy Clause of the United States Constitution[47] prevents state commissions from trapping Commission-ordered wholesale costs at the retail level. The parties advance no persuasive reason why this same logic does not equally apply to orders directing refunds, and we cannot ascertain one.

25. Nor can we give credence to Arkansas/Mississippi's assertion that Congress intended section 206(c) to not provide for refunds under the circumstances presented in spite of the Supreme Court's interpretation of the Supremacy Clause in *Nantahala* and *Mississippi Power*. The legislative history gives no such indication, and we would not assume that Congress intended to rule on this Constitutional issue *sub silentio*.[48]

26. The Commission also rejects Entergy's argument that the Commission must interpret section 206(c) with reference to "practical problems" at the retail level that might impede Entergy's full recovery of costs.[49] In this regard, Entergy maintains that the

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[47] U.S. Constitution, Article VI.

[48] *See supra* note 44 (citing legislative history).

[49] Entergy Reply Brief at 10.

retail ratemaking processes in the different states here would not necessarily allow total recovery of "one-time, non-recurring costs," such as the refunds here, "in retail base rates."[50] Such alleged practical problems would not overcome a Constitutional doctrine like the Supremacy Clause.[51] Nor does the legislative history of section 206(c) indicate that Congress had such alleged practical problems in mind when enacting this provision. Rather, the Senate Report makes clear that Congress was solely concerned with a registered holding company absorbing costs that "can result from the operation of the filed rate doctrine at both the wholesale and retail jurisdictional levels and in effect create a 'trapping' of costs."[52] As explained above, however, the filed rate doctrine does not trap costs here. Indeed, not only is Entergy's assertion that such costs might be trapped largely speculative,[53] but the record also indicates that the Operating Companies have already recovered some of the costs in question at the retail level.[54]

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[50] *Id.*

[51] *Cf. Free Enterprise Fund v. Public Company Accounting Oversight Board,* No. 08-861, slip op. at 18 (U.S. June 28, 2010) (fact that a given law or procedure may be, e.g., useful does not save it if it is contrary to the Constitution).

[52] S. Rep. No. 100-491 at 7; 1998 U.S.C.C.A.N. at 2688.

[53] *See, e.g.,* Entergy Reply Brief at 11 (indicating that "it is not clear whether, or how much of" certain costs could be recovered by two operating companies, as the companies have deferred filings at the retail level pending the Commission's decision here).

[54] *See Entergy Louisiana LLC v. Louisiana Public Service Comm'n*, 990 So.2d 716 (La. 2008).

27. Entergy objects that the Commission cannot make the statutorily-required finding of "full recoverability as a matter of law" merely by invoking federal preemption and notice.[55] This reasoning, Entergy argues, "would mean that the statutorily-required finding is effectively a nullity and could be made as a matter of law in every case where FPA section 206(c) applies."[56]

28. The Commission is ruling today only on the case before it. In light of the court's decision in *Louisiana Public Service Commission,* we find that the statute does not bar refunds in this case. This interpretation is consistent with the overall purpose of section 206, mandating the Commission to remedy the effect of unjust and unreasonable rates, including, when permitted, by means of refunds.

29. We also reject the argument that *City of Anaheim* presents a legal barrier to refunds here. In that case, the Commission reviewed a complaint by wholesale generators "that they were under-compensated as a result of the [Commission]-approved rate they were required to charge electricity purchasers."[57] The Commission issued an order on July 26, 2006, finding the old rate no longer just and reasonable, but did not establish a new rate until February 13, 2007, which it made retroactively effective beginning June 1, 2006.[58]

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[55] *Id.* at 7.

[56] Entergy Reply Brief at 5.

[57] 558 F.3d at 522.

[58] *Id.*

This action, the court concluded, violated section 206(a), which "[o]n its face . . . , prohibits retroactive adjustment of rates."[59] This finding has no bearing here, where the Commission properly established a refund effective date, and thus properly established a 15-month refund period consistent with FPA section 206(b).

30. The court in *City of Anaheim* also addressed section 206(b), stating that section 206(b) "applies in cases where a complainant is a *purchaser* alleging that the rates it paid were too high,"[60] but then holding that "[b]y contrast, this case [i.e., the facts present in *City of Anaheim*] involves a complainant *seller* alleging that the rates it received were too low."[61] Here, however, Louisiana's ratepayers were paying excessive amounts because Entergy was improperly including interruptible load in the computation of peak load responsibility, i.e., the instant proceeding involves purchasers complaining that the rates they paid were too high.

b. Equitable Discretion

31. Having determined that section 206(c) does not prohibit refunds in this case, we now turn to the

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[59] *Id.*

[60] *Id.* at 524 (emphasis in original). The court went on to state: "That provision [i.e., section 206(b)] permits [Commission]-ordered refunds '*of any amounts paid . . . in excess of those* which would have been paid under the just and reasonable rate.' *Id.*" (emphasis in original).

[61] *Id.* at 524 (emphasis in original).

general considerations governing refunds under section 206. There is no question that the Commission has a policy of granting full refunds to correct unjust and unreasonable rates.[62] The only issue is whether Arkansas/Mississippi and Entergy have demonstrated any reason here for the Commission to deviate from its policy of granting full refunds.[63] We hold that they have not.

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[62] *E.g., Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003); *Town of Concord v. FERC*, 955 F.3d 67, 76 (D.C. Cir. 1992); *accord Louisiana Public Service Commission v. FERC*, 174 F.3d 218, 223, 224 (D.C. Cir. 1999) ("Commission's self-described general policy is to provide refunds to remedy overcharges"); *Corporation Commission of the State of Oklahoma v. American Electric Power Co.*, 125 FERC ¶ 61,237, at P 33 (2008) ("Commission's general policy is to order refunds for overcharges"); *Entergy Services, Inc.*, 82 FERC ¶ 61,098, at 61,369 (1998) ("the Commission's general policy is to order refunds to remedy overcharges"), *aff'd*, 174 F.3d 218 (D.C. Cir. 1999).

Moreover, last year the D.C. Circuit again recognized that this is the case, noting that the Commission's "general practice" is to order refunds when it concludes that the rates charged were unjust and unreasonable. *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009) (*Westar Energy*). In fact, in this latest case, the court found "nothing unreasonable about the Commission's adhering to its standard approach" when it denied a request to waive a company's refund liability. *Id.* What the Commission has done here is simply to abide by its general policy – having found Entergy's rates to be unjust and unreasonable, the Commission has ordered refunds.

[63] The Commission would need to justify its *not* ordering refunds in a case like this, where the Commission finds that rates were unjust and unreasonable, because *not* ordering refunds would be inconsistent with its general policy. While we justify ordering refunds below, we also note that the same justification is

32. First, there is no doubt that Entergy's inclusion of interruptible load affected the Operating Companies' cost of service, led to an overcharge to Louisiana customers, and resulted in unjust and unreasonable rates.[64] That Entergy's doing so was not undertaken in

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simply not necessary when the Commission is applying its general policy and ordering refunds in the face of rates found to be unjust and unreasonable.

An agency "may not depart, *sub silentio,* from its usual rules of decision to reach a different, unexplained result in a single case," *See, e.g., California Trout v. FERC*, 572 F.3d 1003, 1023 (9th Cir. 2009). In fact, in laying out the background of this case, the court noted that it had earlier granted a petition for review because the Commission "did not give an adequate explanation for *departing* from the precedent it had set out in *Kentucky Utilities Co.*, 15 FERC ¶ 61,002, at 61,004-05 (1981)." 482 F.3d at 513-14 (emphasis added). What we do here, however, is to apply – not depart from – our "usual rules of decision." As suggested by *Westar Energy*, there is no comparable requirement that an agency must justify with a comparably detailed explanation its "adhering to its standard approach." *Westar Energy*, 568 F.3d at 989. Yet that is exactly what the parties who object to our ordering refunds seek – that we justify with equal rigor our decision to apply our general policy of ordering refunds.

In sum, therefore, having found Entergy's rates unjust and unreasonable, our general policy provides for refunds and so we have ordered refunds; no further and more specific justification is required.

[64] *See* 482 F.3d at 514; Opinion No. 468, 106 FERC ¶ 61,228 at P 61-77; *accord* 120 FERC ¶ 61,241 at P 6. *See generally Electrical District No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) (describing "Federal Power Act's primary purpose" as "protecting the utility's customers"); *accord FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1962) (purpose of Natural Gas Act is "to protect consumers against exploitation at the hands of natural gas companies," "to underwrite just and reasonable rates to the consumers of natural gas," and "to afford consumers a complete,

bad faith does not militate against applying the Commission's general refund policy here; the Commission presumes, absent contrary evidence, that all regulated entities are acting in good faith,[65] but that does not automatically make their rates just and reasonable. Second, contrary to Arkansas/Mississippi's position, this is not a rate design case where customer usage patterns are relevant. Rather, it involves a misallocation of costs, so that one group of customers was paying too much, while others paid too little. Third, we do not see the passage of time as affecting the equities one way or the other. Under the facts of this case, we do not consider the length of time to be a relevant factor, and we decline to consider this a relevant factor in determining whether refunds are equitable. This is not a case where the dilatory behavior of a party or some other special circumstance is responsible for the delay.

The Commission orders:

(A) To the extent it has not already done so, Entergy and/or its Operating Companies is hereby directed to make a compliance filing to remove interruptible load from the computation of peak load

permanent and effective bond of protection from excessive rates and charges").

[65] *Cf., e.g., New England Power Co.*, 31 FERC ¶ 61,047 at 61,082, ("good faith is presumed on the part of the utility absent a showing of inefficiency or improvidence", citing *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63, 72 (1935)), *reh'g denied*, 32 FERC ¶ 61,113 (1985), *aff'd*, 800 F.2d 280 (1st Cir. 1986).

responsibility since April 1, 2004, within 30 days of the date of issuance of this order.

(B) To the extent it has not already done so, Entergy and/or its Operating Companies is hereby directed, within 30 days of the date of issuance of this order to make refunds as discussed above, and to file a refund report within 60 days of the date of issuance of this order.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 6, 2006 Decided April 3, 2007

No. 05-1161

LOUISIANA PUBLIC SERVICE COMMISSION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

ENTERGY SERVICES, INC., ET AL.,
INTERVENORS

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Michael R. Fontham argued the cause for petitioner. With him on the briefs were *Paul L. Zimmering* and *Noel J. Darce*.

Robert H. Solomon, Solicitor, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief was *Monique L. Watson*, Attorney.

Mary W. Cochran argued the cause for intervenors Arkansas Public Service Commission, et al. With her on the brief were *Paul R. Hightower*, *Clinton A. Vince*, *J. Cathy Fogel*, *Paul E. Nordstrom*, *George M. Fleming*, *William S. Scherman*, *J. Wayne Anderson*, and *Gregory W. Camet*.

Before: GINSBURG, *Chief Judge*, and ROGERS and KAVANAUGH*, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* GINSBURG.

GINSBURG, *Chief Judge*: The Louisiana Public Service Commission (Louisiana) petitions for review of an order of the Federal Energy Regulatory Commission (1) permitting Entergy Corporation to phase interruptible load out of its calculation of peak load, which it uses to equalize capacity costs for its Operating Company subsidiaries; (2) refusing to order those Operating Companies that benefitted from inclusion of interruptible load in the calculation to make payments, pursuant to § 206 of the Federal Power Act, to those Operating Companies that were burdened by such inclusion; and (3) refusing to determine in this proceeding whether Entergy should have included the opportunity cost of allowances for emissions of sulfur dioxide (SO_2) in its calculation of each Operating Company's peak load responsibility.

I. Background

Entergy is a public utility holding company with five subsidiary operating companies** that generate and sell electricity in Arkansas, Louisiana, Mississippi,

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* Circuit Judge Kavanaugh, who was a member of the panel at the time the case was argued, recused himself from the case after oral argument.

** Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc.

and Texas. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 106 F.E.R.C. ¶ 61,228 at 61,793 P 2 n.1 (2004) (Opinion No. 468). In 1982 each Operating Company entered into a contract (the System Agreement) with another subsidiary, now called Entergy Services, Inc., which agreement allocates capacity costs among them. *Id.* Pursuant to the System Agreement, each Operating Company was liable to make an "equalization payment" each month, depending upon the amount of electricity it took at the time of peak monthly demand on the Entergy system. *Id.* at 61,793-94 PP 2-3. If at the monthly peak an Operating Company took more power than it generated, then it was "short" and had to pay the companies that were "long." *Id.* The calculation of peak load was based upon a rolling average of the 12 previous monthly peak loads.

A. Interruptible Load in the Calculation of Peak Load Responsibility

Under § 201(b) of the Act, the Commission has jurisdiction to approve rates, terms, and conditions for wholesale electricity service offered in interstate commerce, *see* 16 U.S.C. § 824(b) (2004), which includes the electricity sold by the Operating Companies. The Commission may review and order a change in any rate it finds is "unjust, unreasonable, unduly discriminatory or preferential." § 206(a), 16 U.S.C. § 824e(a) (2004).

Some of the Operating Companies carry an "interruptible load" in addition to a "firm load." Firm load is electricity sold pursuant to a contract that entitles the

customer to receive service from the seller on demand. Interruptible load, on the other hand, is electricity sold pursuant to a contract that entitles the seller to curtail service when it does not have enough capacity to produce electricity in excess of the quantity demanded by customers with contracts for firm service. Louisiana regulates the retail rates charged by utilities operating in Louisiana, where most of Entergy's retail customers with contracts for interruptible service are located.

In 1995 Louisiana filed a complaint with the Commission claiming the formula for peak load responsibility in Entergy's System Agreement was unjust or unreasonable because it allocated capacity costs to the Operating Companies based upon monthly peak demand for both firm and interruptible load. The Commission, whose trial staff estimated that removing interruptible load from the formula Entergy used to calculate peak load responsibility would shift $ 14 million in cost responsibility from Entergy Louisiana's ratepayers to the ratepayers served by the other Operating Companies, rejected Louisiana's complaint. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 76 F.E.R.C. ¶ 61,168 at 61,956 (1996), *reh'g denied*, 80 F.E.R.C. ¶ 61,282 at 62,007 (1997). The Commission also determined Louisiana was not entitled to a hearing because it had not alleged that Entergy's decision no longer to count interruptible load when deciding whether to add new capacity had upset the "rough" "equalization" of costs among the Operating Companies achieved by the System Agreement. *Louisiana Commission*, 80 F.E.R.C. ¶ 61,282 at 62,007.

We granted Louisiana's petition for review and held the Commission did not give an adequate explanation for departing from the precedent it had set in *Kentucky Utilities Co.*, 15 F.E.R.C. ¶ 61,002 at 61,004-05 (1981), where the Commission held it was unjust or unreasonable for a utility to charge capacity costs to a customer purchasing only interruptible service because the utility could control its capacity costs by curtailing interruptible service during times of peak demand. *See La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 896-97 (1999) (*Louisiana I*). We remanded the case for the Commission to determine whether including interruptible load in the formula for allocating peak load responsibility was unjust or unreasonable and, if not, then to explain its reasoning in light of *Kentucky Utilities. See id.* at 897, 900. Because we could not "discern the content of its 'rough equalization' standard," we also directed the Commission to clarify the standard and "either reveal why [Louisiana's] allegation of an unjust and unreasonable method of allocation with facially significant consequences does not meet that standard, or grant [Louisiana] a hearing, as the case may be." *Id.* at 899.

Nearly five years later, in March 2004, the Commission determined it was unjust or unreasonable for Entergy to include interruptible load in its calculation of peak load responsibility because the Operating Companies could control capacity costs by curtailing interruptible service during times of peak demand. *Louisiana Commission*, 106 F.E.R.C. ¶ 61,228 at 61,802-04 PP 67-77 (Opinion No. 468). Entergy moved

for rehearing, arguing it should not have to remove interruptible load from its calculation of peak load for the 12 months preceding April 2004 so that "the effect of Opinion No. 468 will be phased in prospectively over the ensuing twelve months." In April 2005 the Commission answered, rather cryptically: "Entergy must adjust the system peaks and its rates beginning April 1, 2004, as required by Opinion No. 468." *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 111 F.E.R.C. ¶ 61,080 at 61,372 P 31 (2005) (Opinion No. 468-A). Later that month, at a hearing before the Louisiana Public Service Commission, counsel for Entergy Services, Inc. took the position that the Opinion No. 468-A "was saying that you begin the rolling 12 months in April of '04, so that, by the time you get to April of '05, you'll have the effect"; in other words, Entergy interpreted Opinion No. 468-A as adopting its request to phase the interruptible load out of its formula for peak load responsibility over a period of 12 months.

In June 2005 Louisiana filed a protest with the Commission. In a Compliance Order issued that August, however, the Commission expressly accepted Entergy's phase-out approach as the "natural result of the billing lag built into the formula rate." *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 112 F.E.R.C. ¶ 62,192 at 62,014 P 13 (2005). Louisiana now seeks review of Opinion Nos. 468 and 468-A, so interpreted.

B. Refunds for Cost of Interruptible Load

Entergy continued to include interruptible load in its calculation and allocation of peak load responsibility after Louisiana had filed its complaint in March 1995. Louisiana contends the Commission may and should, pursuant to § 206(b) of the Act, 16 U.S.C. § 824e(b), order the Operating Companies that were benefitted by the inclusion of interruptible load in the calculation to pay the Operating Companies that were burdened the amount each would have paid if interruptible load had not been included for the 15-month period following the "refund effective date." That section of the Act authorizes the Commission to order a public utility that has charged customers an unjust or unreasonable rate:

> to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force.

Section 206(c), however, specifically prohibits the Commission from ordering one subsidiary of a holding company to refund monies to a sister subsidiary unless the Commission determines the holding company will not experience any reduction of revenue because of the

payor subsidiary's "inability . . . to recover such increase in costs" from its ratepayers.*

After this court held in *Louisiana I* that the Commission had not adequately explained its decision permitting Entergy to include interruptible load in its calculation of peak load, the Commission established May 14, 1995 as the refund effective date. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 93 F.E.R.C. ¶ 61,013 at 61,027 (2000). In Opinion Nos. 468 and 468-A, however, the Commission determined it could not order refunds because it could not find, as required by § 206(c), that the Operating Companies would be able to recover the refunded amounts from their retail customers. *Louisiana Commission*, 106 F.E.R.C. ¶ 61,228 at 61,805-06 PP 82-89 (Opinion No. 468),

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* Section 206(c), 16 U.S.C. § 824e(c) says:

> Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that . . . (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order.

reh'g denied, 111 F.E.R.C. ¶ 61,080 at 61,370 PP 21-22 (Opinion No. 468-A). In response to Louisiana's contention that a refund ordered by the Commission would preempt inconsistent state retail rates, the Commission observed that it lacked jurisdiction "to directly prescribe retail rates." *Louisiana Commission*, 111 F.E.R.C. ¶ 61,080 at 61,370 P 22 (Opinion No. 468-A). The Commission also rejected as being without probative value testimony proffered by Louisiana asserting that the payor subsidiaries could pass the cost of refunds on to their retail customers in the same manner as they pass on equalization payments under the System Agreement. *Louisiana Commission*, 106 F.E.R.C. ¶ 61,228 at 61,805-06 PP 85-89 (Opinion No. 468). Louisiana also seeks review of Order Nos. 468 and 468-A with respect to this question of Commission authority.

C. Opportunity Cost of Allowances for Emissions of SO_2

The Congress enacted the Acid Deposition Control portion of the Clean Air Act Amendments of 1990 in order to reduce the emission of atmospheric pollutants that contribute to acid rain. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, tit. IV, 104 Stat. 2399, 2584-631 (codified at 42 U.S.C. §§ 7651-7651o). The Amendments capped annual emissions of SO_2 and established a system for the purchase and sale of "allowances," each of which is essentially a permit to emit one ton of SO_2. *Id.* tit. IV, § 402(3) (codified at 42 U.S.C. § 7651a(3)).

In 1999 Entergy filed with the Commission a proposed amendment to the System Agreement designed to "ensure[] that each Entergy Operating Company will be compensated for any sulfur dioxide emission allowances used to generate energy exchanged among the Operating Companies." *See Entergy Services, Inc.*, 89 F.E.R.C. ¶ 61,331 at 62,004 (1999). Because of the effect this so-called SO_2 Amendment would have upon the allocation of costs among the Operating Companies, Louisiana intervened in opposition, arguing the amendment was unjust or unreasonable insofar as it disrupted the "rough equalization" of costs among the Operating Companies provided in the System Agreement. *See id.* at 62,004-05. The Commission accepted the amendment "subject to refund" and subject to the Commission's determination, pursuant to our remand order in *Louisiana I*, whether the inclusion of interruptible load in the calculation of peak load was consistent with the same "rough equalization" requirement (Docket No. EL95-33-000). *Id.* at 62,005. In later filings in that proceeding, Louisiana argued the Commission should reject the SO_2 Amendment as inconsistent not only with the Entergy System Agreement but also with a 1993 agreement between Entergy and its retail regulators, presumably including Louisiana.

In 2004 the Commission concluded that the reasonableness of the SO_2 Amendment was not properly before it in the aforementioned docket; pursuant to an agreement approved by the Commission in 2001, the parties (including Louisiana) had settled a number of issues with respect to the allocation of costs under the

System Agreement, and the Commission concluded that the "SO_2 amendment issue and all other issues related to the rough equalization of costs among the Operating Companies" had been moved to another docket (No. EL01-88-000). *Louisiana Commission*, 106 F.E.R.C. ¶ 61,228 at 61,807 PP 96-99 (Opinion No. 468). In particular, the parties agreed not to submit in this docket the question whether, in order "[t]o amend the System Agreement to reflect the cost of emission allowances," Entergy first should be "required to show that the 'rough equalization' of costs among the Operating Companies [had] been upset." Though the Commission overlooked it in Opinion No. 468, the parties contemplated that the question whether the "amendment to add the replacement cost of SO_2 allowances to costs billed under MSS-3 in the System Agreement [is] just and reasonable and consistent with the [Act]" would remain pending in this docket (No. EL95-33-002).

Upon Louisiana's petition for rehearing, which called attention to the Commission's oversight, the Commission decided it would not be appropriate after all to resolve that issue in that docket (No. EL01-88-000) because the issues raised in that docket had already been briefed, tried, and resolved by the Administrative Law Judge (ALJ), *see La. Pub. Serv. Comm'n v. Entergy Servs.*, 106 F.E.R.C. ¶ 63,012 (2004). *See Louisiana Commission*, 111 F.E.R.C. ¶ 61,080 at 61,371 P 26 (Opinion No. 468-A). The Commission also held, however, that Louisiana's challenge to the SO_2 Amendment was untimely, having been raised only

when Louisiana had excepted to the ALJ's initial decision in the case involving the calculation of peak load and the issue of refunds (Docket Nos. EL00-66-000 & EL95-33-002), *see La. Pub. Serv. Comm'n v. Entergy Corp.*, 96 F.E.R.C. ¶ 63,002 (2001); therefore the Commission determined Louisiana could pursue the SO_2 Amendment issue in "the next case Entergy files regarding the System Agreement, or . . . a complaint" initiating a new proceeding. *Louisiana Commission*, 111 F.E.R.C. ¶ 61,080 at 61,371 P 26 (Opinion No. 468-A). Louisiana petitions the court for review of this procedural decision, arguing the Commission must determine whether the SO_2 Amendment is proper without Louisiana having to file a new complaint.

II. Analysis

We will set aside a decision of the Commission only if it is "arbitrary and capricious or otherwise contrary to law." *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991). Before considering the merits of Louisiana's petition, however, we must dispose of the jurisdictional objections to our review.

A. Jurisdiction

The Commission and the Intervenors argue the court may not entertain Louisiana's challenge to the Commission's decision permitting Entergy to phase interruptible load out of its calculation of peak load because Louisiana did not first ask the Commission to rehear that issue. Under § 313(b) of the Act, 16 U.S.C.

§ 825l(b), the court may not consider an objection to an order of the Commission "unless such objection shall have been urged before the Commission in [an] application for rehearing [or] there is reasonable ground for failure so to do." Satisfaction of § 313(b) is a "jurisdictional prerequisite to judicial review," *Pub. Serv. Comm'n of the State of N.Y. v. FPC*, 543 F.2d 757, 774 n.116 (D.C. Cir. 1974).

Louisiana claims as its "reasonable ground" that it had no reason to seek rehearing of the Commission's decision requiring Entergy to remove interruptible load from its calculation of peak load until the Commission issued the Compliance Order, at which time the deadline for filing a rehearing petition had passed. We agree. According to both the Compliance Order and the Commission's argument on review, Opinion Nos. 468 and 468-A call for Entergy to phase interruptible load out of its calculation of peak load over a 12-month period; the Compliance Order merely interprets the Opinions to that effect. This is far from apparent on the face of the Opinions, however; indeed, they give no indication that Entergy's removal of interruptible load from its calculation is to be anything other than immediate. Louisiana could not be expected to seek rehearing of decisions that, on their faces, represented a complete victory for it. Only when the agency by interpretation made the victory less than complete – after the time for rehearing had passed – did Louisiana have reason to seek review. If review were unavailable in these circumstances, then an "agency [could] enter an ambiguous or obscure order, wilfully or otherwise, wait

out the required time, then enter an 'explanatory' order that would extinguish the review rights of parties prejudicially affected." *Sam Rayburn Dam Elec. Coop. v. FPC*, 515 F.2d 998, 1007 (D.C. Cir. 1975). As the cited case makes clear, the law of this circuit does not allow such a "perversion" of the "policy requiring timely filing of motions for reconsideration." *Id.*

The Commission also challenges Louisiana's standing to object to the Commission's decision to permit Entergy to phase interruptible load out of its calculation of peak load on the ground that, because the proceeding that was the subject of the Compliance Order is still ongoing, Louisiana has not suffered an immediate or concrete injury. The Compliance Order, however, authorized Entergy to phase the interruptible load out of its calculation of peak load and that is in fact what Entergy did, as the result of which Louisiana clearly sustained an immediate and concrete injury.* Therefore, we hold Louisiana has standing to challenge the inclusion of interruptible load in Entergy's calculation and allocation of peak load responsibility, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and we turn to the merits of its case.

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* At oral argument, counsel for the Commission made clear that it awaited in the compliance proceeding only Entergy's submission of calculations and work papers showing precisely how it phased the interruptible load out of its calculation of peak load, a step in no wise material to the injury claimed, which goes to phasing-out in any form.

B. Phasing Out Interruptible Load

Louisiana argues the Commission acted arbitrarily and capriciously by allowing Entergy to phase interruptible load out of its calculation of peak load over the course of a year. The gist of its argument is simply that the Commission, having held a rate unjust or unreasonable and approved a new rate in place thereof, may not carry forward the effect of the disapproved rate, any more than it could simply leave the unjust or unreasonable rate in place. *See Pub. Util. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) ("the formula itself is the rate, not the particular components of the formula") (quoting *Ocean State Power II*, 69 F.E.R.C. ¶ 61,146 at 61,544 (1992)).

The Commission contends the phase-in of the new rate was the "natural result of the billing lag built into the formula rate." *Louisiana Commission*, 112 F.E.R.C. ¶ 61,192 at 62,014 P 13. The Commission's point appears to be that the System Agreement called for a "cost of service" rate, which required that costs incurred in one month be recovered in a later month, thus necessarily creating a billing lag for the intervening months. *See Pub. Serv. Co. of N.H. v. FERC*, 600 F.2d 944, 948 (D.C. Cir. 1979). Louisiana, on the other hand, argues the System Agreement provided a "fixed rate" formula, which used data from a past period as a proxy for current costs. *See id.* at 948, 950-52.

The Commission errs insofar as it suggests the lingering inclusion of interruptible load in the calculation of peak load was justified on the ground that it

properly recovered an actual cost incurred in the provision of service. The cost of providing interruptible service is, by definition, avoidable and therefore – as the Commission has held, *see Kentucky Utilities*, 15 F.E.R.C. ¶ 61,002 at 61,004 – not an expense that justifies an increase in capacity, and therefore not the type of expense for which one Operating Company may recover from others under the *Entergy System Agreement, Louisiana Commission*, 106 F.E.R.C. ¶ 61,228 at 61,802-04 PP 63-77 (Opinion No. 468). This is so regardless whether including interruptible load in Entergy's calculation of peak load enabled it to recover actual costs via deferred billing or served as a proxy for actual costs in a fixed rate formula. On either view, the Commission has not explained why Entergy may continue to bill for costs the Commission has determined may not be justly and reasonably recovered. We hold, therefore, the Commission acted arbitrarily and capriciously by allowing Entergy to phase interruptible load out of its calculation of peak load for the purpose of allocating costs among the Operating Companies after the Commission had determined inclusion of interruptible load in the determination of peak load responsibility was unreasonable and therefore unlawful.

C. Refunds

As we have seen, Louisiana asked the Commission to order the Operating Companies that benefitted to make refunds to the Operating Companies that were burdened by Entergy's inclusion of interruptible load

in its calculation of peak load. The Commission declined on the ground that, because it could not be certain the Operating Companies owing refunds would be allowed by their state regulators to recover at retail the revenue needed to pay the refunds, it could not find, as required under § 206(c), that Entergy "would not experience any reduction in revenues" as a result. *See Louisiana Commission*, 111 F.E.R.C. ¶ 61,080 at 61,370 PP 21-22 (Opinion No. 468-A).

Louisiana maintains that an order of the Commission requiring an Operating Company to make refunds would preempt state retail ratemaking in the same way that an order of the Commission requiring a change in rates it finds are unjust or unreasonable preempts inconsistent state ratemaking. *See Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988) (holding state retail ratemaking preempted *pro tanto* by Commission order approving allocation of costs of a new facility among subsidiaries of a holding company); *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) ("State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable").

The Commission responds that, because its jurisdiction is limited to setting wholesale rates, it lacks authority to require a state public utility commission to permit an Operating Company owing refunds to collect from retail customers the revenue necessary to pay those refunds. *See Louisiana Commission*, 111 F.E.R.C. ¶ 61,080 at 61,370 PP 21-22 (Opinion No. 468-A). Further to that point, the Commission maintains

Louisiana provided insufficient evidence that the concerned state commissions would permit the Operating Companies owing refunds to recover the costs thereof from retail customers. At oral argument, counsel for the Commission elaborated that a state commission might not permit a utility to pass the cost of refunds through to retail customers because the retroactive nature of a refund would conflict with the state's filed rate doctrine, which allows only prospective recovery of costs. *See, e.g., Cullum v. Seagull Mid-South, Inc.*, 907 S.W.2d 741, 744-45 (Ark. 1995) (adopting filed rate doctrine, which "forbids a regulated entity from charging rates for its services other than those properly filed with the [Arkansas PSC])" (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992)). Louisiana, on the other hand, argues that when the Commission orders the payment of a refund, the filed rate for the refund-effective period is changed by the refund order.

The Congress added subsections (b) and (c) to § 206 of the Act, authorizing the Commission to order a refund when the Commission finds an approved rate has become unjust or unreasonable, in 1988. Regulatory Fairness Act, Pub. L. No. 100-473 § 2, 102 Stat. at 2299-300.* The Commission points to a Report of the

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* The Intervenors point out that the Congress acted after the Supreme Court had made clear in *Nantahala* (1986) and in *Mississippi Power* (1988) that the states are required by the Supremacy Clause to allow a utility to pass through to customers a rate increase ordered by the Commission. Because the Congress is presumed to know how the courts have interpreted extant law when it enacts a new law, *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184-85 (1988), the Intervenors (alone) argue the requirement

Senate Committee on Energy and Natural Resources, S. Rep. No. 100-491 at 6-7, *as reprinted in* 1988 U.S.C.C.A.N. 2684, 2688-89, stating that the Regulatory Fairness Act would amend § 206(c) to address the Congress's concern that the cost of Commission-ordered refunds – as opposed, presumably, to a change in rates mandated by the Commission – would be "trapped" on the books of the paying subsidiary if the state utility commission prevented the utility from recovering that cost from its retail customers. In particular, the Committee feared the state utility commissions would invoke the filed rate doctrine to prevent the pass through.

This is all very interesting but, as Louisiana notes, the Commission fails to explain why the requirements of the filed rate doctrine would not be satisfied with respect to the refunds here at issue considering that all parties were on notice as of the filing of Louisiana's complaint in 1995 that Entergy's calculation of peak

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of a finding under § 206(c) – that the holding company will not experience a reduction in revenue from the inability of a subsidiary to recover the cost of refunds – would be superfluous if the states already had to permit those costs to be passed through to retail customers.

We may in our discretion "entertain arguments raised only by an intervenor on review if they have been fully litigated in the agency proceedings and [are] potentially determinative of the outcome of judicial review." *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 729-30 (D.C. Cir. 1994) (internal quotation marks omitted). This rationale for why a Commission-ordered refund does not preempt inconsistent state ratemaking was not, however, offered, let alone vetted, before the Commission.

load responsibility might be held unjust or unreasonable. *Cf. Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) ("So long as the parties had adequate notice that surcharges might be imposed in the future, imposition of surcharges does not violate the filed rate doctrine"). In fact, the Commission itself has previously taken the position that a refund ordered pursuant to § 206(c) "would be . . . 'prospective' from the refund date, rather than 'retroactive.'" *Blue Ridge Power Agency v. Appalachian Power Co.*, 57 F.E.R.C. ¶ 61,100 at 61,374 (1991). Nor has the Commission explained why, under the Supremacy Clause, a rate increase ordered by the Commission may be recovered through retail rates but a refund ordered by the Commission may not be. *Cf. Mississippi Power*, 487 U.S. at 369-72.

Commission counsel argues in the alternative that the Commission, even if it was in error about its authority to order refunds, merely exercised its discretion not to do so in this case. There is not even a hint of discretion being exercised, however, in the orders under review, and "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Therefore, with respect to the Commission's determination that it could not make the finding necessary to order some of the Entergy Operating Companies to make refunds to other Entergy Operating Companies in order to compensate them for costs unjustly or unreasonably allocated to them, we shall grant the petition for review

and remand the matter to the Commission for a more considered determination.

D. Opportunity Cost of Allowances for Emissions of SO_2

Louisiana asks us to require the Commission – in the docket underlying this appeal – to pass upon Louisiana's claim that it is unjust or unreasonable for Entergy to allocate among the Operating Companies the opportunity cost some of them incur by using rather than selling their allowances to emit SO_2. Louisiana argues the Commission has shuffled that issue back and forth among various dockets in order to avoid addressing it. We afford the Commission "broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures." *Mobil Oil Exploration & Producing S.E., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991). The agency abuses that discretion only when its manner of proceeding significantly prejudices a party or unreasonably delays a resolution. *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 274 (D.C. Cir. 1986).

Louisiana argues for the first time in its reply brief that it "might" be prejudiced by the potential inability of the Entergy Louisiana Operating Company to recover the costs allocated to it under the SO_2 Amendment, which the Commission approved subject to refund. *See Entergy Services*, 89 F.E.R.C. ¶ 61,331 at 62,005. Specifically, Louisiana states, without explanation, "In a future case that refund condition might not

carry over." This argument – if it is an argument and not just the speculation it seems to be – is forfeit because Louisiana did not raise it earlier. *Grant v. U.S. Air Force*, 197 F.3d 539, 542 n.6 (D.C. Cir. 1999) ("our caselaw makes clear that an argument first made in a reply comes too late"). Therefore, we shall not disturb the Commission's decision to defer consideration of the SO_2 issue to "the next case Entergy files regarding the System Agreement, or . . . a complaint raising this issue." *Louisiana Commission*, 111 F.E.R.C. ¶ 61,080 at 61,371 P 26 (Opinion No. 468-A).

III. Conclusion

We grant the petition for review insofar as the Commission, having determined that inclusion of interruptible load in the formula for allocating peak load responsibility was unreasonable, acted arbitrarily and capriciously in allowing Entergy to phase that load out of its calculation. With respect to the Commission's refusal to order refunds of costs unjustly or unreasonably allocated to certain Operating Companies due to such inclusion, we grant the petition and remand the matter to the Commission for further proceedings consistent with Part II.C. of this opinion. Finally, with respect to the Commission's decision to defer consideration of the sulfur dioxide issue, we deny the petition; the Commission acted within its broad discretion to manage the matters before it and Louisiana failed to show any cognizable prejudice therefrom.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1382 **September Term, 2017**

FERC-EL00-66-019,
FERC-EL00-66-020

Filed On: May 3, 2018

Louisiana Public Service Commission,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

Arkansas Public Service Commission
and Entergy Services, Inc.,

Intervenors

BEFORE: Garland, Chief Judge; Rogers, Circuit Judge; and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for panel rehearing filed on April 20, 2018, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk