UNITED STATES OF AMERICA 106 FERC ¶ 61,228
FEDERAL ENERGY REGULATORY COMMISSION

Louisiana Public Service Commission
and the Council of the City of New Orleans

v. Docket No. EL00-66-000

Entergy Corporation

Entergy Services, Inc. Docket No. ER00-2854-000

Louisiana Public Service Commission

v. Docket No. EL95-33-002

Entergy Services, Inc.

OPINION NO. 468

OPINION AND ORDER AFFIRMING IN PART AND REVERSING
IN PART INITIAL DECISION

Issued: March 8, 2004

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APPEARANCES

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FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

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Summary

1. This order directs Entergy Corporation (Entergy) to modify the Entergy System Agreement (System Agreement) prospectively to exclude interruptible load from the calculation of peak load responsibility. This order will ensure that a public utility will recover the cost of its facilities from the load that causes it to incur those costs.

Background

2. This case involves the System Agreement under which Entergy, among other things, allocates system costs among its Operating Companies.[1] The System Agreement[2] allocates capacity costs among the Operating Companies in proportion to the load that each Operating Company places on the Entergy System (System) at the time of the System peak.[3]

3. If, at the time of the System peak, an Operating Company places more of a load on the System than the energy that it generates, the company is "short" and must pay the "long" companies under Service Schedule MSS-1 (Reserve Equalization) for the

[1] Entergy is a registered public utility holding company that owns all of the common stock of public utility companies collectively known as its Operating Companies (Operating Companies). The current Entergy System Agreement is an interconnection and pooling agreement among the Operating Companies and Entergy Services, Inc. (Entergy Services). Entergy Services is a subsidiary of Entergy that acts as agent for the corporation and for the Operating Companies in matters related to the System Agreement. The Operating Companies are: Entergy Arkansas, Inc.; Entergy Louisiana, Inc.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Gulf States, Inc. The Operating Companies provide wholesale and retail electric service in the states of Arkansas, Louisiana, Texas and Mississippi. See Trial Staff Initial Brief at 2, n.1; Ex. No. S-1 at 4-5.

[2] The System Agreement consists of seven Service Schedules: MSS-1 (Reserve Equalization); MSS-2 (Transmission Equalization); MSS-3 (Exchange of Electric Energy Among the Companies); MSS-4 (Unit Power Purchase); MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies); MSS-6 (Distribution of Operating Expenses of System Operation Center); and MSS-7 (Merger Fuel Protection Procedure).

[3] For a general discussion of the coincident peak methodology of assigning costs, see, e.g., Town of Norwood v. FERC, 962 F.2d 20, 25 (D.C. Cir. 1992); Second Taxing District of the City of Norwalk v. FERC, 683 F.2d 477, 480-81 (D.C. Cir. 1982); Cities of Bethany, et al. v. FERC, 727 F.2d 1131, 1146-47 (D.C. Cir.), cert denied, 469 U.S. 917 (1984); Cities of Batavia, et al. v. FERC, 672 F.2d 64, 80-81 (D.C. Cir. 1982).

additional capacity that it must draw from the System at the time of the System peak.[4] The company bases the payment on the average cost of the "long" companies' oil and gas units. This arrangement benefits both the "long" and the "short" companies. The "long" companies have a ready market for their excess capacity, while the short companies have a steady, reliable supply of electric energy.[5]

4. Under the System Agreement, the Operating Companies include interruptible load when calculating a Company's peak load responsibility if the Company is serving interruptible load at the time of the 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 would therefore tend to increase the share of costs allocated to Louisiana's customers.[6]

5. On March 15, 1995, the Louisiana Public Service Commission (Louisiana Commission) filed in Docket No. EL95-33-000 a complaint against Entergy, seeking revision of the System Agreement to exclude interruptible loads from the calculation of peak load responsibility.[7]

6. On August 5, 1996, the Commission dismissed the Louisiana Commission's complaint. The Commission noted that the System Agreement has included interruptible loads in the calculation of peak load responsibility since the parties entered into the

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[4] The System Agreement allocates Entergy System costs on the basis of the ratio of an Operating Company's coincident peak load for the prior twelve months to the average sum of all Operating Companies' coincident peak load for that period. See Ex. No. 48 at 109; Ex. No. 72 at 38, 47-48; Ex. No. 216 at 20 (System Agreement employs a rolling twelve-month average of System coincident peak loads).

[5] See Louisiana Public Service Company v. FERC, 184 F.3d 892, 894-95 (D.C. Cir. 1999)(Louisiana Public Service); Mississippi Industries v. FERC, 808 F.2d 1525, 1528-31, vacated in part after reconsideration, 822 F.2d 1104 (1987); Louisiana Commission Brief on Exceptions at 8; Ex. No. 48 at 109; Tr. 2927-28.

[6] Trial Staff Brief on Exceptions at 8-9.

[7] Louisiana Public Service Commission v. Entergy Services, Inc., 76 FERC ¶ 61,168 at 61,953 (1996) (Louisiana I), reh'g denied, 80 FERC ¶ 61,282 (1997) (Louisiana II).

System Agreement in 1951.[8] Because the Commission found that the Louisiana Commission had not identified changed circumstances that would warrant a re-examination of the merits of the System Agreement, [9] it summarily declined to change the formula under which Entergy recovers its costs. The Commission stated "that a load may be curtailable is not by itself a reason to disregard it."[10] It concluded that if an Operating Company is serving an interruptible customer at the time of the System peak, then it should properly include that load in determining the company's peak load responsibility.[11] On September 12, 1997, the Commission denied the Louisiana Commission's request for rehearing of the Commission's order dismissing the complaint.[12]

7. The Louisiana Commission appealed these orders to the United States Court of Appeals for the District of Columbia Circuit, which, on August 6, 1999, remanded the matter to the Commission.[13] The Court found that the Commission had failed to explain its departure from its precedent, in particular, Kentucky Utilities Company, Opinion No. 116, 15 FERC ¶ 61,002, reh'g denied, Opinion No. 116-A, 15 FERC ¶ 61,222 (1981)(Kentucky Utilities).[14]

8. In Kentucky Utilities, the Commission rejected the inclusion of interruptible service 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

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[8] Louisiana I, 76 FERC at 61,955. See also Louisiana Public Service Commission v. Entergy Services, Inc., 93 FERC ¶ 61,013 at 61,026 (2000)(Louisiana III).

[9] Louisiana I, 76 FERC at 61,955.

[10] Id. at 61,956. Entergy uses the terms "interruptible" and "curtailable" synonymously. See Ex. No. 48 at 112, n.11.

[11] Id.

[12] Louisiana II, 80 FERC at 62,007.

[13] Louisiana Public Service, 184 F.3d at 900.

[14] Id.

could thus control its capacity costs.[15] The court directed the Commission to either adhere to the principles that it articulated in Kentucky Utilities or to provide a reason for including interruptible load in the allocation of capacity costs.[16]

9. On April 10, 2000, in Docket No. EL00-66-000, the Louisiana Commission and the City Council of New Orleans filed a complaint against Entergy, raising issues regarding the introduction of retail competition in Texas and Arkansas. On June 20, 2000, as supplemented on June 27, 2000, Entergy Services, on behalf of the Operating Companies, filed, in Docket No. ER00-2854-000, several proposed amendments to the System Agreement to facilitate the introduction of retail competition in Arkansas and Texas and to provide for continued rough equalization of costs among the Operating Companies in Louisiana and Mississippi.

10. On August 22, 2000, the Commission issued an order establishing hearing procedures and consolidating Docket Nos. EL00-66-000 and ER00-2854-000.[17] On October 4, 2000, the Commission issued an order addressing the Court's remand of Docket No. EL95-33-000, set the docket for hearing and consolidated it with Docket Nos. EL00-66-000 and ER00-2854-000 for purposes of hearing and decision.[18] The Commission directed that the hearing should also consider "any offsetting factors that might dictate that the Louisiana Commission's suggested revisions [to the System Agreement] not be made, or that offsetting adjustments [to the System Agreement] be made."[19]

11. On May 10, 2001, the Presiding Judge certified questions to the Commission regarding whether the System Agreement continues to produce a rough equalization of production costs. In response, the Commission issued an order on May 24, 2001,

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[15] See Kentucky Utilities, 15 FERC at 61,004; see also Delmarva Power & Light Company, 24 FERC ¶ 61,199 at 61,462, modified on other grounds, 24 FERC ¶ 61,380 (1983) (Delmarva).

[16] Louisiana Public Service, 184 F.3d at 897, 900.

[17] Louisiana Public Service Commission, et al. v. Entergy Corporation, et al., 92 FERC ¶ 61,171 (2000) (Louisiana IV).

[18] Louisiana III, 93 FERC at 61,026-028.

[19] Id. at 61,027.

directing the Presiding Judge to reopen the record and to: (a) make findings of fact by July 31, 2001 on the issue of whether the System Agreement continues to produce a rough equalization of the costs of production among the Operating Companies; and (b) forward to the Commission the completed record as well as findings of fact on all matters before him in the consolidated proceedings, without an initial decision, for decision by the Commission.[20]

12. On May 30, 2001, after a prehearing conference held before a newly-designated Presiding Judge,[21] the parties entered into settlement discussions that resulted in a resolution of all issues except the issue of whether the Commission should direct Entergy to revise the System Agreement to exclude interruptible loads from the calculation of peak load responsibility. In light of the agreement among the parties, the Chief Administrative Law Judge asked the Commission to authorize an initial decision on this issue. The Commission granted that request in an order issued on June 7, 2001, and directed the presiding judge to issue an initial decision by July 28, 2001.[22]

Initial Decision

Cost Responsibility of Interruptible Load

13. On July 6, 2001, the Presiding Judge issued an Initial Decision.[23] With regard to the cost responsibility of interruptible load, the presiding judge decided that: (a) when calculating its peak load responsibility ratio, each Operating Company should continue to include the interruptible load that it serviced in 1995, if it is continuing to serve that load at the time of the current System peak; (b) each Operating Company should remove interruptible load from its peak load responsibility ratio as the individual customer's contract expires; (c) no Operating Company should include newly acquired interruptible

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[20] Louisiana Public Service Commission v. Entergy Corporation, et al., 95 FERC ¶ 61,266 at 61,941 (2001).

[21] The Presiding Judge who originally conducted the hearing had left the Commission.

[22] Louisiana Public Service Commission, et al. v. Entergy Corporation, et al., 95 FERC ¶ 61,360 at 62,373 (2001).

[23] Louisiana Public Service Commission, et al. v. Entergy Corporation, et al., 96 FERC ¶ 63,002 (2001).

load in the calculation of its peak load responsibility ratio; and (d) refunds are appropriate.[24] The Presiding Judge also ruled that the Louisiana Commission failed to justify excluding interruptible load from the load that the Operating Companies use to allocate transmission costs.[25]

14. The Presiding Judge found that before 1995 Entergy treated interruptible load as though it were firm load and planned and acquired capacity for it accordingly.[26] He also found that "[s]ince 1995, Entergy no longer has planned, constructed, or acquired capacity to meet the interruptible load of customers."[27] The Presiding Judge reasoned that, because, before 1995, Entergy planned its capacity to serve both firm and interruptible loads, interruptible loads that Entergy served before 1995 "resulted in the incurrence of capacity costs on the Entergy system . . . ."[28] The Presiding Judge directed the Operating Companies to include the interruptible load that they served as of 1995 for purposes of calculating their peak load responsibility if it is being served at the time of the System peak.[29]

15. To recognize that, as of 1995, Entergy no longer plans for interruptible load, the Presiding Judge directed the Operating Companies to remove interruptible load from the calculation of peak load responsibility "when the individual interruptible customer's contract expires[,]"[30] and to include no new (i.e., post-1995) interruptible loads in the calculation of peak load responsibility.[31] In the Presiding Judge's view, this system of

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[24] Id. at 65,012, 65,024.

[25] Id. at 65,019.

[26] Id. at 65,010.

[27] Id.

[28] Id. at 65,011.

[29] Id. at 65,012.

[30] Id.

[31] Id.

cost allocation would preserve fundamental principles of cost causation for two distinct periods: (a) pre-1995, during which Entergy included interruptible loads in its system planning; and (b) post-1995, during which Entergy excluded interruptible loads from its system planning.[32]

16. The Presiding Judge decided that Kentucky Utilities and Delmarva do not require the exclusion of interruptible loads in the calculation of peak load responsibility because: (a) unlike the situation in Kentucky Utilities, Entergy included interruptible load with firm load in its planning process and "has incurred substantial capacity costs to serve interruptible loads."[33] Also, according to the Presiding Judge, while Kentucky Utilities curtailed its interruptible load for economic reasons, "Entergy curtails interruptible load primarily for reliability reasons[;] . . . [t]hat is, Entergy's decision to serve interruptible customers is based on reliability and not [on] economic considerations."[34] The Presiding Judge found that, in sum, "Entergy's obligation to serve its interruptible customers is much greater than the interruptible service the Kentucky Utilities Co. provided . . . ."[35]

17. In ordering refunds, the Presiding Judge adopted the testimony of the Louisiana Commission's witness, which, he found, had "not been controverted."[36] He, therefore, ordered the Operating Companies to provide refunds by including a surcharge on prospective MSS-1 (Reserve Equalization) billings over a three-year period and a concomitant refund over a three-year period.[37] He found this procedure valid based on the witness's testimony that Entergy makes similar types of adjustments to correct billing errors.[38]

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[32] Id.

[33] Id. at 65,022.

[34] Id.

[35] Id.

[36] Id. at 65,024.

[37] Id. at 65,023-24.

[38] Id. at 65,024.

SO_2 Amendment to System Agreement

18. The Final Joint Statement of Issues in this proceeding included the issue of whether an amendment to the System Agreement to add the replacement cost of SO_2 allowances to costs billed under Schedule MSS-3[39] in the System Agreement (SO_2 Amendment) is just and reasonable.[40] The Presiding Judge ruled that the issue was not before him in this proceeding,[41] but is before the Commission in another proceeding, Docket No. EL95-33-000, which he referred to as the "rough equalization" proceeding.[42] The Presiding Judge ruled that, subject to the outcome of that proceeding, the SO_2 Amendment is "just and reasonable and consistent with the Federal Power Act."[43]

Motion to Supplement the Record

19. On August 6, 2001, the Louisiana Commission moved to supplement the record with the entire deposition of Entergy's witness, Mr. Frank P. Gallaher, Jr.[44] The Louisiana Commission states that it did not see the need to put the entire deposition into evidence until after the Presiding Judge issued the Initial Decision.[45]

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[39] Schedule MSS-3 provides for the exchange of electric energy among the Operating Companies.

[40] See 96 FERC at 65,025 (description of issue). See also Trial Staff Brief Opposing Exceptions at 9 (same).

[41] See 96 FERC at 65,025 ("It is difficult to understand why this issue is before me. There is no such proposal on the table.").

[42] Id.

[43] Id.

[44] During the hearing, Entergy placed a portion of the deposition into evidence as Ex. No. 235.

[45] Motion to Supplement at 2-3.

20. In the Initial Decision, the Presiding Judge found that Entergy began excluding interruptible customers from its planning criteria in 1995.[46] The Louisiana Commission submits that the complete deposition "establishes categorically that the interpretation of the substitute Administrative Law Judge regarding a change in planning practices in 1995 is incorrect."[47]

21. On August 31, 2001, State Regulators filed an answer to the motion to supplement the record. They oppose the motion on three grounds. First, they state that the proffered evidence is unnecessary because there is other evidence in the record regarding Entergy's planning practices before 1995.[48] Second, they assert that the proffered evidence does not demonstrate that the Initial Decision's selection of 1995 as the date on which Entergy changed its planning practices is incorrect.[49] Third, they argue that the Louisiana Commission had ample time before the close of the record to tender the proposed evidence.[50]

22. State Regulators maintain that, before the close of the proceeding "the parties all understood 1995 to be the year in which Entergy changed its planning criteria for the future."[51] They submit that "there is no reason to supplement the record now."[52] On September 5, 2001, the Louisiana Commission filed an answer to the State Regulators' answer.

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[46] 96 FERC at 65,011.

[47] Motion to Supplement at 2.

[48] Answer at 4-5.

[49] Id. at 5.

[50] Id. at 6-7.

[51] Id.

[52] Id. at 7.

Briefs on Exceptions

23. Entergy, Energy Users, the Louisiana Commission, State Regulators and Trial Staff filed briefs on exception to the initial decision; Entergy Users, the Louisiana Commission and Trial Staff all essentially seek a finding that capacity costs not be allocated to interruptible load, while Entergy and State Regulators oppose refunds.

24. Trial Staff argues that strict adherence to Commission precedent and to the principle of cost causation requires that Entergy exclude interruptible load from the calculation of the peak load responsibility ratio, since it is firm, not interruptible, service that drives the amount of capacity that Entergy must secure.[53] As to cost responsibility before 1995, Trial Staff points out that Entergy's last facility came on line in 1985, so that Entergy has not constructed any new capacity for well over ten years.[54] (Trial Staff also maintains that, if the Operating Companies exclude interruptible load from Rate Schedule MSS-1, they should also exclude it from Rate Schedule MSS-5 and joint account purchases.[55])

25. Trial Staff further argues that the Presiding Judge's phase-out plan is not feasible. Trial Staff contends that it is not clear whether the Operating Companies should include interruptible load as it existed in 1995, or as it has changed in the intervening years and whether they should include firm load that has since converted to interruptible.[56]

26. Trial Staff also contends that Section 206(c) of the Federal Power Act (FPA),[57] which exempts public utilities from having to pay refunds in certain circumstances, does not apply to this situation and that refunds are appropriate. Trial Staff submits that there is no evidence in this proceeding that Operating Companies ordered to pay refunds because of a re-allocation of System costs cannot recover those refunds from their retail

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[53] Trial Staff Brief on Exceptions at 12-15.

[54] Id.

[55] Id. at 15-17.

[56] Id. at 14.

[57] 16 U.S.C. § 824e(c) (2000).

ratepayers.[58] Trial Staff, however, excepts to the Presiding Judge's methods of implementing the refund. Trial Staff submits that the Commission can implement a refund by simply ordering an exchange of checks, rather than imposing a three-year period of surcharges and refunds.[59]

27. The Louisiana Commission argues on exceptions that the record does not support the conclusion that Entergy planned for its interruptible loads until 1995. Rather, the Louisiana Commission contends, Entergy last installed capacity in 1985 and planned that capacity in the 1970's.[60]

28. The Louisiana Commission also argues that the inclusion of interruptible load that existed in 1995 in an Operating Company's current peak load responsibility ratio conflicts with: (a) the court's ruling in Louisiana Public Service that cost allocation should be forward-looking; (b) Commission precedent; and (c) the System Agreement's cost allocation approach, which uses recent load data to allocate capacity costs.[61]

29. The Louisiana Commission also submits that there are difficulties with implementing the Presiding Judge's direction to include pre-1995 interruptible load in the calculation of the peak load responsibility ratio. The Louisiana Commission contends that it is unclear how increases or decreases in those loads would affect the calculation, whether the Operating Companies should include automatically-renewing contracts (which otherwise would have expired by now), or whether they should continue to include interruptible load even if they have interrupted it at System peaks.[62] The Louisiana Commission also notes that the Presiding Judge acknowledged that "allocating capacity costs to interruptible loads violates the principle of cost causation."[63]

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[58] Trial Staff Brief on Exceptions at 18-21.

[59] Id. at 21-22.

[60] Louisiana Commission Brief on Exceptions at 13, 22-26.

[61] Id. at 16, 20-21, 27-28.

[62] Id. at 15, 28-29.

[63] Id. at 22, quoting 96 FERC at 65,010.

30. The Louisiana Commission further contends that the Operating Companies should exclude interruptible loads when allocating not only capacity costs but also when allocating transmission costs, since the System Agreement allocates capacity and transmission costs in the same manner.[64] The Louisiana Commission maintains that both generating units and transmission facilities are constructed to meet peak demand.[65]

31. Energy Users note that the Initial Decision found that Entergy has not planned, constructed or acquired capacity to meet the loads of interruptible customers since 1995, but fails to exclude interruptible load when allocating the cost of additional resources that Entergy is purchasing to provide reliable service to firm load during summer peak periods. Entergy Users argue that, as interruptible load does not cause these costs, the Operating Companies should exclude interruptible load from their current peak load responsibility ratio.[66]

32. Energy Users further argue that exclusion of interruptible load from peak load responsibility only if and when the customers' contracts expire does nothing to exclude interruptible load from the allocation of capacity costs that such interruptible load does not cause.[67] Energy Users add that the Initial Decision does not give interruptible load credit for the substantial savings for which it is responsible.[68]

33. Energy Users also contend that the past is irrelevant to deciding how the Operating Companies should allocate cost responsibility for existing capacity, since the cost-causation principle that the Commission adopted in Kentucky Utilities is forward-looking, and the question of how Entergy planned, constructed or acquired capacity before 1995 is not relevant to the issue of current cost allocation.[69] Energy Users also

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[64] Id. at 30-31.

[65] Id. at 30-31, citing Kentucky Utilities, 15 FERC at 61,004.

[66] Energy Users Brief on Exceptions at 3-4.

[67] Id. at 4-5.

[68] Id. at 6-7, 12.

[69] Id. at 7, citing Louisiana Public Service, 184 F.3d at 896-97.

maintain that interruptible load never caused Entergy to plan or acquire capacity; rather, interruptible load is an opportunity sale that uses otherwise idle capacity during off-peak periods.[70]

34. Energy Users contend that the evidence does not support a finding that interruptible load customers receive essentially firm service. Indeed, according to Energy Users, the evidence reflects that Entergy's right to curtail the loads of its interruptible customers is broader than the right to curtail in Kentucky Utilities.[71]

35. Entergy excepts to the Presiding Judge's decision to allow refunds, arguing that refunds are not appropriate in the holding company context. Entergy argues that the Louisiana Commission's witness's testimony on this point was not "uncontroverted," since Entergy, Trial Staff and the Council of the City of New Orleans all challenged the witness's testimony.[72] Entergy contends that section 206(c) of the FPA bars refunds in this situation.[73] It further maintains that the correction of past billing errors is no basis for ordering refunds.[74] Entergy further contends that "finding that prior billing corrections supports the ordering of refunds could have a chilling effect on utilities revising bills to correctly implement the filed rate . . . ."[75]

36. State Regulators also oppose the granting of refunds. They agree with Entergy that there is a distinction between correcting billing errors and changing an existing rate.[76] They recognize that the Commission has allowed public utilities to correct past

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[70] Id. at 8-12, citing Louisiana Public Service, 184 F.3d at 895.

[71] Id. at 13-15.

[72] Entergy Brief on Exceptions at 4.

[73] Id. at 4-6.

[74] Id. at 6.

[75] Id. at 6-7.

[76] State Regulators Brief on Exceptions at 6.

billing errors in order to correctly apply a filed rate. But they submit that excluding interruptible load from the calculation of peak load responsibility ratios is different; it is not an application of a filed rate, but rather a fundamental change in cost allocation.[77]

37. State Regulators argue that "the Commission's general policy has been to deny refunds when ordering a change in rate design because retroactive implementation may result in under-collections by the company and may be unfair to the customers who cannot alter their past demands in light of the new rate design."[78] State Regulators also argue that refunds would violate Section 206(c) of the FPA. Finally, State Regulators point out that the Commission has denied reparations when it has found no willful wrongdoing or unjust enrichment.[79]

Briefs Opposing Exceptions

38. In its Brief Opposing Exceptions, Trial Staff reiterates its position that the exemption from refunds contained in Section 206(c) of the FPA does not apply to this situation and that refunds are appropriate. It argues that Section 206(c) exempts the public utility operating companies of a registered public utility holding company from paying refunds only to the extent that the companies cannot recover such refunds in rates, and that that is not the case here.

39. Trial Staff contends that the parties who are in a position to show that they cannot recover such refunds are the utility operating companies paying the refunds and their regulators. It maintains that, since no party in this proceeding has demonstrated that state or local law bars the recovery in rates of any refund obligation that the Commission might impose, Section 206(c) does not exempt Entergy Mississippi, Entergy Arkansas, Entergy Gulf States or Entergy New Orleans from paying refunds in this proceeding.[80]

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[77] Id. at 7.

[78] Id. at 7, quoting Commonwealth Edison Company, 25 FERC ¶ 61,323 at 61,732 (1983); accord Consumers Energy Company, Opinion 429-A, 89 FERC ¶ 61,138 at 61,397 (1999).

[79] Id. at 8, citing Entergy Services, Inc. and Gulf States Utilities, Opinion No. 415, 80 FERC ¶ 61,197 at 61,787 (1997), reh'g denied, Opinion No. 415-A, 82 FERC ¶ 61,089 (1998), aff'd, Louisiana Public Service Commission, et al. v. FERC, 174 F.3d 218 (D.C. Cir. 1999); Koch Gateway Pipeline Company v. FERC, 136 F.3d 810 (D.C. Cir. 1998).

[80] Trial Staff Brief Opposing Exceptions at 3.

40. The Arkansas Electric Cooperative Corporation (Arkansas Electric) opposes the elimination of interruptible loads when allocating transmission costs. Arkansas Electric argues that the Louisiana Commission failed to sustain its burden of proof on this issue.[81]

41. The South Mississippi Electric Power Association (South Mississippi Electric) takes the same position. It argues that the Louisiana Commission's own witness testified that the Operating Companies should not exclude interruptible load from transmission peak load responsibility calculations, and that there is other testimony in the record to the effect that Entergy planned and built its transmission facilities to meet the needs of all of its customers, including those with interruptible loads.[82]

42. South Mississippi Electric notes that the Louisiana Commission stated that it did not undertake a thorough analysis of Entergy's transmission planning, and maintains that the Louisiana Commission failed to provide any evidence that interruptible customers do not cause transmission costs. South Mississippi Electric also notes that the Louisiana Commission concedes: (a) that Entergy's generation planning criteria differ from its transmission planning criteria; and (b) that Entergy most likely added transmission even in years when it had excess capacity. [83]

43. South Mississippi Electric further argues that Kentucky Utilities does not support the Louisiana Commission's position on the allocation of capacity costs. South Mississippi Electric submits that in Kentucky Utilities the utility (the proponent of the change in rates) failed to show that the right to interrupt generation allowed it to avoid serving interruptible load during peak periods.[84] South Mississippi Electric maintains that this situation is the mirror image of Kentucky Utilities. South Mississippi Electric contends that here it is the Louisiana Commission that has the burden of proof to show that Entergy's right to interrupt generation allows it to avoid serving interruptible customers during peak periods.[85]

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[81] Arkansas Electric Brief Opposing Exceptions at 3-5.

[82] South Mississippi Electric Brief Opposing Exceptions at 1-9, citing Ex. No. 48 at 119; Tr. 3367.

[83] Id. at 8-10, citing Louisiana Commission Brief on Exceptions at 7, 30.

[84] Id. at 10-11.

[85] Id.

44. Entergy argues that the evidence supports the Presiding Judge's decision to include interruptible load served before 1995 in peak load responsibility calculations until each individual pre-1995 contract expires. Entergy contends that this approach to peak load responsibility calculations recognizes that, before 1995, Entergy built its capacity to serve all of its customers, including those with interruptible loads.[86]

45. Entergy also notes that retail interruptible tariffs in each Operating Companies' jurisdiction include demand charges to recover a portion of fixed costs.[87] It further submits that excluding interruptible load from the calculation of peak load responsibility will cause substantial cost shifts among the Operating Companies.[88] Entergy argues that including interruptible load in the calculation of peak load responsibility is proper because interruptible customers receive "essentially firm service at a discounted rate."[89]

46. Entergy next contends that the Commission should depart from strict cost causation principles in this instance. Entergy maintains that, in deciding whether it is just and reasonable to include interruptible load in peak load responsibility calculations, the Commission should consider that interruptible customers benefit from the use of fixed assets.[90]

47. Entergy submits that the Presiding Judge's finding that Kentucky Utilities and Delmarva are not controlling here is correct. Entergy submits that its obligation to serve its interruptible customers is much greater than Kentucky Utilities Company's obligation to serve. Entergy states that it included interruptible load with firm load in its planning process and has incurred substantial capacity costs to serve interruptible loads.[91] Entergy

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[86] Entergy Brief on Exceptions at 1-2.

[87] Id. at 5, citing 96 FERC at 65,013.

[88] Id.

[89] Id. at 6, quoting 96 FERC at 65,015.

[90] Id. at 6-8.

[91] Id. at 8-9, citing 96 FERC at 65,022.

also states that it curtails generation only for reliability reasons, while Kentucky Utilities curtailed its interruptible customers for economic reasons.[92]

48. Entergy further maintains that the Commission should not direct the Operating Companies to exclude interruptible load from the calculation of peak transmission load responsibility, in particular, since record evidence supports the inclusion of interruptible load in the peak transmission load calculation.[93]

49. Finally, Entergy argues that Section 206(c) of the FPA prohibits refunds in this situation.[94] Entergy argues that, despite Trial Staff's arguments to the contrary,[95] the burden is on the complainant to show that those Operating Companies that would have to pay refunds would be able to recover them from the ratepayers in their respective jurisdictions, and that the Louisiana Commission has failed to meet this burden.[96] Entergy states that, based on its experience, "it is reasonable to believe that at least some of Entergy's state commissions will challenge Entergy's recovery of a one-time payment of refunds."[97]

50. State Regulators argue that, until 1995, Entergy did not differentiate between firm and interruptible customers when planning its capacity. State Regulators contend that under the principle of cost causation it is, therefore, entirely appropriate for the Operating Companies to include in the calculation of peak load responsibility the load of interruptible customers.[98]

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[92] Id. at 9.

[93] Id. at 10-11, citing 96 FERC at 65,019 & n.54; Tr. 3366-68.

[94] Id. at 11.

[95] Trial Staff argues that "logic dictates that the individual Operating Companies and their retail regulators' should bear the burden of proof to show that the exception to [Section] 206(c) does not apply." Trial Staff Brief on Exceptions at 20.

[96] Id. at 11-12.

[97] Id. at 12.

[98] State Regulators Brief Opposing Exceptions at 6-12.

51. State Regulators also stress that interruptible customers receive the benefits of the capacity and low fuel costs of the Entergy system.[99] They argue that it would be unfair for interruptible customers to receive these benefits while evading payments that would contribute to the payment of the System's fixed costs.[100] State Regulators also argue that the Presiding Judge properly distinguished Kentucky Utilities and Delmarva, since, in those cases, there is no mention that the utilities included interruptible load in their planning process, and Entergy's decision to interrupt is based on reliability rather than economic considerations.[101] (State Regulators add that, if the Commission directs the Operating Companies to remove interruptible load from the calculation of System peak load, it should also direct them to remove interruptible load from MSS-5 calculations.[102])

52. State Regulators also argue that, regardless of the outcome with respect to generation costs, the Commission should not direct the Operating Companies to remove interruptible load from the calculation used to allocate transmission costs, since Entergy builds transmission to meet interruptible load on the same basis that it builds transmission to meet firm load.[103]

53. Finally, State Regulators argue that Section 206(c) of the FPA prohibits refunds in this situation, since there is no evidence that the Operating Companies that would have to pay the refunds would be able to recoup these funds from their retail customers.[104]

54. The Louisiana Commission argues that refunds are appropriate. It contends that Section 206(c) does not prohibit refunds in the circumstances of this case. It maintains that there is no evidence that any state commission "has in the past, or would in the

[99] Id. at 13.

[100] Id. at 14.

[101] Id. at 17-19.

[102] Id. at 21.

[103] Id. at 19-20.

[104] Id. at 21-23. State Regulators note that the State of Mississippi prohibits the pass-through of such costs to retail customers. Id. & n.58.

future, refuse to pass through surcharged costs to retail consumers."[105] It also argues that there is no evidence that the Operating Companies responsible for refunds will not recover their refund payments from their retail ratepayers.[106] In the Louisiana Commission's view, then, the Entergy System will experience no reduction in revenues, since the Operating Companies that pay refunds can recover those costs from their retail ratepayers.[107]

55. The Louisiana Commission also maintains that the Entergy System can implement a refund order through surcharge and billing procedures.[108] The Louisiana Commission states that Entergy regularly makes retroactive corrections to its bills to reflect credits and charges and has surcharged customers whom it had undercharged. The Louisiana Commission contends that Entergy can do the same here to implement a refund order.[109]

Discussion

A. Preliminary Matters

1. Answer to Answer

56. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[110] prohibits an answer to an answer, unless otherwise permitted by the decisional authority. We are not persuaded to allow the Louisiana Commission's answer to State Regulators' answer to its motion to supplement the record and will, therefore, reject it.

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[105] Louisiana Commission Brief Opposing Exceptions at 2.

[106] Id. at 2.

[107] Id. at 2, 7-8.

[108] Id. at 4-7.

[109] Id. at 11.

[110] 18 C.F.R. § 385.213(a)(2) (2003).

2. Motion to Supplement the Record

57. The record contains a number of indications that Entergy changed its planning process in 1995.[111] Though, admittedly, the Louisiana Commission could not know in advance that the year 1995 would be a fulcrum in the Initial Decision, it was not without notice that the year 1995 was important to this proceeding.

58. Moreover, the Louisiana Commission had sufficient opportunity to seek inclusion of the entire deposition of Entergy's witness, Mr. Frank P. Gallaher, Jr., earlier in the proceeding had it wished to do so. A party to a proceeding may not wait to find out from an Initial Decision what were the weaknesses in its evidence, and then, after the fact and after the record has closed and the time for further examination has passed, seek to fill in the holes in its case.

59. Accordingly, we will deny the motion to supplement the record.

B. Interruptible Load

60. The Presiding Judge directed that, when calculating its peak load responsibility ratio, each Operating Company should continue to include the interruptible load that it served in 1995, if it is continuing to serve that load at the time of the current System peak.[112] He based that decision on a finding that, before 1995, Entergy planned its capacity to serve both firm and interruptible loads.[113] In his view, then, interruptible loads "resulted in the incurrence of capacity costs on the Entergy system[,]"[114] and should pay for the costs that they caused the Operating Companies to incur.[115] We disagree with his analysis and his conclusion, and accordingly will reverse the Presiding Judge in this regard.

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[111] See 96 FERC at 65,011, 65,022 (and evidence there referenced).

[112] 96 FERC at 62,012.

[113] Id. at 65,011-12, 65,022.

[114] Id. at 65,011.

[115] Id. at 65,011-12.

61. The Initial Decision overlooks that Entergy bases the recovery of its costs on the coincident peak recovery method, in which Entergy allocates its costs among its customers according to each customer's share of the System load at the time of the System peak. It assesses its capacity costs to peak period users because it is peak demand that determines how much Entergy will invest in capacity.[116] In Kentucky Utilities, the Commission explained the theory behind this method of cost allocation. A utility builds its bulk power facilities, i.e., generating units and transmission lines, to meet the maximum or peak demand of its firm customers. Because the utility incurs the cost of these facilities to meet the peak demand of its firm customers, those customers should pay for the facilities. The peak responsibility method accomplishes this by allocating the cost of the facilities among the firm customers in the same proportion as each customer's demand bears to the system peak.[117] In contrast, as explained below, a utility need not build to meet its interruptible demand.

62. The Commission thus traditionally has not "allocated" the cost of facilities to interruptible load. However, that the Commission does not "allocate" the cost of facilities to interruptible load, we note, does not necessarily mean that interruptible customers make no contribution to the recovery of fixed costs. The capital investment to meet the peak demand of firm customers makes it possible to provide interruptible

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[116] Cf. Union Electric Company, 890 F.2d 1193, 1198 (D.C. Cir. 1989) (Union Electric).

[117] Kentucky Utilities, 15 FERC at 61,003, citing Bonbright, Principles of Public Utility Rates 352 (1961); 1 Kahn, The Economics of Regulation 89-95 (1970). Cf. Union Electric, 890 F.2d at 1198. While Kentucky Utilities disallowed the "allocation" of capacity or fixed costs to interruptible service, the Commission did not reach the issue of alternative methods of developing rates to interruptible customers, and the Commission noted that "no such proposal is now before us;" the Commission added that "[a]ll we hold is that . . . it is neither just nor reasonable to allocate capacity costs to [the interruptible customer]." Kentucky Utilities, 15 FERC at 61,005 (emphasis added); but see infra note 124 (discussing later cases that address the development of rates to interruptible customers). Both Bonbright writing in 1961, at page 354, and Kahn writing in 1970, at pages 95, 106-07, and both cited by Kentucky Utilities, appear, in fact, to recognize that, while under a peak load responsibility cost allocation methodology interruptible customers are not allocated fixed costs, it nevertheless may be appropriate for interruptible customers to pay some amount of fixed costs in their rates. See infra note 124 (discussing later cases that address the development of rates to interruptible customers).

service when the firm customer is not demanding service. In fact, rates for non-firm or interruptible customers on file with the Commission typically reflect a contribution to fixed costs and, thereby, reduce the cost responsibility of firm customers.[118] Similarly, here, if an Operating Company serves interruptible load without having sufficient capacity of its own, i.e., is "short" on capacity, it draws upon the capacity of an Operating Company that is "long" on capacity (or on the capacity of a third-party). If the "short" Operating Company draws upon the capacity of a "long" Operating Company, there will be a contribution to the long Operating Company's cost of investment used to provide the service.

63. Since Entergy can curtail interruptible service so that it does not contribute to the System peak, interruptible load does not determine how much Entergy must invest in capacity to meet the System peak, i.e., its customers' needs. Therefore, under the peak load responsibility cost allocation method, Entergy should not include interruptible load in its calculations.

64. The Presiding Judge recognized all of this. But he nevertheless decided that Entergy should include interruptible load in its peak load responsibility cost allocation because, he stated, up until 1995, "interruptible load was treated in the same manner as firm load and Entergy incurred capacity cost to meet the needs of both types of service."[119]

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[118] See, e.g., Delmarva, 24 FERC at 61,795 (with respect to power sales rates to interruptible customers, "a demand charge is included in the rate for the energy as a contribution toward the already recovered capital costs," and this demand charge is then "credited against the [full requirements customers'] cost of service to compensate the full requirements customers for the use of the capacity"); accord Terra Comfort Corporation, 52 FERC ¶ 61,241 at 61,839 & n.26 (1990) (it is "common practice for jurisdictional utilities to assess demand charges for even non-firm sources" in order "to provide a contribution to the fixed cost of those facilities which support the sale for the benefit of the ratepayers who are assigned all fixed costs in the first instance"); Florida Power & Light Co., 33 FERC ¶ 61,116 at 61,247-48 (1985)(it would be inappropriate to charge interruptible load only the variable costs of providing service, and interruptible rates should include a "contribution" to fixed costs as an incentive to provide interruptible service; the "contribution" is credited to firm customers through revenue credits).

[119] 96 FERC at 65,010.

65. We disagree with the Presiding Judge's reasoning. The Initial Decision overlooks that Entergy uses a peak load responsibility cost allocation method, but nevertheless allocates costs to interruptible load, which it need not serve at its peak. Entergy did not have to treat interruptible load in the same manner as firm load; it could interrupt such load at the time of its peak.

66. That Entergy may have, in practice, opted not to interrupt its interruptible load is not the critical determinant, and does not warrant Entergy's including interruptible load when determining peak load responsibility ratios.[120] What is important is that Entergy was entitled to curtail its interruptible load at the time of its System peak.

67. Thus, as explained above, because Entergy did not and does not have to construct capacity to serve interruptible load at the time of its System peak (and thus can and does offer interruptible service at a lower rate), the Initial Decision cannot stand.[121] Moreover, the cost recovery system that the Initial Decision adopts[122] is without foundation. There is no evidence that Entergy built capacity to serve interruptible load. While Entergy may have considered interruptible capacity in its planning before 1995,[123] it then already had sufficient capacity to meet its load and did not need to construct additional capacity; its most recent capacity additions occurred in the mid-1980's.[124] So reference to interruptible load in Entergy's planning documents does not demonstrate that Entergy actually built capacity to serve interruptible load.[125]

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[120] Entergy, in fact, has interrupted its interruptible load, however, as explained below. See infra notes 138-40 and accompanying text.

[121] What is important is that Entergy did not have to (i.e., was not required to) serve its interruptible load at the time of its System peak and it did not have to (i.e., was not required to) build capacity to serve its interruptible load at the time of its System peak, so interruptible load did not drive the construction of any capacity. See 1 Kahn, Economics of Regulation 89-95 (1970).

[122] 96 FERC at 65,010.

[123] See 96 FERC at 65,010 (and exhibits there cited).

[124] See infra note 129 and accompanying text.

[125] See Louisiana Brief on Exceptions at 13-26; Energy Users Brief on Exceptions at 8-10; Trial Staff Brief on Exceptions at 11 (before 1995 Entergy was in a period of

68. Entergy states that it constructed plants in the 1970's and 1980's to provide fuel diversity,[126] and that it did not consider in its planning whether the load it was serving was interruptible or firm.[127] Entergy argues from this that it constructed its generation to serve all of its customers (both firm and interruptible).[128] But it is equally reasonable to conclude from this evidence that, during the time in question, Entergy constructed its generation to serve firm load, and that the benefit to interruptible customers was merely a by-product of this process. In this regard, Entergy acknowledges that, when its last generation came on line in the mid-1980s, its system was "awash" in capacity.[129] There was no need, then, for Entergy to construct any generation to serve interruptible load.[130] And there was no reason for it to do so in any event, since, if necessary, it could always interrupt that load at the time of the System peak.

69. Also, it is uncontroverted that Entergy does not now acquire capacity, and, since at least 1995 has not acquired capacity, to serve interruptible loads.[131] The Presiding Judge so found,[132] and no one disputes this finding.[133] Since it is clear, then, that firm load

excess capacity, so that including interruptible load in its planning did not result in the construction of capacity to serve that load); Ex. No. 235 at 267 (when Entergy included interruptible load in its planning process, it was not building capacity); Ex. No. 158 at 2-3; Tr. 2929-32, 2947.

[126] Entergy Brief Opposing Exceptions at 3.

[127] Id., citing Tr. 3353-57, 3388.

[128] Id. at 3; Ex. No. 144 at 31.

[129] Entergy Brief Opposing Exceptions at 4. Entergy's last generating unit came on line in 1985. Id. at 3; Trial Staff Brief on Exceptions at 13.

[130] See Louisiana Public Service, 184 F. 3d at 896 ("even projected firm load did not require additional future capacity").

[131] See Ex. No. 48 at 112-116; Ex. No. 60 at 2; Ex. No. 158 at 3; Tr. 2942-43.

[132] 96 FERC at 65,011, 65,016-17.

currently drives Entergy's capacity acquisitions, there is no credible basis to allocate the cost of capacity to interruptible loads that existed in 1995. For example, in 2000, Entergy needed all of its existing generating capacity, plus 2950 MW, to meet firm load.[134] When all capacity is needed to serve firm load, there is no logical reason to allocate the cost of this capacity based, in part, on interruptible load - - either pre-1995 or post-1995.

70. Finally, the idea of basing the allocation of the cost of Entergy's current capacity on the interruptible load that existed in 1995 "ignores the fact that the cost causation principles that the Commission adopted in Kentucky Utilities are essentially forward looking."[135] Entergy is now planning capacity to meet the future needs of its customers. It makes no sense, then, to consider the interruptible load that existed in 1995 in the allocation of the costs of capacity that Entergy will acquire to meet its future needs.

71. The Presiding Judge also justified including 1995 interruptible load in allocating the cost of Entergy's current capacity in part by finding that interruptible customers receive "essentially firm service."[136] The meaning of the phrase "essentially firm service" is unclear, however. Indeed, Entergy does not provide interruptible customers with the same service that it provides to its firm customers. It is undisputed that Entergy can, and has, curtailed service to its interruptible customers.[137] Indeed, Entergy states that it will curtail service to its interruptible customers whenever it does not have sufficient resources to meet its load, and will interrupt them as often as needed to protect firm load.[138] And Entergy curtailed its interruptible customers on 14 days in 1996, 7 days in

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[133] The Louisiana Commission asserts that Entergy may have stopped including interruptible load in its planning even before 1995. See Louisiana Commission Brief on Exceptions at 13, 22-26; Tr. 2943.

[134] Louisiana Commission Brief on Exceptions at 26-7; Ex. No. 150. Entergy's current, owned generation is insufficient to meet its firm load. See Energy Users Brief on Exceptions at 10-11; Tr. 2895, 3027.

[135] Louisiana Public Service, 184 F.3d at 896.

[136] 96 FERC at 65,015.

[137] See Energy Users Brief on Exceptions at 14; Ex. No. 225.

[138] Energy Users Brief on Exceptions at 14; Tr. 3223.

1997, 31 days in 1998, 14 days in 1999 and 15 days in 2000.[139] Given the interruptions that have already occurred and the potential for further interruptions, we cannot find Entergy's service to its interruptible customers to be "essentially firm."[140]

72. The Presiding Judge distinguished Kentucky Utilities on two bases. He found that: (a) "Entergy's obligation to its interruptible customers is much greater than the interruptible service that Kentucky Utilities Co. provided to the City of Paris[;]" and (b) "Entergy's decision to serve the interruptible customers is based on reliability and not economic considerations."[141] Neither of these finding withstands close examination.

73. First, Entergy's obligation to its interruptible customers is not greater than Kentucky Utilities' obligation to its interruptible customers. In Kentucky Utilities the utility had the right to curtail its interruptible customers up to 400 hours per year.[142] Entergy can curtail much of its interruptible load, particularly that located on the Entergy Louisiana and Energy Gulf States systems, more than 500 hours a year.[143] Some of Entergy's tariffs, in fact, provide for unlimited interruptions.[144] It would appear, then, that Entergy's commitment to its interruptible load is not firmer than the commitment that Kentucky Utilities made to serve its interruptible customers.

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[139] Energy Users Brief on Exceptions at 14; Ex. No. 225; Ex. No. 226; Tr. 3219-26.

[140] The Presiding Judge found that "retail interruptible tariffs in each of the jurisdictions for each Entergy Operating Company include demand charges to recover a portion of fixed costs." 96 FERC at 65,014 (footnote omitted). The relevance of this finding to the instant proceeding is unclear. Retail ratemaking determinations do not determine the Commission's wholesale ratemaking decisions. Cf. Louisiana Public Service, 184 F.3d at 899-900; Cities of Bethany v. FERC, 727 F.2d 1131, 1137 (D.C. Cir. 1984).

[141] 96 FERC at 65,022.

[142] Kentucky Utilities, 15 FERC at 61,003.

[143] Entergy Users Brief on Exceptions at 14; Ex. No. 216 at 19; Ex. No. 36 at 6-7.

[144] Id.

74. Also, in this regard, the Initial Decision is inconsistent with the Commission's later holding in Delmarva that:

> [E]ven a limited right of interruption, if it enables the company to keep a customer from imposing demands on the system during peak periods, gives a company the ability to control its capacity costs. Therefore, that customer shares no responsibility for capacity costs under a peak responsibility method.[145]

It is, thus, the right to interrupt that is critical to the analysis, and not the actual interruptions or even the number or length of such interruptions. If a company can keep a customer from imposing its load on the system at system peak, as Entergy can do here, then, under the peak responsibility method of cost allocation that Entergy uses, "that customer shares no responsibility for capacity costs . . . ."[146]

75. Second, the distinction that the initial decision draws between "reliability " and "economic" considerations is also unclear. When a utility makes a commitment to serve firm load, it commits to serve that load at all times (absent a force majeure event on the system). When a utility makes a commitment to serve interruptible load, it does not commit to serve that load at all times. To the contrary, it expressly reserves the right to interrupt (even if there is no force majeure event on its system). Moreover, when it curtails interruptible load, it does so to protect its service to its firm load. That is, it curtails interruptible load precisely because it has not undertaken to construct or otherwise acquire the necessary facilities to serve interruptible load at all times and most particularly when use of the system is peaking; for firm load, in contrast, it has undertaken to construct or otherwise acquire such facilities.

76. The Presiding Judge also found that interruptible customers, like firm customers, benefit from lower cost energy because of Entergy's investment in generating plants that achieve greater fuel efficiency and thus provide energy at lower cost.[147] While this is true, the benefit to interruptible load comes merely as a by-product of capacity left over from Entergy's construction of capacity to serve its firm load. Interruptible load does not

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[145] Delmarva, 24 FERC at 61,462.

[146] Id. Accord Northeast Utilities Service Company, Opinion No. 422-A, 84 FERC ¶ 61,159 at 61,867-68 (1998).

[147] 96 FERC at 65,015, citing Tr. 3353-57, 3394.

cause Entergy to incur capacity costs; rather, when Entergy does not need capacity to serve firm load, that capacity is available to sell to anyone, including Entergy's interruptible load.

77. We will, therefore, direct the Operating Companies to remove interruptible load when calculating peak load responsibility ratios. We will also direct the Operating Companies to remove interruptible load from Schedule MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of All Companies) and from joint account purchases.[148]

C. Transmission

78. The Presiding Judge ruled that the Louisiana Commission failed to justify excluding interruptible load from the load that the Operating Companies use to allocate transmission costs.[149] We agree.

79. The Louisiana Commission's own witness opposed excluding interruptible load when allocating transmission costs. The Louisiana Commission's witness testified as follows:

> To the extent that interruptible load is strictly a capacity related effect (and it is), the adjusted load responsibility should only be applicable to computations under Schedule MSS-1 [Reserve Equalization]. The computations for Schedules MSS-2 [Transmission Equalization], MSS-5 [Distribution of Revenue from Sales Made to the Joint Account of All Companies], MSS-6 [Distribution of Operating Expenses of System Operations Center] and joint account purchases, which rely on load responsibility, should not be based on load responsibility ratios that are adjusted for interruptible load. Because interruptible load is a demand-side

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[148] See Trial Staff Brief on Exceptions at 15-17; State Regulators Brief Opposing Exceptions at 21; Ex. No. 97 at 17; Ex. No. 125 at 57; Ex. No. 144 at 28. Schedule MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies) allocates the profits of off-system sales to the respective Operating Companies. Because Entergy generators make these sales possible, an Operating Company should participate in the profits of off-system sales only to the extent that it participates in the allocation of the generation assets that make those sales possible. See Ex. No. 72 at 51.

[149] 96 FERC at 65,019.

> resource, associated with generating capacity, it is not appropriate to develop MSS-2 [Transmission Equalization] transactions using the interruptible load adjusted responsibility ratios.[150]

80. Moreover, while Entergy's Open Access Transmission Tariff, consistent with Order No. 888's pro forma tariff,[151] provides for non-firm point-to-point transmission service,[152] the Louisiana Commission failed to demonstrate that any interruptible load takes such service.[153]

81. As the proponent of a rate change, the Louisiana Commission bore the burden of showing that the transmission rate was unjust and unreasonable.[154] We conclude that the Presiding Judge properly found that the Louisiana Commission failed to carry this burden.

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[150] Ex. No. 48 at 119. The Louisiana Commission also admitted that it "did not undertake a thorough analysis of Entergy's transmission planning." Louisiana Commission Brief on Exceptions at 31. See also Tr. 2865-66.

[151] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles, January 1991-June 1996 ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg., 12,274 (March 14, 1997), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2001 ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al., v. FERC, 225 F. 3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

[152] See American Electric Power Service Corporation, 78 FERC ¶ 61,070 (1997), order on reh'g, 82 FERC ¶ 61,204 (1998).

[153] Cf. Entergy Services, Inc., 58 FERC ¶ 61,234 at 61,767 (1992) (if a customer is willing to accept the risk of interruption, a customer may have its firm power transmitted at the non-firm rate), order on reh’g, 60 FERC ¶ 61,168 (1992), remanded on other grounds, 28 F.3d 173 (D. C. Cir. 1994).

[154] See, e.g., Cambridge Electric Light Company, 84 FERC ¶ 61,049 at 61,233, reh'g denied, 85 FERC ¶ 61,190 (1998).

D. Refunds

82. The Presiding Judge ordered refunds in this proceeding. We find that he erred in this regard, and accordingly we will reverse this finding.

83. Section 206(c) of the FPA provides, in relevant part that:

> [I]n 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) 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: 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.[155]

84. Unlike the more typical case that involves refunds of rates that were excessive,[156] the instant case involves a reallocation of costs among the Operating Companies and thus falls within the scope of Section 206(c).[157] And here we cannot make the requisite finding that there would not be a reduction in revenues because the Operating Companies

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[155] 18 U.S.C. § 824e(c) (2000).

[156] See, e.g., S. Rep. No. 100-491 at 6-7 (1988); Connecticut Light and Power Company, Opinion No. 305-A, 45 FERC ¶ 61,370 at 62,163-64 (1998) (CL&P); Southern Company Services, Inc., 46 FERC ¶ 61,381 at 62,191 & n.19 (1989); Blue Ridge Power Agency v. Appalachian Power Company, Opinion No. 363-A, 57 FERC ¶ 61,100 at 61,375 (1991), order on reh'g, Opinion No. 363-B, 58 FERC ¶ 61,193 (1992) (Blue Ridge).

[157] See, e.g., S. Rep. No. 100-491 at 6-7 (1988); Blue Ridge, 57 FERC at 61,375; CL&P, 45 FERC at 62,163; Louisiana III, 93 FERC at 61,027 n.5.

would be able to recover the monies that would be refunded as a result of the reallocation of costs among such companies.

85. The Louisiana Commission argues that its witness's testimony regarding the recovery of refunds:

> is the only testimony in the record on whether costs would be "trapped" by a refund, and his testimony was that Entergy could recover those costs. This testimony is reliable, "uncontroverted" and fully supports the refund decision by the Administrative Law Judge.[158]

86. We disagree that this witness' testimony was "uncontroverted." To the contrary, several parties challenged the witness' conclusion that refunds are appropriate in this proceeding. State Regulators, for example, explain that "[I]n Mississippi, retroactive ratemaking and the pass through of such costs to its retail customers has been prohibited."[159]

87. Nor do we agree that the Louisiana Commission's witness's testimony "fully supports" the Presiding Judge's decision on this issue. The witness testified that the prospective rate that he proposed "would then be passed on to retail ratepayers within each retail jurisdiction in the same manner as MSS-1 [Reserve Equalization] payments and receipts are currently treated for ratemaking purposes."[160] The witness offered absolutely no basis for this assertion, nor did he claim to know how state commissions would treat the recovery of past costs through future surcharges. We find this evidence of no probative value.

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[158] Louisiana Commission Brief Opposing Exceptions at 11.

[159] State Regulators Brief Opposing Exceptions at 22-23. Cf., e.g., Entergy Initial Brief at 60-62 (witness' proposal would be inconsistent with filed rate doctrine); Entergy Reply Brief at 33-34 (refunds are inappropriate when Commission alters an existing method of allocating costs); Trial Staff Initial Brief at 77 (Section 206(c) appears to prohibit the recovery of refunds in this proceeding); Arkansas Public Service Commission Initial Brief at 34-35 (refunds are neither necessary nor appropriate).

[160] 96 FERC at 65,024; Ex. No. 48 at 125-26.

88. In sum, since we cannot find, as we 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, we cannot order refunds in this proceeding. Accordingly, we will decline to order refunds in this proceeding; rather, we will make the change that we order here effective from the first day of the first month following the date of this order (i.e., April 1, 2004).[161]

89. In addition, we do not agree that Entergy's correction of past billing errors provides precedent for ordering refunds in this case. We have allowed utilities to correct past billing errors in order to correctly apply the filed rate.[162] Billing adjustments made to correctly charge a filed rate afford no support for ordering refunds when the Commission orders a public utility to change a filed rate.

E. SO_2 Amendment to System Agreement

Background

90. Title IV of the Clean Air Act Amendments of 1990 (CAAA)[163] establishes a regulatory mechanism designed to control acid rain by providing for the issuance of emissions allowances as a means of reducing electric utilities' emissions of sulfur dioxide (SO_2). On December 15, 1994, the Commission issued a policy statement setting forth the conditions under which it would allow utilities to recover the cost of emission allowances through their wholesale rates.[164]

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[161] We will also direct that Entergy revise the language of its rate schedules accordingly to exclude interruptible load.

[162] See Southwestern Public Service Company, 168 FERC ¶ 61,184 at 61,495 (1994); Philadelphia Electric Company, 57 FERC ¶ 61,147 at 61,566 (1991).

[163] Pub. L. No. 101-549, Title IV, 104 Stat. 2399, 2584, 42 U.S.C.A. § 7651, et seq. (1990).

[164] See Policy Statement Regarding the Treatment of Emissions Allowances in Coordination Rates, 60 Fed. Reg. 22,257 (May 5, 1995), FERC Stats. & Regs. Regulations Preambles January 1991-June 1996 ¶ 31,019 (1995) (Policy Statement).

91. On November 1, 1999, Entergy submitted for filing in Docket No. ER00-432-000 an amendment to the System Agreement to include in Service Schedule MSS-3 (Exchange of Electric Energy Among the Companies) the incremental replacement cost of SO_2 emission allowances that the Operating Companies use in connection with the generation of electric energy that they exchange among themselves (SO_2 Amendment).[165] The purpose of the amendment was to ensure recovery of SO_2 allowance costs that the Operating Systems incur in complying with the CAAA.

92. On December 28, 1999, the Commission issued an order in Docket No. ER00-432-000, finding that Entergy's filing satisfied the requirements of the Policy Statement and accepting Entergy's emissions allowance amendment for filing, subject to the outcome of Docket No. EL95-33-000.[166]

Discussion

93. As above noted, the Final Joint Statement of Issues in this proceeding included the issue of whether an amendment to the System Agreement to add the replacement cost of SO_2 allowances to costs billed under Schedule MSS-3 (Exchange of Electric Energy Among the Companies) in the System Agreement (the SO_2 Amendment) is just and reasonable.[167] The Presiding Judge ruled that the issue was not before him in this proceeding,[168] but is before the Commission in another proceeding, Docket No. EL95-33-000, which he referred to as the "rough equalization" proceeding.[169] The Presiding Judge

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[165] Schedule MSS-3 sets forth the provisions governing the exchange and pricing of energy among the Operating Companies. It provides that an Operating Company that supplies energy to the pool receives reimbursement for the current estimated cost of fuel plus an adder designed to reimburse that company for the incremental operating and maintenance costs associated with the production of additional energy. See Trial Staff Brief Opposing Exceptions at 11 & n.4.

[166] Entergy Services, Inc., 89 FERC ¶ 61,331 at 62,003-05 (1999) (Entergy Services).

[167] 96 FERC at 65,024-25 (description of issue); Trial Staff Brief Opposing Exceptions at 9 (same).

[168] 96 FERC at 65,025 ("It is difficult to understand why this issue is before me. There is no such proposal on the table.").

[169] Id.

ruled that, subject to the outcome of that proceeding, the SO_2 Amendment is "just and reasonable and consistent with the Federal Power Act."[170]

94. The Louisiana Commission argues on exceptions that the SO_2 Amendment is unjust and unreasonable, because it allows the Operating Companies to recover lost opportunity costs related to selling SO_2 allowances.[171] The Louisiana Commission maintains that these are not actual costs.[172] The Louisiana Commission contends that the System Agreement allows recovery only of the actual, incremental costs of SO_2 allowances; it does not allow for the recovery of opportunity costs relating to the sales of those allowances.[173] The Louisiana Commission argues that, to the extent that the SO_2 Amendment includes recovery of opportunity costs relating to the sale of SO_2 allowances, it does not conform to the MSS-3 formula, which is designed to track actual costs.[174]

95. In response to this argument, Entergy argues that this issue is no longer part of this proceeding; but, if it is, then the SO_2 Amendment is just and reasonable. Entergy states that, in Entergy Services, the Commission accepted the SO_2 Amendment for filing, found that it satisfied the requirements of the Commission's Policy Statement regarding emissions allowances, and consolidated this issue with the Louisiana Commission's complaint regarding the rough equalization of costs under the System Agreement.[175] Entergy maintains that the parties then removed that issue from this proceeding in the

[170] Id. The Presiding Judge reasoned that because the Commission had accepted this amendment in Entergy Services, the Louisiana Commission bore the burden of showing that the amendment is now not just and reasonable. He found no evidence in the record to support such a contention. Id.

[171] Louisiana Commission Brief Exceptions at 33-37.

[172] Id. at 32-37.

[173] Id. at 35-37.

[174] Id. at 32-36.

[175] Entergy Brief Opposing Exceptions at 13-14.

June 25, 2001 Offer of Settlement, which the Commission accepted. Trial Staff concurs that the SO_2 Amendment is no longer before the Commission in this proceeding.[176]

96. We agree with Entergy and Trial Staff that the issue of the SO_2 Amendment is not before us in this proceeding. In Entergy Services, the Commission accepted the SO_2 Amendment for filing, subject to the outcome of Docket No. EL95-33-000.[177] By Offer of Settlement filed June 15, 2001, in Docket No. EL95-33-000, the parties to that proceeding agreed to defer the SO_2 Amendment issue and all other issues related to the rough equalization of costs among the Operating Companies to Docket No. EL01-88-000.[178] The Commission approved the Offer of Settlement on July 26, 2001.[179]

97. Our order authorizing issuance of a limited decision in this proceeding, recognized that the SO_2 Amendment issue was no longer before us in this proceeding. That order stated:

> At a prehearing conference held on May 29, 2001, the parties informed the presiding judge that they had agreed to an amicable settlement of almost all issues in these consolidated proceedings. As a part of that settlement the parties agreed that the presiding judge will determine the issue set for hearing in Louisiana Public Service Commission, 93 FERC ¶ 61,023 (2000), i.e., whether Entergy Corporation and its operating companies should revise the Entergy System Agreement to exclude curtailable loads from the calculation of peak load responsibility, in an initial decision that he will issue no later than July 28, 2001. On June 1, 2001, the Chief Administrative Law Judge requested the Commission to authorize the

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[176] Trial Staff Brief Opposing Exceptions at 9-13.

[177] See Entergy Services, 89 FERC at 62,005.

[178] On June 14, 2001, the Louisiana Commission filed a complaint in Docket No. EL01-88-000, claiming that the System Agreement no longer provides rough equalization of costs among the Operating Companies. On February 13, 2002, the Commission set the complaint for hearing. See Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation, 98 FERC ¶ 61,135 (2002).

[179] See Entergy Services, Inc., 96 FERC ¶ 61,125 (2001).

issuance of an initial decision on that issue. Under these circumstances, the Commission authorizes the issuance of an initial decision on that issue by July 28, 2001.[180]

98. The Presiding Judge thus could not rule on the SO_2 Amendment issue, because the order allowing an initial decision in this proceeding directed him to rule only on the issue before him, i.e., whether Entergy should revise the System Agreement to exclude interruptible loads from the calculation of peak load responsibility ratios.

99. We will, therefore, affirm the Presiding Judge's finding that the issue of the SO_2 Amendment was not before us in this proceeding. This finding does not deprive the Louisiana Commission of a forum in which to litigate this issue; it merely ensures that the parties will litigate the issue in the proper proceeding.

The Commission orders:

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

(B) Within 15 days of the date of the issuance of this order, Entergy must submit a compliance filing amending its tariffs as provided in the body of this order.

By the Commission. Chairman Wood not participating.

(S E A L)

Magalie R. Salas,
Secretary.

[180] Louisiana Public Service Commission v. Entergy Services, Inc., 95 FERC ¶ 61,360 at 62,372 (2001) (footnote omitted, emphasis supplied).