

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Arkansas Electric Cooperative Corporation

v.

Docket No. EL05-15-001

Entergy Arkansas, Inc.

OPINION NO. 488

ORDER ON INITIAL DECISION

(Issued October 25, 2006)

1. In an Initial Decision issued January 26, 2006, in the captioned proceeding,¹ the presiding administrative law judge (ALJ) ruled that certain general billing provisions and principles in the contract between Entergy Arkansas, Inc. (Entergy) and Arkansas Electric Cooperative Corporation (Arkansas Electric) should be interpreted to permit Entergy to take transmission system operating constraints into account in determining the availability of Arkansas Electric's generation units for purposes of billing. This finding would permit Entergy to bill Arkansas Electric at the higher replacement energy cost for energy deemed purchased from Entergy to supply Arkansas Electric's customers' energy requirements. We reverse, finding that this determination conforms neither to the specific billing provisions of the contract nor to the long-standing course of performance between the parties, as discussed below.

I. Background

2. Entergy is an investor-owned electric utility organized under the laws of the State of Arkansas. Entergy generates, purchases, transmits, and distributes electric energy and

¹ *Arkansas Electric Cooperative Corp.*, 114 FERC ¶ 63,015 (2006) (Initial Decision).

associated capacity in, among other places, various parts of the State of Arkansas. Arkansas Electric is an electric generation and transmission cooperative incorporated under Arkansas law. Arkansas Electric provides wholesale electricity to its sixteen electric distribution cooperative members through the use of Entergy's transmission system.² In addition to two gas-fired generation resources, Arkansas Electric co-owns, with Entergy and others, a thirty-five percent interest in the coal-fired Independence Steam Electric Station (Independence Units 1 and 2) located in Newark, Arkansas, and the coal-fired White Bluff Steam Electric Station (White Bluff Units 1 and 2) located near Redfield, Arkansas.

3. Arkansas Electric and Entergy entered into the Power Agreement on June 27, 1977, as part of a settlement. The Power Agreement integrates all of Arkansas Electric's generation resources with those of Entergy. The Power Agreement makes Entergy responsible for dispatching and scheduling Arkansas Electric's generation resources and establishes a settlement billing mechanism ("redispatch") under which Arkansas Electric is billed based on the theoretical assumption that, to the extent the power that Entergy actually decides to dispatch from Arkansas Electric's generating units is less than the power Entergy actually delivers to Arkansas Electric's customers, Arkansas Electric purchases the deficiency from Entergy.³

4. In a nutshell, the dispute at issue in this case is over the price for such purchased power. Arkansas Electric contends that, pursuant to Redispatching Principle No. 6 of the Power Agreement, as long as the amount of power Entergy supplies to Arkansas Electric's customers does not exceed the rated capacity of the Arkansas Electric generating units, the price Arkansas Electric pays for the power deemed purchased from Entergy (which Arkansas Electric dubs "substitute energy") generally is equal to the relatively inexpensive incremental cost of fuel at the Arkansas Electric coal-fired generating units.⁴ Thus, it asserts, under the Power Agreement's billing mechanism, it generally does not matter how much power the Entergy dispatcher actually decides to

² Power Agreement at 6.

³ The Power Agreement's billing ("redispatch") provisions are located in Article V, section 5 and have corresponding Redispatching Principles in Exhibit E of the Power Agreement that clarify the billing mechanism. These and other relevant provisions are included in the attached Appendix.

⁴ For simplicity in dealing with the billing issues that Arkansas Electric raises in the instant proceeding, we will treat the "substitute energy" cost as generally being the cost of fuel at Arkansas Electric's coal-fired units and take no position on the billing issues raised in another proceeding, Docket No. EL05-135-000, which the Commission deferred to the courts to resolve regarding whether and in what circumstances its more expensive gas-fired generation costs apply. *See, Entergy Arkansas, Inc.*, 112 FERC ¶ 61,306 (2005).

dispatch from Arkansas Electric's generating units for system purposes because all the power is to be priced at its own low fuel cost as if the power theoretically was produced at its generating units and economically dispatched to serve its customers.

5. Entergy, on the other hand, asserts that certain general principles found in Article V and Redispatching Principle No. 3 of the Power Agreement should be interpreted to provide that, even if the Arkansas Electric generating units are capable of producing sufficient power to meet the requirements of its customers, if the generating units are nonetheless not "available" to the Entergy dispatcher due to an operating constraint on Entergy's transmission system, the deficiency in power supplied to Arkansas Electric's customers is deemed to be "Replacement Energy" that is purchased by Arkansas Electric from Entergy at a very expensive rate. In its complaint, Arkansas Electric asserted that, starting in June 2004, Entergy inappropriately changed how it bills and that power that previously was billed for some 24 years at the low, so-called "substitute energy" price is now being billed at the much higher "Replacement Energy" price.

6. The ALJ agreed with Entergy. On exceptions to the Initial Decision, Arkansas Electric asserts that the ALJ erred and urges that we reverse the Initial Decision. Entergy filed a Brief Opposing Arkansas Electric's Exceptions. For the reasons discussed below, we find in favor of Arkansas Electric, reverse the Initial Decision, order Entergy to cease and desist the collection of the unlawful charges and to refund, with interest, any such charges previously collected.

II. The Complaint

7. In its complaint filed October 25, 2004, Arkansas Electric alleged that Entergy unilaterally changed the method of classifying and pricing energy from the four co-owned coal-fired units under the Power Agreement. Arkansas Electric further alleged that these actions are anticompetitive and violate both the terms of the Power Agreement and the filed rate doctrine.⁵

8. Arkansas Electric asserted that since August 1980, when the first of the units went into operation, through June 2004, Entergy, with minor exceptions, credited Arkansas Electric its ownership share of the total capability of the White Bluff and Independence generation units without consideration of how Entergy actually operated these plants. Arkansas Electric states that, for that period, pricing of energy associated with the co-owners' share of the capacity was based on the cost of the plants' fuel inventory. Arkansas Electric stated that the pricing of "substitute energy," *i.e.*, energy it purchases from Entergy to supply its customers that is theoretically assumed to be generated by the units, has been identical to the price that the co-owners would pay for the energy generated by the coal units themselves (\$14.08/MWh in June 2004). Arkansas Electric

⁵ *Id.*

stated that if Entergy provided Arkansas Electric with “Replacement Energy” (which Arkansas Electric defined as energy that exceeds installed capacity of its generating units), Entergy charged a price based on Entergy’s incremental production cost or the price of energy purchased by Entergy (\$58.65/MWh in June 2004).

9. Arkansas Electric stated that, at a meeting held on June 23, 2004, it learned that, effective July 1, 2004, Entergy would no longer base billing on the Independence and White Bluff coal units' physical capability. Instead, it asserted, Entergy would limit the plants' capabilities deemed "available" to Entergy to the actual generation outputs to meet system load, as determined by Entergy. According to Arkansas Electric, when this effective reduction of Arkansas Electric's capacity diminishes to a level below its load requirements, Entergy will charge Arkansas Electric for more expensive Replacement Energy. The only exception would be when Entergy limited actual generation outputs of the units for economic reasons.

10. Arkansas Electric contended that the repricing by Entergy resulted in Entergy’s overbilling Arkansas Electric approximately \$400,000 for the month of July 2004, approximately \$585,000 for the month of August 2004, and approximately \$286,000 for the month of September, 2004.

11. Arkansas Electric claimed that, before July 1, 2004, Entergy never deemed the capability of the plants to be only that level at which Entergy chose to operate them. Arkansas Electric argues that a party’s own interpretation of a provision by its longstanding performance of that provision is telling evidence of what the parties intended so long as that interpretation is not contrary to the words of the contract.⁶ Arkansas Electric stated that the Power Agreement does not allow Entergy to sell Arkansas Electric “Replacement Energy” under the broad range of circumstances Entergy is now asserting causes it to limit the output of the generation plants.

12. In its Answer to the Complaint, Entergy argued that provisions of the Power Agreement provide for the consideration of system operational constraints in the crediting of energy from the jointly-owned units. Therefore, Entergy argued that Arkansas Electric is not to be given credit for energy that is not produced when Independence and White Bluff have to be operated at a less than optimum level due to conditions on the Entergy system.

13. Entergy contended that when the Entergy control area operator operates and manages the Entergy system, a number of operational factors that are outside of its

⁶ Citing, *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 53 FERC ¶ 61,026 (1990).

control can cause imbalances between generation and load.⁷ Entergy stated that the Entergy dispatcher must have sufficient unloaded generation that can be turned up or down in response to instantaneous load fluctuations and there is no basis for excluding co-owned resources from being used for this purpose. Entergy stated that the Entergy dispatcher has the obligation to balance the output of IPP generation on the Entergy system, and, to the extent that IPPs do not match the output of their units to their schedules, the Entergy dispatcher must balance the unpredictable output by varying the output of the units under its control. Entergy asserted that it must contend with the unpredictable nature of schedules for delivery of energy by third-parties into the Entergy system when third-parties, such as Arkansas Electric, schedule energy deliveries into the system. Entergy submitted that Arkansas Electric seeks to have unfettered access to energy from its ownership interest in the co-owned resources even though Entergy may have to turn down a co-owned resource to accommodate delivery of Arkansas Electric's energy from other, off-system resources.

14. On December 22, 2004, the Commission stated that it was unable to summarily resolve the complaint because it raises issues of material fact that are best determined in the context of a trial-type evidentiary hearing.⁸ Accordingly, the Commission set the issues raised by the complaint for hearing.

III. The Initial Decision

15. According to the Initial Decision, this case boils down to one issue: whether Entergy violated a provision of a contract outstanding between it and Arkansas Electric. The Initial Decision concludes that Arkansas Electric, which bore the burden of proof, did not demonstrate by reliable, probative and substantial evidence that: (a) Entergy had violated a contractual provision; (b) Entergy's actions were anticompetitive; or (c) Entergy's actions violated the filed rate doctrine.⁹

16. At the heart of the Initial Decision is its conclusion that "it is clear that the plain terms of the Co-Owner Agreements - all five agreements governing the relationship between [Entergy] and [Arkansas Electric] - call for [Entergy] to include system

⁷ Entergy's witness Ralston described the following five transmission system operational constraints, the presence of which Entergy claims permits it to charge the expensive "Replacement Energy" rate: (1) moment-to-moment changes in loads; (2) Independent Power Producer(IPP) imbalances; (3) third-party deliveries of energy to and from the Entergy Control Area; (4) QF purchases; and (5) transmission constraints. Exhibit EAI-9, page 27.

⁸ *Arkansas Electric Cooperative Corp.*, 109 FERC ¶ 61,327 at P 38 (2004) (December 22, 2004 Order).

⁹ Initial Decision at P 48.

operating constraints in determining the hour-to-hour availability of [Arkansas Electric's] units."¹⁰

17. The Initial Decision notes that the Power Agreement is the agreement that addresses, among other things, the manner in which Entergy redispatches Arkansas Electric's resources.¹¹ The initial decision faults Arkansas Electric for citing to the Power Agreement "only selectively" to support its arguments, and for attempting to interpret that agreement in ways that "frustrate [Entergy's] obligations as a dispatcher and its responsibilities for after-the-fact redispatch billing"¹²

18. In particular, the Initial Decision implies that Arkansas Electric ignored what the Initial Decision asserts is the "plain language" of the first sentence of Article V, Section 5 of the Power Agreement, which, provides as follows:

Energy. It is the intent of both parties that all resources of both parties will be dispatched by [Entergy] for maximum combined efficiency, and that [Arkansas Electric's] Resources will, on a retroactive basis, considering their availability on an hour- to-hour basis, be used to theoretically redispatch [Arkansas Electric's] load from [Arkansas Electric's] Resources. This redispatch will be the basis for the energy portion of the actual bills referred to in section 1 of this Article V.

19. The Initial Decision finds that dispatching all resources of both parties for "maximum combined efficiency" of both parties necessarily means that Entergy must consider system operating constraints in the dispatch, while, in the after-the-fact redispatch, it must use the units' "availability" on an hour-to-hour basis "to theoretically dispatch" Arkansas Electric's load from Arkansas Electric's resources. According to the Initial Decision, recognition in redispatch that unit availability will vary from hour to hour must mean that Entergy can take system constraints into account in redispatching Arkansas Electric's resources.¹³

¹⁰ *Id.* at P 21.

¹¹ *Id.* at P 22, *citing* Exhibit AECC-3 (the Power Agreement); Arkansas Electric Initial Brief at 25; Entergy Initial Brief at 30.

¹² *Id.* at P 22.

¹³ *Id.* at P 22, *citing* Exhibit AEC-3 (Power Agreement) Article 5, section 5; Exhibit E (Redispatching Principles), 3; Exhibit EIA-3 at 30; Arkansas Electric Initial Brief at 25.

20. The Initial Decision points to Arkansas Electric's statement in another proceeding¹⁴ that Article V, section 5 of the Power Agreement and Exhibit E (Redispatching Principles):

are designed to assure a realistic scenario for using [Arkansas Electric] Resources in the after-the-fact redispatch, and to assure that the [Arkansas Electric] Resources are used in a manner that is consistent with the conditions of their real-time availability to the [Entergy] dispatcher.¹⁵

21. The Initial Decision concludes that to ensure such a "realistic scenario" for after-the-fact redispatch based on "real-time availability," the Entergy dispatcher must recognize system operating constraints in the hour-to-hour availability of Arkansas Electric's resources.¹⁶ According to the Initial Decision, to not include system operating constraints in the after-the-fact redispatch of Arkansas Electric's units would be inconsistent with the "conditions of their real-time availability," which Arkansas Electric says is what Article V, section 5 and Exhibit E are designed to implement.¹⁷ The Initial Decision concludes that Entergy must take the constraints on its system into account in determining the hour-to-hour availability of Arkansas Electric's units. Accordingly, the Initial Decision states that Arkansas Electric's argument that system operating constraints are limited to "unit constraints" is unsupported.¹⁸

22. Citing Redispatching Principle No. 3 in Exhibit E to the Power Agreement, the Initial Decision also finds that Exhibit E "specifically calls for appropriate consideration to be given to system operating constraints. Redispatching Principle No. 3, as noted above, states:

For redispatch purposes appropriate consideration will be given to other operating constraints which limit the availability of the plant to the [Entergy] dispatcher.¹⁹

¹⁴ *Entergy Arkansas, Inc.*, 112 FERC ¶ 61,306 (2005).

¹⁵ Initial Decision at P 23, *citing* Exhibit EAI-32 at 41.

¹⁶ *Id.* at P 23.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at P 24, *citing*, Exhibit AEC-3 (Power Agreement, p. 73, Exhibit E (3)).

23. The Initial Decision concludes that:

This provision means that [Arkansas Electric] is not to be given credit for phantom energy that is not produced, and could not have been produced even in theory, when [Independence] and White Bluff have to be operated at a less than optimum level due to other operating constraints such as the operating constraints on the Entergy System.²⁰

24. The Initial Decision states that Arkansas Electric argues, however, that the language contained in Redispatching Principle No. 3 does not include all operating constraints, and that the Power Agreement “is with [Entergy] and not Entergy Corporation or any of its subsidiaries, other than [Entergy].” The Initial Decision asserts that implicit in this argument is a recognition by Arkansas Electric that Entergy properly includes system operating constraints in the after-the-fact redispatch billing.²¹ The Initial Decision asserts that Arkansas Electric’s witnesses acknowledge that Entergy is responsible for scheduling and dispatching Arkansas Electric’s resources as part of the overall Entergy system resources to serve the combined loads of both Entergy and Arkansas Electric. Further, the Initial Decision states that the Independence and White Bluff plants “are part of the integrated Entergy [Corporation] system.”²² Therefore, the Initial Decision states that any claims by Arkansas Electric that Independence and White Bluff plants cannot be affected by system operating constraints “are contradicted by uncontroverted evidence.”²³ From this observation, the Initial Decision concludes that by the Power Agreement’s express language (*i.e.*, Redispatching Principle No. 3) other operating constraints on the Entergy Corporation system limit the operation and redispatch of these plants. The Initial Decision also references the statement by an Arkansas Electric witness that there is not an individual Entergy grid, only an Entergy Corporation grid; and it notes that the Power Agreement references the Entergy System Agreement. Finally the Initial Decision notes that an Entergy witness stated that system operating constraints affect all system generation, including Arkansas Electric’s resources.²⁴ Accordingly, the Initial Decision claims that Arkansas Electric wants Entergy to shoulder all of the effects of system operating constraints and insulate Arkansas Electric from the effect of those constraints. The Initial Decision concludes that this is not what the parties’ agreements require.²⁵

²⁰ *Id.* at P 24 citing Exhibit EAI-3 at 67; *see also id.* at P 38.

²¹ *Id.* at P 25.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at P 25, citing Exhibit EAI-32 at 52.

²⁵ *Id.* at P 25.

25. The Initial Decision rejects Arkansas Electric's argument that because the word "unit" appears in Redispatching Principle Nos. 1, 2 and 9, the Commission should interpret the Power Agreement as if the parties intended the word "unit" also to limit Redispatching Principle No. 3 despite the fact that the words "unit constraints" do not appear in that Principle. The Initial Decision acknowledges that the word "unit" appears in Redispatching Principles Nos. 1, 2, and 9, but sees no reason to import the word "unit" into Redispatching Principle No. 3. The Initial Decision concludes that if the drafters of the Power Agreement intended to include the word "unit" in Redispatching Principle No. 3, they would have expressly included it, as they did with Redispatching Principle Nos. 1, 2, and 9. As they did not, the Initial Decision refuses to read the word into the Principle. The Initial Decision finds that "[t]he more reasonable interpretation is that Redispatching Principles 1, 2, and 9 address unit issues, while Redispatching Principle No. 3 deals with "other operating constraints," specifically those that are not unit-specific.²⁶

26. The Initial Decision finds that Arkansas Electric misinterpreted the Redispatching Principles in a different context in another proceeding.²⁷ It also rejects Arkansas Electric's assertion that the only constraints that Entergy should take into account in redispatch are plant operating constraints, *i.e.*, constraints that occur at or near Independence or White Bluff. The Initial Decision states that to refute this assertion, it is only necessary to refer to Article II, section 18 of the Power Agreement, which lists "transmission operations" as one of the reasons that either party may wish to purchase "Replacement Energy" from the other.²⁸

27. The Initial Decision rejects Arkansas Electric's claim that the system operating constraints that Entergy relies upon to deny Arkansas Electric "substitute energy" (*i.e.*, energy priced at Arkansas Electric's plant fuel cost) are solely the result of Entergy's generation and power purchase decisions. The Initial Decision notes that Arkansas Electric also makes generation and power purchase decisions.²⁹

28. The Initial Decision finds contradictory Arkansas Electric's claim that although Arkansas Electric decides which purchases and sales to make, Entergy is completely responsible for dispatching Arkansas Electric's resources. The Initial Decision finds this contradiction illustrative of Arkansas Electric's position, which the Initial Decision

²⁶ *Id.* at P 26.

²⁷ *Id.* at P 27, *citing* Exhibit AEC-3 at 75 (Power Agreement, Exhibit E, 8); Exhibit EAI-32 at 10 and 43 (Affidavit of Ricky Bittle).

²⁸ *Id.* at P 28, *citing* Exhibit AEC-18 at 9; Exhibit AEC-3 at 14 (Power Agreement Article II, section 18); Tr. at 233.

²⁹ *Id.* at P 29, *citing* Tr. 268; Exhibit EAI-32.

characterizes as asserting “that the contracts support its position notwithstanding the (contrary) express terms of those contracts.”³⁰

29. The Initial Decision rejects Arkansas Electric’s claim that the basic bargain of the contracts between Arkansas Electric and Entergy is that Arkansas Electric permitted Entergy to operate and dispatch its plants in return for holding Arkansas Electric economically indifferent as to how it operates and dispatches Arkansas Electric’s plants. The Initial Decision finds no contract reference to this bargain.³¹

30. The Initial Decision notes that the Power Agreement insulates Entergy from any loss to Arkansas Electric as a result of any action of Entergy that does not result from willful misconduct. The Initial Decision concludes from this that Entergy is not required to hold Arkansas Electric harmless from its actions in dispatching Arkansas Electric’s resources and billing Arkansas Electric for energy as if its units operated in real time, subject to constraints on the Entergy transmission system. The Initial Decision also accuses Arkansas Electric of interpreting the contracts in ways that are completely counter to their express terms.³²

31. The Initial Decision rejects Arkansas Electric’s reliance on Redispatching Principle No. 6, which states that:

If the capability of [Arkansas Electric] Resources is sufficient to supply [Arkansas Electric] requirements and if [Arkansas Electric] requirements are greater than the energy supplied from [Arkansas Electric] Resources in an hour, [Arkansas Electric] will pay to [Entergy] [Arkansas Electric]’s incremental cost per kWh of the energy deficiency.³³

32. The Initial Decision asserts that Article V, section 5 states that Entergy must redispatch energy from Arkansas Electric’s resources “considering their availability on an hour-to-hour basis,” and therefore asserts that this means Entergy must redispatch energy not considering their maximum rated or dependable capability. From this, the Initial Decision reasons that Redispatching Principle No. 6 only applies when Entergy, for economic reasons, elects to reduce the output of an Arkansas Electric resource.³⁴

³⁰ *Id.* at P 29, *citing* Exhibit AEC-1 at 7.

³¹ *Id.* at P 29, *citing* Exhibit AEC-1 at 10.

³² *Id.* at P 29.

³³ Power Agreement at 74.

³⁴ Initial Decision at P 30.

33. The Initial Decision also concludes that “availability on an hour-to-hour basis” in Article V Section 5 means “actual output,” and that “substitute energy” is a function of Entergy’s having, for economic reasons, elected to reduce actual output. That is, according to the Initial Decision, Arkansas Electric would only receive substitute energy when Entergy, on a real-time basis, elected to reduce the output of one or more of Arkansas Electric’s resources.³⁵

34. The Initial Decision further concludes that “good utility practice” requires that Entergy bill Arkansas Electric on a real-time basis, taking into consideration the operating constraints on its transmission system.³⁶

35. The Initial Decision rejects any consideration of past billing practice. It finds that there is no consistent past practice in dealing with system operating constraints because many system operating constraints did not exist in the past or their magnitude was significantly smaller than the constraints that exist on the Entergy system today. The Initial Decision also rejects any reference to past billing practice as irrelevant because it finds that the contract terms are clear and unambiguous.³⁷

IV. Arkansas Electric’s Brief on Exceptions

36. In its Brief on Exceptions, Arkansas Electric explains that the Power Agreement gives Entergy the right and responsibility to dispatch Arkansas Electric’s generation, along with its own, in real time, to meet the needs of combined Entergy-Arkansas Electric loads. At the same time, the Power Agreement provides for an after-the-fact theoretical redispatch billing process that simulates an Arkansas Electric-only economic dispatch.³⁸ According to Arkansas Electric, the after-the-fact redispatch is a billing construct in which Entergy is supposed to theoretically redispatch Arkansas Electric’s resources against Arkansas Electric’s load at the end of each month. Arkansas Electric states that, under the Power Agreement, this redispatch billing forms the basis on which Entergy is to bill Arkansas Electric for “substitute energy,” as if the energy were provided from Arkansas Electric’s resources.³⁹

37. Arkansas Electric defines “substitute energy” as energy priced at the cost of Arkansas Electric’s resources, regardless of whether or not Entergy dispatches energy

³⁵ *Id.* at P 32.

³⁶ *Id.* at P 41-43.

³⁷ *Id.* at P 44-47.

³⁸ Brief on Exceptions at 6, *citing Entergy Arkansas, Inc.*, 112 FERC ¶ 61,306 at P 2 (2005).

³⁹ Brief on Exceptions at 2.

from those resources.⁴⁰ Arkansas Electric asserts that from the inception of the contract until June 2004, Arkansas Electric always received “substitute energy” in varying amounts.⁴¹ It claims that in July, 2004, Entergy unilaterally changed the way it billed Arkansas Electric by directing its billing agent to modify the billing to Arkansas Electric so that the capability of the units is equal to the generation in each hour. According to Arkansas Electric, this modification changed Arkansas Electric’s entitlement to substitute energy from Arkansas Electric’s units’ hourly physical capabilities - - which it had been for 24 years - - to the output Entergy actually dispatches from the units in real time.

38. Arkansas Electric argues that the Initial Decision misconstrues the contract between the parties, sanctions a violation of the filed rate doctrine, eliminates Arkansas Electric’s contractual right to substitute energy and makes it more difficult for Arkansas Electric to compete against Entergy in Entergy’s control area. Arkansas Electric further argues that the Initial Decision erroneously rejects consideration of Arkansas Electric’s evidence regarding the intent of the parties and the 24-year course of performance of the parties under the Power Agreement. Arkansas Electric notes that the Power Agreement expressly provides for changes to rates pursuant to section 205 of the Federal Power Act. Arkansas Electric argues that Entergy ignored this provision in favor of a unilateral, unfilled change in a key billing determinant.

39. Arkansas Electric asks the Commission to require Entergy to follow the proper procedures and to file a change in rates with the Commission and carry its burden under section 205. Arkansas Electric maintains that the Initial Decision fails to acknowledge that Entergy eliminated an entire category of energy transactions. *i.e.*, substitute energy, from billings to Arkansas Electric after June 2004, and that the elimination of substitute energy from Arkansas Electric’s billings violates the filed rate doctrine.

40. Arkansas Electric contends that elimination of substitute energy is inconsistent with the language of the Power Agreement, and with the parties’ mutual interpretation of that agreement as illustrated by the way the parties implemented the agreement for 24 years. That is, it asserts, for 24 years (from 1980 to 2004) Arkansas Electric received substitute power, a practice that Entergy eliminated in July of 2004. Arkansas Electric argues that the Initial Decision misinterprets the Power Agreement because it fails to distinguish between the real-time dispatch process – in which Arkansas Electric commits all of its resources to the Entergy dispatcher for “maximum combined efficiency” and the after-the-fact redispatch process – in which Entergy must theoretically redispatch Arkansas Electric’s resources to simulate, for billing purposes, an Arkansas Electric-only economic dispatch.⁴²

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 6.

⁴² *Citing Entergy Arkansas, Inc.*, 112 FERC ¶ 61,306 at P 2.

41. That is, Arkansas Electric distinguishes between the “capability” of its resources to be dispatched in real time and the “availability” of Arkansas Electric generating resources for redispatch billing.

42. Arkansas Electric challenges the Initial Decision’s conclusion that the contract language is clear, and, therefore, that evidence of intent and past performance is irrelevant. Arkansas Electric insists that the question of past performance is directly relevant to the question of whether there was a change in billing. Also, Arkansas Electric notes that the Commission found that it could not summarily decide this matter on the face of the contract. Arkansas Electric contends that the Initial Decision ignores substantial evidence in the record that, until July of 2004, Entergy’s interpretation of the Power Agreement was the same as Arkansas Electric’s, *i.e.*, both parties agreed that, under the Power Agreement, Arkansas Electric is entitled to receive substitute energy. Arkansas Electric asserts that, for 24 years, until July 2004, it did, in fact, receive substitute energy.

43. Arkansas Electric addresses the statement from a pleading in another proceeding (*Entergy Arkansas, supra*, note 4) upon which the Initial Decision relied, that Article V, section 5 of the Power Agreement and Exhibit E (Redispatching Principles):

are designed to assure a realistic scenario for using [Arkansas Electric] Resources in the after-the-fact redispatch, and to assure that the [Arkansas Electric] Resources are used in a manner that is consistent with the conditions of their real-time availability to the Entergy dispatcher.

Arkansas Electric asserts that the Initial Decision’s interpretation of this statement mischaracterizes Arkansas Electric’s position in the other proceeding and ignores: (a) the distinction between real-time dispatch and after-the-fact dispatch; and (b) the fact that the two concepts serve different purposes.

44. As to the “good utility practices” and “no liability” provisions of the contracts, Arkansas Electric says that they are irrelevant to this proceeding because they do not refer to “substitute energy” and, by their express terms, refer to Entergy as plant operator and not as dispatcher.

V. Entergy’s Brief Opposing Exceptions

45. Entergy replies that the Initial Decision correctly identified the issues that this proceeding presents, properly considered all relevant evidence, and appropriately found that the agreements between the parties provide for recognition of system constraints in redispatch billing. According to Entergy, the Initial Decision properly dismissed Arkansas Electric’s arguments regarding the filed rate doctrine. Entergy also argues that the Initial Decision properly recognized that the magnitude of operating constraints on Entergy’s transmission system has grown in recent years. Entergy submits that the Initial

Decision also correctly recognized that, although the clause in question, Redispatching Principle No. 3, may have been dormant because there were no operational constraints until relatively recently, Entergy could invoke the plain meaning of that principle to consider operational constraints in after-the-fact billing without making a section 205 filing.⁴³

46. Entergy submits that the Initial Decision clearly understood the distinction between real-time dispatch and after-the-fact theoretical dispatch, properly considered the need for “maximum combined efficiency” contained in Article V, section 5 of the Power Agreement, and correctly rejected Arkansas Electric’s definition of the “availability” of its resources.

47. Entergy also agrees with the Initial Decision’s finding that the plain meaning of the contract language is clear and that there is no need to consider the parties’ course of performance.⁴⁴

48. Entergy states that the agreements in question reflect the co-ownership of the resources between Entergy and Arkansas Electric. Entergy submits that it should not have to bear all of the risks associated with operating the units as part of an integrated electric system. Rather, according to Entergy, Arkansas Electric should also bear some of those risks. Entergy submits that the Power Agreement recognized that the parties should share the risks associated with operating constraints on the Entergy transmission system by taking them into account both when dispatching Arkansas Electric’s resources, and in the after-the-fact theoretical redispatch of those resources.⁴⁵

49. Entergy maintains that one of the ways that the Power Agreement provides for the sharing of the risks associated with operating constraints on the Entergy transmission system is in the provision regarding the billing for “energy” in Article V, section 5. Entergy contends that Article V section 5 provides that, in billing for energy, Entergy will theoretically redispatch Arkansas Electric’s resources retroactively “considering their availability on an hour-to-hour basis.” Entergy agrees with the Initial Decision that this billing treatment of energy allows for recognition of system operating constraints in the determination of the hour-to-hour capability of Arkansas Electric’s resources. According to Entergy, recognizing those constraints in after-the-fact dispatching does not change the bargain between the parties; rather, it gives appropriate effect to that bargain.

50. Entergy supports the Initial Decision’s finding that the only reason that operating constraints on Entergy’s transmission system did not sooner affect Entergy’s billing is

⁴³ Entergy Brief Opposing Exceptions at 2-17, 33-36.

⁴⁴ *Id.* at 18-30.

⁴⁵ *Id.* at 39-42.

that, until recently, their effect was slight and difficult to quantify.⁴⁶ Entergy also agrees with the finding in the Initial Decision that Arkansas Electric's claim that the parties intended to insulate Arkansas Electric from the effects of constraints on Entergy's transmission system is simply not credible. Entergy points to the finding in the Initial Decision that the testimony of Arkansas Electric's witnesses is fraught with contradictions, generally inconsistent with both the written record and the contract language, and, therefore, unreliable.

51. In short, Entergy argues that the agreements in question provide for Entergy and Arkansas Electric to share, proportionately, the burden of system operating constraints. It submits that the plain language of the Power Agreement calls for Entergy to consider system operating constraints in determining the hour-to-hour capability of Arkansas Electric's resources as part of the redispatch billing calculations. It asks the Commission to uphold the Initial Decision and to adopt it as its own.

VI. Commission Decision

52. We reverse the Initial Decision on the basis that there is no way to apply its interpretation of the general billing principles of the "intent" sentence of Article V, Section 5 and Redispatching Principle No. 3 to the specific billing provisions of the Power Agreement, which explain the criteria for determining exactly what rate Entergy may charge, in order to justify Entergy's practice of billing the expensive "Replacement Energy" rate. As we discuss below, the Initial Decision relies on what we find is an incorrect interpretation of an ambiguous reference to "availability" in the general billing principles of the Power Agreement in a way that conflicts with the specific billing provisions of Article III, section 5, and Redispatching Principles No. 6 and 7 of the Power Agreement.⁴⁷

53. Under the Power Agreement, billing for any deficiency between what Entergy chooses to dispatch from Arkansas Electric's generation resources and what Entergy actually supplies Arkansas Electric's customers is, in accordance with Article V, section 5(a)(ii) and the corresponding Redispatching Principle No. 6, to be at the relatively

⁴⁶ *Id.* at 14, 33-39.

⁴⁷ In the interpretation of a contract, specific and exact terms have a greater weight than general language. Attention and understanding are likely to be in better focus when language is specific or exact, and in the case of conflict, the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language. *Restatement of the Law of Contracts*, Second Edition, American Law Institute, 1981 at 94, 95 (§ 203, Standards of Preference in Interpretation). *See, e.g., Southwestern Elec. Coop., Inc. v. FERC*, 347 F.3d 975 at 982-983 (D.C. Cir. 2003) ("Where specific contractual provisions are irreconcilably in conflict with more general ones, the specific provisions control.").

inexpensive Arkansas Electric incremental fuel (coal) cost (*i.e.*, “substitute energy” cost) if power delivered to meet its customers’ requirements is less than the “capability” of the Arkansas generating resources. Specifically, Redispatching Principle No. 6 provides:

If the capability of [Arkansas Electric] resources is sufficient to supply [Arkansas Electric] requirements, and if [Arkansas Electric] requirements are greater than the energy supplied from [Arkansas Electric] Resources in an hour, Arkansas Electric will pay to [Entergy] [Arkansas Electric]’s incremental cost per kWh of the energy deficiency.

Contrary to the Initial Decision’s interpretation of the term “capability” in that context as being affected by transmission system constraints, Article II, Section 17 of the Power Agreement expressly defines “capability” of Arkansas Electric generation resources as the “net generating capability based on tests.” Thus, as long as the generation units are not down due to scheduled maintenance or emergencies as set forth in Article III, section 5 “Outages”, the redispatch billing mechanism requires the relatively inexpensive “substitute energy” rate to be charged for the deficiency between the actual amount of power Entergy chooses to dispatch from Arkansas Electric’s generation units and the actual amount of power Entergy delivers to Arkansas Electric’s customers, the deficiency being the amount of power Arkansas Electric buys from Entergy. That is the situation that the parties appear to agree has generally existed with respect to Arkansas Electric and its customers and that is the rate Entergy should, therefore, have been charging.

54. In contrast, the relatively expensive “Replacement Energy” rate that Entergy claims it has the right to charge as a result of transmission system operating constraints only applies in two specific circumstances and neither of those circumstances applies to warrant billing at that expensive rate, according to the record. The “Replacement Energy” rate only applies if, and to the extent: (1) in accordance with Article V, section 5(c) and the corresponding Redispatching Principle No. 7, power delivered to Arkansas Electric’s customers is greater than the “capability” of the Arkansas generating units (expressly defined in Article II, section 17 as the “net generating capability based on tests” of the units),⁴⁸ or (2) in accordance with Article III, section 5, “Outages”, power delivered to its customers is greater than actual dispatchability of the units because the units are down for scheduled maintenance or because of emergencies. Further, in either case, the expensive “Replacement Energy” rate only applies to the amount of power supplied above the tested or actual dispatchable capacity levels of the units and not

⁴⁸ Redispatching Principle No. 7 corresponds to, and clarifies, Article V, section 5(c) of the billing provisions which ambiguously provides: “For any energy used by [Arkansas Electric] on redispatch for which [Arkansas Electric] did not have sufficient [Arkansas Electric] Resources available, [Arkansas Electric] will pay [Entergy] an amount calculated as in Article III, section 5 [Replacement Energy rate for Outages].”

necessarily to all the power supplied to its customers. There is no provision to account for or otherwise affect the rate charged due to transmission system operating constraints. Accordingly, because Article V, section 5(c), which contains the ambiguous term “available,” is more specifically defined by its corresponding Redispatching Principle No. 7, which uses the expressly-defined term “capability,” the term “available” used in Article V, section 5(c) is reasonably interpreted to mean the same thing, *i.e.*, tested capability of the Arkansas Electric generation units. It is, therefore, reasonable to give the same interpretation to the term “availability” as used in the sections on which the Initial Decision relies (*i.e.*, the “intent” sentence at the beginning of Article V, section 5 and Redispatching Principle No. 3).

55. A few examples will help to explain how the billing mechanism works. Hypothetically, assume that, during a given hour, the Arkansas Electric generation unit is fully operational (*i.e.*, not down for scheduled maintenance or emergency), the rated capacity of the Arkansas Electric generation unit is 100 MW, Arkansas Electric’s customers’ requirements are 90 MW, and Entergy actually dispatches 60 MW (contending a transmission system constraint limiting “availability” of the unit to that 60 MW level). Under the Power Agreement’s Billing and Redispatching Principles, the 60 MW actually dispatched is at no cost (per Article V, section 5(a)(i)), and the 30 MW difference between actual power dispatched from its generation unit (60 MW) and its customers’ requirements that Entergy delivers (90 MW) is deemed sold to Arkansas Electric at its inexpensive incremental cost of fuel rate (“substitute power” rate) per Article V, section 5(a)(ii) and Redispatching Principle No. 6. However, if, Arkansas Electric’s customers’ requirements are 115 MW during that hour and, therefore, more than the rated capacity of the generating unit, although Arkansas Electric pays zero for the 60 MW actually dispatched and the inexpensive incremental fuel rate for 40 MW (100 MW rated capacity minus 60 MW supplied from its own generators), it now pays the expensive “Replacement Energy” rate for the remaining 15 MW actually delivered (115 MW requirements minus 100 MW rated capacity) per Article V, section 5(c) and Redispatching Principle No. 7 because the extra 15 MW couldn’t have come from Arkansas Electric’s generating plants.⁴⁹ None of the scenarios reflected in the billing provisions treats 60 MW (the level actually dispatched by Entergy) as a capacity constraint warranting the more expensive “Replacement Energy” rate for the additional amount of power supplied, notwithstanding any claim it may make of a system constraint limiting “availability” of the unit to that level.

⁴⁹ If actual capacity at the unit is zero because the unit is shut down during that hour for scheduled maintenance, Arkansas pays the expensive “Replacement Energy” rate for all 115 MW supplied to its customers because of the “Outage” provision, Article III, section 5. However, there is no dispute over pricing in such a circumstance and Entergy’s claims relate to transmission system constraints and not constraints at the Arkansas Electric generating units.

56. Accordingly, there is no provision in the Power Agreement that changes the billing from the low “substitute energy” price to the high “Replacement Energy” price simply because Entergy determines that the unit is “unavailable” to its transmission system due to some alleged transmission system constraint. If the billing provisions price the power so delivered at the inexpensive “substitute energy” rate, and the “Outage” provisions of Article III, section 5 do not apply, there is no way that Entergy, nonetheless, can justify charging the more expensive “Replacement Energy” rate just because of its reading of the ambiguous use of the word “availability” in general language of Article V and Redispatching Principle No. 3. Because of the inconsistency of the Initial Decision’s interpretation of those general principles with the specific billing provisions, we find that it is unreasonable to interpret the term “other operating constraints that limit the availability of the plant to the [Entergy] dispatcher” in Redispatching Principle No. 3 to include consideration of transmission system constraints. Instead, we find it reasonable to interpret that term consistent with the specific billing provisions to mean the rated (tested) capacity of the generating units usable by the Entergy dispatcher regardless of whether actually used on dispatch. The effect of the Initial Decision’s interpretation of the general billing language of the opening sentence of Article V and Redispatching Principle No. 3 is to read a new, fourth billing provision into the Power Agreement that authorizes the “Replacement Energy” rate under the circumstances of transmission system operating constraints.

57. Taking the Initial Decision at its own words, the parties knew how to write in specific billing provisions by expressly explaining in two specific sections (Article III, section 5, “Outages”, and Redispatching Principle No. 7) when the expensive “Replacement Energy” pricing applies, and they did not provide for that expensive pricing when, in the absence of an outage, the requirements of Arkansas Electric’s customers do not exceed the rated capacity of the Arkansas Electric units (despite some alleged transmission system constraint). Accordingly, it would be unreasonable to read Entergy’s claimed billing procedure into the Power Agreement.

58. Hence, as long as the tested capacity of a unit is greater than the amount of power supplied to its customers, the power Arkansas Electric purchases from Entergy must be priced at the cheap “substitute energy” price. That is exactly the situation contemplated where, but for the settled arrangement by which Entergy runs Arkansas’s generators, Arkansas would actually dispatch all the power from its own generators necessary to meet its own customers’ needs, *i.e.*, economic dispatch. Based on the language of the billing provisions and principles of the Power Agreement, the fact that Entergy chooses to actually dispatch less was not to affect the price it uses for billing purposes as long as the tested capacity of the units is sufficient to meet Arkansas’s customers’ requirements that Entergy supplies. We now respond to the specific findings and rationale of the Initial Decision.

59. At the outset, we disagree with the Initial Decision that the issues can be resolved based on the “plain language” of the term “availability” of Arkansas Electric’s resources as used in the opening “intent” sentence of Article V, section 5, and in Redispatching Principle 3. That term is ambiguous in those provisions when viewed in isolation because it can be given more than one meaning. The common industry definition of a generation unit’s “availability,” of which we take official notice, is the physical capacity or capability of the generation unit itself.⁵⁰ Thus, taken out of context, the term “availability” could be given at least two meanings, one narrow and one broad: (1) the capability of the unit to generate power irrespective of whether and in what amount power is actually dispatched, as Arkansas Electric interprets it, or (2) whether the power the unit is capable of generating is usable by the Entergy dispatcher based on operating conditions on the transmission system, as Entergy apparently interprets it. Given that there is the possibility of two alternative interpretations of the same term, the term is ambiguous. Likewise, the use of that ambiguous term “availability” in connection with the reference to “other operating constraints” in Redispatching Principle No. 3 renders ambiguous the term “other operating constraints” used in that principle. Indeed, the very use of the term “other” in reference to “operating constraints” in Redispatching Principle No. 3 is necessarily ambiguous when read by itself and requires reference to the “other” preceding billing principles, *i.e.*, Redispatching Principles No. 1 and 2, to have any purpose or meaning at all in that principle.

60. Because it is not clear from the face of those provisions what those terms mean, other provisions of the Power Agreement as well as other forms of extrinsic evidence, such as the parties’ course of conduct, may be referred to in order to give meaning to

⁵⁰*See, e.g.*, Glossary of Terms, Prepared by the Glossary of Terms Task Force, North American Electric Reliability Council (NERC), August 1996 at page 4 (“**Availability** – A measure of time a generating unit, transmission line, or other facility is capable of providing service, whether or not it actually is in service.” “**Available Resource** – The sum of existing generation capacity, plus new units scheduled for service, less existing capacity available for the period under consideration.”). http://www.naesb.org/pdf/weq_glossary072804w10.pdf. Also, the Data Reporting Instructions that NERC has developed for its Generating Availability Data System (GADS) expressly instructs reporting utilities that system dispatch requirements that require generating units to be operated at less than full capacity “are not relevant to unit availability.” *See* NERC Council GADS Data Reporting Instructions, effective January 2006, at p. III-16, available at <http://www.nerc.com>. *See also* Energy Information Administration, Office of Energy Statistics from the U.S. Government (“**Available but not needed capability**: Net capability of main generating units that are operable but not considered necessary to carry load and cannot be connected to load within 30 minutes.”). http://www.eia.doe.gov/glossary/glossary_a.htm

those terms.⁵¹ For example, Redispatching Principles No. 1 and 2 require consideration of the minimum and maximum rated capacity, respectively, of each Arkansas Electric generating unit. Because those principles refer to maximum and minimum operating constraints of the generation units, they reasonably inform the meaning of the word “other” as used in “other operating constraints that limit the availability of the plant to the [Entergy] dispatcher” in Redispatching Principle No. 3, to mean consideration of “other” operating constraints of the Arkansas Electric generating *units*. Accordingly, we find that the reference to “other” operating constraints in Redispatching Principle No. 3 most reasonably is interpreted as referring to the minimum and maximum operating constraints of the unit referenced in Redispatching Principles No. 1 and 2 and not, as the Initial Decision finds, to transmission system operating constraints.

61. Further, and more importantly, we have detailed how the after-the-fact theoretical Billing provisions of Article V and Redispatching Principles No. 6 and 7 operate to define the term “availability” in Article V and Redispatching Principle No. 3 as the rated capability of the generation unit to generate power irrespective of transmission system constraints that may cause the Entergy dispatcher to reduce actual dispatch from the units below their rated capability. The Initial Decision’s focus only on the ambiguous language of the general principles expressed in the “intent” sentence of Article V, section 5 and Redispatching Principle No. 3 results in the Initial Decision’s failure to account for the effect the other, more specific, billing provisions have in interpreting how the Power Agreement’s billing mechanism works. As noted above, billing should be at the inexpensive incremental fuel rate under Redispatching Principle No. 6 which provides: “If the capability of [Arkansas Electric] resources is sufficient to supply [Arkansas Electric] requirements and if [Arkansas Electric] requirements are greater than the energy supplied from [Arkansas Electric] resources in an hour, [Arkansas Electric] will pay to [Entergy] [Arkansas Electric]’s incremental cost per kwh of the energy deficiency.” (emphasis added.) In the only acknowledgement the Initial Decision makes of any of these other billing provisions, when confronted with the language of Redispatching Principle No. 6, the Initial decision interpreted that principle directly inconsistent with the express language of that principle and a definition of the Power Agreement. Based on the

⁵¹ *Standard Oil Co. v. U.S.*, 340 U.S. 54, 58-60 (1950) (Where the terms of the contract are ambiguous, vague, or indefinite, where the words have, by the usage of trade, acquired a particular meaning, or where the words are technical or are applicable to a certain trade and require an explanation or interpretation in order to determine what the parties meant, parole evidence of usage is admissible to explain them); *American First Investment Corp. v. Goland*, 925 F. 2d 1518, 1522 (D.C. Cir. 1991) (if a contract provision is ambiguous, extrinsic evidence may be necessary to ascertain the mutual intent of the parties and thus resolve the ambiguity). *Cf. Cajun Electric Power Cooperative, Inc. v. FERC*, 924 F.2d 1132, 1137 (D.C. Cir. 1991) (FERC erred in relying on alleged plain meaning drawn from matters not in the record to summarily resolve claim instead of permitting evidence to be taken on ambiguous contract provision).

Initial Decision's definition of "availability", *ipse dixit*, the Initial Decision construes the term "capability" in Redispatching Principle No. 6 to be consistent with that definition as only coming into play when Entergy "elects" to turn down Arkansas Electric units for economic reasons and not for reasons of system operating constraints. To comport with this reasoning, the Initial Decision supplied its own definition of the word "capability" as used in that principle to mean that "when system operating constraints are limiting the [Arkansas Electric] Unit, the capability of the [Arkansas Electric] Resource in the hour is not sufficient to supply [Arkansas Electric]'s requirements, as recognized in Redispatching Principle No. 3."⁵² The Initial Decision's interpretation of the word "capability" is in direct conflict with Article II, Section 17 of the Power Agreement which expressly defines "capability" of Arkansas Electric-Owned Resources as the "net generating capability based on tests conducted in accordance with approved Entergy Corporation capability rating plant testing procedures." The rated capability of the generation units cannot change simply because of some transmission system constraint.

62. The Initial Decision also attempts to support its interpretation of "capability" based on language in section 8.4 of the Independence Unit's Operating Agreement. section 8.4 provides that "for its overall system requirements" Entergy may "elect" not to schedule generation from Arkansas Electric's Independence units and, if that occurs, it must supply the power not so scheduled at the "substitute energy" rate. The Initial Decision claims that this shows that the "substitute energy" rate only applies if Entergy makes an "election" and not when system constraints render Arkansas Electric's units unavailable to the dispatcher. That provision does not govern billing and, therefore, is irrelevant. Moreover, the Initial Decision reads too much into the word "elect" used in that provision. Use of Arkansas Electric's generation capacity is at the discretion of the Entergy dispatcher, so any decision regarding how much power is to be dispatched from the unit is arguably an "election." Moreover, an interpretation of a word ("elect") in the Operating Agreement that does not even appear in Redispatching Principle No. 6 (or in Principle No. 7 for that matter) has no relevance to the definition of the specific term "capability" used in that Redispatching Principle because that term is expressly defined in Article II, section 17 as tested capability.

63. The Initial Decision errs in failing to recognize the fact that, other than in circumstances of "Outages" like scheduled maintenance governed by Article III, section 5, which are not at issue, the only billing provision in the Power Agreement that clarifies when Entergy may bill at the expensive "Replacement Energy" rate is Redispatching Principle No. 7 which uses the same term, "capability," to define when that expensive rate applies. Redispatching Principle No. 7 provides as follows: "If the capability of [Arkansas Electric] resources is not sufficient to supply [Arkansas Electric] requirements in an hour, [Arkansas Electric] may purchase Replacement Energy in accordance with Article III, section 5, after giving consideration to the principles in 1, 2, and 3 above."

⁵² Initial Decision, P 30.

(emphasis added.) Since the “capability” of Arkansas Electric’s resources means the capability of the units to produce power based on tests, as long as the requirements of its customers do not exceed that unit’s maximum tested capacity level at which the unit is rated, the “Replacement Energy” rate does not apply. Only the inexpensive incremental fuel rate, *i.e.*, “substitute energy” rate, under Redispatching Principle No. 6 applies.

64. Other provisions of the Power Agreement that include the term “availability” also support the finding that the term concerns the capacity of the unit and not system operating constraints. For example, Article V, section 5(a)(4) of the “Billing” provisions of the Power Agreement provides: “For purposes of these calculations, and for dispatching purposes [Arkansas Electric] will keep [Entergy] informed as to availability of each of its units as well as costs and availability of fuel at each of its units.” As Arkansas Electric asserts,⁵³ if “availability” means what Entergy and the Initial Decision contend and turns on whether there are system operating constraints at that time, then how could Arkansas Electric be able to inform Entergy of the “availability” of the units; only Entergy would know that. Also, Article II, section 1 defines Arkansas Owned Resources to mean: “the electric generating facilities owned by [Arkansas Electric] (including [Arkansas Electric]’s share of power and energy in any jointly owned facilities) located within the [Entergy] Load Control Area and which are available for dispatching by [Entergy].” As Arkansas Electric observes, this language distinguishes between “availability” of capacity and “dispatchability” of that capacity as two separate concepts.⁵⁴ Obviously, a determination by the Entergy dispatcher that an Arkansas Electric generating unit is not “available” for dispatch cannot alter the ownership interest Arkansas Electric has in that unit.

65. Notwithstanding the Initial Decision’s ruling that the issue of the case is resolved based on the “plain language” of Article V, section 5 and Redispatching Principle No. 3, thus rendering Arkansas Electric’s extrinsic evidence of intent and course of performance irrelevant, the Initial Decision, nonetheless, inconsistently relies on extrinsic evidence of an Arkansas Electric statement in another proceeding. There, in its answer in opposition to a petition for declaratory order that the Commission declined to address,⁵⁵ the Initial Decision asserts that Arkansas Electric stated that Article V, section 5 of the Power Agreement and Exhibit E (Redispatching Principles) “are designed to assure a realistic scenario for using [Arkansas Electric’s resources] in the after-the-fact redispatch, and to assure that [Arkansas Electric’s resources] are used in a manner that is consistent with the conditions of their real-time availability to the [Entergy] dispatcher.”⁵⁶

The Initial Decision argues:

⁵³ Arkansas Electric Brief on Exceptions at 36.

⁵⁴ *Id.*

⁵⁵ *Entergy Arkansas, Inc.*, 112 FERC ¶ 61,306 (2005).

⁵⁶ Initial Decision, P 23, *citing* Exhibit EAI-32 at 41.

To ensure such a realistic scenario for after-the-fact redispatch based on the real-time availability, the [Entergy] Dispatcher must recognize system operating constraints in the hour-to-hour availability of the Co-Owned Units. To not include system operating constraints in the after-the-fact redispatch would be inconsistent with the “conditions of their real-time availability,” which according to [Arkansas Electric] is what Article V, section 5 and Exhibit E are designed to implement. Clearly, system operating constraints must be included in the hour-to-hour determination of unit availability. [Arkansas Electric’s] argument that system operating constraints are limited to “unit constraints” is unsupported.⁵⁷

66. Taken out of context, as the Initial Decision does, Arkansas Electric’s statement sheds no greater light on the issue than the general, ambiguous language in Article V (*i.e.*, the “availability” of Arkansas Electric’s generation resources is to be considered on redispatch “on an hour-to-hour basis”) on which Arkansas Electric’s statement appears to have been based.⁵⁸ Further, as noted above, Article III, section 5 of the Power Agreement specifically provides for redispatch billing to account for actual hour-to-hour availability of the units due to scheduled maintenance or emergencies. The consideration of such “real-time” unit outages and unit capacity maximum and minimum capacity constraints are consistent with the intent expressed in the general “intent” sentence of Article V that redispatch, *i.e.*, theoretical after-the-fact billing, is designed to assure a “realistic scenario” on an hour-by-hour basis as relevant to the generation units. Thus, the Initial Decision reads too much into Arkansas Electric’s statement as an admission against interest that simply does follow. Arkansas Electric’s statement cannot be read as conceding that system operating constraints must be factored into the after-the-fact redispatch billing mechanism of the Power Agreement.

⁵⁷ Initial Decision at P 23. *See also Id.* at P 42.

⁵⁸ Indeed, Entergy’s position in that proceeding arguably appears to be inconsistent with the position taken in the instant proceeding. In the Declaratory Order proceeding, Entergy argued that it should be able to include consideration of the minimum operating levels of Arkansas Electric’s other non-co-owned higher-cost gas-fired generation resources that are available for redispatch whether or not operated in a particular hour to meet Arkansas Electric’s load. 112 FERC ¶ 61,306 at P 4, 7, 20. Entergy relied on Redispatching Principle No. 1, which requires the minimum operating level for each unit to be considered the first cost for billing purposes. Arkansas Electric interpreted this provision differently, asserting that billing is to be based on theoretical redispatching of capacity from its least expensive resources first, as it would have dispatched its resources solely to serve its own load had it not turned over dispatch to Entergy. *See, e.g.*, Arkansas Electric Answer, Docket No. EL05-135-000, at 16-17. However, the Commission declined to address the parties’ respective claims and deferred the issues to the courts to resolve. 112 FERC ¶ 61,306 at P 1.

67. The Initial Decision appears to assume, incorrectly, that transmission system operating constraints are relevant to redispatch billing just because they are relevant to the decisions the Entergy dispatcher must make regarding the actual dispatch of power from the units. On its face, the billing mechanism as we interpret it reflects a simple billing system that does not embroil the parties in debates over the particular reasons why the dispatcher has chosen to dispatch less power than needed to meet Arkansas Electric customers' requirements at a time when its generation resources are fully capable of meeting such requirements. Thus, the Initial Decision fails to distinguish between real-time dispatch and after-the-fact, theoretical redispatch and overlooks that they serve different purposes. Real-time dispatch is the way in which Entergy actually uses the integrated Arkansas-Electric-Entergy facilities to dispatch power as it deems fit for the benefit of both its entire transmission system and Arkansas Electric; after-the-fact redispatch is the way in which Entergy is supposed to bill Arkansas Electric as if a stand-alone economically-dispatched facility serving only its own load.

68. A substantial portion of the record of this case reflects the same kind of irrelevant debate over other issues such as whether Entergy has been following "good utility practice" in its actual dispatch and use of Arkansas Electric's generation resources, and whether other portions of the Entergy system, *e.g.*, Mississippi or Louisiana, are subject to the Power Agreement such that conditions on those parts of the network should be taken into account in the actual dispatch of power from Arkansas Electric's resources. We will assume each proposition was true for purposes of deciding the issues here. The provisions of the billing mechanism, in particular Redispatching Principle No. 6, confirm Arkansas Electric's view that they are designed to render it economically indifferent as to the actual amount of power that the Entergy dispatcher decides to dispatch from Arkansas Electric's units as long as the units are physically capable of generating the power needed to serve its own load. Under that billing principle, Arkansas Electric incurs the same incremental cost of fuel for the power supplied to meet its customers' requirements irrespective of whether that amount of power actually was dispatched from its generation units and without regard to the reasons why that amount of power was dispatched.⁵⁹ The record also is replete with evidence and debate relative to other irrelevant issues, such as issues raised regarding provisions of the Operating Agreements and liability provisions (which the Initial Decision styles as "Hold Harmless" provisions) of the Power Agreement.

⁵⁹ That is, if all the power needed to meet its customers' requirements actually is dispatched from its units, Arkansas Electric incurs the incremental cost of the coal burned at those units that generated the power (and pays Entergy nothing). To the extent that the power actually dispatched from its units is not sufficient to meet its customers' requirements, Arkansas Electric buys the deficiency from Entergy at the same cost, *i.e.*, the incremental cost of the fuel that would have been burned at its units to produce an amount of power equal to what it purchases from Entergy.

69. Further, having opened up the record to extrinsic evidence of Arkansas Electric statements, the Initial Decision erred in failing to give weight (or even mention) extrinsic evidence of Entergy's own employees' internal correspondence that conforms to Arkansas Electric's interpretation of the relevant billing mechanism and, in particular, its interpretation of the term "availability" as we adopt herein. For example, as Arkansas Electric recounts,⁶⁰ the record contains an email memorandum from Entergy's witness Hurstell regarding "Substitute Energy Losses" in which he recognized that when the output of a co-owned (Arkansas Electric) unit is reduced in off-peak hours below its full load, "the unit is fully available, and the co-owners are entitled to their full ownership interest."⁶¹ The record also includes other Entergy documents stating: "In general, the co-owners [including Arkansas Electric] are entitled to their share of the capacity of the unit at all times unless a formal derate placed on the unit and the co-owner appropriately notified."⁶² and "While the co-owners of Nelson 6 receive the net output, the Co-owners of the Arkansas units receive their share of the Net Dependable Capability NDC of the units."⁶³ The absence of any qualifiers regarding transmission system constraints supports Arkansas Electric's interpretation of the Power Agreement.

70. Finally, since the term "availability" in the first sentence of Article V, section 5 and in Redispatching Principle No. 3 is reasonably subject to more than one interpretation and, therefore, the meaning of the term "availability" as used therein is not "plain," the Initial Decision also erred in finding that the parties' course of conduct since 1977 when the Power Agreement was executed is "irrelevant because the contract terms are clear and unambiguous."⁶⁴ Entergy concedes that some system constraints occurred in the past (however infrequent or minor) and, yet it never charged on that basis until 2000, some 23 years after the Power Agreement was executed, then only over the objection of Arkansas Electric. The record is replete with evidence that for over twenty-three years *both* parties regarded Arkansas Electric as entitled to pay the lower incremental fuel (coal) cost of its units when the units were capable of meeting Arkansas Electric's load, regardless of whether and to what extent Entergy actually dispatched power from those units.⁶⁵

⁶⁰ Arkansas Electric Brief on Exceptions at 68-69.

⁶¹ Exhibit AEC-44 at 1.

⁶² Exhibit AEC-53 at 21.

⁶³ Exhibit AEC-53.

⁶⁴ Initial Decision at P 44. *See, Teamsters Industrial Employees Welfare Fund v. Rolls Royce Motor Cars, Inc.*, 989 F.2d 132, 137 (3rd Cir. 1993) (evidence of a course of conduct is particularly compelling when it occurs over a substantial period of time).

⁶⁵ *See* Arkansas Electric Brief on Exceptions at 62-70; Arkansas Electric Initial Brief at 49-57.

71. Entergy's own witnesses have stated in affidavits filed in this proceeding that before July 1, 2004, Arkansas Electric received its ownership share of White Bluffs and ISES capacity regardless of constraints on Entergy's transmission system. For example, Entergy's witnesses Hurstell testified that "[p]rior to July 1, 2004, [Arkansas Electric] and the other co-owners received their ownership shares of ISES and White Bluff's respective rated capacity regardless of what the unit was actually capable of delivering in light of system conditions."⁶⁶ Similarly, Entergy's witness Castleberry testified that "[p]reviously, [Arkansas Electric] received its MW ownership percentage of ISES's and White Bluff's average rated capability regardless of what the plant was actually generating in MW or could produce in light of system conditions."⁶⁷ Entergy did not regularly begin including transmission system constraints in its after-the-fact billing calculations until July 1, 2004.⁶⁸ Arkansas Electric's witnesses also testified that Entergy did not regularly reflect its system operating constraints in the after-the-fact redispatch billing process until July 1, 2004.⁶⁹

The Commission orders:

(A) Arkansas Electric's complaint is granted.

(B) Entergy is hereby directed to cease billing Arkansas Electric at the Replacement Energy rate when circumstances do not warrant, as discussed in the body of this order.

⁶⁶ Affidavit of John P. Hurstell, at P 44, attached to Entergy's Answer to Arkansas Electric's complaint filed in this proceeding.

⁶⁷ Affidavit of Kurt Castelberry, at P 9, attached to Entergy's Answer to Arkansas Electric's complaint filed in this proceeding.

⁶⁸ *Id.*

⁶⁹ See Arkansas Electric Brief on Exceptions at 62-70; Arkansas Electric Initial Brief at 49-70.

(C) Within 30 days of a final order herein, Entergy must refund all excess amounts improperly billed, with interest in accordance with the Commission's regulations, and file a refund report within 30 days thereafter.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

APPENDIX

The following are the key billing provisions of the Power Agreement addressed by the parties and the Initial Decision that are relevant to the disposition of the issues of the case.

Article II., Definitions, of the Power Agreement provides in pertinent part:

Section 17. Determination of Capability of [Arkansas Electric] Owned Resources.

The capability of [Arkansas Electric] Owned Resources shall be net generating capability based on tests conducted in accordance with approved Entergy Corporation capability rating plant testing procedures.

Section 18. Replacement Energy. The term “Replacement Energy” as used herein shall mean electric energy which one party desires to purchase from the other party for reasons including, but not limited to, deferring use of fuel or water, transmission system operations, scheduled short outages of generating units, environmental conditions, selling replacement energy to another party or other reasons of similar nature.

Article III., Special Obligations Undertaken Respectively By The Parties, of the Power Agreement provides in pertinent part:

Section 5. Outage of [Arkansas Electric] Owned Resources. When any [Arkansas Electric] Owned Resource is out of service because of emergency or planned maintenance, [Entergy] will replace [Arkansas Electric]’s generation so lost, to the extent possible, with power and energy from [Arkansas Electric] Resources. Subject to availability, [Entergy] will supply the remaining requirements as Replacement Energy which will be billed to [Arkansas Electric] and paid for at the following rate:

Energy generated by [Entergy]:

The incremental production cost per kilowatt hour of [Entergy] during the transaction plus 2 mills per kwh off-peak and 3 mills per kwh on-peak.

Energy purchased by [Entergy], if necessary, for sale hereunder:

Purchased price per kilowatt hour of power and energy plus 2 mills per kwh off-peak and 3 mills per kwh on-peak.

Article V., Billing, of the Power Agreement provides in pertinent part:

Section 5. Energy. It is the intent of both parties that all resources of both parties will be dispatched by [Entergy] for maximum combined efficiency, and that [Arkansas Electric's] Resources will, on a retroactive basis, considering their availability on an hour- to-hour basis, be used to theoretically redispatch [Arkansas Electric's] load from [Arkansas Electric's] Resources.

For billing purposes:

(a) For [Arkansas Electric's] Owned Resources.

(i) All energy generated in [Arkansas Electric's] Owned Resources, and absorbed on redispatch into [Arkansas Electric's] load will be at zero (0) cost.

(ii) For all energy assigned to [Arkansas Electric] from [Arkansas Electric's] Owned Resources on redispatch, and not generated at [Arkansas Electric] Owned Resources, [Arkansas Electric] will pay to [Entergy] a kwh cost based on the cost of fuel and the heat rate of the plant or unit as defined in Article II, section 21.

(iii) For all energy generated in [Arkansas Electric]'s Owned Resources, and not absorbed into [Arkansas Electric]'s load on a redispatch basis, [Entergy] will pay to [Arkansas Electric] a cost per kwh determined in section 5(a)(ii) of this Article V plus an adder to be evidenced by a letter agreement between the parties.

(iv) For purposes of these calculations, and for dispatching purposes, [Arkansas Electric] will keep [Entergy] currently informed as to availability of each of its units as well as costs and availability of fuel at each of its units.

(c) Excess Energy. For any energy used by [Arkansas Electric] on redispatch for which [Arkansas Electric] did not have sufficient [Arkansas Electric] resources available, [Arkansas electric] will pay to [Entergy] an amount calculated as in Article III, section 5.

(d) Redispatching Principles. All redispatching of [Arkansas Electric's] Resources will be in accordance with the principles outlined in Exhibit E.

Exhibit E, Redispatching Principles, to the Power Agreement provides that for billing purposes the following principles will be utilized:

- (1) The first cost will be the minimum operating level for each unit. The minimum operating level will be the lowest level of net generation at which the plant can be operated as designated by the owner and furnished to the [Entergy] dispatcher.
- (2) For redispatch purposes it will be assumed that each unit will not be loaded above 95% of rated capacity unless said unit actually operated at a greater value.
- (3) For redispatch purposes appropriate consideration will be given to other operating constraints which limit the availability of the plant to the [Entergy] dispatcher.
- (4) Incremental cost shall be the cost per kWh based on the heat rate as defined in section 21 of Article II times the fuel cost in terms of cents per million BTU determined as follows: [omitted]
- (5) If [Arkansas Electric] requirements are less than the energy supplied from [Arkansas Electric] Resources in an hour, [Entergy] will pay to [Arkansas Electric] the incremental cost per kwh of the excess energy plus an adder to be evidenced by a letter of agreement between the parties.
- (6) If the capability of [Arkansas Electric] Resources is sufficient to supply [Arkansas Electric] requirements and if [Arkansas Electric] requirements are greater than the energy supplied from [Arkansas Electric] Resources in an hour, [Arkansas Electric] will pay to [Entergy] [Arkansas Electric]'s incremental cost per kWh of the energy deficiency.
- (7) If the capability of [Arkansas Electric] Resources is not sufficient to supply [Arkansas Electric] requirements in an hour, [Arkansas Electric] may purchase Replacement Energy in accordance with Article III, section 5, after giving consideration to the principles in 1, 2 and 3 above.
- (8) For the purposes of dispatching for billing purposes, [Arkansas Electric] will keep [Entergy] currently informed of fuel available and cost thereof for each unit and the cost of purchased energy.