169 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Louisiana Public Service Commission Docket No. EL01-88-019
v.
Entergy Services, Inc.

ORDER ON PAPER HEARING

(Issued November 21, 2019)

1. In response to a petition for review of the Commission's orders issued earlier in this proceeding,[1] on April 15, 2008, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded the case to the Commission for further proceedings regarding, inter alia, whether the Commission had adequately supported its decision not to order refunds in the circumstances presented in this case.[2] Subsequently, the Commission issued orders in response to the D.C. Circuit's remand.[3] These orders were in turn appealed to the D.C. Circuit by the Louisiana Public Service Commission (Louisiana Commission). Upon consideration of a subsequent D.C. Circuit decision considering similar refund issues in a different proceeding regarding Opinion No. 468[4]

[1] *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005).

[2] *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (2008 Bandwidth Opinion).

[3] *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,047 (2011) (2011 Remand Order), *order on reh'g,* 146 FERC ¶ 61,152 (2014) (2014 Rehearing Order).

[4] *La. Pub. Serv. Comm'n v. Entergy Corp*., Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh'g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005). The Opinion No. 468 proceeding involves whether certain cost allocations under the Entergy System

(Interruptible Load Proceeding),[5] the Commission moved for voluntary remand in the instant proceeding to more fully consider the D.C. Circuit's decision. On August 8, 2017, the D.C. Circuit granted the Commission's motion.[6] On March 6, 2018, the D.C. Circuit issued an additional decision affirming the Commission's denial of refunds in the Interruptible Load Proceeding.[7] On May 22, 2018, the Commission issued an order[8] on voluntary remand establishing a paper hearing regarding whether refunds are appropriate given the circumstances in this case.

2. Having reviewed the briefs submitted in response to the 2018 Order on Voluntary Remand, as discussed below, we find that, given the D.C. Circuit's decisions in the 2014 Interruptible Load Opinion and the 2018 Interruptible Load Opinion, and the specific circumstances presented in the case, refunds are not appropriate.

I. Background

3. This case arose from a complaint filed by the Louisiana Commission against Entergy Services, Inc. (Entergy) and the Entergy Operating Companies concerning the Entergy System Agreement's requirement that production costs be "roughly equal"

Agreement were unjust and unreasonable because they excluded interruptible load from the calculation of peak load responsibility.

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

[6] *La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426 (D.C. Cir. 2017) (2017 Bandwidth Opinion).

[7] *La. Pub. Serv. Comm'n v. FERC*, 883 F.3d 929 (D.C. Cir. 2018) (2018 Interruptible Load Opinion).

[8] *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 163 FERC ¶ 61,136 (2018) (2018 Order on Voluntary Remand).

among the Entergy Operating Companies.[9] Upon review of an Initial Decision,[10] the Commission determined in Opinion Nos. 480 and 480-A that rough production cost equalization on the Entergy system had been disrupted, and that applying a numerical bandwidth of +/- 11 percent to the Entergy Operating Companies' production costs was an appropriate remedy. This remedy, referred to as the bandwidth remedy, changes the allocation of production costs among the Entergy Operating Companies to maintain rough production cost equalization.

4. In Opinion Nos. 480 and 480-A, on the issue of refunds,[11] the Commission found that Federal Power Act (FPA) section 206(c)[12] prohibits refunds among electric companies of a registered holding company to the extent that one or more of the electric companies making refunds cannot surcharge its customers or otherwise obtain retroactive cost recovery.[13] The Commission found that there was no evidence in the record indicating that those Entergy Operating Companies making a refund would be able to obtain retroactive cost recovery, and accordingly the Commission denied refunds. In reaching this decision, the Commission relied on its previous finding in the Interruptible

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[9] *La. Pub. Serv. Comm'n v. Entergy Servs., Inc*., Opinion No. 480, 111 FERC ¶ 61,311, at P 136, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006) (November 2006 Compliance Order), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007) (April 2007 Compliance Order), *aff'd in part and remanded in part sub nom. La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (2008 Bandwidth Opinion), *order on remand*, 137 FERC ¶ 61,047 (2011 Remand Order), *order dismissing reh'g*, 137 FERC ¶ 61,048 (2011), *order on reh'g*, 146 FERC ¶ 61,152 (2014) (2014 Rehearing Order), *order denying reh'g*, 153 FERC ¶ 61,034 (2015) (2015 Order Denying Rehearing II), *remanded*, 2017 Bandwidth Opinion, 866 F.3d 426 (affirming 2011 Remand Order and 2014 Rehearing Order). At the time that Opinion No. 480 was issued, the Entergy Operating Companies were Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Louisiana, Inc. (Entergy Louisiana), Entergy Mississippi, Inc., Entergy Gulf States, Inc., and Entergy New Orleans, Inc.

[10] *La. Pub. Serv. Comm'n v. Entergy Servs., Inc*., 106 FERC ¶ 63,012 (2004).

[11] The refund effective period for this case is from September 13, 2001 through May 2, 2003.

[12] 16 U.S.C. § 824e(c) (2018).

[13] Opinion No. 480, 111 FERC ¶ 61,311 at P 145; Opinion No. 480-A, 113 FERC ¶ 61,282 at P 59.

Load Proceeding that refunds among the Entergy Operating Companies were prohibited under FPA section 206(c).[14]

5. The D.C. Circuit subsequently remanded the Commission's decision to deny refunds in the Interruptible Load Proceeding.[15] On judicial review of Opinion Nos. 480 and 480-A, the D.C. Circuit upheld the bandwidth provisions, but remanded the decision denying refunds because the basis for that decision was the Commission's refund ruling in the Interruptible Load Proceeding.[16] The D.C. Circuit found that its holding in the 2007 Interruptible Load Opinion rejected the only rationale upon which the Commission relied for denying refunds in the instant proceeding, and therefore the D.C. Circuit remanded the issue to the Commission for further proceedings.[17]

6. In the 2011 Remand Order, the Commission found that it would not invoke its equitable discretion to order refunds. The Commission noted that, since the issuance of the D.C. Circuit's remand, the specific issue of whether refunds were prohibited under FPA section 206(c) had been addressed by the Commission in the orders that resulted from the paper hearing in the Interruptible Load Proceeding.[18] The Commission noted that, in the Opinion No. 468 Remand Rehearing Order, the Commission found that "[FPA] section 206(c) gives the Commission the specific authority to order refunds prospectively from a set date, the refund effective date, for a fifteen month period."[19] The Commission further noted that this case, like the Interruptible Load Proceeding, does not involve a utility that has been unjustly enriched by over-collecting revenues. The Commission found that, instead, in a case involving the bandwidth remedy, the issue is whether the production costs have been properly allocated among the Entergy Operating

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[14] Opinion No. 480, 111 FERC ¶ 61,311 at P 145 (citing Opinion No. 468, 106 FERC ¶ 61,228 at PP 83-84).

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

[16] 2008 Bandwidth Opinion, 522 F.3d at 399 (citing 2007 Interruptible Load Opinion, 482 F.3d at 520).

[17] *Id*.

[18] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,133 (2010) (Opinion No. 468 Amended Remand Order), *order granting reh'g in part and denying reh'g in part*, 135 FERC ¶ 61,218 (2011) (Opinion No. 468 Remand Rehearing Order).

[19] 2011 Remand Order, 137 FERC ¶ 61,047 at P 31 (citing Opinion No. 468 Amended Remand Order, 132 FERC ¶ 61,133 at P 30).

Companies. The Commission ruled that it would accordingly invoke its equitable discretion not to order refunds, notwithstanding its authority to do so.[20] However, the Commission held this ruling in abeyance pending the outcome of an additional paper hearing in the Interruptible Load Proceeding that was further examining under what circumstances it is appropriate for the Commission to invoke its equitable discretion to deny refunds.[21]

7. In the 2014 Rehearing Order, the Commission reaffirmed its decision to deny refunds. The Commission stated that considerations relevant to its refund determination in this case were similar to those presented in an order that had recently been issued on a paper hearing regarding the issue of refunds in the Interruptible Load Proceeding.[22] The Commission noted that it had determined once again in the 2013 Interruptible Load Rehearing Order that new cost allocations or rate designs that do not reflect over-recoveries or other special circumstances will run prospectively from the date of the issuance of the order and that refunds will not lie.[23] The Commission added that an equitable ground disfavoring refunds in this context is the fact that Entergy cannot revisit past Commission decisions.[24]

8. The Louisiana Commission appealed the 2011 Remand Order and the 2014 Rehearing Order to the D.C. Circuit. As noted above, subsequent to the Louisiana Commission's appeal, the Commission requested a voluntary remand of the refund issue in light of the D.C. Circuit's more recent decision[25] regarding the appropriateness of ordering refunds among the Entergy Operating Companies in the Interruptible Load Proceeding. On August 8, 2017, in its decision regarding other aspects of the

[20] *Id*.

[21] *Id*. P 32.

[22] *La. Pub. Serv. Comm'n v. Entergy Corp*., 142 FERC ¶ 61,211, at P 51 (2013) (2013 Interruptible Load Rehearing Order).

[23] 2014 Rehearing Order, 146 FERC ¶ 61,152 at P 51 (citing 2013 Interruptible Load Rehearing Order, 142 FERC ¶ 61,211 at P 51).

[24] *Id*. P 53.

[25] *See* 2014 Interruptible Load Opinion, 772 F.3d 1297.

implementation of Opinion No. 480, the D.C. Circuit granted the Commission's request for a voluntary remand.[26]

9. On remand from the D.C Circuit's 2014 decision in 2014 Interruptible Load Opinion – and while the petition for review of the refund issue in the instant proceeding was pending before the D.C. Circuit – the Commission issued the 2016 Interruptible Load Orders,[27] clarifying its policy regarding refunds and reaffirming its decision to deny refunds for the refund effective period in the Interruptible Load Proceeding. In those orders, the Commission explained that "the basic consideration in ruling on refunds is one of fairness,"[28] and clarified its refund policy in rate design and cost allocation cases where there is no over-collection by the utility. The Commission identified three equitable factors that, when present, support the denial of refunds in cost allocation cases: (1) a potential for, or possibility of, under-recovery by Entergy if refunds are awarded;[29] (2) a possibility of past decisions made in reliance on the prior cost allocation method that cannot be undone if refunds are ordered;[30] and (3) the possibility that, if refunds are ordered, other customers who were not responsible for the misallocation would have to pay surcharges attributable to actions by "a prior generation of customers."[31]

10. The Commission also found in the 2016 Interruptible Load Orders that FPA section 206(c) provides a separate legal basis for denying refunds. The Commission found that FPA section 206(c) prohibits the Commission from ordering FPA section 206(b) refunds between utility companies in a holding company system unless the Commission expressly finds that the holding company will not experience

[26] 2017 Bandwidth Opinion, 866 F.3d at 428 n.3.

[27] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120 (2016) (2016 Interruptible Load Order) and *La. Pub. Serv. Comm'n v. Entergy Corp.*, 156 FERC ¶ 61,221 (2016) (2016 Interruptible Load Rehearing Order).

[28] 2016 Interruptible Load Order, 155 FERC ¶ 61,120 at P 27.

[29] *Id.* P 31; 2016 Interruptible Load Rehearing Order, 156 FERC ¶ 61,221 at PP 64-65.

[30] 2016 Interruptible Load Order, 155 FERC ¶ 61,120 at P 35; 2016 Interruptible Load Rehearing Order, 156 FERC ¶ 61,221 at PP 60-63.

[31] 2016 Interruptible Load Order, 155 FERC ¶ 61,120 at P 36; 2016 Interruptible Load Rehearing Order, 156 FERC ¶ 61,221 at P 67.

any reduction in revenues as a result of the refunds.[32] The Commission found that it could not make this finding in light of uncertainty regarding Entergy Arkansas' ability to recover surcharges to pay for any refunds ordered in that proceeding.[33]

11. As noted above, on March 6, 2018, the D.C. Circuit issued an additional decision on refunds in the Interruptible Load Proceeding.[34] In that decision, the court noted that the Commission had clarified that the Commission has no generally applicable policy of granting refunds.[35] The court noted that the Commission had found that it generally awards refunds where there have been overcharges that result in over-collection of revenue.[36] The court added, however, that the Commission has explained that its default position is the opposite in cases in which it has found a rate unjust and unreasonable because of a flaw in rate design or cost allocation.[37] The court concluded that the Commission's denial of refunds in the Interruptible Load Proceeding accords with its usual practice of denying refunds in cost allocation cases. The court affirmed the Commission's finding that the three equitable factors identified by the Commission support the decision to deny refunds.[38] With regard to FPA section 206(c), the court found that the section would require the Commission to deny refunds if it could not conclude that Entergy would not suffer any reduction in revenues. However, the court concluded that the Commission's reasoning in denying refunds on equitable grounds was sufficient and, therefore, declined to address the parties' arguments regarding application of FPA section 206(c) to that case.[39]

12. On May 22, 2018, in response to a Louisiana Commission motion requesting that the Commission establish a briefing schedule, the Commission issued in the instant

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[32] 16 U.S.C. § 824e(c).

[33] 2016 Interruptible Load Order, 155 FERC ¶ 61,120 at P 31; 2016 Interruptible Load Rehearing Order, 156 FERC ¶ 61,221 at P 28.

[34] *See supra* P 1.

[35] 2018 Interruptible Load Opinion, 883 F.3d at 932 (citing 2016 Interruptible Load Order, 155 FERC ¶ 61,120 at P 17).

[36] *Id*. (citing 2016 Interruptible Load Rehearing Order, 156 FERC ¶ 61,221, at P 10).

[37] *Id*. (citing 2016 Interruptible Load Order, 155 FERC ¶ 61,120 at P 25).

[38] *Id*. at 931.

[39] *Id*. at 935.

proceeding the 2018 Order on Voluntary Remand. The Commission found that, having reviewed the 2014 Interruptible Load Opinion, the 2018 Interruptible Load Opinion, and the Louisiana Commission's motion, further analysis was warranted to consider the unresolved refund issues presented in this case. The 2018 Order on Voluntary Remand established a 30-day deadline for parties to submit initial briefs, with reply briefs due 21 days thereafter.

13. The Louisiana Commission filed a preliminary initial brief concurrently with its motion for a briefing schedule. The Louisiana Commission submitted an updated initial brief subsequent to the issuance of the 2018 Order on Voluntary Remand. Entergy and the Arkansas Public Service Commission (Arkansas Commission) also filed initial briefs. Entergy, the Arkansas Commission, and the Louisiana Commission filed reply briefs. The Louisiana Commission also submitted a motion to submit a rebuttal brief in response to the reply briefs, along with its rebuttal brief. Entergy filed an answer opposing the Louisiana Commission's motion to file a rebuttal brief.

II. Initial and Reply Briefs

A. Entergy Initial Brief

14. Entergy contends that the Commission should reaffirm its decision to deny refunds in this case. Entergy argues that now that the Commission has issued final decisions clarifying the Commission's refund policies and denying refunds in the Interruptible Load Proceeding and those decisions have been affirmed by the D.C. Circuit, the Commission should issue an order reaffirming its decision to deny refunds in this proceeding. Entergy notes that the Commission has explained that the Interruptible Load Proceeding is an "analogous System Agreement cost allocation case" that presented "similar" equitable considerations to those present here.[40] Entergy argues that the reasons for denying refunds in the 2016 Interruptible Load Orders and the 2018 Interruptible Load Opinion are fully applicable here.

15. Entergy argues that the Commission's default position against refunds in rate design and cost allocation cases applies equally to this case. Entergy asserts that, in the 2018 Interruptible Load Opinion, the court confirmed that the Commission's "default position" in rate design and cost allocation cases in which there is no net-over recovery by the utility is to deny refunds.[41] Entergy explains that, like the Interruptible Load

[40] Entergy Initial Brief at 14 (citing 2014 Rehearing Order, 146 FERC ¶ 61,152 at P 50).

[41] 2018 Interruptible Load Opinion, 883 F.3d at 932-33.

Proceeding, this proceeding also involves a zero-sum allocation of costs among the Entergy Operating Companies under the Entergy System Agreement.[42]

16. Entergy contends that, moreover, the same equitable considerations that resulted in a denial of refunds in the 2018 Interruptible Load Opinion are present here. First, Entergy notes that there is a "non-trivial risk" that the utility might under-recover costs if refunds are awarded, because it is uncertain whether Entergy Arkansas would be allowed to fully recover surcharges necessary to pay for the refunds. Entergy notes that Entergy Arkansas' full recovery of the costs of refunds is uncertain here for the same reasons this recovery was uncertain in the Interruptible Load Proceeding. Entergy explains that it is uncertain whether the Arkansas Commission would allow Entergy Arkansas to collect surcharges from Arkansas retail customers to pay for the refunds.[43] Entergy adds that it is uncertain whether Entergy Arkansas would be able to fully recover refund costs from its wholesale customers. Entergy explains that Entergy Arkansas currently only has one wholesale customer – one who was not a customer during the refund effective period.[44]

17. Entergy argues that another equitable factor against refunds in rate design and cost allocation cases is the possibility that the utility or its customers may have made decisions in reliance on the cost allocation in effect during the refund effective period. Entergy explains that the version of the System Agreement in effect during the refund effective period included Service Schedules that allocated certain production and transmission costs among the Operating Companies, including production capacity costs. Entergy further explains, however, that the version of the System Agreement in effect during the refund effective period did not contain the bandwidth formula or any similar provision that required all production costs to be roughly equalized among the Operating Companies on a calendar year basis.[45] Entergy contends that it is not possible to determine, after the fact, how Entergy's resource planning decisions might have changed if the bandwidth formula had been in effect during the refund effective period. Entergy contends that a requirement for large annual payments based on short-term, calendar-year cost disparities could have altered the Entergy system's longer-term approach to planning generation during the refund effective period.[46]

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[42] Entergy Initial Brief at 15.

[43] *Id*.

[44] *Id*. at 18.

[45] *Id*. at 22.

[46] *Id*. at 23.

18. Entergy contends that a final factor present in the Interruptible Load Proceeding – and other rate design and cost allocation cases denying refunds – is inequity arising because, due to a change in the customer base, customers that benefited from the prior cost allocation are not the same as the customers that would incur surcharges to pay for refunds.[47] Entergy explains that Entergy Arkansas' customer base has changed significantly since the refund effective date nearly seventeen years ago. Entergy contends that, for example, during the refund effective period, wholesale customers constituted approximately 13.87 percent of Entergy Arkansas' peak load, but now all of those customers have left and a single wholesale customer currently constitutes less than 0.001 percent of Entergy Arkansas' load.[48] Entergy notes that the customer was not a wholesale customer of Entergy Arkansas during the refund effective period, and did not benefit from the old regime.

19. Entergy also argues that FPA section 206(c) provides a separate basis for denying refunds. Entergy explains that, under FPA section 206(c), Congress created a general rule prohibiting refunds between utility companies in a holding company system unless the Commission can make an express finding that the holding company "would not experience any loss of revenues" as a result of refunds. Entergy contends that if the Commission cannot find conclusively that the Entergy system will fully recover the costs of any refunds, the Commission is statutorily prohibited from ordering refunds for the refund effective period.[49] Entergy argues that, for the reasons discussed above, it is uncertain whether Entergy Arkansas would be allowed to fully recover from retail and wholesale customers any surcharges necessary to pay for refunds ordered for the refund effective period. Entergy contends that this uncertainty prevents the Commission from making the statutorily-required finding that the Entergy holding company will not experience "any reduction in revenues" as a result of refunds and, therefore, bars the Commission from ordering refunds in this case.

B. Arkansas Commission Initial Brief

20. The Arkansas Commission contends that the Commission has never wavered throughout the history of this proceeding in finding that refunds should not be allowed, and asserts that the Commission should continue to disallow refunds. The Arkansas Commission reiterates Entergy's arguments that refunds cannot be justified under the

[47] *Id*. at 26 (citing 2018 Interruptible Load Opinion, 883 F.3d at 934-35).

[48] *Id*.

[49] *Id*. at 27 (citing 2018 Interruptible Load Opinion, 883 F.3d at 935 ("[T]he section would require the Commission to deny refunds if it could not conclude that the holding company will not suffer a reduction in revenues.").

Commission's equitable discretion analysis.[50] The Arkansas Commission also agrees with Entergy that FPA section 206(c) precludes issuance of refunds in this proceeding, contending that the inability to meet the explicit prerequisites of FPA section 206(c) in the instant circumstances constitutes a complete bar to allowing refunds.[51]

C. Louisiana Commission Initial Brief

21. The Louisiana Commission argues that refunds are required to ensure compliance with the filed rate contained in the System Agreement. The Louisiana Commission explains that although the Louisiana Commission originally grounded its initial complaint in this proceeding on the requirements of the FPA, more recent decisions of the D.C. Circuit and the Commission have clarified that the true source of the rough equalization requirement is the System Agreement itself. The Louisiana Commission contends that the Commission's orders establishing the bandwidth remedy thus involve enforcement of a tariff. The Louisiana Commission adds that the Commission's authority to enforce tariffs is granted in FPA section 309,[52] and that refunds are almost always required to enforce a filed rate.[53]

22. The Louisiana Commission contends that prior to *Council of the City of New Orleans*, *La. v. FERC*,[54] it was unclear whether the requirement of rough equalization stemmed from the FPA or from the System Agreement. The Louisiana Commission explains, however, that when Entergy Arkansas withdrew from the System Agreement, the Council of the City of New Orleans, La. and the Louisiana Commission argued that the Entergy system should still be subject to rough equalization pursuant to the FPA. The Louisiana Commission explains that, in that case, the D.C. Circuit ruled that the requirement of rough equalization is "rooted in the [System] Agreement."[55] The Louisiana Commission contends that the Commission also clarified in the 2014 Rehearing Order that bandwidth refunds involved "implementation of the filed formula

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[50] Arkansas Commission Initial Brief at 4-7 (citing Entergy Initial Brief at 15-17).

[51] *Id.* at 9.

[52] 16 U.S.C. § 825h (2018).

[53] Louisiana Commission Initial Brief at 28.

[54] *Council of the City of New Orleans*, *La. v. FERC,* 692 F.3d 172, 177 (D.C. Cir. 2012).

[55] Louisiana Commission Initial Brief at 28 (citing *Council of the City of New Orleans*, *La. v. FERC*, 692 F.3d 172).

rate," distinguishing decisions granting refunds in cases implementing the bandwidth formula.[56] The Louisiana Commission notes that, in the same order, the Commission held that "[t]he System Agreement requires that production costs be 'roughly equal' among the Operating Companies."[57]

23. The Louisiana Commission argues that, read together, *Council of City of New Orleans*, *La. v. FERC* and the 2014 Rehearing Order establish that this case involves contract compliance.[58] The Louisiana Commission adds that many cases establish that the Commission has a policy of requiring refunds to enforce a filed rate. According to the Louisiana Commission, the Commission has granted refunds in bandwidth-related cases and has likened those cases to tariff enforcement.[59] The Louisiana Commission contends that the Commission stated that rough equalization proceedings "involve implementation of the filed formula rate. Refunds in such cases are consistent with the Commission's policy of generally ordering refunds and surcharges where a utility violates the filed rate."[60]

24. The Louisiana Commission contends that the refund issue in this case is indistinguishable from refunds the Commission granted in this proceeding in 2011 and 2014 to cure its delay in enforcing the bandwidth remedy.[61] The Louisiana Commission contends that those refunds, which provided bandwidth payments for a seven-month period in 2005, enforced a pre-existing contract requirement and that refunds here would enforce the same contract requirement. The Louisiana Commission states that all bandwidth refunds have enforced the rough production cost equalization requirement.

25. The Louisiana Commission states that the Commission distinguished the bandwidth cases and other refund cases as tariff enforcement proceedings in a brief

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[56] *Id*. at 3 (citing 2014 Rehearing Order, 146 FERC ¶ 61,152 at P 54.

[57] *Id.* at 4.

[58] *Id*. at 30.

[59] *Id.* at 5.

[60] *Id*. (citing 2016 Interruptible Load Rehearing Order, 156 FERC ¶ 61,221 at P 36).

[61] *Id*. at 32 (citing 2011 Remand Order, 137 FERC ¶ 61,047, and 2014 Rehearing Order, 146 FERC ¶ 61,152).

submitted to the D.C. Circuit in the Interruptible Load Proceeding. The Louisiana Commission notes that the brief stated:

> The Louisiana Commission continues to rely on cases involving violations of, or errors in the implementation of, the filed rate, . . . and asserts that the Commission has not explained why violations of the filed rate doctrine warrant refunds. "The Commission's authority to order refunds of amounts improperly collected in violation of the filed rate derives from FPA § 309, 16 U.S.C. § 825h," and thus do not implicate the same limitations found in [FPA] section 206. . . . [T]he Commission distinguished other Entergy cases where refunds have been required, including the bandwidth cases, as involving deviations from the filed rate or settlements that do not represent Commission precedent.[62]

26. The Louisiana Commission argues that *Blue Ridge*[63] supports its contention that refunds should be awarded. The Louisiana Commission explains that *Blue Ridge* involved a failure to credit the gain on a sale/leaseback against costs allocated through the American Electric Power Interconnection Agreement. The Louisiana Commission explains that, in that case, despite the Appalachian Power Company's assertion that refunds would be barred by FPA section 206(c), the Commission allowed refunds, finding that the filed rate "requires the passthrough of the entire gain on the sale."[64] The Louisiana Commission contends that, in *Blue Ridge*, the Commission required refunds to enforce a contract, even though that action produced offsetting effects on other ratepayers.

27. The Louisiana Commission also cites other cases for the proposition that refunds are appropriate to enforce a contract's filed rate. For example, the Louisiana Commission argues that, in *City of Holland*,[65] the Commission determined that the Midwest Independent Transmission System Operator, Inc. had incorrectly applied its

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[62] *Id*. at 31 (citing Brief for Respondent at 46-47, *La. Pub. Serv. Comm'n v. FERC*, No. 16-1382 (D.C. Cir. filed June 5, 2017).

[63] *Blue Ridge Power Agency v. Appalachian Power Co*., 58 FERC ¶ 61,193 (1992) (*Blue Ridge*).

[64] Louisiana Commission Initial Brief at 32 (citing *Blue Ridge*, 58 FERC at 61,599).

[65] *City of Holland, Mich. v. Midwest Indep. Transmission Sys. Operator, Inc*., 154 FERC ¶ 61,204 (2016) (*City of Holland*).

Open Access Tariff in billing for transmission service.[66] The Louisiana Commission explains that, in that case, the Commission held that it could order refunds "for past periods where a public utility had either misapplied a formula rate or otherwise charged rates contrary to the filed rate."[67] The Louisiana Commission adds that the Commission found that its general policy is to order refunds.[68]

28. The Louisiana Commission further states that, in *DC Energy*,[69] the Commission approved PJM Interconnection, L.L.C.'s (PJM) decision to rebill market participants who escaped certain charges under the PJM tariff by characterizing transactions properly. The Louisiana Commission notes that the Commission upheld PJM's retroactive rebilling of the charges because the complainants had acted inconsistently with the tariff.[70]

29. The Louisiana Commission argues that the large disparities in production costs commencing in 2000 resulted in large part from Entergy's failure to maintain rough equalization though the rotation and allocation of resources, or through tariff amendments. The Louisiana Commission argues that Entergy has argued and the Commission has agreed that the System Agreement contemplated that Entergy maintain rough equalization through the allocation of resources, along with the allocations of the System Agreement. The Louisiana Commission contends that for many years Entergy failed to meet that responsibility. The Louisiana Commission explains that Entergy did not prepare a resources plan to promote rough equalization until well after the complaint in this proceeding was filed. The Louisiana Commission argues that Entergy's actions prior to 2003 exacerbated the disruption of rough equalization.

30. The Louisiana Commission contends that, even if it were appropriate to consider equities in a contract enforcement proceeding, the equities support refunds. The Louisiana Commission argues that all parties were on notice prior to the institution of this proceeding that rough equalization was required for the Entergy system and that that requirement could be enforced. The Louisiana Commission contends that the System

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[66] Louisiana Commission Initial Brief at 33 (citing *City of Holland*, 154 FERC ¶ 61,204 at P 3).

[67] *Id*.

[68] *Id*. (citing *City of Holland*, 154 FERC ¶ 61,204 at P 37).

[69] *D.C. Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 (2012) (*DC Energy*).

[70] Louisiana Commission Initial Brief at 34 (citing *DC Energy*, 138 FERC ¶ 61,165 at P 101).

Agreement – the filed rate – placed all parties on notice of its requirement of rough equalization, and there can accordingly be no concern in this proceeding that refunds would constitute retroactive ratemaking.[71]

31. The Louisiana Commission argues that noncompliance with the tariff had a detrimental impact on Louisiana consumers and the Louisiana economy. The Louisiana Commission contends that the undue discrimination between Louisiana and Arkansas consumers, all served by the same system, amounted to hundreds of millions of dollars annually.[72] The Louisiana Commission contends that the disparities in this case would cause substantial injury to consumers that can only be repaired through refunds.[73]

32. The Louisiana Commission contends that the parties in this case agreed to an extension of the FPA 206(b) refund period in this proceeding so that Entergy could prepare a resource plan that would address disparities in rough production cost equalization. The Louisiana Commission explains that on October 7, 2002, Entergy filed a motion to extend the procedural schedule by 20 weeks. The Louisiana Commission explains that it agreed to the extension only on the condition that all parties agreed to an extension of the FPA 206(b) refund period.[74] The Louisiana Commission contends that extension delayed the issuance of Opinion No. 480 by five months. The Louisiana Commission argues that these delays caused by Entergy's non-compliance with its resource planning obligation and its request for time to prepare a resource plan constitute equitable factors in favor of supporting refunds.[75]

33. The Louisiana Commission argues that, in tariff compliance proceedings, the ability of the utility to collect surcharges to make refunds is not an issue. The Louisiana Commission argues that Entergy had a responsibility to maintain rough production cost equalization, but failed to adjust the System Agreement fuel cost allocations through a section 205 filing, which would have cured most cost imbalances.[76] The Louisiana Commission argues that, even if Entergy's ability to collect surcharges were an issue, Entergy has experienced no difficulty in Arkansas collecting the surcharges necessary to

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[71] *Id*. at 50.

[72] *Id*.

[73] *Id*. at 52.

[74] *Id.* at 53.

[75] *Id*. at 54.

[76] *Id*. at 56.

pay refunds to ensure compliance with the rough equalization requirement. The Louisiana Commission adds that the United States Supreme Court has ruled twice that a state cannot disallow a Commission-approved cost allocation affecting Entergy.[77] The Louisiana Commission adds that any difficulty Entergy might have in collecting rough equalization surcharges results from its own violation of the System Agreement through inaction and a corporate strategy to enhance profits.[78]

D. Entergy Reply Brief

34. Entergy argues that the Louisiana Commission attempts to raise for the first time a new and different refund claim – that the Commission should order refunds under FPA section 309 to remedy an alleged violation of the System Agreement, i.e., for a violation of the filed rate. Entergy argues that the Louisiana Commission's new refund claim should be summarily dismissed because it is far too late in this proceeding for the Louisiana Commission to attempt to change its theory of the case and raise for the first time a new refund claim. Entergy argues that until the Louisiana Commission's Initial Brief, the only refund claim raised and considered throughout this proceeding was whether the refunds should be ordered under FPA section 206(b) to remedy the Commission's finding that the System Agreement had become unjust and unreasonable, i.e., the same refund issue addressed in the Interruptible Load Proceeding. Entergy argues that allowing the Louisiana Commission to raise its new claim now would violate Commission policies regarding administrative efficiency and finality that are essential for the Commission to conduct orderly and efficient proceedings.[79]

35. Entergy contends that the Louisiana Commission has had ample opportunities to assert a tariff violation theory in this case and has identified no valid reason why it could not do so until its Initial Brief in this second remand of a 17-year-old proceeding. Entergy explains that the Louisiana Commission argues that it is raising its new refund claim now because "more recent decisions of the D.C. Circuit and the Commission" have clarified that rough production cost equalization is "rooted" in the System Agreement, not the FPA.[80] Entergy argues that the Louisiana Commission is incorrect in claiming that there has been any change in the law regarding rough production cost equalization that is relevant to its new legal theory. Entergy explains that the Commission and the

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[77] *Id*. (citing *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) and *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003)).

[78] *Id*. at 57.

[79] Entergy Reply Brief at 2.

[80] *Id*. at 3 (citing Louisiana Commission Initial Brief at 27-28).

courts have long held that rough production cost equalization is consistent with the goals and intent of the System Agreement.

36. Entergy contends that if the Commission were to consider the Louisiana Commission's new claim, it should reject that claim on the merits. Entergy contends that the underlying premise of the Louisiana Commission's claim – that disruption of rough production cost equalization constituted a violation of the System Agreement by Entergy – is incorrect. Entergy argues that there was no provision in the System Agreement prior to the issuance Opinion Nos. 480 and 480-A that required rough production cost equalization of production costs among the Operating Companies.[81]

37. Entergy contends that, even if a disruption of rough production cost equalization could in some circumstance violate the System Agreement itself, the Louisiana Commission has not demonstrated that Entergy acted in a manner that violated the System Agreement. Entergy contends that the record shows that the disruption of rough production cost equalization was caused by an unexpected rise in natural gas prices and that Entergy acted reasonably and consistent with the intent of the System Agreement in its efforts to remedy the cost disparities over time through its Strategic Supply Resource Plan.[82]

38. Entergy explains that the same three equitable factors that caused the Commission to deny refunds in the Interruptible Load Proceeding are present in this proceeding: (1) a possibility of under-recovery by Entergy; (2) a possibility of decisions detrimentally relying on the prior cost allocation; and (3) a disjunction between those who benefited from the prior cost allocation and those who will bear surcharges. Entergy adds that many of the Louisiana Commission's equitable arguments rely on its new and incorrect claim that Entergy violated the System Agreement in this case. Entergy contends that these arguments should be rejected because this case does not involve a violation of the System Agreement.[83]

39. Entergy characterizes as unpersuasive the Louisiana Commission's arguments against other equitable factors that would support denying refunds. Entergy contends that the Louisiana Commission's argument that refunds should be ordered because Entergy had notice of the Louisiana Commission's complaint challenging Entergy's production cost allocations should be disregarded because every FPA section 206 complaint is noticed by the Commission. Entergy contends that to the extent that issues about notice

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[81] *Id*. at 4.

[82] *Id*.

[83] *Id*. at 5.

are relevant, they provide an additional basis to reject refunds. Entergy explains that, before Opinion No. 480 was issued, there was no requirement for production costs to be roughly equalized with an 11 percent bandwidth. Entergy contends that it would not be equitable to impose the bandwidth remedy on periods before Opinion No. 480 when parties did not have notice at that time that 11 percent would be the applicable standard and would be applied on an annual basis.[84]

40. Entergy disagrees with the Louisiana Commission's argument that refunds should be granted under FPA section 206(b) because Louisiana customers were significantly harmed by disparities in rough production costs among the Operating Companies during the refund effective period. Entergy explains that when the Commission finds that a zero-sum cost allocation is just and reasonable, it is always the case that one group of parties has been harmed by the cost allocation while another group has benefitted. Entergy contends that the Commission's general policy nonetheless is to deny refunds in cost allocation cases because this harm to one group of customers is outweighed by the other equitable factors counseling against refunds.[85] Entergy adds that, while the amounts at issue in this proceeding are larger than those in the Interruptible Load Proceeding, the Commission has previously ruled that that does not change the equitable analysis.[86]

41. Entergy also disagrees with the Louisiana Commission's contention that delays in this proceeding should alter the equitable analysis. Entergy notes that the Commission previously rejected the Louisiana Commission's argument that refunds should be ordered because the parties agreed to extend the refund period in this case in return for an extension of the procedural schedule.[87] Entergy argues that, to the contrary, in granting the requested proposed procedural extension, the Presiding Judge noted the parties' "understanding that they do not concede that refunds are appropriate under any circumstances, permissible by the Federal Power Act or due and owing."[88] Entergy argues that making the extension a factor in deciding whether to order refunds would be

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[84] *Id*. at 45.

[85] *Id*. at 46 (citing 2016 Interruptible Load Order, 155 FERC ¶ 61,120 at P 36).

[86] *Id*. (citing 2014 Rehearing Order, 146 FERC ¶ 61,152 at P 58).

[87] *Id*. (citing 2014 Rehearing Order, 146 FERC ¶ 61,152 at P 44).

[88] *Id*. (citing Order of Chief Judge Extending Initial Decision Deadline, Docket No. EL01-88-001 at P 2 (issued on Oct. 10, 2002)).

inconsistent with the parties' understanding and the Chief Judge's order approving the extension.

E. Arkansas Commission Reply Brief

42. The Arkansas Commission contends that the Louisiana Commission's belated attempt to revise its theory of the case is unfounded and should be given no credence. The Arkansas Commission disagrees with the Louisiana Commission's argument that the instant case "is a contract compliance proceeding rather than a case seeking a change to an unjust and unreasonable tariff requirement."[89] The Arkansas Commission argues that, contrary to the Louisiana Commission's assertion, the annual bandwidth refund issue is distinguishable from the refund issue in the instant case.[90] The Arkansas Commission argues that the instant case "does not involve a utility that has been unjustly enriched by over-collecting revenues," but, instead, involves whether production costs have been properly allocated among the Operating Companies. The Arkansas Commission argues that, as such, this case presents a situation where the Commission has invoked its equitable discretion not to order refunds.[91] The Arkansas Commission explains that, in contrast, because the annual bandwidth proceedings involve implementation of the filed rate, refunds are appropriate.

43. The Arkansas Commission disagrees with the Louisiana Commission's assertion that the instant refund situation is similar to that in *Blue Ridge* because the Commission "required refunds to enforce the contract, even though the action produced offsetting effects on other ratepayers."[92] The Arkansas Commission explains that the Commission ordered refunds in *Blue Ridge* because one of the parties violated the filed rate.[93] The Arkansas Commission further explains that, in this case, tariff compliance is not the issue. The Arkansas Commission also notes that in *Blue Ridge* the amount of relief allowed could be determined from the four corners of the tariff, whereas in this case the

[89] Arkansas Commission Reply Brief at 1-2 (citing Louisiana Commission Initial Brief at 3).

[90] *Id*. at 5 (citing Louisiana Commission Initial Brief at 32).

[91] *Id*. (citing 2014 Rehearing Order, 146 FERC ¶ 61,152 at P 8).

[92] *Id*. (citing Louisiana Commission Initial Brief at 32-33).

[93] *Id*. (citing *Blue Ridge*, 55 FERC at 61,600).

System Agreement did not specify what relief applied when rough production cost equalization was not being realized.[94]

44. The Arkansas Commission also disagrees with the Louisiana Commission's reliance on *City of Holland* as an example of refunds allowed for "compliance with a tariff requirement in cost allocation cases."[95] The Arkansas Commission explains that *City of Holland* is not a cost allocation case, and that ordering refunds in *City of Holland* was consistent with the Commission's general policy to order refunds for overcharges and for violations of the filed rate. The Arkansas Commission explains that, in contrast, in this case there were no overcharges and Entergy did not violate the System Agreement.

45. The Arkansas Commission also argues that the Louisiana Commission's reliance on *DC Energy* is unfounded because that case addressed a situation unlike this proceeding. The Arkansas Commission explains that, in *DC Energy*, the complainants violated PJM's tariff in a way that allowed them to avoid millions of dollars in deviation charges, and that the governing tariff provision specifically contemplated a remedy in the form of a billing adjustment for up to two years. The Arkansas Commission explains that neither factor is present here.[96]

46. The Arkansas Commission disagrees with the Louisiana Commission's contention that, because the Arkansas Commission has passed through in retail rates all bandwidth surcharges required for refunds in the annual bandwidth cases, any concerns regarding undercollection should not be an issue in this case. The Arkansas Commission contends that its approval of annual bandwidth surcharges does not signal how it would respond to a filing to recover surcharges in the instant proceeding. The Arkansas Commission explains that annual bandwidth payments differ from what is being sought in the instant case in that the bandwidth payments are not refunds and are based on compliance with a specific formula, the bandwidth formula, which did not govern this proceeding. The Arkansas Commission notes that it disallowed a request to recover surcharges in retail rates in the Interruptible Load Proceeding. The Arkansas Commission explains that this disallowance opens the possibility that if a similar challenge were made regarding proposed retail recovery of surcharges in this proceeding, the Arkansas Commission might disallow recovery as prohibited by the Arkansas filed rate doctrine and the rule against retroactive recovery.[97]

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[94] *Id*. at 7.

[95] *Id*. at 8.

[96] *Id*. at 9.

[97] *Id*. at 12.

F. Louisiana Commission Reply Brief

47. The Louisiana Commission argues that Entergy and the Arkansas Commission rely entirely on the Interruptible Load Case as the basis for denying refunds. The Louisiana Commission contends that the instant proceeding involves compliance with a filed rate, rather than a proposed change in the filed rate. The Louisiana Commission explains that Opinion No. 480 did not change the pre-existing terms of the System Agreement. The Louisiana Commission further explains that, instead, Opinion No. 480 added the bandwidth remedy to ensure that payments and receipts would comply with a rough production cost equalization, a central requirement of the filed rate. The Louisiana Commission argues that in *Council of the City of New Orleans*, *La. v. FERC*, the D.C. Circuit held that the rough equalization requirement is rooted in the tariff rather than the FPA.[98] The Louisiana Commission adds that the Commission's general policy requires refunds when payments do not comply with the requirements of a tariff.[99]

48. The Louisiana Commission contends that Entergy and the Arkansas Commission cannot deny that rough equalization was a contract requirement, because they argued to the D.C. Circuit that the System Agreement's withdrawal provision permitted Entergy Arkansas to withdraw from the System Agreement despite the withdrawal's impact on the System Agreement.[100] The Louisiana Commission contends that the D.C. Circuit agreed with this point, finding that "[t]he requirement of rough equalization is rooted in the [System] Agreement. Because rough equalization is tied to the Agreement it was reasonable for FERC to conclude that once a Company leaves the Agreement, it need not continue to make the payments."[101] The Louisiana Commission contends that in Opinion No. 480, the Commission enacted the bandwidth remedy to enforce the contract or rough production cost equalization. The Louisiana Commission explains that Opinion No. 480 restored the rough equalization required by the agreement, which was disrupted during the refund periods. The Louisiana Commission explains that refunds here would ensure contract compliance during those periods.

49. The Louisiana Commission argues that it is a settled practice for the Commission to grant refunds when necessary to restore rough equalization. The Louisiana

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[98] Louisiana Commission Reply Brief at 6-7.

[99] *Id*. at 7 (citing *City of Holland*, 154 FERC ¶ 61,204 at P 37).

[100] *Id*. at 9 (citing Brief of Intervenors Supporting FERC at 19, Nos. 11-1043 and 11-1044 (D.C. Cir.) ("In short, the bandwidth remedy cannot be detached from the underlying System Agreement that spawned it.").

[101] *Id*. (citing *Council of the City of New Orleans*, *La. v. FERC*, 692 F.3d at 177).

Commission explains that in every rough production cost equalization case filed since 2005, whether brought pursuant to FPA section 205 or 206, the Commission has granted full refunds. The Louisiana Commission argues that these numerous refund decisions in rough equalization cases are more than sufficient to establish a "long-standing" practice. The Louisiana Commission adds that when the Commission deviates from a settled practice, "[i]t is the Commission that must provide the substantial evidence to support its departure from long-standing practice."[102]

50. The Louisiana Commission contends that rather than requiring individual filings in each bandwidth case, the Commission has permitted Entergy to make comprehensive refund calculations covering multiple dockets. The Louisiana Commission explains that pursuant to Commission orders, Entergy has made refunds for each bandwidth test year covering multiple issues. The Louisiana Commission explains that, in some cases, Entergy has made multiple refunds to add interest or to implement Commission-ordered adjustments to its refund reports. The Louisiana Commission adds that these refunds were typically made a number of years after the affected test year.[103]

51. The Louisiana Commission argues that the Commission has also granted refunds for the 2005 delay in initially implementing the bandwidth remedy in this proceeding. The Louisiana Commission explains that, in 2011, the Commission ordered that refunds be made to provide for bandwidth payments for June-December 2005.[104] The Louisiana Commission adds that, in rough production cost equalization proceedings, the Commission has never considered any equitable factor before requiring refunds. The Louisiana Commission argues that Entergy itself has delayed refunds in bandwidth cases until years after the fact by waiting to file comprehensive refund calculations after multiple pending cases were resolved.[105] The Louisiana Commission argues that retroactivity and the passage of time were not concerns to Entergy.

52. The Louisiana Commission contends that Entergy admits it failed in its responsibility to maintain rough production cost equalization in Opinion No. 480. The Louisiana Commission contends that, in its Initial Brief, Entergy states that its resource decisions prior to the bandwidth remedy were guided by "perverse economic signals" and

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[102] *Id*. at 10 (citing *Pub. Serv. Comm'n of N.Y. v. FERC,* 642 F.2d 1335, 1346 (D.C. Cir. 1980), 642 F.2d 1335, 1346 (D.C. Cir. 1980)).

[103] *Id*. at 11 (citing, *e.g*., *Entergy Servs., Inc*., 151 FERC ¶ 61,112 (2015) (2006 test year) and *Entergy Servs., Inc*., 156 FERC ¶ 61,195 (2016) (2007 test year)).

[104] *Id*. at 13 (citing 2011 Remand Order, 137 FERC ¶ 61,047 at P 34).

[105] *Id*. at 14.

"irrational incentives" that "impeded orderly and cooperative planning."[106] The Louisiana Commission argues that Entergy did not begin to change its resource planning until it became clear that the Commission would likely adopt a remedy. The Louisiana Commission contends that the new planning approach reportedly was designed to promote rough production cost equalization, but the presiding judge found it to be inadequate. The Louisiana Commission argues that, therefore, Entergy's approach failed in its obligation to plan for rough production cost equalization.[107]

53. The Louisiana Commission contends that, while Entergy may argue that there is no proof that it was imprudent in resource planning prior to Opinion No. 480 and the bandwidth remedy contained therein, imprudence is not the issue. The Louisiana Commission argues that, rather, the issue is contract compliance, and Entergy failed to comply with its contract obligation to roughly equalize production costs. The Louisiana Commission argues that it is ironic for Entergy to use its own failure to abide by the contract as an equitable basis to excuse Entergy from making refunds.[108]

54. The Louisiana Commission argues that Entergy characterizes the System Agreement as a zero-sum cost allocation for the Entergy holding company, since payments are receipts among the Operating Companies and cancel each other out. The Louisiana Commission argues that that point ignores the interrelationship between retail and wholesale rates. The Louisiana Commission explains that, in Arkansas, the System's lowest-cost jurisdiction, Entergy Arkansas avoided rate changes for five years through a negotiated rate freeze preserving discriminatory cost allocations. The Louisiana Commission argues that Entergy earned excess revenues totaling hundreds of millions of dollars in Arkansas through its cost allocation strategies. The Louisiana Commission adds that the Commission generally does not require a finding that a utility over earned in contract compliance cases. The Louisiana Commission contends that this adds another reason for granting refunds in this proceeding.[109]

55. The Louisiana Commission argues that there are equitable factors supporting refunds in this case that were not present in the Interruptible Load Proceeding. The Louisiana Commission contends that, as an accommodation to the Arkansas Commission's request for formal notice and a hearing, all parties settled on using the complaint procedure to implement the Commission-ordered investigation of whether

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[106] *Id*. at 18 (citing Entergy Initial Brief at 25).

[107] *Id*. at 19.

[108] *Id*. at 25.

[109] *Id*. at 27.

rough production cost equalization had been disrupted. The Louisiana Commission explains that that accommodation delayed the proceeding and the Commission's ultimate ruling. The Louisiana Commission also argues that, as an additional equitable factor, all parties agreed to an extension of the refund effective period as the quid pro quo for accommodating Entergy's request for a delay to revise its System planning. The Louisiana Commission explains that that agreement further delayed Opinion No. 480, and that denying refunds would penalize the Louisiana Commission for entering into good-faith agreements.[110]

III. Discussion

A. Procedural Matters

56. We deny the Louisiana Commission's request to file a supplemental reply brief, as the proffered material is unnecessary for us to make our decision.

B. Commission Determination

1. 2018 Interruptible Load Opinion

57. Upon review of the 2018 Interruptible Load Opinion and the briefs submitted in response to the 2018 Order on Voluntary Remand, we reaffirm the Commission's decision to deny refunds for the refund period in this proceeding.

58. The Commission considers whether to require refunds based on the specific facts and equities of each case.[111] In considering that issue here, we find that the considerations relevant to our determinations are similar to those presented in the Interruptible Load Proceeding.[112] In the 2018 Interruptible Load Opinion, the court stated that the Commission's "default" position is to deny refunds in cases in which there is no net over-recovery by the utility.[113] The court also stated that this default position against refunds applies to holding company allocations, including cost allocation cases under the Entergy System Agreement.[114] Like the Interruptible Load Proceeding, this

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[110] *Id*. at 29.

[111] *See Black Oak Energy, LLC v. PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,250, at P 27 (2019).

[112] 2014 Rehearing Order, 146 FERC ¶ 61,152 at P 50.

[113] 2018 Interruptible Load Opinion, 883 F.3d at 932-33.

[114] *Id*. at 933.

case involves a zero-sum allocation of costs among the Operating Companies under the System Agreement.

59. Moreover, as we discuss below, the same three equitable considerations discussed in the 2018 Interruptible Load Opinion are present here: (1) a non-trivial risk of under-recovery from wholesale customers if refunds are ordered; (2) a fair inference that past decisions made in reliance on the prior cost allocation cannot be revisited; and (3) a disjunction between those who would pay surcharges and those who benefited from the prior cost allocation.

60. First, as noted in the 2018 Interruptible Load Opinion, one equitable factor counselling against refunds is a "non-trivial risk" that the utility might under-recover costs if refunds are awarded.[115] The danger of under-recovery is presented where rate design or cost allocation is changed because "[t]he sums that one set of customers lost through allocation of excessive costs will usually be matched by unduly low rates to another set, from whom it would be difficult or inequitable to extract recompense."[116] Here, the risk of under-recovery is significant because it is unclear whether the Arkansas Commission would allow Entergy Arkansas to collect surcharges from Arkansas retail customers to pay for refunds. The Arkansas Commission previously has ruled that recovery through retail rates of the surcharges necessary to fund the refunds sought "is impermissible under Arkansas law because such a pass-through would violate the filed rate doctrine and the rule against retroactive ratemaking."[117] Although the Arkansas Commission has not yet addressed whether the state's filed rate doctrine and rule against retroactive ratemaking would preclude retail rate recovery of the surcharges needed to fund refunds sought in this proceeding, the Arkansas Commission did expressly single out recovery of the refunds as requiring a separate rate filing rather than being flowed through a proposed production cost rider.[118] If Entergy were to make such a filing, it is likely that parties would challenge the proposed recovery as precluded by Arkansas' filed rate doctrine and rule against retroactive ratemaking. We find that those challenges would present a not-insignificant risk that recovery would be disallowed, thus placing Entergy at risk of under-recovery.

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[115] *Id*. at 933-34.

[116] *Id*. at 933; *see Union Electric Co*., 64 FERC ¶ 61,355, at 63,468 (1993) ("Another important basis for our policy to implement rate design changes prospectively is that retroactive implementation might result in an under-recovery of costs.").

[117] 2018 Interruptible Load Opinion, 883 F.3d at 933.

[118] Arkansas Commission Initial Brief at 6.

61. The second equitable factor is that Entergy "cannot review and revisit past decisions were we to order a refund."[119] The Commission has previously noted that refunds may not be appropriate because system operating decisions cannot be revisited and redone. For example, in *Southern*, the Commission found that "operational decisions made while the operating companies' proposed cost classification was in effect, and thus made in reliance on that classification, cannot be undone."[120] The System Agreement that was in effect during the refund effective period included Service Schedules that allocated production and transmission costs among the Operating Companies. However, Entergy's System Agreement did not contain the bandwidth formula, which required that all production costs be roughly equalized among the Operating Companies on a calendar year basis. The bandwidth formula, which was created by the Commission in Opinion No. 480 (issued June 1, 2005), was an entirely new formula that roughly equalized costs among the Operating Companies. This new System Agreement provision required Entergy to roughly equalize production costs among the Operating Companies using a +/- 11 percent bandwidth (from system average), which required Operating Companies with low production costs outside the bandwidth to make payments to Operating Companies with higher production costs.[121]

62. While it is not possible to determine how Entergy's resource planning might have changed if the bandwidth formula had been in effect during the refund effective period, the bandwidth formula unquestionably changed the production cost allocation under the System Agreement. The bandwidth formula required payments among the Operating Companies each calendar year if rough production cost equalization was not maintained. These (often large) annual payments could have altered Entergy's longer term approach to generation planning, and in particular the allocation of generation resources, used during the refund effective period. We find that the reasonable inference that resource and cost allocation decisions during the refund effective period might have been affected by the bandwidth formula is sufficient for the Commission to rely on this equitable factor in denying refunds. As the D.C. Circuit stated in the 2018 Interruptible Load Opinion, this factor does not require specific evidence of particular decisions made in

[119] 2014 Rehearing Order, 146 FERC ¶ 61,152 at P 53.

[120] *Southern Co. Servs*., *Inc.*, Opinion No. 377-A, 64 FERC ¶ 61,033 (1993) (*Southern*).

[121] Opinion No. 480, 111 FERC ¶ 61,311 at P 144.

reliance on the prior System Agreement.[122] This factor has long been a ground for denying refunds.[123]

63. With respect to the third equitable factor, we find that requiring refunds in this proceeding could result in "the disjunction between the beneficiaries of the old regime and those who would have to pay surcharges to ensure that each operating company fully recouped costs retroactively allocated to it."[124] Just as in the Interruptible Load Proceeding, there has been a substantial change in the make-up of Entergy Arkansas' wholesale customer base between the refund effective period (2001-2003) and today.[125] During the refund effective period in this case, Entergy Arkansas had 11 wholesale customers constituting approximately 13.87 percent of its peak load.[126] However, Entergy Arkansas currently has only one wholesale customer – who was not a customer during the refund effective period, and makes up less than .001 percent of Entergy Arkansas' peak load.[127] Accordingly, as in the Interruptible Load Proceeding, it is uncertain whether Entergy Arkansas could recover the full amount of the refunds allocated to wholesale service from this single wholesale customer. We also note that Entergy Arkansas has experienced significant changes to its retail customers since the refund effective period. Entergy Arkansas' largest retail customer today – Big River Steel – was not a customer of Entergy Arkansas during the refund period.[128] If the Commission ordered refunds here and permitted them to be passed through to retail customers, Big River Steel could possibly be subjected to significant charges, even though it did not benefit from prior cost allocations under the System Agreement.

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[122] 2018 Interruptible Load Opinion, 883 F.3d at 934.

[123] *See, e.g., Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983) (denying refunds "because retroactive implementation may result in undercollection by the company and may be unfair to customers who cannot alter their past decisions in light of the new rate design.").

[124] 2018 Interruptible Load Opinion, 883 F.3d at 934.

[125] Entergy Initial Brief at 18.

[126] During the refund effective period, Entergy Arkansas had the following wholesale customers: North Little Rock, Campbell, Thayer, Conway, West Memphis, Osceola, Benton, North Arkansas, Prescott, Farmers, and Ameren. Castleberry Aff. ¶ 6.

[127] *Id*. ¶ 7.

[128] *Id*.

64. These facts also bring FPA section 206(c) to bear in this proceeding. As noted above, FPA section 206(c) provides that in a proceeding under FPA section 206 involving two or more electric utility companies of a registered holding company system, the Commission may order refunds only if it determines that the refunds would not cause the registered holding company to experience any reduction in revenues that resulted from an inability of an electric utility company in the system to recover the resulting increase in costs.[129] In the 2016 Interruptible Load Orders, the Commission found that Entergy Corporation was a registered holding company during the refund effective period,[130] and that the inability of an Entergy Operating Company to recover surcharges for one or more of the reasons discussed above would trigger the prohibition on refunds set forth in FPA section 206(c).[131] Similarly, we cannot find that the Entergy system would not experience a reduction in revenues if the Commission awarded refunds here.

2. The Louisiana Commission's Refund Claims

65. In its Initial Brief, the Louisiana Commission raises a new refund claim, arguing that the Commission should order refunds to remedy an alleged violation of the System Agreement. We find that it is too late in this 17-year-old proceeding for the Louisiana Commission to change its theory of the case and raise for the first time a new refund claim. Until the Louisiana Commission's Initial Brief, the only refund issue present in this proceeding was whether refunds should be ordered under FPA section 206(b) to remedy the Commission's finding that the System Agreement had become unjust and unreasonable or unduly discriminatory. Allowing the Louisiana Commission to raise a new claim now, 17 years after the Louisiana Commission filed its complaint and 15 years after the hearing in this case, would contravene Commission policies against administrative efficiency. Because the Louisiana Commission has had previous opportunities to raise this claim and has failed to do so until now, the Louisiana Commission's claim is untimely.[132]

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[129] 16 U.S.C. § 824e(c); *see supra* P 10.

[130] *See supra* note 10. With the repeal of the Public Utility Holding Company Act of 1935, there are no longer Securities and Exchange Commission-regulated "registered" holding companies. *See* Pub. L. No. 109-58, § 1263, 119 Stat. 594, 974 (2005).

[131] 2016 Interruptible Load Order, 155 FERC ¶ 61,120 at P 36; 2016 Interruptible Load Rehearing Order, 156 FERC ¶ 61,221 at P 67.

[132] *Pac. Gas and Electric Co*., 109 FERC ¶ 61,337, at PP 8, 20 (2004) (affirming administrative law judge determination that it was untimely for a party to raise a new

66. We note that the Louisiana Commission attempted to raise a similar claim in the Interruptible Load Proceeding, which the Commission denied because the case had been in process for 16 years through two prior court remands and the Louisiana Commission "failed to make that claim when it had the opportunity."[133] Allowing the Louisiana Commission to raise its new theory of the case now, after the D.C. Circuit rejected the Louisiana Commission's similar FPA section 309 arguments in the analogous Interruptible Load Proceeding, also would be inconsistent with Commission precedent that disfavors allowing parties to raise a new argument after losing on previously-advanced theories and therefore being given a "second bite at the apple."[134]

67. The Louisiana Commission nevertheless contends that it should be able to raise new arguments at this late date because, according to the Louisiana Commission, recent decisions of the D.C. Circuit and the Commission have clarified that the rough equalization requirement is rooted in the System Agreement rather than in the FPA.[135] The Louisiana Commission argues that, therefore, this case involves enforcement of the filed rate.[136] The Louisiana Commission points to the D.C. Circuit's decision in *Council of the City of New Orleans*, *La. v. FERC*, and the annual cases implementing the bandwidth formula, which noted that Entergy historically engaged in single-system planning and stated that "[t]he requirement of rough equalization is rooted in the [System] Agreement."[137] The Louisiana Commission claims that bandwidth implementation proceedings and *Council of the City of New Orleans*, *La. v. FERC* show that this case involves contract compliance.[138]

68. However, the Louisiana Commission is incorrect in asserting that there has been a change in the law regarding rough production cost equalization that is relevant to its new legal theory. The Commission and the courts have consistently held that where an allocation of costs under the System Agreement did not result in rough production cost

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issue "in a hearing on remand from appellate review, almost three years from its protest to the original filing.").

[133] 2016 Interruptible Load Rehearing Order, 156 FERC ¶ 61,221 at P 69.

[134] *See, e.g., Fla. Power Corp.*, 66 FERC ¶ 61,200, at 61,452 (1994).

[135] Louisiana Commission Initial Brief at 27-28.

[136] *Id*. at 28.

[137] *Id*. (citing *Council of the City of New Orleans*, *La. v. FERC*, 692 F.3d at 176).

[138] *Id*. at 16.

equalization, that allocation violated the FPA, rather than violating the System Agreement. For example, in Opinion No. 480, the Commission held that "[t]his case determines, inter alia, that the allocation of production costs among the Operating Companies in the [System Agreement] is no longer just and reasonable, and establishes a remedy to assure the justness and reasonableness of the System Agreement and the cost allocations thereunder."[139] In its order upholding Opinion Nos. 480 and 480-A, the D.C. Circuit upheld the Commission's decision to adopt the bandwidth formula, as the court found that the formula eliminated undue discrimination under the System Agreement.[140] In other words, the Commission's and the court's prior rulings held that the framework under the System Agreement causes the Operating Companies to be similarly situated with respect to production costs, and, therefore, rough production cost equalization was required to satisfy the FPA's undue discrimination standard.

69. The Louisiana Commission points to *Council of the City of New Orleans*, *La. v. FERC* to support its contention that there has been a recent change in the law. However, that case changes nothing with regard to the Commission's and the court's approach to cost allocation cases. In *Council of the City of New Orleans*, *La. v. FERC*, the D.C. Circuit rejected the Louisiana Commission's argument that an Operating Company that exited the System Agreement must continue making bandwidth payments to those Operating Companies remaining within the system.[141] The D.C. Circuit described the Louisiana Commission's argument as follows:

> The petitioners abandon the Agreement altogether and claim that "rough equalization" payments must continue after the withdrawal because of "Entergy's history of single-System planning." Withdrawal, they contend, will have "disparate consequences" on the remaining Operating Companies, which will then need to charge higher rates to their customers. Because the requirement for rough equalization is "based on these

[139] Opinion No. 480, 111 FERC ¶ 61,311 at P 1. *See also* Opinion No. 480-A, 113 FERC ¶ 61,282 at P 1 ("In this order, we deny rehearing in part and grant rehearing in part of [Opinion No. 480], finding that the allocation of production costs among the Entergy Operating Companies . . . in the [System Agreement] is no longer just and reasonable, and that a bandwidth remedy is necessary to assure the justness and reasonableness of the System Agreement and the cost allocations thereunder.").

[140] 2008 Bandwidth Opinion, 522 F.3d at 393.

[141] *Council of the City of New Orleans*, *La. v. FERC*, 692 F.3d at 175.

> imbalances, not on contract language," the petitioners argue that the payments must continue, potentially forever.[142]

70. The D.C. Circuit held that, because rough equalization is "rooted to" or "tied to" the System Agreement, it was reasonable for the Commission to conclude that an Operating Company that leaves the System Agreement need not continue to make bandwidth payments.[143] The D.C. Circuit's conclusion is consistent with the Commission's precedent regarding the bandwidth remedy because of the integration of the Operating Companies under the System Agreement. It is due to this integration that cost allocations on the Entergy system that do not roughly equalize production costs are unduly discriminatory under the FPA. Similarly, the departure of one Operating Company from the System Agreement terminates that Operating Company's obligation to equalize costs under the System Agreement. *Council of the City of New Orleans, La. v. FERC,* therefore, did not conflict with the legal precedent in this case.

71. The Louisiana Commission also argues that the Commission has granted refunds in a number of bandwidth-related cases, likening those cases to contract enforcement.[144] However, the cases to which the Louisiana Commission refers are the cases in this proceeding providing bandwidth payments and receipts for a seven-month period in 2005,[145] and resulted from the D.C. Circuit's decision to implement the bandwidth remedy as of June 1, 2005 (i.e., the date Opinion No. 480 was issued).[146] In other words, those cases involve the implementation of the filed rate, i.e., the bandwidth formula, with an implementation date as directed by the D.C. Circuit. Those cases, unlike the instant case, "can be viewed as a true-up process that ensures that the filed rate is complied with."[147] In the instant case, unlike the cases relied upon by the Louisiana Commission, there was no filed formula rate addressing rough production cost equalization for the refund effective period. Accordingly, the orders cited by the Louisiana Commission are

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[142] *Id*. at 176-77 (citations omitted).

[143] *Id*. at 177.

[144] Louisiana Commission Initial Brief at 30.

[145] *See* 2011 Remand Order, 137 FERC ¶ 61,047 at PP 33-34; 2014 Rehearing Order, 146 FERC ¶ 61,152 at PP 33-40.

[146] 2008 Bandwidth Opinion, 522 F.3d at 398.

[147] 2016 Interruptible Load Rehearing Order, 156 FERC ¶ 61,221 at P 36.

not applicable and do not support the Louisiana Commission's argument that this case should be treated as one of contract enforcement.

72. Similarly, because we disagree with the Louisiana Commission's contention that this is a contract enforcement case, the Louisiana Commission's reference to *Blue Ridge* is unavailing. In *Blue Ridge*, the Commission looked "at the four corners of the filed rate schedule" to determine what relief was allowed from the sale/leaseback at issue.[148] The opposite situation exists in the instant case, where the System Agreement did not specify what relief applied when rough production cost equalization was not realized.[149] Similarly, *City of Holland* and *DC Energy* also involved application of a filed rate and are inapposite to the situation in this proceeding. [150]

73. We also are not persuaded by the additional equitable factors raised by the Louisiana Commission, each of which has previously been found insufficient by the Commission, either in this proceeding or in the Interruptible Load Proceeding. First, the Louisiana Commission contends that all parties that would be affected by refunds were on notice well in advance of the refund period that rates had to conform to the rough production cost equalization requirement, and that any deviation would be corrected.[151] However, notice does not, by itself, provide an equitable reason for granting refunds. If notice of a complaint in and of itself provided an equitable basis for providing refunds, then such a finding would apply in every case.

74. Second, we disagree with the Louisiana Commission's contention that detrimental impact on Louisiana customers is a sufficient reason to order refunds

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[148] *Blue Ridge*, 58 FERC at 61,600.

[149] Opinion No. 480, 111 FERC ¶ 61,311 at P 140.

[150] Similarly, the Louisiana Commission argues that the Commission distinguished bandwidth cases as tariff enforcement proceedings in a brief submitted to the D.C. Circuit. However, the brief cited by the Louisiana Commission was referencing the Interruptible Load Rehearing Order, wherein the Commission found that the annual bandwidth cases, which implement the bandwidth formula and calculate payments and receipts, can be distinguished from the Interruptible Load Proceeding, where the filed rate was complied with but subsequently found to be unjust and unreasonable. Interruptible Load Rehearing Order, 156 FERC ¶ 61,221 at PP 36-38.

[151] Louisiana Commission Initial Brief at 47.

in this proceeding.[152] When the Commission finds in a cost allocation proceeding that a particular cost allocation is unjust and unreasonable, it is always the case that one group of parties has been harmed by that cost allocation while another group has benefited. In the 2016 Interruptible Load Order, the Commission explained:

> While it may be inequitable that some customers paid too much under the filed rate, the Commission also considers the equities involved in assessing additional charges on customers who were not responsible for the misallocation but who would be required to make additional payments for past purchases they reasonably concluded were final and cannot revisit.[153]

The Commission stated that in these situations, in balancing these equities, the Commission has traditionally denied refunds and made new, corrected rates applicable prospectively.[154]

75. Third, the Louisiana Commission argues that a strong equitable factor in this proceeding is that all parties agreed to an extension of the refund period in return for the delay in the procedural schedule. However, the Commission previously addressed this same argument in this proceeding in the 2014 Rehearing Order. In that order, the Commission ruled that it was not persuaded "that the procedural delays cited by the Louisiana Commission warrant a decision here other than the substantively appropriate decision, i.e., such delays do not warrant a departure from our general rule that new cost allocations or rate designs . . . will run prospectively from the date of issuance of the order and that refunds will not lie."[155] The Louisiana Commission has given us no reason to change that determination here.

76. In sum, upon review of the 2018 Interruptible Load Opinion and the pleadings submitted in response to the 2018 Order on Voluntary Remand, we find – as the Commission has found consistently in this proceeding – that the equitable considerations discussed by the parties do not support granting refunds, and the Louisiana Commission's request that we consider a new theory of this case is accordingly denied.

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[152] Louisiana Commission Initial Brief at 50.

[153] 2016 Interruptible Load Order, 155 FERC ¶ 61,120 at P 36.

[154] *Id*.

[155] 2014 Rehearing Order, 146 FERC ¶ 61,152 at P 58.

The Commission orders:

We hereby affirm that refunds are not appropriate under the circumstances presented in this case, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.