169 FERC ¶ 61,113
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. EL19-50-000

v.

Entergy Corporation
Entergy Services, LLC
Entergy Louisiana, LLC
Entergy Arkansas, LLC
Entergy Mississippi, LLC
Entergy New Orleans, LLC
Entergy Texas, Inc.

ORDER DENYING COMPLAINT

(Issued November 21, 2019)

1. On February 27, 2019, the Louisiana Public Service Commission (Louisiana Commission) filed, pursuant to sections 205, 206, 306, and 309 of the Federal Power Act (FPA)[1] and Rules 206 and 207 of the Commission's Rules of Practice and Procedure,[2] a complaint (Complaint) against Entergy Corporation and its subsidiaries[3] alleging that certain off-system sales of electric energy by Entergy Services to third-party power marketers and others for the benefit of Entergy Arkansas violated the provisions of

---

[1] 16 U.S.C. §§ 824d, 824e, 825e, 825h (2018).

[2] 18 C.F.R. §§ 385.206, 385.207 (2019).

[3] These subsidiaries are Entergy Arkansas, LLC (Entergy Arkansas), Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, LLC, Entergy New Orleans, LLC (Entergy New Orleans), and Entergy Texas, Inc. (Entergy Texas) (collectively, Operating Companies) and Entergy Services, LLC (Entergy Services).

Entergy's generation and transmission pooling arrangement (System Agreement). In this order, we deny the Complaint.

I. Background

A. Entergy System Agreement

2. The System Agreement was a 1982 contract that provided for the planning and operating of the Operating Companies' generation and bulk transmission facilities on a coordinated, single-system basis.[4] Service Schedules MSS-1 through MSS-8 to the System Agreement governed the basis for compensation for the use of facilities and for the capacity and energy provided or supplied by one or more Operating Companies under the System Agreement, and contained formulas providing for the allocation of costs and revenues among the Operating Companies.

B. Docket No. EL09-61-000 Complaint

3. On June 29, 2009, the Louisiana Commission filed a complaint in Docket No. EL09-61-000 against Entergy alleging that certain sales by Entergy Services on behalf of Entergy Arkansas to third-party power marketers and other parties that are not members of the System Agreement[5] were imprudent and violated the terms of the System Agreement. The Louisiana Commission alleged that these sales: (1) violated the provision of the System Agreement that prohibits sales of excess capacity and energy to third parties by individual Operating Companies absent an offer of a right of first refusal to the other Operating Companies; (2) violated the provisions of the System Agreement that allocate the energy generated by System resources; (3) imprudently denied the System and its ultimate customers the benefits of low-cost System generating capacity; and (4) imprudently impaired a Commission-ordered remedy to ensure rough equalization of production costs among the Operating Companies.[6]

---

[4] Entergy Arkansas withdrew from the System Agreement effective December 18, 2013 and Entergy Mississippi withdrew effective November 7, 2015. On December 29, 2015, the Commission approved a settlement agreement filed on August 14, 2015 that terminated the System Agreement (2015 Settlement Agreement) effective August 31, 2016. *See Entergy Ark., Inc.*, 153 FERC ¶ 61,347 (2015) (2015 Settlement Agreement Order).

[5] These sales were referred to as "Opportunity Sales" in that proceeding.

[6] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 129 FERC ¶ 61,205, at P 5 (2009).

4. The Commission set the complaint for hearing and settlement judge procedures and, in Opinion No. 521,[7] the Commission determined that Entergy Arkansas had authority to make the Opportunity Sales under the System Agreement but that Entergy had violated the System Agreement by including the sales in Entergy Arkansas' native load under System Agreement section 30.03 and allocating low cost energy to those sales instead of allocating higher cost energy as "Sales to Others" under System Agreement section 30.04. The Commission established hearing procedures to determine refunds and on April 21, 2016, in Opinion No. 548,[8] the Commission required a further hearing to determine refunds and required that Entergy re-run the Intra-System Bill to determine damages from the Opportunity Sales.

5. On October 18, 2018, the Commission issued Opinion No. 565[9] finding, as relevant here, that two of the System Agreement violations alleged by the Louisiana Commission were outside the scope of the damages proceeding. First, the Commission found that sales from Entergy Arkansas' share of the Grand Gulf nuclear facility[10] for January through September 2000 were already accounted for as Joint Account Sales (sales made on behalf of all the Operating Companies collectively) under section 30.04 of the System Agreement and were not improperly allocated under section 30.03 and thus did not belong in the calculation of damages caused by the Opportunity Sales.[11] The Commission found the issue of whether Entergy Arkansas was over-compensated for energy to supply the Grand Gulf sales from January through September 2000, resulting in harm to the other Operating Companies, to be beyond the scope of the damages proceeding.[12] Second, concerning Opportunity Sales made on behalf of Entergy Arkansas that Entergy had subsequently converted, in part, to Joint Account Sales because Entergy Arkansas did not have enough resources to fully source those sales as

---

[7] *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 521, 139 FERC ¶ 61,240 (2012) (Phase I).

[8] *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548, 155 FERC ¶ 61,065 (2016) (Phase II).

[9] *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 565, 165 FERC ¶ 61,022 (2018) (Phase III or damages proceeding).

[10] Grand Gulf is a nuclear generating unit owned by System Energy Resources, Inc., an Entergy affiliate. Four of the Operating Companies, including Entergy Arkansas, purchased capacity from Grand Gulf in fixed percentages known as "retained shares."

[11] Opinion No. 565, 165 FERC ¶ 61,022 at PP 102-104.

[12] *Id.* PP 104-107.

Opportunity Sales, the Commission affirmed, on other grounds, the Presiding Judge's rejection of the Louisiana Commission's claim that those Opportunity Sales caused harm that should be accounted for as part of the damages, finding the Louisiana Commission's claims also to be beyond the scope of the damages proceeding.

II. Complaint

6. In the Complaint, the Louisiana Commission argues that: (1) Entergy made sales from Entergy Arkansas' Grand Gulf Retained Share,[13] from January through September 2000,[14] that violated cost provisions in the System Agreement for determining the reimbursement due for generating electricity for off-system sales, denied Entergy system customers the benefit of correctly-calculated margins earned on the off-system sales, and harmed Entergy system customers by denying them the benefit of capacity that they supported through FERC cost allocation (2000 Retained Share Sales); and (2) Entergy imprudently made off-system sales, originally made as Opportunity Sales but then later converted to Joint Account Sales, from 2000 to 2005, and required Entergy system customers to absorb the cost of uneconomic sales made so that stockholders could profit on off-system Opportunity Sales made for the account of Entergy Arkansas in violation of the System Agreement.[15]

A. 2000 Retained Share Sales

7. The Louisiana Commission contends that the 2000 Retained Share Sales were accounted for with an inflated avoided cost for energy that violated the System Agreement. The Louisiana Commission states that the Commission found in Opinion

[13] As discussed further below, pursuant to a settlement agreement approved by the Arkansas Public Service Commission (Arkansas Commission) on September 9, 1985 (1985 Arkansas Settlement), Entergy Arkansas is authorized to include its allocated portion of Grand Gulf in retail rates, with the exception of a carved out portion of the allocated share of which Entergy Arkansas is not allowed to recover actual costs in retail rates (termed the Grand Gulf Retained Share). Instead, Entergy Arkansas is authorized by the Arkansas Commission to sell the Grand Gulf Retained Share to third parties and, in the event Entergy Arkansas does not sell the Grand Gulf Retained Share to third parties, Entergy Arkansas has the right to sell the energy to Entergy Arkansas' retail customers at avoided cost.

[14] The Louisiana Commission refers to these sales as the "2000 Retained Share Sales" in the Complaint.

[15] The Louisiana Commission refers to these sales as the "Packaged Sales" in the Complaint.

No. 565 that the 2000 Retained Share Sales were properly accounted for as Joint Account Sales and thus should not have been included in the damages calculation. The Louisiana Commission argues that an Operating Company that generated electricity for a Joint Account Sale was supposed to be reimbursed "the current estimated cost of fuel used by the specific unit or units supplying the energy," plus a small adder applicable only to fossil generating units.[16] According to the Louisiana Commission, the remaining amount, the net margin, was then supposed to be credited to the Operating Companies to help offset Entergy system generation costs. The Louisiana Commission alleges that, instead of applying the fuel plus adder energy cost to the 2000 Retained Share Sales, Entergy Services assigned a higher avoided cost to the sales, which left a smaller margin to be distributed among the Operating Companies.[17]

8. The Louisiana Commission contends that assigning an avoided cost to the 2000 Retained Share Sales violated the provisions of Service Schedule MSS-3 of the System Agreement. The Louisiana Commission argues that, during the period of January through September 2000, Entergy Services' violation of the System Agreement cost the Operating Companies other than Entergy Arkansas $7.2 million and that the proper remedy for this violation is to reinstate the actual fuel cost for the sales and allocate the margins to the Operating Companies based on their responsibility ratios.[18]

9. The Louisiana Commission acknowledges that the 1985 Arkansas Settlement authorized Entergy Arkansas to sell the Grand Gulf Retained Share output to third parties and allowed the proceeds from such sales to inure solely to the benefit of Entergy Arkansas stockholders. The Louisiana Commission argues that while the 1985 Arkansas Settlement relieved Arkansas retail ratepayers of partial cost responsibility, it had no effect on the wholesale cost allocations, which required other Operating Companies to bear allocated responsibilities for the Grand Gulf Retained Share.[19]

B. Packaged Sales

10. The Louisiana Commission alleges that Entergy Services made several Opportunity Sales on behalf of Entergy Arkansas from 2000 to 2005 that were partially converted to

---

[16] Complaint at 18 (citing System Agreement § 30.04 (Energy for Sales to Others)).

[17] *Id.* at 17-18.

[18] *Id.* at 17, 21, 25.

[19] *Id.* at 19, 25-26.

Joint Account Sales from 2000 to 2005 and that, when converted, were made at a loss to the Entergy system. The Louisiana Commission argues that these uneconomic sales required Entergy system customers to absorb the cost of uneconomic sales made so that shareholders could profit on off-system Opportunity Sales made for the account of Entergy Arkansas.[20]

11. The Louisiana Commission argues that Entergy Services was imprudent to enter into transactions for Entergy Arkansas when it knew or should have known that the Entergy system did not have economic energy to support the sales. The Louisiana Commission states that during Phase III of the Docket No. EL09-61 proceeding, Entergy asserted that Entergy Services did not contemplate that Entergy Arkansas did not have enough resources to make the sales, but according to the Louisiana Commission, this claim is dubious. The Louisiana Commission contends that most of the Packaged Sales involved the Grand Gulf Retained Share, which had a known maximum capacity of 91 MW. The Louisiana Commission argues that, when Entergy Services, on behalf of Entergy Arkansas, agreed to supply energy in larger blocks to off-system customers, it had to know that the energy from the Grand Gulf Retained Share would be insufficient. Additionally, the Louisiana Commission argues that the Opportunity Sales were made a month or several weeks ahead of the scheduled deliveries when Entergy Services had no assurance that the Joint Account Sales portions of the Packaged Sales would not impose losses on Entergy system customers.[21]

12. The Louisiana Commission argues that Entergy Services' accounting for the Packaged Sales violated the System Agreement because the margins from those sales were allocated to all Operating Companies pursuant to Service Schedule MSS-5, and not directly to Entergy Arkansas.[22] The Louisiana Commission contends that Opinion Nos. 521 and 548 held that Opportunity Sales margins are to remain with the Operating Company that made the individual sales. The Louisiana Commission argues that the Packaged Sales are Opportunity Sales initiated by Entergy Services on behalf of Entergy Arkansas and, therefore, margins from those sales should be allocated directly to Entergy Arkansas. The Louisiana Commission also argues that allocating the Packaged Sales

---

[20] During some hours when Opportunity Sales occurred Entergy Arkansas did not have enough resources to fully source an individual sale and, consequently, the remainder of the sale was treated after-the-fact as a Joint Account Sale. *See id.* at 27.

[21] *Id.* at 26-31.

[22] The Louisiana Commission argues that Service Schedule MSS-5 only directs "the distribution among the Companies of the net balance received *from sales to others for the joint account of all the Companies*." *Id.* at 32 (emphasis by the Louisiana Commission).

margins to all Operating Companies, as Entergy Services did, violated the requirement that a company making Opportunity Sales must assume sole responsibility for them.

13. The Louisiana Commission also argues that the Packaged Sales violated other sections of the System Agreement that require sales to be made on an economical basis. The Louisiana Commission argues that the central purpose of the System Agreement was violated because the sales resulted in economic harm at the expense of other Operating Companies and did not preserve the cheapest resources for the benefit of native load customers.[23]

III. Notice of Filing and Responsive Pleadings

14. Notice of the Complaint was published in the *Federal Register*, 84 Fed. Reg. 8,330 (2019), with interventions and protests due on or before March 19, 2019. Texas Industrial Energy Consumers filed a timely motion to intervene. The Mississippi Public Service Commission, the Council of the City of New Orleans, Louisiana, and the Public Utility Commission of Texas each filed a notice of intervention. The Arkansas Commission filed a notice of intervention and protest.

15. On March 19, 2019, Entergy filed an answer to the Complaint and a motion to dismiss. On April 3, 2019, the Louisiana Commission filed an answer to Entergy's answer and the Arkansas Commission's protest. On May 7, 2019, Entergy filed an answer to the Louisiana Commission's April 3 answer. On May 14, 2019, the Louisiana Commission filed an answer to Entergy's May 7 answer.

A. Responsive Pleadings

1. Answer to Complaint

16. Entergy argues that the Commission should dismiss the Complaint because the Louisiana Commission waived its claims in the 2015 Settlement Agreement that terminated the Entergy Service Agreement.[24] Entergy contends that the parties to the 2015 Settlement Agreement

> irrevocably waive[d] and release[d] any rights, claims, remedies, or causes of action they may have against any other . . . [p]arty arising out of or relating to the [Entergy]

[23] *Id.* at 32-33.

[24] Entergy Answer at 1, 5-7 (citing Settlement Agreement Order, 153 FERC ¶ 61,347).

> System Agreement that are not filed and served upon the applicable parties as of the filing of the Settlement Agreement . . . .[25]

17. Accordingly, Entergy argues, the Louisiana Commission's claims must be dismissed because they arise out of and relate to the System Agreement, pertain to the manner in which Entergy Services accounted for certain sales pursuant to the System Agreement, and because the Louisiana Commission first raised the issues that are the basis of the Complaint over a year after the 2015 Settlement Agreement was filed on August 14, 2015. Entergy argues that, contrary to the Louisiana Commission's assertion that it previously raised these claims in the Docket No. EL09-61 proceeding, it was not until the Louisiana Commission made its direct and rebuttal cases in Phase III of the Docket No. EL09-61 proceeding (filed on November 18, 2016 and March 24, 2017, respectively) that the Louisiana Commission argued alleged harm to the Entergy system or System Agreement violations based on the sales at issue in the Complaint.[26]

18. Entergy also argues that the Complaint should be dismissed because the Louisiana Commission's allegations have no merit and the Louisiana Commission has failed to meet its burden under section 206 of the FPA.[27] Regarding the 2000 Retained Share Sales, Entergy contends that under the 1985 Arkansas Settlement, Entergy Arkansas is authorized to sell the Grand Gulf Retained Share output to third parties, and the proceeds from such sales inure solely to the benefit of Entergy Arkansas stockholders. Entergy states that, in the event that Entergy Arkansas does not sell Grand Gulf Retained Share energy to third parties, it has the right to sell that energy to Entergy Arkansas' retail customers at avoided cost.[28]

19. Entergy claims that it reimbursed Entergy Arkansas using the appropriate measure required by section 30.04 of the System Agreement for the Joint Account Sales of Grand

---

[25] *Id.* at 5 (citing 2015 Settlement Agreement § G(1), Docket No. ER14-75-000, *et al.* (filed Aug. 14, 2015)).

[26] *Id*. at 6.

[27] *Id.* at 2, 7-11.

[28] Entergy states that the Arkansas Commission defines the avoided cost at which Entergy Arkansas' Grand Gulf Retained Share energy can be sold to retail customers as "the avoided cost as filed with the [Arkansas] Commission pursuant to [Entergy Arkansas]'s Cogeneration Service Rider M-23 or any superseding rate schedule." *Id.* at 8-9.

Gulf Retained Share energy from January through September 2000.[29] Entergy states that the cost of exercising the option to sell Entergy Arkansas' Grand Gulf Retained Share capacity to wholesale was the foregone cost of not putting that power to Arkansas retail customers, or, in other words, avoided cost. Entergy argues that the Louisiana Commission changed its position in Phase III of the Docket No. EL09-61 proceeding, alleging that Entergy Services violated the System Agreement by pricing Joint Account Sales made from January through September 2000 and sourced from the Grand Gulf Retained Share capacity at avoided cost. Contrary to the Louisiana Commission's claim that Entergy Services engaged in such pricing to provide Entergy Arkansas' shareholders with unjust profits, Entergy argues that no profits were realized from those sales and that the Louisiana Commission has no evidence to show otherwise.[30]

20. Regarding the Complaint's allegations concerning the Packaged Sales, Entergy argues that these off-system sales occurred in limited instances when Entergy Services entered into an Opportunity Sale on Entergy Arkansas' behalf but Entergy Arkansas did not have sufficient resources to supply the entirety of the sale and that, in those circumstances, Entergy Services elected to have the Entergy system supply that portion of the sale that Entergy Arkansas could not. Entergy states that Entergy Services accounted for that portion of the sale as a Joint Account Sale. Entergy also argues that the Louisiana Commission's allegations with regard to the Packaged Sales are insupportable because, contrary to its argument that the sales violated the central purpose of the System Agreement because they were uneconomical and unprofitable, margins on a Joint Account Sale, whether positive or negative, are calculated after-the-fact without regard to the circumstances existing at the time the decision was made to enter into the transaction. Therefore, Entergy argues, the negative margins resulting from the Joint Account Sales from 2000 to 2005 do not determine whether the Joint Account Sales were uneconomic, unprofitable, or cause harm to the Entergy system.[31] Additionally, Entergy argues that a Louisiana Commission

---

[29] *Id.* at 9.

[30] *Id*. (citing Joint Statement of Issues and Witness List, Docket No. EL09-61-004, at 3).

[31] Entergy also notes that a Louisiana Commission witness in the Docket No. EL09-61 proceeding conceded that simply because a Joint Account Sale results in a negative margin does not make the Joint Account Sale uneconomic, and that circumstances existing at the time the sales transaction was entered into must be considered. *Id.* at 10-11 (citing Tr. at 339-340, Docket No. EL09-61-004 (Hayet cross)).

witness testified that the concerns regarding the Packaged Sales did not constitute a System Agreement violation.[32]

21. Further, Entergy argues that any challenge to the prudency of Entergy Arkansas' and Entergy Services' conduct with respect to the Packaged Sales was raised and rejected in the Docket No. EL09-61 proceeding and should not be relitigated again in this new complaint docket. Specifically, Entergy argues that the Louisiana Commission failed to meet its burden of proof in the Docket No. EL09-61 proceeding regarding its allegation that the Packaged Sales were imprudent. Entergy argues that Entergy Services made and priced the Packaged Sales in good faith.[33]

22. Entergy also argues that, if the Commission does not dismiss the Complaint, the Commission should nonetheless determine that retroactive remedies are inappropriate in this proceeding. Entergy argues that, given that the sales at issue in this proceeding occurred at least 14 years ago and that the Louisiana Commission and Entergy Services and others entered into the 2015 Settlement Agreement to resolve claims arising out of the System Agreement, the Commission should exercise its broad discretion by declining to implement refunds.[34]

2. Arkansas Commission's Protest

23. The Arkansas Commission argues that the Commission should deny the Complaint because it is based on misleading and inaccurate information and unsubstantiated allegations. The Arkansas Commission contends that the 2000 Retained Share Sales were properly classified as Joint Account Sales under section 30.04 of the System Agreement. The Arkansas Commission argues that the Louisiana Commission does not provide factual support for its claim that the other Operating Companies and ratepayers subsidized Entergy Arkansas' Grand Gulf Retained Share and that the Commission would have allocated more Grand Gulf to Entergy Arkansas had the Grand Gulf Retained Share been excluded from the allocation formula.[35] The Arkansas Commission also argues that it did not collude with Entergy Arkansas for the treatment of the 2000 Retained Share Sales, and did not attempt to regulate wholesale sales rates through the terms of the 1985 Arkansas Settlement, as the Louisiana Commission asserts. The Arkansas Commission argues that Entergy Arkansas

---

[32] *Id.* at 11 (citing Tr. at 337, 365-367, 382-383, Docket No. EL09-61-004 (Hayet cross)).

[33] *Id.* at 11 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136).

[34] *Id.* at 17-18.

[35] Arkansas Commission Protest at 4-5.

was authorized to sell the energy available from its Grand Gulf Retained Share to third parties and if it was not able to sell that energy to third parties then it was authorized to sell that capacity to its retail customers at a price equal to its avoided cost pursuant to the 1985 Arkansas Settlement. The Arkansas Commission also argues that the 1985 Arkansas Settlement determined the ratemaking treatment, and costing and pricing, of Entergy Arkansas' Grand Gulf Retained Share at retail exclusively and not at wholesale. The Arkansas Commission argues that the establishment of Arkansas' retail rates rests properly with the Arkansas Commission.[36]

3. Louisiana Commission's April 3 Answer

24. The Louisiana Commission argues that Entergy Arkansas was not a party to the 2015 Settlement Agreement[37] and, therefore, the 2015 Settlement Agreement does not exonerate Entergy Arkansas in this case. The Louisiana Commission states that it has not alleged that the Operating Companies that were Settling Parties to the 2015 Settlement Agreement violated the System Agreement but that the Complaint makes clear that these parties and their customers were the victims of the violation. The Louisiana Commission also argues that, even if the 2015 Settlement Agreement did apply in this case, the 2015 Settlement Agreement excludes disputes concerning cost allocations as the agreement provided that "[t]his Settlement Agreement shall have no effect on cost allocation disputes affecting costs incurred prior to January 1, 2016."[38]

25. Further, the Louisiana Commission argues that the violations concerning the two sets of off-system sales at issue in the Complaint involve the same substantive violations as the complaint in the Docket No. EL09-61 proceeding.[39] The Louisiana Commission therefore

---

[36] *Id.* at 3-9.

[37] The Settling Parties to the 2015 Settlement Agreement include: Entergy Services, Entergy Texas, Entergy Louisiana, Entergy Gulf States, Louisiana, L.L.C., Entergy New Orleans, the Louisiana Commission, the Council for the City of New Orleans, and the Public Utility Commission of Texas. *See* 2015 Settlement Agreement at n.1, Docket No. ER14-75-000, *et al.* (filed Aug. 14, 2015).

[38] Louisiana Commission April 3 Answer at 2, 5 (citing 2015 Settlement Agreement § G(2), Docket No. ER14-75-000, *et al.* (filed Aug. 14, 2015)).

[39] The Louisiana Commission provides excerpts from its complaint in Docket No. EL09-61 to support its argument that the two proceedings concern the same violations, including the following:

> The [Docket No. EL09-61] Complaint seeks a ruling that sales of electric energy by Entergy Arkansas[] to third-party

asserts that Entergy's argument that the Louisiana Commission waived its claim because it was "not filed and served upon the applicable parties as of the filing of the Settlement Agreement" is incorrect.[40] The Louisiana Commission notes that Entergy itself identified the sales at issue in this proceeding as within the scope of the Docket No. EL09-61 proceeding when Entergy produced spreadsheets identifying the Entergy Arkansas Opportunity Sales in response to a Louisiana Commission data request. The Louisiana Commission also argues that the Commission found that the 2000 Retained Share Sales were within the scope of the Docket No. EL09-61 complaint based on Entergy's factual representations regarding the sales.[41] The Louisiana Commission argues that Entergy then changed its story in Phase III of Docket No. EL09-61, i.e., the damages phase, and contended that the January through September 2000 Retained Share Sales should be excluded from the remedy in that proceeding based on the argument that they were not within the specific violation found in Opinion No. 521 —i.e., that Entergy had priced the sales as if they were Entergy's native load. Accordingly, the Louisiana Commission argues

---

> power marketers and others that are not members of the System Agreement: a) violated the provisions of the System Agreement that allocate the energy generated by System resources, b) imprudently denied the System and its ultimate consumers the benefits of low-cost System generating capacity, and c) violated the provision of the System Agreement that prohibits sales to third parties by individual companies absent an offer of a Right-of-First-Refusal to the other companies . . . .
>
> Entergy through Entergy Arkansas[] engaged in sales of low-cost energy to unaffiliated third parties -- power marketers and others -- from low-cost base load System resources, thus requiring the use of higher-cost resources to serve the System's requirements. Entergy made these sales, in violation of the provisions of the System Agreement and the requirement of prudent utility practice, to benefit the Entergy shareholder, and in the process harmed System ratepayers.

Id. at 6 (citing Louisiana Commission Complaint, Docket No. EL09-61-000, at PP 1, 4 (filed June 29, 2009)).

[40] *Id.* at 4-6 (citing 2015 Settlement Agreement § G(1), Docket No. ER14-75-000, *et al.* (filed Aug. 14, 2015)).

[41] *Id.* at 8 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 8, n.13).

that the Commission never ruled that those sales were not included within the scope of the overall complaint.[42] The Louisiana Commission also argues that Entergy's change of position led to the exclusion of the sales from the Docket No. EL09-61 proceeding but that this did not happen until after the approval of the 2015 Settlement Agreement, which means the 2015 Settlement Agreement could not apply to those sales.[43] The Louisiana Commission argues that, in the event the Commission determines that the 2015 Settlement Agreement applies in this case, the Commission should apply the doctrine of equitable estoppel to prevent Entergy from changing positions after inducing reliance on its prior position.[44]

26. The Louisiana Commission does not dispute that the Arkansas Commission allowed Entergy Arkansas to sell the Grand Gulf Retained Share at avoided cost at retail, but argues that the Arkansas Commission's ruling could not affect wholesale rates and does not justify a wholesale tariff violation.[45] The Louisiana Commission also argues that the Complaint does not allege collusion, contrary to the Arkansas Commission's allegation in its protest. The Louisiana Commission states that it agrees with the Arkansas Commission's position that its retail order could only apply to retail ratemaking. The Louisiana Commission contends that the System Agreement did not permit assigning an avoided cost to the 2000 Retained Share Sales, and that the Arkansas Commission's protest confirms that the 1985 Arkansas Settlement "avoided cost" applied "for retail purposes" and "determined the ratemaking treatment, and costing and pricing, of [Entergy Arkansas'] allocated Retained Share *at retail exclusively*, and not at wholesale."[46]

27. In response to Entergy's argument that negative margins resulting from the Packaged Sales do not determine whether the sales were uneconomic, the Louisiana Commission argues that, although it is true that Joint Account Sales sometimes produced small losses because the forecast of Entergy system energy costs made a day ahead or hours ahead of the energy delivery was incorrect, the sales more often produced benefits because the forecast was generally accurate. The Louisiana Commission asserts that the Packaged Sales were unique because they were made a month or more ahead of the

---

[42] *Id.* (citing Opinion No. 565, 165 FERC ¶ 61,022 at P 103).

[43] *Id.*

[44] *Id.* at 10-11 (citing *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878 (6th Cir. 2002); *Meyerson v. Werner*, 683 F.2d 723 (2d Cir. 1982)).

[45] *Id.* at 3.

[46] *Id.* at 12-13 (citing Arkansas Commission Protest at 6-7 (emphasis by Arkansas Commission)).

scheduled delivery even though Entergy Services had a policy of not making Joint Account Sales that far ahead.[47]

28. The Louisiana Commission also contends that the prudency of the Packaged Sales was not determined in the Docket No. EL09-61 proceeding as Entergy claims.[48] The Louisiana Commission reiterates its argument that Entergy Services committed to supply additional Joint Account Sale energy needed to make the Packaged Sales on behalf of Entergy Arkansas, in violation of its own practice that was designed to avoid losses to consumers, which makes the actions imprudent.[49] The Louisiana Commission accepts that Joint Account Sales sometimes produced small losses because of incorrect forecasts made a day ahead or hours ahead of energy delivery, but argues that these forecasts were generally accurate and that the Packaged Sales are not comparable because they were made a month or more ahead of the scheduled delivery. The Louisiana Commission also disagrees with Entergy that the prudency of the Packaged Sales was determined in the Docket No. EL09-61 proceeding. The Louisiana Commission argues that the Commission only determined that the Packaged Sales were outside the scope of the proceeding and made no decision concerning the prudency of the sales.

4. Entergy's May 7 Answer

29. Entergy argues that the Louisiana Commission is a signatory to and therefore bound by the 2015 Settlement Agreement and that it waived and released the claims brought in the Complaint. Noting that the Louisiana Commission states that it has not alleged that the Operating Companies that were Settling Parties violated the System Agreement, Entergy asserts that the Louisiana Commission however named Entergy Services and all of the Operating Companies as respondents to the Complaint. Entergy argues that the Louisiana Commission's claims necessarily implicate not just Entergy Arkansas but all the Operating Companies that were parties to the 2015 Settlement Agreement, because the Louisiana Commission's proposed remedy of refunds would require re-running the Entergy monthly Intra-System billing system to change the accounting for the sales, thereby resulting in a reallocation of costs among all the Operating Companies. Entergy argues that, because the System Agreement governs all such sales at issue in the Complaint and determines how the cost and benefits of such sales are allocated and shared among all the Operating Companies, the waiver and release provisions of the 2015 Settlement Agreement apply to the claims

---

[47] *Id.* at 15.

[48] *Id.* at 16.

[49] *Id.*

asserted in the Complaint regardless of whether Entergy Arkansas was a party to the 2015 Settlement Agreement.[50]

30. Entergy also argues that the Louisiana Commission misinterprets Paragraph G(2) of the 2015 Settlement Agreement. Entergy contends that the Louisiana Commission takes a single sentence out of context to support its claim that the waiver and release provisions set forth in Paragraph G(1) did not encompass its claims regarding the sales at issue in the Complaint. Entergy argues that Paragraph G(2) pertains exclusively to final implementation of rough production cost equalization via the annual bandwidth calculation[51] and that the single sentence cited by the Louisiana Commission only clarifies that the 2015 Settlement Agreement does not preclude parties from pursuing claims properly raised in the final bandwidth calculation compliance filing that had not been submitted at the time the 2015 Settlement Agreement was filed with the Commission.[52] Entergy argues that

---

[50] Entergy May 7 Answer at 3.

[51] In Opinion Nos. 480 and 480-A, the Commission found that the System Agreement no longer produced rough production cost equalization, and ordered modifications designed to maintain roughly equal production costs between the Operating Companies within +/-11 percent of the system-wide average. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at PP 144-145, *order on reh'g,* Opinion No. 480-A, 113 FERC ¶ 61,282, at P 46 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part, La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047, *order dismissing reh'g*, 137 FERC ¶ 61,048 (2011), *order on reh'g*, 146 FERC ¶ 61,152, *order rejecting compliance filing*, 146 FERC ¶ 61,153 (2014). In its compliance filing implementing these directives, Entergy included the formulas for implementing the rough production cost equalization in Service Schedule MSS-3 (i.e., the bandwidth remedy). *See La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006). Under the bandwidth remedy, each calendar year, the production costs of each Operating Company were calculated, with payments made by the low cost Operating Company(ies) to the high cost Operating Company(ies) such that, after reflecting the payments and receipts, no Operating Company would have production costs more than 11 percent above the Entergy System average or more than 11 percent below the Entergy System average.

[52] Entergy May 7 Answer at 3-4 (citing 2015 Settlement Agreement §§ G(1), G(2), Docket No. ER14-75-000, *et al.* (filed Aug. 14, 2015)).

interpreting the sentence as the Louisiana Commission suggests would render the waiver and release provisions meaningless and superfluous.[53]

31. Entergy also argues that the Louisiana Commission's claims were not in the complaint in Docket No. EL09-61. Entergy argues that the complaint in Docket No. EL09-61 specifically involved energy sales from Entergy Arkansas' low-cost resources to unaffiliated third parties denying the benefits of that less-expensive energy to other Operating Companies. According to Entergy, in the instant Complaint, the Louisiana Commission argues that Entergy Arkansas was improperly reimbursed for the 2000 Retained Share Sales that were never included in Entergy Arkansas' load and that the net margins on the Packaged Sales should be allocated only to Entergy Arkansas because those Joint Account Sales were uneconomical and imprudent.[54]

5. <u>Louisiana Commission's May 14 Answer</u>

32. The Louisiana Commission reiterates that the 2015 Settlement Agreement cannot block claims against Entergy Arkansas, which was not a party to the agreement. The Louisiana Commission argues that it has not brought a claim for relief against any party but Entergy Arkansas and that naming the other parties as respondents to the Complaint is not the assertion of a claim against a settling party. The Louisiana Commission argues that the other Operating Companies were injured by Entergy Arkansas as well and would receive damages on behalf of their ratepayers. The Louisiana Commission contends that these other parties are not indispensable to proving the basis for relief as Entergy Services claims. The Louisiana Commission argues that the principle of mutuality is central to contract law and because Entergy Arkansas is free from any obligation under the 2015 Settlement Agreement, the agreement can provide it no protection. The Louisiana Commission also argues that, if Entergy Arkansas is indispensable as Entergy claims, then the 2015 Settlement Agreement itself is nonbinding because Entergy Arkansas and the Arkansas Commission were both participants in the Docket No. ER14-75, *et al.* proceeding yet they did not join the 2015 Settlement Agreement, making the 2015 Settlement Agreement non-unanimous. The Louisiana Commission argues that the Commission only had the power to approve a settlement based on an independent

---

[53] *Id.* (citing *Pub. Serv. Co. of N. H. v. N. H. Elec. Coop., Inc.*, Opinion No. 436, 86 FERC ¶ 61,174, at 61,598 (1999) (finding that a contract should be construed so as to give effect to all of its provisions and to avoid rendering any provision meaningless)).

[54] *Id.* at 5-6.

finding that the proposal will establish just and reasonable rates[55] and in this case the Commission approved the 2015 Settlement Agreement in a Commission letter order that only found that the settlement appeared to be reasonable. The Louisiana Commission argues that if Entergy's argument had merit, the 2015 Settlement Agreement would be void and, therefore, no basis exists to dismiss the Complaint.

33. The Louisiana Commission also asserts that in Opinion No. 521, with respect to the off-system sales at issue there, the Commission held that "[a]ll refunds will be paid from Entergy Arkansas to the other Operating Companies," which means the Commission determined that Entergy Arkansas, not the entire Entergy system, would respond in damages.[56] Additionally, the Louisiana Commission argues that the case does not necessitate an energy reallocation (i.e., a re-running of the monthly Intra-System billing system) because the megawatt hours sold on behalf of Entergy Arkansas off-system in January through September 2000, the fuel costs of Grand Gulf, and the avoided cost paid to Entergy Arkansas are known. Therefore, the Louisiana Commission argues, determining damages involves simple arithmetic.

34. The Louisiana Commission reasserts that the 2015 Settlement Agreement unambiguously provided that "[t]his Settlement Agreement shall have no effect on cost allocation disputes affecting costs incurred prior to January 1, 2016" and that Entergy suggests an interpretation that is at odds with the plain language.[57] Regarding Entergy's argument that the Complaint raises a different claim than that raised in Docket No. EL09-61, the Louisiana Commission argues that Entergy does not discuss the complaint in Docket No. EL09-61 but instead shifts focus to the violation found in Opinion No. 521. The Louisiana Commission argues that "[t]he specific violation found by the Commission may have been different, but the off-system sales at issue were the same."[58] The Louisiana Commission adds that the January-September sales were included in those addressed in Opinion No. 521. The Louisiana Commission argues that Entergy provides no explanation for its misrepresentations, throughout years of litigation,

---

[55] Louisiana Commission May 14 Answer at 5 (citing *Mobil Oil Corp. v. Fed. Power Comm'n*, 417 U.S. 283, 314 (1974) (stating that if a proposal lacks unanimity, "it may be adopted as a resolution on the merits, if [the Federal Power Commission] makes an independent finding supported by substantial evidence on the record as a whole that the proposal will establish just and reasonable rates for the area") (internal quotations omitted))).

[56] *Id.* at 3-4 (citing Opinion No. 521, 139 FERC ¶ 61,240 at P 136).

[57] *Id.* at 5-6.

[58] *Id*. at 7.

that the treatment of the sales at issue in this proceeding were the same as for all other Entergy Arkansas Opportunity Sales.[59]

IV. Discussion

A. Procedural Matters

35. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

36. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept the Louisiana Commission's and Entergy's answers because they have provided information that assisted us in our decision-making process.

B. Commission Determination

37. We find that the 2015 Settlement Agreement bars the Louisiana Commission from raising the claims alleged in the Complaint and we therefore deny the Complaint.

38. On August 14, 2015, Entergy filed the 2015 Settlement Agreement on behalf of itself and the Settling Parties to terminate of the System Agreement and to resolve all issues pending in several proceedings related to the System Agreement. On November 24, 2015, the Settlement Judge certified the 2015 Settlement Agreement and on December 29, 2015, the Commission approved the uncontested 2015 Settlement Agreement. As discussed by both the Louisiana Commission and Entergy, the 2015 Settlement Agreement includes a waiver and release provision. Specifically, section G(1) provides as follows:

> The Settling Parties irrevocably waive and release any rights, claims, remedies, or causes of action they may have against any other Settling Party arising out of or relating to the System Agreement that are not filed and served upon the applicable parties as of the filing of the Settlement Agreement, including but not limited to any claims or causes of action that would seek to extend any System Agreement obligations beyond the System Agreement Termination Date; provided, however, that nothing herein shall bar any action or

---

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

> proceeding to enforce the terms of this Settlement Agreement . . . .[60]

Applying this provision, we find that the 2015 Settlement Agreement bars the Louisiana Commission from bringing the Complaint because: (1) the Louisiana Commission, as a Settling Party, filed the Complaint against another Settling Party; (2) the Complaint constitutes claims, remedies, or causes of action arising out of or relating to the System Agreement; and (3) the Louisiana Commission did not file and serve the claims, remedies, or causes of action on the applicable parties as of the filing of the 2015 Settlement Agreement (i.e., August 14, 2015).

39. First, it is undisputed that the Louisiana Commission is a Settling Party to the 2015 Settlement Agreement. In addition, we disagree with the Louisiana Commission's argument that the Complaint can proceed because Entergy Arkansas did not sign the 2015 Settlement Agreement. It is clear from the record that Entergy Services, a signatory to the 2015 Settlement Agreement, acted as Entergy Arkansas' agent at the time of the disputed sales.[61] Additionally, the Louisiana Commission filed the Complaint naming all of the Entergy companies that were Settling Parties to the 2015 Settlement Agreement (i.e., Entergy Services, Entergy Louisiana, Entergy Mississippi, Entergy New Orleans, and Entergy Texas). Accordingly, we find that the Louisiana Commission, a Settling Party, filed its cause of action against other Settling Parties, as described in section G(1) of the 2015 Settlement Agreement.

40. Second, we find that the 2000 Retained Share Sales and the Packaged Sales "aris[e] out of or relat[e] to the System Agreement" because the sales were governed by the System Agreement and Entergy Services made the sales pursuant to the System Agreement.[62] Further, the Louisiana Commission argues in the Complaint that the sales violated the System Agreement and the Louisiana Commission seeks a ruling from the Commission that the sales "violated . . . provisions of the System Agreement" and "improperly denied the [Entergy] System . . . the benefits of off-System sales of low-cost

---

[60] 2015 Settlement Agreement § G(1), Docket No. ER14-75-000, *et al.* (filed Aug. 14, 2015).

[61] *See* Complaint at 7 (explaining Entergy Services' role as agent for the parties to the System Agreement); Entergy Answer at n.1, 8-11 (describing Entergy Services' accounting of the disputed sales).

[62] *See* discussion *supra* Part II.A-B.

System generating capacity [required by the System Agreement]," and Entergy Services "imposed harm on System customers by [making the Packaged Sales]."[63]

41. Third, we find that the Louisiana Commission did not file and serve the claims it made in the Complaint as of the filing date of the 2015 Settlement Agreement. As discussed above, Entergy filed the uncontested 2015 Settlement Agreement on behalf of itself and the Settling Parties on August 14, 2015. The Louisiana Commission filed the Complaint on February 27, 2019. The Louisiana Commission argues that it first raised the issues that it raises in the instant Complaint in the complaint that it filed in Docket No. EL09-61-000 on June 29, 2009, and that its 2009 complaint alleged the same substantive violations that are present in the instant proceeding.[64] We disagree. The language in the Docket No. EL09-61 complaint that the Louisiana Commission cites to support its argument is too vague to reasonably represent the 2000 Retained Share Sales and the Packaged Sales claims.[65]

42. We likewise are not persuaded by the Louisiana Commission's arguments that Entergy misrepresented the nature of the 2000 Retained Share Sales until late in the proceeding and that the doctrine of equitable estoppel should prevent Entergy from relying on its own misrepresentation as a basis to deny the Louisiana Commission a remedy.[66] We find this argument to be outside the scope of this proceeding and, in any event, the Commission rejected this argument in Phase III of the Docket No. EL09-61 proceeding. As the Louisiana Commission argues in the Complaint, in response to

---

[63] *See* Complaint at 1-2.

[64] Louisiana Commission April 3 Answer at 5-11.

[65] The Louisiana Commission's Docket No. EL09-61 complaint sought relief for "sales of electric energy by Entergy Arkansas [] to third-party power marketers and others that are not members of the [] System Agreement [that] . . . violated provisions of the System Agreement . . . [or] imprudently denied . . . benefits of low-cost System generating capacity . . ." and alleged that the sales "caused the System to generate power to meet its needs from resources that are more expensive than the resources sold off-System, damaging the System's ratepayers who incurred the higher replacement costs for the energy." *See* Louisiana Commission April 3 Answer at 6-7 (citing Louisiana Commission Complaint, Docket No. EL09-61, at P 1). The Louisiana Commission's Docket No. EL09-61 complaint does not provide any specific information that describes the use of an inflated avoided cost for energy for Grand Gulf Retained Share sales from January through September 2000 or allegedly imprudent Joint Account Sales from 2000 to 2005 that were converted from Opportunity Sales.

[66] Complaint at 26-27; Louisiana Commission April 3 Answer at 8-11.

discovery in Phase III of the Docket No. EL09-61 proceeding, Entergy described new information about the Joint Account Sales components of the Opportunity Sales at issue in that proceeding.[67] The Commission considered this argument in Opinion No. 565 and rejected it. The Commission determined that the Packaged Sales were outside the scope of the Docket No. EL09-61 proceeding as that proceeding was "intended to determine the refunds due as a result of the misallocation of the Opportunity Sales."[68] The Commission found that "although Entergy may have previously made other representations regarding the Grand Gulf sales, [the relevant calculation] was not at issue in this proceeding until . . . []Phase III[], when the Commission set for hearing a final calculation of the damages . . . ."[69] The Commission determined that "parties were not prejudiced by any prior Entergy representations" and that there is "no reason to prohibit Entergy from correcting previous representations . . . ."[70] We are not persuaded by the Louisiana Commission's repetition of this argument in the instant proceeding and find that, by entering into the 2015 Settlement Agreement, the Louisiana Commission has waived its right to now raise the 2000 Retained Share Sales and Packaged Sales claims in the Complaint.

43. Further, we find to be without merit the Louisiana Commission's argument that even if the 2015 Settlement Agreement applies, the Complaint is not barred because section G(2) of the 2015 Settlement Agreement excludes disputes concerning cost allocation. Section G(2) provides as follows:

> There shall be no post-withdrawal obligation to roughly equalize production costs for any cost incurred by any Operating Company after December 31, 2015. For the purpose of this provision, "cost incurred" means costs incurred for the production of electricity, not costs deferred from an earlier period that are subject to rough equalization in

[67] Entergy revealed that "[i]n some hours when Opportunity Sales occurred it was determined that [Entergy Arkansas] did not have enough resources to fully source the sale; the remainder was treated as a Joint Account Sale." Complaint at 27 (citing Ex. LC-010, Docket No. EL09-61).

[68] Opinion No. 565, 165 FERC ¶ 61,022 at P 128.

[69] *Id.* P 106.

[70] *Id.*

> that earlier period. This Settlement Agreement shall have no effect on cost allocation disputes affecting costs incurred prior to January 1, 2016. The Entergy Operating Companies that are subject to rough production cost equalization ("RPCE") shall complete any FERC approved "rough equalization" payments and receipts based on the 2015 test year, by the System Agreement Termination Date or upon issuance of a final FERC order establishing the amount and timing of such payments, whichever is later.

45. The Louisiana Commission's focus on the sentence stating that "[t]his Settlement Agreement shall have no effect on cost allocation disputes affecting costs incurred prior to January 1, 2016" takes this sentence out of context of section G(1) of the 2015 Settlement Agreement and inappropriately applies the section's reference to "cost allocation disputes" to any cost allocation dispute. We agree with Entergy that this provision pertains to final implementation of rough production cost equalization via the annual bandwidth calculation.[71] Section G(2) starts by providing that there is no "post-withdrawal obligation to roughly equalize production costs for any cost incurred by any Operating Company after December 31, 2015," specifies that "'cost incurred' means costs incurred for the production of electricity," and goes on to discuss the terms that Operating Companies subject to rough production cost equalization must meet for any Commission approved "rough equalization" payments and receipts based on the 2015 test year. Accordingly, a reasonable reading of section G(2) is that it pertains to the bandwidth calculation and the sentence cited by the Louisiana Commission clarifies that the Settling Parties would not be precluded from pursuing cost allocation disputes related to the final bandwidth calculation compliance filing that had not yet been submitted at the time of the 2015 Settlement Agreement. The Louisiana Commission's interpretation would render section G(1), a general waiver and release of all claims relating to the System Agreement, meaningless if the Commission were to read section G(2) as carving out all cost allocation disputes.

46. Because we find that the 2015 Settlement Agreement bars the Complaint, we need not address the Louisiana Commission's arguments regarding whether the 2000 Retained Share Sales and the Packaged Sales violated the System Agreement and harmed the other Operating Companies.

---

[71] *See* Entergy May 7 Answer at 3-5.

<u>The Commission orders</u>:

The Louisiana Commission's Complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.