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**ORAL ARGUMENT NOT YET SCHEDULED**

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

**Nos. 17-1251, 18-1009, 18-1010, and 20-1023 (consolidated)**

ENTERGY SERVICES, INC., *ET AL.*,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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August 5, 2020

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**CIRCUIT RULE 28(A)(1) CERTIFICATE AS TO  
PARTIES, RULINGS, AND RELATED CASES**

**A. Parties and Amici**

The following are parties before this Court in these consolidated cases:

Entergy Services, Inc. (Petitioner and Intervenor)  
Arkansas Public Service Commission (Petitioner and Intervenor)  
Louisiana Public Service Commission (Petitioner and Intervenor)  
Federal Energy Regulatory Commission (Respondent)  
Mississippi Public Service Commission (Intervenor)  
Public Utility Commission of Texas (Intervenor)

In addition, the following parties intervened before the Federal Energy Regulatory Commission in the underlying docket:

Ameren Services Company, as agent for Union Electric Company  
Occidental Chemical Corporation  
Louisiana Energy Users Group  
Texas Industrial Energy Consumers  
Council of the City of New Orleans, Louisiana

**B. Rulings Under Review**

**Case No. 17-1251:**

1. Order Affirming in Part and Reversing in Part Initial Decision and Establishing Further Hearing Procedures, *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 521, 139 FERC ¶ 61,240 (June 21, 2012), R. 297, JA \_\_\_\_;
2. Order Denying in Part and Granting in Part Rehearing, *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 521-A, 155 FERC ¶ 61,064 (Apr. 21, 2016), R. 535, JA \_\_\_\_;

3. Order on Rehearing, *La. Pub. Serv. Comm'n v. Entergy Corp.*, 160 FERC ¶ 61,109 (Sept. 22, 2017), R. 658, JA \_\_\_\_;

**Case Nos. 17-1251, 18-1009, and 18-1010:**

4. Order on Initial Decision, *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548, 155 FERC ¶ 61,065 (Apr. 21, 2016), R. 534, JA \_\_\_\_;
5. Order Denying Rehearing and Clarification, *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548-A, 161 FERC ¶ 61,171 (Nov. 16, 2017), R. 563, JA \_\_\_\_ (Errata Notice issued Nov. 30, 2017, R. 569, JA \_\_\_\_);

**Case No. 20-1023:**

6. Order on Initial Decision, *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 565, 165 FERC ¶ 61,022 (Oct. 18, 2018), R. 673, JA \_\_\_\_; and
7. Order Denying Rehearing, *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 565-A, 169 FERC ¶ 61,179 (Dec. 3, 2019), R. 681, JA \_\_\_\_.

**C. Related Cases**

This case has not previously been before this Court or any other court. In a predecessor case concerning an earlier challenge to some of the energy sales at issue here, this Court dismissed the petition for review for lack of aggrievement. *La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008).

In addition, in an order issued in this case on April 3, 2020, the Court granted the parties' request to sever certain issues that were decided in the orders challenged in Case No. 20-1023; the Court assigned that portion of the case a new docket number (*La. Pub. Serv.*

*Comm'n v. FERC*, Case No. 20-1104) and held it in abeyance pending the conclusion of a separate, ongoing FERC proceeding.

*/s/ Carol J. Banta*

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Senior Attorney

## TABLE OF CONTENTS

	<b>PAGE</b>
STATEMENT REGARDING JURISDICTION .....	1
STATEMENT OF THE ISSUES.....	4
STATUTORY AND REGULATORY PROVISIONS.....	8
STATEMENT OF FACTS .....	8
I. THE ENTERGY SYSTEM AND THE SYSTEM AGREEMENT .....	8
II. THE COMMISSION PROCEEDINGS AND ORDERS.....	18
SUMMARY OF ARGUMENT .....	31
ARGUMENT .....	34
I. STANDARD OF REVIEW .....	34
II. THE COMMISSION REASONABLY DETERMINED THAT ENTERGY ARKANSAS HAD VIOLATED THE SYSTEM AGREEMENT. ....	37
A. The Commission Found That The Opportunity Sales Were Permitted Under The System Agreement. ....	37
B. The Commission Reasonably Found That Entergy Arkansas Violated The Energy Allocation Provisions Of The System Agreement. ....	39
1. The Commission properly found the allocation provisions ambiguous.....	40

## TABLE OF CONTENTS

	<b>PAGE</b>
2. The Commission reasonably interpreted the System Agreement to require treating Opportunity Sales as “sales to others” .....	42
<b>III. THE COMMISSION PROPERLY EXERCISED ITS REMEDIAL DISCRETION IN DETERMINING THE CALCULATION OF REFUNDS THAT ENTERGY ARKANSAS WOULD PAY TO THE OTHER OPERATING COMPANIES. ....</b>	<b>45</b>
A. Refunds Were An Appropriate Remedy For The Tariff Violation And Resulting Harm To The Entergy System And Its Customers .....	45
B. The Commission Reasonably Exercised Its Discretion In Approving A Refund Methodology Based On Reallocation Of The Energy For The Opportunity Sales, With Appropriate Adjustments.....	51
1. The Commission reasonably required certain adjustments to the refund calculations .....	53
a. Bandwidth Payments.....	54
b. Responsibility Ratios .....	60
2. Louisiana bore the burden of proof as to damages, including the adjustments .....	61
C. The Commission Reasonably Determined That Neither Allocating Losses From The Opportunity Sales Nor Removing Their Effects From The Bandwidth Adjustment Was Appropriate .....	63

## TABLE OF CONTENTS

	<b>PAGE</b>
D. The Commission Appropriately Declined To Address The Treatment Of The Damages And Adjustments For Purposes Of Retail Rates .....	66
CONCLUSION .....	69
TIMELINE OF RELEVANT FERC PROCEEDINGS.....	Back of Brief

## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>American Public Gas Association v. FPC</i> , 546 F.2d 983 (D.C. Cir. 1976).....	50
<i>Anadarko Petroleum Corp. v. FERC</i> , 196 F.3d 1264 (D.C. Cir. 1999).....	50
<i>Arizona Corporation Commission v. FERC</i> , 397 F.3d 952 (D.C. Cir. 2005).....	36
<i>Arkansas Public Service Commission v. FERC</i> , 712 F. App'x 3 (D.C. Cir. 2018) .....	9
<i>Arkansas Public Service Commission v. FERC</i> , 891 F.3d 377 (D.C. Cir. 2018).....	9
<i>California Department of Water Resources v. FERC</i> , 306 F.3d 1121 (D.C. Cir. 2002).....	44
<i>City of New Orleans v. FERC</i> , 875 F.2d 903 (D.C. Cir. 1989).....	8
<i>City of New Orleans v. FERC</i> , 67 F.3d 947 (D.C. Cir. 1995) .....	8
<i>Consolidated Edison Co. of New York, Inc. v. FERC</i> , 510 F.3d 333 (D.C. Cir. 2007).....	7
<i>Consolo v. Federal Maritime Commission</i> , 383 U.S. 607 (1966) .....	37

---

\* Cases chiefly relied upon are marked with an asterisk.

## TABLE OF AUTHORITIES

<b>COURT CASES (continued):</b>	<b>PAGE</b>
<i>Council of New Orleans v. FERC</i> , 692 F.3d 172 (D.C. Cir. 2012).....	8, 36
<i>Entergy Louisiana, Inc. v. Louisiana Public Service Commission</i> , 539 U.S. 39 (2003) .....	9, 11, 12, 68
<i>ESI Energy, LLC v. FERC</i> , 892 F.3d 321 (D.C. Cir. 2018).....	36
<i>FERC v. Electric Power Supply Association</i> , 136 S. Ct. 760 (2016) .....	35
<i>Florida Gas Transmission Co. v. FERC</i> , 604 F.3d 636 (D.C. Cir. 2010).....	37
<i>Gulf Power Co. v. FERC</i> , 983 F.2d 1095 (D.C. Cir. 1993).....	48
<i>Koch Gateway Pipeline Co. v. FERC</i> , 136 F.3d 810 (D.C. Cir. 1998).....	48
<i>Louisiana Public Service Commission v. FERC</i> , 174 F.3d 218 (D.C. Cir. 1999).....	8, 36
<i>Louisiana Public Service Commission v. FERC</i> , 184 F.3d 892 (D.C. Cir. 1999).....	8, 12
<i>Louisiana Public Service Commission v. FERC</i> , 482 F.3d 510 (D.C. Cir. 2007).....	8
* <i>Louisiana Public Service Commission v. FERC</i> , 522 F.3d 378 (D.C. Cir. 2008).....	8-11, 13, 34, 36, 37, 46

## TABLE OF AUTHORITIES

<b>COURT CASES (continued):</b>	<b>PAGE</b>
<i>*Louisiana Public Service Commission v. FERC</i> , 551 F.3d 1042 (D.C. Cir. 2008).....	8, 19, 51
<i>Louisiana Public Service Commission v. FERC</i> , 341 F. App'x 649 (D.C. Cir. 2009) .....	8, 17
<i>Louisiana Public Service Commission v. FERC</i> , 761 F.3d 540 (5th Cir. 2014) .....	8-9, 17
<i>Louisiana Public Service Commission v. FERC</i> , 771 F.3d 903 (5th Cir. 2014) .....	9
<i>Louisiana Public Service Commission v. FERC</i> , 772 F.3d 1297 (D.C. Cir. 2014).....	9
<i>Louisiana Public Service Commission v. FERC</i> , 606 F. App'x 1 (D.C. Cir. 2015) .....	9
<i>Louisiana Public Service Commission v. FERC</i> , 860 F.3d 691 (D.C. Cir. 2017).....	9
<i>Louisiana Public Service Commission v. FERC</i> , 866 F.3d 426 (D.C. Cir. 2017).....	9, 36
<i>Louisiana Public Service Commission v. FERC</i> , 883 F.3d 929 (D.C. Cir. 2018).....	9
<i>Mastrobuono v. Shearson Lehman Hutton, Inc.</i> , 514 U.S. 52 (1995) .....	42
<i>Middle South Energy, Inc. v. FERC</i> , 747 F.2d 763 (D.C. Cir. 1984).....	8

## TABLE OF AUTHORITIES

<b>COURT CASES (continued):</b>	<b>PAGE</b>
<i>Mississippi Industries v. FERC</i> , 808 F.2d 1525 (D.C. Cir), <i>vacated and remanded in part</i> , 822 F.2d 1104 (D.C. Cir. 1987).....	8, 10-13
<i>Mississippi Power &amp; Light Company v. Mississippi ex rel. Moore</i> , 487 U.S. 354 (1988) .....	9
<i>Morgan Stanley Capital Group Inc. v. Public Utility District No. 1</i> , 554 U.S. 527 (2008) .....	35
<i>Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.</i> , 463 U.S. 29 (1983) .....	35
<i>Niagara Mohawk Power Corp. v. FERC</i> , 379 F.2d 153 (D.C. Cir. 1967).....	36
<i>South Carolina Public Service Authority v. FERC</i> , 762 F.3d 41 (D.C. Cir. 2014) .....	35, 37
<b>ADMINISTRATIVE CASES:</b>	
<i>Arkansas Electric Cooperative Corp. v. Entergy Arkansas, Inc.</i> , 119 FERC ¶ 61,314 (2007) .....	42
<i>Corporation Commission of the State of Oklahoma v. American Electric Power Co.</i> , 125 FERC ¶ 61,237 (2008), <i>reh'g denied</i> , 130 FERC ¶ 61,120 (2010) .....	46-47

## TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued):	PAGE
<i>Duquesne Light Co.</i> , 122 FERC ¶ 61,039 (2008) .....	42
<i>Entergy Arkansas, Inc.</i> , 153 FERC ¶ 61,347 (2015) .....	13
<i>Entergy Gulf States, Inc.</i> , 120 FERC ¶ 61,079 (2007) .....	10
<i>Entergy Gulf States Louisiana, L.L.C.</i> , 153 FERC ¶ 61,153 (2015) .....	17, 18
<i>Entergy Services, Inc.</i> , 116 FERC ¶ 61,296 (2006), <i>reh'g denied</i> , 119 FERC ¶ 61,019 (2007) .....	18-19
<i>Entergy Services, Inc.</i> , 130 FERC ¶ 61,023 (2010) .....	18
<i>Louisiana Public Service Commission v. Entergy Corp.</i> , 129 FERC ¶ 61,205 (2009) .....	20
<i>Louisiana Public Service Commission v. Entergy Corp.</i> , 133 FERC ¶ 63,008 (2010) .....	20-21
* <i>Louisiana Public Service Commission v. Entergy Corp.</i> , Opinion No. 521, 139 FERC ¶ 61,240 (2012), <i>on reh'g</i> , Opinion No. 521-A, 155 FERC ¶ 61,064 (2016), <i>on reh'g</i> , 160 FERC ¶ 61,109 (2017) .....	5, 15, 21-22, 38-43, 45, 47, 51-53, 65, 66
<i>Louisiana Public Service Commission v. Entergy Corp.</i> , 144 FERC ¶ 63,021 (2013) .....	24

## TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued):	PAGE
<p><i>*Louisiana Public Service Commission v. Entergy Corp.</i>,            Opinion No. 521-A, 155 FERC ¶ 61,064 (2016), <i>on reh’g</i>,            160 FERC ¶ 61,109 (2017) .....</p>	5, 23, 25, 38, 40, 41, 43-50, 52-53, 66
<p><i>*Louisiana Public Service Commission v. Entergy Corp.</i>,            Opinion No. 548, 155 FERC ¶ 61,065 (2016), <i>reh’g denied</i>,            Opinion No. 548-A, 161 FERC ¶ 61,171 (2017) .....</p>	5, 18, 23, 25-28, 49, 52-57, 59, 60, 62, 63, 66
<p><i>*Louisiana Public Service Commission v. Entergy Corp.</i>,            160 FERC ¶ 61,109 (2017) .....</p>	5, 23-24, 46
<p><i>Louisiana Public Service Commission v. Entergy Corp.</i>,            160 FERC ¶ 63,009 (2017) .....</p>	29
<p><i>*Louisiana Public Service Commission v. Entergy Corp.</i>,            Opinion No. 548-A, 161 FERC ¶ 61,171 (2017) .....</p>	5, 28, 49, 52, 54, 60-64, 66, 67
<p><i>*Louisiana Public Service Commission v. Entergy Corp.</i>,            Opinion No. 565, 165 FERC ¶ 61,022 (2018), <i>reh’g denied</i>,            Opinion No. 565-A, 169 FERC ¶ 61,179 (2019) .....</p>	5, 29-30, 49, 53, 55, 57-59, 64, 66
<p><i>*Louisiana Public Service Commission v. Entergy Corp.</i>,            Opinion No. 565-A, 169 FERC ¶ 61,179 (2019) .....</p>	5, 31, 49, 53, 57-59
<p><i>Louisiana Public Service Commission v. Entergy Services, Inc.</i>,            111 FERC ¶ 61,311, <i>on reh’g</i>,            113 FERC ¶ 61,282 (2005) .....</p>	13

## TABLE OF AUTHORITIES

<b>ADMINISTRATIVE CASES (continued):</b>	<b>PAGE</b>
<i>Louisiana Public Service Commission v. Entergy Services, Inc.</i> , 117 FERC ¶ 61,203 (2006), <i>on reh’g and compliance</i> , 119 FERC ¶ 61,095 (2007) .....	17
<i>Louisiana Public Service Commission v. Entergy Services, Inc.</i> , 146 FERC ¶ 61,153 (2014) .....	50
<b>STATUTES:</b>	
Administrative Procedure Act	
5 U.S.C. § 556(d).....	63
5 U.S.C. § 706(2)(A).....	34
Federal Power Act	
Section 206, 16 U.S.C. § 824e .....	19
Section 313(b), 16 U.S.C. § 825l(b) .....	3, 37, 44
<b>REGULATIONS:</b>	
18 C.F.R. § 35.19a(a)(2)(iii)(A), (B) (2019) .....	50

## GLOSSARY

Arkansas	Arkansas Public Service Commission, Petitioner in Case No. 18-1009
Commission or FERC	Respondent Federal Energy Regulatory Commission
Entergy	Entergy Corporation (corporate parent of the Operating Companies) or Entergy Services, Inc. (acting on behalf of Operating Companies), Petitioner in Case No. 17-1251
Entergy Arkansas	Entergy Arkansas, Inc.
Entergy System or System	Generation and transmission facilities owned and operated by Entergy Operating Companies in Arkansas, Louisiana, Mississippi, and Texas
FPA	Federal Power Act
Intra-System Bill	The detailed monthly invoice of costs and revenues for transactions among the Operating Companies under the System Agreement, or the computer programs used to generate that invoice
JA	Joint Appendix
Louisiana	Louisiana Public Service Commission, Petitioner in Case Nos. 18-1010 and 20- 1023
<i>Louisiana 2008-I</i>	<i>La. Pub. Serv. Comm'n v. FERC</i> , 522 F.3d 378 (D.C. Cir. 2008) (upholding bandwidth remedy)

## GLOSSARY

<i>Louisiana 2008-II</i>	<i>La. Pub. Serv. Comm'n v. FERC</i> , 551 F.3d 1042 (D.C. Cir. 2008) (upholding resource allocations)
Operating Company/ies	Individually or collectively, Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Gulf States Louisiana, L.L.C. and Entergy Texas, Inc. (which, prior to 2008, operated as a single entity, Entergy Gulf States, Inc.)
<i>Opinion No. 521</i>	Order Affirming in Part and Reversing in Part Initial Decision and Establishing Further Hearing Procedures, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , Opinion No. 521, 139 FERC ¶ 61,240 (2012), R. 297, JA ____
<i>Opinion No. 521-A</i>	Order Denying in Part and Granting in Part Rehearing, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , Opinion No. 521-A, 155 FERC ¶ 61,064 (2016), R. 535, JA ____
<i>Opinion No. 548</i>	Order on Initial Decision, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , Opinion No. 548, 155 FERC ¶ 61,065 (2016), R. 534, JA ____
<i>Opinion No. 548-A</i>	Order Denying Rehearing and Clarification, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , Opinion No. 548-A, 161 FERC ¶ 61,171 (2017), R. 563, JA ____
<i>Opinion No. 565</i>	Order on Initial Decision, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , Opinion No. 565, 165 FERC ¶ 61,022 (2018), R. 673, JA ____

## GLOSSARY

<i>Opinion No. 565-A</i>	Order Denying Rehearing, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , Opinion No. 565-A, 169 FERC ¶ 61,179 (2019), R. 681, JA _____
Opportunity Sales	Short-term, off-system sales of energy made by Entergy Arkansas, Inc. from 2000 through 2009
P	Paragraph in a FERC order
R.	Record item
<i>Second Liability Rehearing Order</i>	Order on Rehearing, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , 160 FERC ¶ 61,109 (2017), R. 658, JA _____
System Agreement or Agreement	Rate schedule that acted as an interconnection and pooling agreement for the Entergy System and provided for the joint planning, construction and operation of new generating capacity

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ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**STATEMENT REGARDING JURISDICTION**

In this Court's April 3, 2020 Order establishing a briefing schedule in this case, the Court directed the parties to address the Court's jurisdiction. Respondent Federal Energy Regulatory Commission (Commission or FERC) submits that the Court properly has jurisdiction to decide each of these consolidated cases.

The underlying agency proceedings were unusually complicated. As discussed more fully in this Brief, the orders on review arose from three phases of litigation. *See also* Timeline of Relevant FERC Proceedings, appended at the back of this Brief. The Commission initially set the complaint of the Louisiana Public Service Commission (Louisiana) for hearing before an administrative law judge to determine whether Entergy Corporation (Entergy) had violated provisions of the Entergy System Agreement, and subsequently ordered second and third hearings to address questions about refund methods and specific calculations that arose in the course of the litigation. Each petition challenges different phases of those proceedings: Entergy, both liability and refund method (Case No. 17-1251); Arkansas Public Service Commission (Arkansas), refund method (Case No. 18-1009); and Louisiana, both refund method and calculations (Case Nos. 18-1010 and 20-1023). Entergy filed its petition for judicial review sixty days after the last Phase I order and five days after the last Phase II order. Both Arkansas and Louisiana filed petitions sixty-one days after the last Phase II order (the sixtieth day having fallen on a federal holiday).

Only Louisiana sought review of the Phase III orders, which determined the exact calculations.

Given the particular course of this phased litigation, the Commission takes the view that each Petitioner timely filed the requisite rehearing request(s) and petition(s) for review of the aggrieving orders that it challenges here regarding Entergy's liability and/or the appropriate refund method.<sup>1</sup> The Commission further notes that Entergy asked the Court to hold its petition for review of the Phase I and Phase II orders in abeyance, pending resolution of the final calculations in Phase III, to enable the Court to consider all of the related orders in a single consolidated case. (The Court then consolidated the subsequent Phase II petitions by Arkansas and Louisiana with Entergy's abeyed case.) Upon completion of Phase III, all parties agreed to the additional consolidation of Louisiana's Phase III petition (severing — at Louisiana's request — certain issues that are related to a separate proceeding pending before the Commission).

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<sup>1</sup> Separately, however, the Commission does contest, where appropriate, the Court's jurisdiction to consider specific issues that were not raised on agency rehearing as required by section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b). *See infra* pp. 43-44, 48.

Considering the numerous cases arising from the Entergy System Agreement that have come before this Court in recent decades, the Commission encourages such cooperation to streamline litigation and does not seek a jurisdictional ruling that might discourage similar coordination in future cases.

### **STATEMENT OF THE ISSUES**

From 2000 through 2009, one of the Operating Companies in the Entergy System, Entergy Arkansas, Inc., made short-term sales of energy to customers outside that system for the benefit of its shareholders. Those off-system sales (the Opportunity Sales) were first challenged in the mid-2000s in a previous FERC proceeding. Following this Court's holding that those sales were not properly at issue, Louisiana filed a complaint. In what ultimately became a complex, three-phase proceeding, the Commission found that Entergy Arkansas had violated the System Agreement and must pay damages to the other Operating Companies.

In Phase I, the Commission found that, although the Opportunity Sales were permitted under the System Agreement, Entergy had violated the Agreement by improperly allocating the energy associated

with those Opportunity Sales. *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 521, 139 FERC ¶ 61,240 (2012), R. 297, JA \_\_\_\_, *on reh'g*, Opinion No. 521-A, 155 FERC ¶ 61,064 (2016), R. 535, JA \_\_\_\_, *on reh'g*, 160 FERC ¶ 61,109 (2017), R. 658, JA \_\_\_\_\_. In Phase II, the Commission determined that the appropriate refund method to remedy that violation was a full re-run of the calculations used to reconcile transactions among the Operating Companies, applying the proper energy allocation and making certain adjustments. *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548, 155 FERC ¶ 61,065 (2016), R. 534, JA \_\_\_\_, *reh'g denied*, Opinion No. 548-A, 161 FERC ¶ 61,171 (2017), R. 563, JA \_\_\_\_\_. In Phase III, the Commission approved the final refund calculations and declined to cap the adjustments related to equalization payments. *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 565, 165 FERC ¶ 61,022 (2018), R. 673, JA \_\_\_\_, *reh'g denied*, Opinion No. 565-A, 169 FERC ¶ 61,179 (2019), R. 681, JA \_\_\_\_\_.  
*See generally* Timeline of Relevant FERC Proceedings.

In the orders on review, the Commission addressed numerous issues concerning Entergy's liability for violating the System Agreement

and the appropriate remedy for that violation. These consolidated appeals raise the following issues:

(1) **Tariff Violation**– Whether the Commission:

(a) properly found that the provisions of the Entergy System Agreement regarding energy allocation were ambiguous [Raised by Entergy]; and

(b) reasonably interpreted those provisions to require treating the Opportunity Sales as lower-priority “sales to others,” rather than as part of Entergy Arkansas’s “loads,” for purposes of allocating System energy [Raised by Entergy];

(2) **Remedy**– Whether, in determining the appropriate remedy for the improper energy allocation, the Commission:

(a) reasonably determined that Entergy Arkansas should pay damages, including interest, to remedy the harm that Entergy Arkansas’s tariff violation caused to the Entergy System and to customers of the other Operating Companies [Raised by Entergy];

(b) reasonably determined that the damages should be adjusted (i) to account for the inflated payments that Entergy Arkansas had made to the other Operating Companies under the

bandwidth remedy and (ii) to remove the off-system Opportunity Sales from Entergy Arkansas's load in the Responsibility Ratio [Raised by Louisiana];

(c) properly held that Louisiana, as the complainant, had the burden of proof as to damages calculations, including with respect to any adjustments [Raised by Louisiana]; and

(d) reasonably decided not to require the other Operating Companies to share the negative margins that might result from repricing the Opportunity Sales [Raised by Entergy]; and

(3) **Scope of the Proceeding**– Whether the Commission reasonably determined that the ultimate distribution of the refunds, as between ratepayers and Entergy's shareholders, was beyond the scope of this proceeding [Raised by Arkansas<sup>2</sup>].

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<sup>2</sup> Though Louisiana raised a similar objection before the Commission, it has waived that objection by omitting the issue from its Opening Brief to this Court (and thus may not address the issue on reply). *See, e.g., Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333, 340 (D.C. Cir. 2007). Because the Court struck Louisiana's unauthorized brief as Intervenor in Case No. 18-1009, the Commission here responds only to the arguments properly raised by Arkansas in its Opening Brief.

## STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum. (In addition, the Timeline of Relevant FERC Proceedings is appended at the back of this Brief, after the Addendum.)

### STATEMENT OF FACTS

#### I. THE ENTERGY SYSTEM AND THE SYSTEM AGREEMENT

The instant case stands against a backdrop of several decades of litigation over the allocation of costs under the Entergy System Agreement.<sup>3</sup> We begin with an overview of that unusual arrangement.

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<sup>3</sup> See *Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (filing of 1982 System Agreement); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1104 (D.C. Cir. 1987) (allocation of nuclear investment costs); *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989) (same, after remand); *City of New Orleans v. FERC*, 67 F.3d 947 (D.C. Cir. 1995) (costs of future replacement capacity after spin-off of generation plants); *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999) (determination of operating companies' available capability for purposes of cost equalization); *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) (allocation of capacity costs); *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (same, after remand); *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (reallocation of production costs through bandwidth remedy); *La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008) (allocation of generation resources); *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. 2009) (methodology for bandwidth calculations); *Council of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (withdrawal of certain Operating Companies from System Agreement); *La. Pub. Serv. Comm'n*

(This Court provided a similar overview of the Entergy System in *Louisiana Public Service Commission v. FERC*, 522 F.3d 378, 383-85 (D.C. Cir. 2008) (“*Louisiana 2008-I*”).)

### A. The Entergy System

During the period at issue here, the Entergy System comprised five or six Operating Companies selling electricity in Arkansas,

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*v. FERC*, 761 F.3d 540 (5th Cir. 2014) (second annual bandwidth proceeding); *La. Pub. Serv. Comm’n v. FERC*, 771 F.3d 903 (5th Cir. 2014) (third annual bandwidth proceeding); *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014) (refunds related to allocation of capacity costs, after remand); *La. Pub. Serv. Comm’n v. FERC*, 606 F. App’x 1 (D.C. Cir. 2015) (first annual bandwidth proceeding); *La. Pub. Serv. Comm’n v. FERC*, 860 F.3d 691 (D.C. Cir. 2017) (depreciation rates variable used in bandwidth formula); *La. Pub. Serv. Comm’n v. FERC*, 866 F.3d 426 (D.C. Cir. 2017) (refunds and timing of implementing bandwidth remedy, after remand); *Ark. Pub. Serv. Comm’n v. FERC*, 712 F. App’x 3 (D.C. Cir. 2018) (bandwidth payments for a portion of 2005); *La. Pub. Serv. Comm’n v. FERC*, 883 F.3d 929 (D.C. Cir. 2018) (refunds related to allocation of capacity costs, after remand); *Ark. Pub. Serv. Comm’n v. FERC*, 891 F.3d 377 (D.C. Cir. 2018) (allocation of settlement proceeds among Operating Companies); *La. Pub. Serv. Comm’n v. FERC*, Case No. 20-1024 (D.C. Cir. filed Jan. 31, 2020) (implementation of bandwidth formula and calculations for 7-month period in 2005; applicability of 2009 tariff amendment) (initial FERC Brief filed July 17, 2020).

System Agreement disputes also have been considered twice in the U.S. Supreme Court. See *Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39 (2003) (preemption of state regulatory jurisdiction as to cost allocation); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988) (same).

Louisiana, Mississippi, and Texas.<sup>4</sup> *See Louisiana 2008-I*, 522 F.3d at 383. The Operating Companies are owned by a multistate holding company, Entergy Corporation.<sup>5</sup> *Id.* (What is now the Entergy System originated under Middle South Utilities, Inc., which owned most of the Operating Companies' predecessors.) At all times relevant to this case, transactions among the Entergy Operating Companies were governed by the System Agreement. *See Miss. Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1104 (D.C. Cir. 1987); *Louisiana 2008-I*, 522 F.3d at 383.

The Entergy System was highly integrated, with the Operating Companies' transmission and generation facilities operated as a single

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<sup>4</sup> Those Operating Companies were: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Louisiana, LLC; Entergy New Orleans, Inc.; and, until 2007, Entergy Gulf States, Inc., which then separated into Entergy Gulf States Louisiana, LLC and Entergy Texas, Inc. *See Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007). In 2015, Entergy Gulf States Louisiana, LLC merged into Entergy Louisiana, LLC. *See Entergy Br., Certificate as to Parties, Rulings, and Related Cases* at ii.

<sup>5</sup> For purposes of this Brief, "Entergy" refers either to Entergy Corporation, the corporate parent of the Entergy Operating Companies and their affiliates, or to Entergy Services, Inc. (now called Entergy Services, LLC), a service affiliate that has acted on behalf of the Operating Companies in various FERC proceedings.

electric system. *See Louisiana 2008-I*, 522 F.3d at 383. For decades, the Entergy System primarily allocated the costs and benefits of new generation resources through a centralized planning process that assigned new resources to individual Operating Companies, on a rotating basis. *See id.* at 383-84. The System Agreement also allocated the costs of imbalances in the cost of facilities used for the mutual benefit of all the Entergy Operating Companies. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) (“[K]eeping excess capacity available for use by all is a benefit shared by the operating companies, and the costs associated with this benefit must be allocated among them.”). The System Agreement required that production costs be roughly equal among the Operating Companies. *See Louisiana 2008-I*, 522 F.3d at 384; *see also Miss. Indus.*, 808 F.2d at 1530 (affirming FERC orders that allocated costs of nuclear generation investments to operating companies in proportion to demand for system energy). Thus, since the first System Agreement in 1951, the Agreement sought to iron out inequities through “equalization payments.” 808 F.2d at 1530. The Agreement in effect from 1982 until 2016 allocated production costs by

requiring that “short” companies pay “long” companies.<sup>6</sup> *See Entergy La.*, 539 U.S. at 42-43. This Court recognized that this arrangement was “mutually beneficial because companies that are long have a ready outlet for their surplus energy and are thereby compensated for carrying excess capacity, while companies that are short enjoy the benefit of a low cost and dependable way of meeting their energy requirements.” *La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 895 (D.C. Cir. 1999).

Nevertheless, over the history of the System Agreement, the Commission twice (in 1985 and 2005) found that disparities in production costs among the Operating Companies had disrupted the rough equalization required by the System Agreement and resulted in undue discrimination, requiring a Commission-ordered remedy. *See*

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<sup>6</sup> If an Operating Company’s share of the System’s generating capacity was greater than its share of the energy generated and distributed by the system as a whole, the Company was deemed to be “long.” *Miss. Indus.*, 808 F.2d at 1530. If the Operating Company’s share of the system’s generating capacity was less than its percentage of the system’s energy, it was deemed to be “short.” *Id.* The terms “long” and “short” did not refer to the Operating Company’s ability to provide enough energy to meet its customer’s requirements, but rather compared the share of system capacity that it contributed with the share of system energy that it used. *Id.* n.8.

*Louisiana 2008-I*, 522 F.3d at 384, 386 (describing both instances); *id.* at 391-94 (affirming Commission’s 2005 finding of undue discrimination and “bandwidth” remedy for rough equalization of production costs); *Miss. Indus.*, 808 F.2d at 1553-58 (affirming Commission’s 1985 finding of undue discrimination and remedy of reallocating nuclear investment costs). The remedy adopted in 2005 established numerical percentage “bandwidths” of +/- 11 percent as the outside bounds by which production costs would be permitted to deviate from the System average, to be remedied annually through equalization payments among the Operating Companies. *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 111 FERC ¶ 61,311 at PP 1, 14, 136, 144, *aff’d on reh’g*, 113 FERC ¶ 61,282 (2005).

The System Agreement terminated on August 31, 2016. *See Entergy Arkansas, Inc.*, 153 FERC ¶ 61,347 (2015) (approving settlement agreement to terminate System Agreement). All of the Entergy Operating Companies joined the Midcontinent Independent System Operator. *See* <https://www.ferc.gov/industries-data/market-assessments/overview/electric-power-markets>. Because these

consolidated appeals concern energy sales that occurred from 2000 to 2009, the System Agreement was still in effect at all relevant times.

### **B. The System Agreement**

The System Agreement and its Service Schedules are included in the Joint Appendix at JA \_\_\_\_-\_\_\_. For purposes of this case, the most relevant provisions are those concerning off-system energy sales, determination of load responsibilities used to allocate the Companies' proportional shares of various costs and revenues, and certain of the Service Schedules that govern transactions between and among the Companies.

Under Article IV of the Agreement, which sets forth various "Obligations" of the Operating Companies, Section 4.05 defines "Sales to Others for the Joint Account of All the Companies," which are "[s]ales of capacity and energy to others for which any Company does not wish to assume sole responsibility . . . ." JA \_\_\_\_\_. Such sales are made by the Company that has a direct connection with the purchasers, on behalf of all the Companies, with the net balance being divided among the Companies according to the Agreement. *Id.*

Article II, “Definitions,” includes three related terms for use in some of the Service Schedules. Section 2.16, “Company Load Responsibility,” is determined for each Company by using its monthly hourly loads at the times of the System’s peak hour loads, minus power for joint account sales. JA \_\_\_\_\_. Section 2.17, “System Load Responsibility,” is the sum of all the Operating Companies’ load responsibilities. JA \_\_\_\_\_. Section 2.18, “Responsibility Ratio,” is determined for each Company by dividing its own load responsibility by the System-wide sum. JA \_\_\_\_\_. *See Opinion No. 521 P 66 n.122, JA \_\_\_\_\_* (“The responsibility ratio is an allocator developed based on an Operating Company’s load and is used to allocate System Agreement costs, revenues, and reserves.”).

The Agreement includes seven Service Schedules that govern compensation among the Companies for a variety of transactions, shared benefits, and coordinated operations. *See generally* Agreement Secs. 3.09, 4.12, JA \_\_\_\_\_, \_\_\_\_\_. Five are relevant to arguments in this case, as each uses the Responsibility Ratio to allocate costs among the Operating Companies. Schedule MSS-1 provides the basis for equalizing capability (available generation and contracted supplies) and

related ownership costs, JA \_\_\_\_; Schedule MSS-2 does the same for certain transmission ownership costs, JA \_\_\_\_; Schedule MSS-3 concerns pricing of exchanges of energy among the companies, including the implementation of the bandwidth remedy, JA \_\_\_\_; Schedule MSS-5 provides for distribution among the Companies of net revenues for joint account sales, JA \_\_\_\_; and Schedule MSS-6 divides centralized operating expenses, JA \_\_\_\_.

Schedule MSS-3 is central to this case, as it prescribes the order of priority for System energy to be allocated and also contains the formula for the bandwidth remedy. First, Section 30.03, “Allocation of Energy,” provides that, in each hour, energy from the lowest cost source available and scheduled must be allocated “first to the loads of the Company having such sources available,” and “second to supply the requirements of other Companies’ Loads (Pool Energy).” JA \_\_\_\_-\_\_; *see also* Agreement Sec. 2.20 (defining “Pool Energy” as energy that a Company generates or acquires in excess of its own requirements that is allocated to supply other Companies’ requirements). Section 30.04, “Energy for Sales to Others,” states that “Energy used to supply others will be provided in accordance with rate schedules on file with” the

Commission, and that the Company supplying the energy will be reimbursed for fuel costs for the specific resource. JA \_\_\_\_.

Sections 30.11 to 30.14, JA \_\_\_\_-\_\_, set forth the procedures and the formula that the Commission approved to implement the bandwidth remedy, beginning in 2005. The bandwidth formula required Entergy to compare the Operating Companies' production costs, calculated using figures documented in accordance with the Commission's annual reporting requirements. *See La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 544 (5th Cir. 2014). Entergy then would roughly equalize the Operating Companies' respective shares of the Entergy System's costs through inter-company payments and receipts. *See La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 at PP 24-27 (2006), *on reh'g and compliance*, 119 FERC ¶ 61,095 at P 48 (2007), *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. 2009).

Entergy made those (and other) payments and receipts through the Intra-System Bill, which was a detailed monthly invoice of each Operating Company's costs to be paid and revenues to be received for transactions among the Companies under the System Agreement. *See Entergy Gulf States La., L.L.C.*, 153 FERC ¶ 61,153 at P 10 n.17 (2015);

*Entergy Servs., Inc.*, 130 FERC ¶ 61023 at P 109 n.134 (2010). It also refers to “the inter-related set of computer programs and databases that are used to prepare th[at] invoice . . . .” 153 FERC ¶ 61,153 at P 10 n.17; *see also Opinion No. 548* P 85, JA \_\_\_\_ (the Intra-System Bill “is a suite of software programs that reconciles monthly payments among Operating Companies for energy supplied for system needs”).

## II. THE COMMISSION PROCEEDINGS AND ORDERS

### A. Prior Proceedings and Louisiana’s Complaint

In 2003, Entergy sought Commission approval of long-term power purchase agreements among various Operating Companies. In the course of that proceeding, Louisiana became aware that Entergy Arkansas had made short-term opportunity sales of energy from its low-cost generation facilities to off-system third parties (that is, parties that were not native load customers or Entergy Operating Companies).

Louisiana argued that the sales violated section 3.05 of the System Agreement, which required an Operating Company to give other Operating Companies a right of first refusal before making certain off-system sales. The Commission determined that the short-term sales were not relevant to the long-term agreements before it, but explained that section 3.05 did not apply to those sales. *See Entergy Servs., Inc.*,

116 FERC ¶ 61,296 at P 134 (2006), *reh'g denied*, 119 FERC ¶ 61,019 at PP 39-42 (2007). On review, this Court held that the short-term sales were not properly before the Commission or the Court and that the Commission's discussion of those sales was mere dicta. *La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042, 1046-47 (D.C. Cir. 2008) ("*Louisiana 2008-IP*").

In June 2009, Louisiana filed a Complaint against Entergy and its affiliates, pursuant to section 206 of the Federal Power Act, 16 U.S.C. § 824e, that again challenged the off-system sales based on the right of first refusal and further alleged other violations of the System Agreement and imprudent utility conduct. Complaint, R. 1, JA \_\_\_\_.

Louisiana alleged that, from at least as early as 2002, Entergy Arkansas had sold excess electric energy to third-party power marketers and other entities that were not members of the System Agreement for the benefit of its shareholders.

In December 2009, the Commission determined that the Complaint merited further investigation and set it for a trial-type evidentiary hearing before an administrative law judge. Order on Complaint and Establishing Hearing and Settlement Judge Procedures,

*La. Pub. Serv. Comm'n v. Entergy Corp.*, 129 FERC ¶ 61,205 at P 26 (2009), R. 20, JA \_\_\_\_.

**B. Phase I: Violation of the System Agreement (Liability Orders)**

**1. Initial Liability Decision**

In December 2010, following that evidentiary hearing, the administrative law judge issued an Initial Decision finding that, from 2000 to 2009, Entergy Arkansas had made off-system sales (the Opportunity Sales) for the benefit of Entergy's shareholders. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 133 FERC ¶ 63,008 at P 343 (2010), R. 288, JA \_\_\_\_, \_\_\_\_. The judge found the Opportunity Sales had violated the System Agreement and shareholders should be required to pay refunds to the Operating Companies. *Id.* at PP 356, 392, JA \_\_\_\_, \_\_\_\_. Specifically, the judge found that the Opportunity Sales were not authorized under the System Agreement and that Entergy had violated the Agreement in allocating the associated energy and costs. *See id.* at PP 355-56, 361-63, JA \_\_\_-\_\_\_, \_\_\_-\_\_\_, \_\_\_-\_\_\_. The judge also found that refunds for damages for the harm to the System were appropriate and should be calculated by re-running the Intra-System Bill with the Opportunity Sales treated as joint account sales and allocating refunds

among the Operating Companies according to their respective Responsibility Ratios. *See id.* at PP 410-13, JA \_\_\_\_-\_\_.

## **2. Opinion No. 521**

On June 21, 2012, the Commission issued *Opinion No. 521*, affirming the Initial Decision in part and reversing it in part.

The Commission found sections 4.05, 30.03, and 30.04 of the System Agreement ambiguous. The Commission determined that the more logical interpretation of section 4.05 permits Operating Companies to make opportunity sales for their own accounts, but that section 30.03 does not provide authority for an Operating Company to allocate the energy associated with such sales as part of its load. Rather, the Commission found, section 30.04 requires allocation of that energy as sales to others. Based on that finding, the Commission determined that Entergy Arkansas was required to allocate energy to higher priority sales (first to its loads and then to the other Companies' loads) under section 30.03(a)-(b) before allocating energy to the Opportunity Sales (and to joint account sales) under section 30.04. Accordingly, the Commission found that Entergy had violated the System Agreement — not by making the Opportunity Sales, but by

improperly allocating the energy for those sales. *Opinion No. 521*

P 124, JA \_\_\_\_.

The Commission agreed with the administrative law judge that “re-running the Intra-System Bill is the appropriate basis for determining damages.” *Id.* at P 135, JA \_\_\_\_.

The Commission determined that “Entergy should calculate the difference between the incremental energy costs allocated to Entergy Arkansas due to inclusion of the Opportunity Sales in its load” and the incremental costs of energy it should have been allocated for the Opportunity Sales, and should pay that difference as refunds to the other Operating Companies based on how they should have been allocated energy, but for the violation. *Id.* at P 136, JA \_\_\_\_-\_\_.

Because the record lacked sufficient information to determine the results, the Commission ordered a second evidentiary hearing to determine refunds. *Id.* at P 137, JA \_\_\_\_.

The Commission rejected some of Entergy’s equitable objections to refunds but directed the administrative law judge to consider certain adjustments and agreed with Entergy’s argument to limit damages to Entergy Louisiana. *Id.* at PP 136, 138-42, JA \_\_\_\_-\_\_.

### 3. Opinion No. 521-A

Entergy and Louisiana each timely filed a request for rehearing. R. 303 (Entergy); R. 304 (Louisiana). The Commission issued *Opinion No. 521-A* (together with *Opinion No. 548*, concerning Phase II) on April 21, 2016. The Commission affirmed its interpretation of the System Agreement, denying Louisiana's request for rehearing of the finding that the Opportunity Sales were permitted under section 4.05 and Entergy's request for rehearing of the finding that Opportunity Sales should have been treated as "sales to others" under section 30.04. *Opinion No. 521-A* at PP 17-22, 34-43, JA \_\_\_\_-\_\_, \_\_\_\_-\_\_. The Commission also denied Entergy's request for rehearing of its decision to require refunds. *Id.* at PP 53-61, JA \_\_\_\_-\_\_. The Commission did, however, reverse its decision to reduce Entergy Louisiana's refunds. *Id.* at PP 70-74, JA \_\_\_\_-\_\_.

### 4. Second Rehearing Order

Entergy again requested rehearing. R. 549. On September 22, 2017, the Commission issued an Order on Rehearing that rejected many of Entergy's arguments as impermissibly repetitive of its earlier rehearing request and affirmed its determination not to reduce refunds to Entergy Louisiana. 160 FERC ¶ 61,109 at PP 10-13, JA \_\_\_\_-\_\_

(*Second Liability Rehearing Order*). Entergy's November 2017 petition for review in Case No. 17-1251 (challenging both Phase I and Phase II, *infra*) followed. *See* Timeline of Relevant FERC Proceedings. On Entergy's motion, this Court held the petition in abeyance pending resolution of the Phase III proceedings.

**C. Phase II: Method for Determining Refunds (Refund Orders)**

**1. Initial Refunds Decision**

In August 2013, the administrative law judge issued an Initial Decision finding that re-running the Intra-System Bill with a full reallocation of energy was the appropriate refund methodology. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 144 FERC ¶ 63,021 at P 424 (2013), R. 514, JA \_\_\_\_\_. (The judge noted that the parties, for purposes of litigating the refund methodology, had provided detailed calculations of Opportunity Sales only for a "Test Period" of three years: 2003, 2004, and 2006. *See id.* at PP 26, 441, JA \_\_\_\_\_, \_\_\_\_\_.) The judge determined that the Opportunity Sales should be assigned the lowest priority allocation (i.e., the highest-cost energy). *See id.* at P 399, JA \_\_\_\_\_.

## 2. Opinion No. 548

On April 21, 2016 (together with *Opinion No. 521-A*), the Commission issued *Opinion No. 548*, affirming the Initial Decision in part and reversing it in part. The Commission agreed that re-running the calculations with the full reallocation of energy was “the most reasonable methodology for determining the effects of the violation of the System Agreement” (*id.* at P 87, JA \_\_\_\_); because the focus of the damages determination “was to correct for the improper allocation of energy,” not a mere mispricing, a full re-allocation was needed “to determine how the system would have looked” if Entergy had properly applied the System Agreement. *Id.* at P 88, JA \_\_\_\_\_. The Commission, however, made one change to the calculation methodology: the administrative law judge had given Opportunity Sales the lowest priority for energy, after joint account sales, but the Commission determined that both types of off-system sales should have the same priority for purposes of energy allocation. *See id.* at P 92, JA \_\_\_\_\_.

The Commission also ruled on various adjustments to the refunds. The Commission found that Louisiana, as the complainant, bore the burden to prove not only liability but also damages — including

whether the inputs for the calculations were correct and whether the damages should be adjusted. *Id.* at P 148, JA \_\_\_\_\_. The Commission determined that the Opportunity Sales should be removed from the Responsibility Ratio for the calculations (as joint account sales were), to put the parties as close as possible to the position they would have been in with the proper allocation. *Id.* at PP 149-50, JA \_\_\_\_-\_\_.

The Commission further determined that “the damages figure should reflect the Opportunity Sales’ effects upon bandwidth payments during the refund period . . . .” *Id.* at P 196, JA \_\_\_\_\_. If Entergy had properly allocated system incremental cost to the Opportunity Sales when they were made, Entergy Arkansas’s production costs would have been higher and its bandwidth payments to other Operating Companies would have been lower. *See id.* Therefore, to put the parties in the position they would have had absent the violation, the refunds must take into account what Entergy Arkansas should have paid under the bandwidth remedy. *Id.* If that meant that some Operating Companies had received bandwidth overpayments that would reduce their damages from the Opportunity Sales, the Commission found that result

consistent with the goal of the refunds proceeding. *Id.* at P 197, JA \_\_\_\_-\_\_.

The Commission determined, however, that the record was “unclear as to what extent the Opportunity Sales will have negative margins following the reallocation, or whether it would be possible and/or advisable to remove such negative margins from the adjustment to damages . . . .” *Id.* at P 200, JA \_\_\_\_-\_\_. For that reason, the Commission ordered the hearing on remand to include “the issue of whether a cap on reduction in damages to account for increased bandwidth payments is necessary to hold the other Operating Companies harmless from exporting negative margins from the reallocated Opportunity Sales.” *Id.*, JA \_\_\_\_.

Finally, the Commission declined to determine how damages would be distributed between ratepayers and shareholders, which it concluded was “outside the scope of this proceeding.” *Id.* at P 201, JA \_\_\_\_.

Having determined the appropriate refund methodology and adjustments, the Commission remanded for further hearing procedures to implement those adjustments, “to calculate and verify the full

measure of damages” for all ten years (2000-2009), and to make “a final determination of refunds . . . .” *Id.* at P 212, JA \_\_\_\_.

### **3. Opinion No. 548-A**

Entergy, Arkansas, and Louisiana timely filed requests for rehearing and/or clarification. R. 547 (Entergy); R. 548 (Arkansas); R. 550 (Louisiana). The Commission issued *Opinion No. 548-A*, denying those requests, on November 16, 2017. (The Commission issued a short Errata Notice on November 30, 2017, correcting a reference in *Opinion No. 548-A* concerning the precise dates of the period in which the Opportunity Sales occurred. R. 569, JA \_\_\_\_.)

In January 2018, Arkansas (Case No. 18-1009) and Louisiana (Case No. 18-1010) each filed a petition for review challenging the Commission’s refund orders in Phase II. *See* Timeline of Relevant FERC Proceedings. The Court consolidated both petitions with Entergy’s earlier petition (No. 17-1251), which was already in abeyance.

## **D. Phase III: Calculation of Refunds (Calculations Orders)**

### **1. Initial Calculations Decision**

In July 2017, the administrative law judge issued an Initial Decision on the calculations. *La. Pub. Serv. Comm’n v. Entergy Corp.*,

160 FERC ¶ 63,009 (2017), R. 644, JA \_\_\_\_\_. The judge found that Entergy Arkansas had received \$202.4 million in revenues for the Opportunity Sales during the 2000 to 2009 period. *Id.* at P 31, JA \_\_\_\_\_. The judge determined that Entergy Arkansas would pay total damages (including interest) of approximately \$85.6 million to the other Operating Companies. *Id.* at P 16, JA \_\_\_\_\_. The judge applied an offset to the bandwidth adjustments, capping the reductions to damages based on the negative margins of the Opportunity Sales. *Id.* at PP 33-34, JA \_\_\_\_-\_\_.

## 2. Opinion No. 565

The Commission issued *Opinion No. 565* on October 18, 2018, affirming the calculations in the Initial Decision but reversing the cap on the bandwidth adjustment. *Id.* at P 11, JA \_\_\_\_\_. The Commission determined that the appropriate method to determine damages — “to put the parties as close as possible to the position they would have been in had the Opportunity Sales not been improperly allocated” — was to recognize the full amount of Entergy Arkansas’s bandwidth overpayments, without excluding the negative margins, in offsetting the damages. *Id.* at PP 76-77, JA \_\_\_\_-\_\_\_. The Commission also

determined that questions that arose in the calculations proceeding regarding certain other off-system sales were outside the scope of this proceeding. *Id.* at PP 107, 129, JA \_\_\_\_, \_\_\_\_.

### 3. Entergy's Compliance Filing

In December 2018, Entergy submitted its Compliance Filing (R. 675, JA \_\_\_\_), which detailed its final calculations of the refunds in accordance with the Commission's rulings in *Opinion No. 565*. Entergy stated that the re-run of the Intra-System Bill, accounting for the Opportunity Sales from October 2000 through December 2009, produced a total charge to Entergy Arkansas of approximately \$81.7 million. Compliance Filing at 4, JA \_\_\_\_\_. That initial amount was divided among the other Operating Companies in various amounts. *See id.* After applying the bandwidth adjustments (approximately \$13.7 million), the net refunds that Entergy Arkansas owed to the other operating companies were reduced to \$67.95 million. *Id.* at 7, JA \_\_\_\_\_. Applying interest based on the Commission's published interest rates, Entergy calculated total refunds from Entergy Arkansas of approximately \$135 million, distributed (approximately) as follows: Entergy Gulf States Louisiana, \$43.7 million; Entergy Louisiana, \$14.9

million; Entergy Mississippi, \$36.1 million; Entergy New Orleans, \$7 million; and Entergy Texas, \$33.2 million. *See id.* Entergy stated that it had effectuated the refunds through intercompany payments and receipts in December 2018. *Id.* at 1, JA \_\_\_\_.

#### **4. Opinion No. 565-A**

Louisiana timely sought rehearing of *Opinion No. 565*, R. 674, which the Commission denied on December 3, 2019, in *Opinion No. 565-A*.

In January 2020, Louisiana filed a petition for review (Case No. 20-1023) of the Phase III orders. All parties agreed to consolidate all of the petitions, with the exception that certain issues decided in Phase III (regarding off-system sales that the Commission found to be outside the scope of the Opportunity Sales proceeding) would be severed and held in abeyance pending conclusion of a related FERC proceeding on another Louisiana complaint. The Court granted that consolidation in its April 3, 2020 Order and established a new docket, D.C. Cir. No. 20-1104, for the severed issues.

### **SUMMARY OF ARGUMENT**

These consolidated appeals arise from a lengthy series of agency proceedings to determine the proper treatment of numerous off-system

energy sales over a ten-year period, involving hundreds of millions of dollars in revenues. Over the course of three phases of trial-type evidentiary hearings and seven orders, spanning another decade, the Commission first determined that the sales were permitted under the System Agreement, but that Entergy had not properly accounted for the energy. The remainder of the litigation concerned the appropriate remedy. (*See* Timeline of Relevant FERC Proceedings.)

On appeal, Entergy challenges the Commission's finding that Entergy Arkansas violated provisions concerning the allocation of energy. The Commission first found — as urged by Entergy and not challenged by any party on appeal — that the System Agreement permitted the Opportunity Sales, based on a provision that authorized “sales to others.” But the Commission went on to find that Entergy had violated the tariff by treating the Opportunity Sales as part of its load, to be allocated high-priority, low-cost energy. The Commission found the allocation provisions in the Agreement ambiguous and reasonably concluded that Opportunity Sales should be allocated as “sales to others,” with a lower priority and higher cost.

The Commission ordered Entergy Arkansas to pay refunds to the other Operating Companies, which had paid higher energy costs because of that improper allocation. Contrary to Entergy's claims that the refunds were unwarranted and excessive, the Commission appropriately sought, to the extent possible, to put the parties in the position that they would have held if the energy had been allocated correctly.

Fashioning such a remedy is particularly complex in the multi-affiliate, multi-state Entergy System, with a tariff that established a long history of coordination, cost-sharing, and mutual benefits, and with seven Service Schedules that governed a web of transactions among the Operating Companies. In particular, given the System Agreement's core principle of proportionality of both obligations and benefits, any change to the calculation of the Companies' respective responsibilities could flow through multiple provisions of the Agreement. Here, allocating the Opportunity Sales as part of Entergy Arkansas's load not only raised energy costs for other Companies but also, conversely, increased Entergy Arkansas's payments to those Companies under the bandwidth remedy and its proportionate share of various System costs.

Therefore, the Commission approved a refund methodology that would re-run Entergy's Intra-System Bill using the correct energy allocations, with certain adjustments to reflect the benefits as well as the costs that flowed from the misallocation. Louisiana challenges those adjustments, but the Commission properly exercised its broad remedial discretion, informed by its technical expertise and ratesetting judgment, to provide a remedy for the harm to the System's customers without awarding windfalls.

Finally, notwithstanding Arkansas's claims, the Commission did not make any determination as to the responsibility of Arkansas ratepayers or Entergy shareholders for the tariff violation damages or the offsetting adjustments. Rather, the Commission appropriately found that the distribution of damages between ratepayers and shareholders was a matter of retail ratemaking and beyond the scope of the Commission proceedings.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The Court reviews FERC orders under the Administrative Procedure Act's deferential "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *Louisiana 2008-I*, 522 F.3d at 391. "The 'scope of

review under [that] standard is narrow.” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). “A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.” *Id.* “Rather, the court must uphold a rule if the agency has ‘examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.’” *Id.* (quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43). “And nowhere is that more true than in a technical area like electricity rate design: ‘[W]e afford great deference to the Commission in its rate decisions.’” *Id.* (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)); see also *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) (because rate-related matters “are either fairly technical or ‘involve policy judgments that lie at the core of the regulatory mission[,]” the Commission “must have considerable latitude in developing a methodology responsive to its regulatory challenge”) (internal quotation marks and citations omitted).

Additionally, this Court affords *Chevron*-like deference to the Commission's interpretation of filed tariffs, including the Entergy System Agreement, unless the tariff language is unambiguous. *See New Orleans*, 692 F.3d at 175; *ESI Energy, LLC v. FERC*, 892 F.3d 321, 329 (D.C. Cir. 2018). This Court also "defers to the Commission's interpretation of its own precedent." *ESI Energy*, 892 F.3d at 329.

This Court affords the Commission "great deference in reviewing its selection of a remedy, for 'the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions.'" *Louisiana 2008-I*, 522 F.3d 378, 393 (D.C. Cir. 2008) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)); accord *La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426, 429 (D.C. Cir. 2017); see also *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 956 (D.C. Cir. 2005) (Commission "wields maximum discretion" when choosing a remedy). Accordingly, the Court "will set aside FERC's remedial decision only if it constitutes an abuse of discretion." *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999).

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825l(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Louisiana 2008-I*, 522 F.3d at 395 (citation omitted); *accord S.C. Pub. Serv. Auth.*, 762 F.3d at 54. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

## **II. THE COMMISSION REASONABLY DETERMINED THAT ENTERGY ARKANSAS HAD VIOLATED THE SYSTEM AGREEMENT**

### **A. The Commission Found That The Opportunity Sales Were Permitted Under The System Agreement**

On appeal, no party has challenged the Commission's determination that the System Agreement permitted the Opportunity Sales. Nevertheless, the Commission's interpretation of the Agreement on that issue also is relevant to its finding that Entergy misallocated

the energy for those Sales in violation of the Agreement, which Entergy does dispute (Br. 25-34). For that reason, we briefly summarize the Commission's analysis.

In the proceeding below, Entergy relied, for authority to make Opportunity Sales, on Section 4.05 of the System Agreement, which addresses "Sales to Others for the Joint Account of All the Companies."

JA \_\_\_\_\_. The Opportunity Sales were not joint account sales, but Section 4.05 defined joint account sales in the negative, as "[s]ales of capacity and energy to others for which any [Operating] Company does not wish to assume sole responsibility . . . ." JA \_\_\_\_\_. The Commission determined that this clause implied that a single Operating Company *could* choose to assume sole responsibility for an off-system sale.

*Opinion No. 521* P 109, JA \_\_\_\_\_; *see also id.* at PP 110-11, JA \_\_\_\_\_ (further finding no provision that precluded single-Company off-system sales, in contrast to other express limitations on activities of individual Companies); *Opinion No. 521-A* PP 17-20, JA \_\_\_\_\_. (The Commission also found that "capacity and energy" could be read disjunctively, meaning that Section 4.05 did not preclude energy-only sales. *Opinion 521* PP 112-15, JA \_\_\_\_\_.) Therefore, the Commission concluded that

Entergy Arkansas did not violate the System Agreement by making Opportunity Sales. *Cf. Opinion No. 521* P 121, JA \_\_\_\_ (noting, however, “there may be some tension between allowing opportunity sales . . . and the interests of the System as a whole” — that is, between such sales and the System Agreement’s objective of using facilities for the mutual benefit of all Operating Companies).

**B. The Commission Reasonably Found That Entergy Arkansas Violated The Energy Allocation Provisions Of The System Agreement**

Having found the Opportunity Sales permissible under the System Agreement, the Commission turned to the issue of cost allocation for those Sales. Reviewing the provisions of Service Schedule MSS-3, which sets forth the pricing of energy exchanged among the companies, the Commission concluded that Entergy had misallocated the energy for Opportunity Sales: rather than pricing those Sales as part of the high-priority, lowest-cost “loads” of Entergy Arkansas under Section 30.03(a), Entergy should have priced them as lower-priority, higher-cost “Sales to Others” under Section 30.04. *See Opinion No. 521* PP 124-29, JA \_\_\_\_-\_\_\_. As a result of the misallocation, Entergy had priced the sales at Entergy Arkansas’s average cost, rather than the

incremental cost of the System as a whole. *Id.* at PP 124, 127, JA \_\_\_\_, \_\_\_\_.

**1. The Commission properly found the allocation provisions ambiguous**

Entergy contends (Br. 25-30) that Opportunity Sales should be included in the Operating Company's "loads" under Section 30.03(a), JA \_\_\_\_\_. Entergy argues that the provision's reference to "loads" has a plain meaning: all customers that receive power from an Operating Company. Br. 26. Entergy cannot locate that meaning within the Agreement itself, drawing instead on broad descriptions from industry organizations. *See id.*; *but see Opinion No. 521 P 128*, JA \_\_\_\_\_ (recognizing that both "loads" and "requirements" are "often used in the electric industry in a more generic, inclusive sense"). Entergy admits that the System Agreement "does not define 'loads'" (Br. 26), even as the Agreement uses the term in various ways throughout. *See Opinion No. 521 P 128*, JA \_\_\_\_\_; *see also Opinion No. 521-A P 34*, JA \_\_\_\_\_ (citing testimony by FERC Trial Staff's witness); Staff Exhibit 1, Answering Testimony of John K. Sammon at 38, JA \_\_\_\_\_ ("[Service Schedule] MSS-3 seems to randomly use the words 'loads' and 'requirements' interchangeably.").

Indeed, the Commission found Entergy's own uses of both terms inconsistent. *See Opinion No. 521* P 128, JA \_\_\_\_ (“Entergy implicitly concedes that the term ‘requirements’ means ‘native load’ in some parts of the System Agreement, but inconsistently argues that planning ‘requirements’ are different from energy allocation ‘requirements’”) (citing Louisiana’s and Entergy’s briefs before the Commission); *Opinion No. 521-A* P 36, JA \_\_\_\_ (“Entergy itself notes that the term ‘requirements’ is used in different ways throughout the System Agreement.”). Even the provisions that Entergy highlights in its Brief (at 27-28) — using “requirements” and “non-requirements” figures set forth in a FERC-required form to calculate a variable in the bandwidth formula (Sec. 30.13, JA \_\_\_\_ ) and using “net area load” as an input for certain cost simulations (Sec. 70.06, JA \_\_\_\_ ) — do not convey a clear, cohesive definition of either term. *See Opinion No. 521-A* P 38, JA \_\_\_\_ (concluding that those sections do not support Entergy’s asserted plain meaning). Therefore, the Commission appropriately found that the energy allocation provisions in Service Schedule MSS-3 were ambiguous.

**2. The Commission reasonably interpreted the System Agreement to require treating Opportunity Sales as “sales to others”**

Having found that the System Agreement did not plainly include short-term, off-system sales within a Company’s “loads” for purposes of prioritizing energy allocation under Section 30.03, the Commission reasonably interpreted the Agreement to treat such transactions as sales “to others” under section 30.04. *Opinion No. 521* P 129, JA \_\_\_\_.

The Commission based its interpretation on both the language of those specific provisions and the context of the System Agreement as a whole. *Id.*; see *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 85 (2008) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)); *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.*, 119 FERC ¶ 61,314 at P 19 (2007), cited in *Opinion No. 521* at P 108 n.218, JA \_\_\_\_.

First, the Commission looked to “the more specific language” in Section 30.04: “Sales to Others” and “Energy used to supply others.” *Opinion No. 521* P 129, JA \_\_\_\_.

Contrary to Energy’s claim that the Commission read that language “in isolation” (Br. 33), the Commission looked again to Section 4.05 — the provision that the Commission found to leave open the potential for single-Company opportunity sales in the

first place — which likewise refers to “others” in describing off-system energy sales. *Opinion No. 521* P 129, JA \_\_\_\_-\_\_; *Opinion No. 521-A* P 39, JA \_\_\_\_\_. Though Entergy argues (Br. 33) that “sales to others’ can only mean sales to others by the System for the joint account of all companies,” section 30.04 contains no such limitation and, indeed, makes no reference to joint account sales. *See Opinion No. 521-A* P 40, JA \_\_\_\_\_.

Nor does Section 30.04 contravene the definition of Opportunity Sales as those for which an Operating Company assumes sole responsibility, as Entergy contends. *See* Br. 30-31 (arguing that language in Section 30.04, providing for a Company to be reimbursed for the cost of fuel used to supply the energy, “makes sense only” for joint account sales). The Commission explained that the reimbursement language also applied to an Opportunity Sale because, given how the System dispatches resources, the energy supplied for that sale “does not necessarily come from” the selling Company’s own generation. *Opinion No. 521* P 131, JA \_\_\_\_-\_\_. Therefore, the Company assuming responsibility for the sale could need to reimburse another Company for fuel. *Id.* (Entergy argues (Br. 31) that Section

30.09 (JA \_\_\_\_ ) confirms its reading of Section 30.04. Entergy, however, failed to raise this objection — or even to cite Section 30.09 — on rehearing before the Commission; therefore, the argument is jurisdictionally barred under section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b). *See, e.g., Cal. Dep’t of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (strictly construing jurisdictional requirement). In any event, Entergy’s exclusionary reading of a provision regarding types of inter-company payments is notably different from its argument in the underlying proceedings that Opportunity Sales are impliedly authorized by an Agreement that nowhere mentions them.)

The Commission also grounded its interpretation in the purpose and context of the Entergy System Agreement as a whole. In particular, the Commission found meaningful “the distinction between sales made to native load and those sales made off-system that is inherent within the System Agreement itself.” *Opinion No. 521-A* P 35, JA \_\_\_\_ . That context — together with the long history and purpose of coordination and cost allocation in the Entergy System pursuant to the Agreement — informed the Commission’s conclusion that “it is

reasonable . . . to give greater priority to on-system sales made to the native load customers who helped to pay for the generation” and a lower priority to short-term off-system sales to other purchasers who did not.

*Id.* That reading “strikes the correct balance between the rights of individual Operating Companies to make opportunity sales for their own account and the rights of the system as a whole in the light of the System Agreement’s language.” *Id.* at P 43, JA \_\_\_\_.

### **III. THE COMMISSION PROPERLY EXERCISED ITS REMEDIAL DISCRETION IN DETERMINING THE CALCULATION OF REFUNDS THAT ENTERGY ARKANSAS WOULD PAY TO THE OTHER OPERATING COMPANIES**

#### **A. Refunds Were An Appropriate Remedy For The Tariff Violation And Resulting Harm To The Entergy System And Its Customers**

Because Entergy violated the System Agreement by including Opportunity Sales in its load under Section 30.03(a), the Commission concluded that damages for that violation should be based on repricing the Opportunity Sales as though they had been correctly treated as sales to others under Section 30.04 (at a lower priority and higher energy cost). *Opinion No. 521* P 136, JA \_\_\_\_-\_\_\_. Entergy Arkansas would then pay that difference as refunds to the other Operating Companies. *Id.*

On appeal, Entergy contends (Br. 38-39) that the Commission abused its discretion by requiring Entergy to pay refunds for the tariff violation — especially in the amount ultimately calculated. But the extent of the Commission’s discretion “is, if anything, at zenith” when fashioning a remedy. *See Louisiana 2008-I*, 522 F.3d at 393 (affording to the Commission “great deference in reviewing its selection of a remedy”); *supra* p. 36 (citing cases). Here, the Commission exercised that discretion appropriately, considering the circumstances of the Opportunity Sales and the adverse impacts on Entergy System customers and concluding that Entergy Arkansas’s tariff violation — using low-priced System energy for its own off-system sales — harmed customers of the other Operating Companies. *See Second Liability Rehearing Order* P 13, JA \_\_\_\_; *see also Opinion No. 521-A* P 55, JA \_\_\_\_ (allocation of cheaper energy to those sales “resulted in an overcharging” to other Operating Companies’ customers).

Moreover, granting refunds to remedy harm from a tariff violation was consistent with Commission precedent. *See, e.g., Corp. Comm’n of the State of Okla. v. Am. Elec. Power Co.*, 125 FERC ¶ 61,237 at P 33 (2008) (ordering refunds for a tariff violation that had benefitted certain

utilities, and their shareholders, at the expense of affiliated utilities and their customers), *reh'g denied*, 130 FERC ¶ 61,120 at P 33 (2010), *discussed in Opinion No. 521-A* P 58, JA \_\_\_\_; *cf. Opinion No. 521-A* P 55, JA \_\_\_\_-\_\_ (explaining that the tariff violation resulted in overcharges to customers of the other Operating Companies). And, again, the Commission looked to the competing interests in the Entergy System: the misallocation here “undermined the energy allocation priorities under the System Agreement that balance the rights of the individual Operating Companies against those of the Entergy system, and native load customers against third parties.” *Opinion No. 521-A* P 55, JA \_\_\_\_; *see also id.*, JA \_\_\_\_ (allowing misallocation to stand “would represent a windfall” for Entergy Arkansas “at the expense of” the System).

Entergy argues (Br. 38) that the refunds are not justified because the Commission found the Agreement ambiguous and made no finding of bad faith. The Commission, however, appropriately concluded that those factors did not “obviate the need for refunds given the violation of the filed rate, as well as the windfall that would otherwise accrue to Entergy Arkansas’[s] shareholders.” *Opinion No. 521-A* P 59, JA \_\_\_\_.

That focus distinguishes this case from *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998), where the Court reversed refunds that would contravene a stated FERC policy and misallocate costs based upon “what was, in essence, a technical error.” *Id.* at 817, *discussed in Opinion No. 521-A P 60*, JA \_\_\_\_-\_\_. Nor is this case comparable to *Gulf Power Co. v. FERC*, 983 F.2d 1095 (D.C. Cir. 1993), in which the Court found that a “ministerial error” (failing to seek a required waiver) did not warrant substantial refunds, where the utility had not profited from the error and had actually saved its customers money. *Id.* at 1099-1100.

Entergy also contends (Br. 34) that the Commission’s interpretation leads to an “absurd outcome” because Entergy Arkansas would not have made the Opportunity Sales had it known that higher-cost energy would be allocated to those transactions. (Entergy failed to raise this claim on rehearing with respect to the Commission’s tariff interpretation, as it now does on appeal, but it did object to refunds on this basis.) That Entergy might find Opportunity Sales less profitable under the correct tariff interpretation, however, is beside the point: “It is entirely possible that the Opportunity Sales would not have been

made, or would have been made in a different way . . . . However, ultimately the Opportunity Sales were in fact made, and system ratepayers were harmed as a result.” *Opinion No. 521-A* P 57, JA \_\_\_\_.

Refunds were, in the Commission’s view, “the best available method of putting parties in the same place that they would have been” absent the tariff violation. *Id.* That remained the Commission’s guiding principle throughout the proceedings. *See also Opinion No. 548* PP 90, 149, 196, JA \_\_\_\_, \_\_\_\_, \_\_\_\_; *Opinion No. 548-A* PP 3, 11, 22, 29, JA \_\_\_\_, \_\_\_\_, \_\_\_\_, \_\_\_\_; *Opinion No. 565* PP 76, 80-81, JA \_\_\_\_, \_\_\_\_-\_\_; *Opinion No. 565-A* PP 12-14, JA \_\_\_\_-\_\_.

Entergy further claims that the principal refunds of approximately \$68 million were “wholly disproportionate” (Br. 38) — omitting the relevant proportions. Over the decade from 2000 to 2009, Entergy Arkansas received approximately \$202 million dollars in revenues for the Opportunity Sales. *See supra* p. 29. And, as discussed in Part B.1.a, *infra*, the Commission directed that the refunds be offset by excess amounts that Entergy Arkansas had paid under the bandwidth remedy due to the energy allocation, resulting in a \$13 million reduction in damages for the 25 percent of Opportunity Sales

that occurred after the June 2005 effective date of the bandwidth remedy.

Finally, Entergy contends that the refunds are “unfair” and “excessive” (Br. 39) because nearly half of the total represents interest. But the Commission, by including interest on the refunds, followed its longstanding policy. *See Opinion No. 521-A* P 63 & n.81, JA \_\_\_\_ (citing cases); *see, e.g., Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999) (“The Commission’s general policy, in effect for many years, requires interest to be paid on various kinds of overcharges”); *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,153 at P 30 & n.30 (2014) (following policy and allowing interest on refunds of overcharges). Indeed, the Commission publishes interest rates to be applied to Commission-ordered refunds. *See* 18 C.F.R. § 35.19a(a)(2)(iii)(A) and (B) (2019) (prescribing interest rates); *see generally Am. Pub. Gas Ass’n v. FPC*, 546 F.2d 983, 987 (D.C. Cir. 1976) (“[T]here is no question that the Natural Gas Act and Federal Power Act specifically grant the Commission authority to order interest on refunds[] and promulgate a general rule determining the interest rate

applicable to refunds.”) (citations omitted) (reversing Commission orders that awarded too little interest on refunds).

Here, the interest calculation produces a substantial figure simply because it reflects the time value of money for a tariff violation that began two decades ago. The Opportunity Sales began in 2000 and continued through 2009; as previously noted, most occurred between 2002 and 2005. Entergy notes (Br. 39) that Louisiana brought its complaint only in 2009 — but Louisiana first challenged the Opportunity Sales’ consistency with the System Agreement in a 2003-2007 proceeding before the Commission. *See Louisiana 2008-II*, 551 F.3d at 1044. Louisiana filed its complaint six months after this Court dismissed its challenge in that litigation, noting that Louisiana could pursue the issue in a different proceeding. *See id.* at 1046; *see also Opinion No. 521* P 142, JA \_\_\_\_ (rejecting Entergy’s laches defense).

**B. The Commission Reasonably Exercised Its Discretion In Approving A Refund Methodology Based On Reallocation Of The Energy For The Opportunity Sales, With Appropriate Adjustments**

Because the Sales were valid under the Agreement and the tariff violation was in the allocation of energy, the Commission determined that the remedy must address that allocation. *See Opinion No. 521*

P 136, JA \_\_\_\_-\_\_; *Opinion No. 548* P 88, JA \_\_\_\_\_. The Commission found that damages were warranted because the other Operating Companies and their customers had been harmed by the violation, as Entergy Arkansas's misallocation of low-cost energy to its Opportunity Sales had inflated their own energy costs. *See Opinion No. 521-A* P 55, JA \_\_\_\_-\_\_. The Commission consistently emphasized that the purpose of the proceeding was to "put the parties as close as possible to the position they would have been in" if Entergy had properly allocated the energy for the Opportunity Sales. *Opinion No. 548* P 90, JA \_\_\_\_; *see also supra* p. 49 (citing orders). The Commission acknowledged that doing so would not be simple: "[W]e are attempting to recreate a situation that did not exist at the time the original allocation was made, which inevitably requires some adjustments." *Opinion No. 548* P 90, JA \_\_\_\_; *see also id.* at P 94, \_\_\_\_ ("It is inevitable that some difficulties will arise when attempting to recreate a complex system based on a counterfactual arrangement."); *id.* at P 95, JA \_\_\_\_; *Opinion No. 548-A* P 29, JA \_\_\_\_\_. Therefore, in refining the methodology to remedy the harm from the tariff violation, the Commission also sought to prevent a "windfall" to any Operating Company. *See Opinion No. 521-A* PP 55,

59, JA \_\_\_\_, \_\_\_\_; *Opinion No. 548* P 197, JA \_\_\_\_, \_\_\_\_; *Opinion No. 565* P 76, JA \_\_\_\_, \_\_\_\_; *Opinion No. 565-A* PP 23, 25, JA \_\_\_\_, \_\_\_\_.

**1. The Commission reasonably required certain adjustments to the refund calculations**

Fashioning such a remedy was especially complicated in the Entergy System, with extensive coordination and cost-sharing transactions among multiple Operating Companies across several states. Given those circumstances, the Commission recognized that the reallocation of energy from load might affect other calculations under the System Agreement and Service Schedules. For that reason, the Commission directed the refund proceeding to include possible adjustments to the refund methodology to account for such effects. *Opinion No. 521* P 138, JA \_\_\_\_, \_\_\_\_; *Opinion No. 521-A* P 46, JA \_\_\_\_, \_\_\_\_.

In its Phase II orders, the Commission required two adjustments to the refunds: (1) the total damages would be reduced to account for excess payments that Entergy Arkansas had made under the bandwidth remedy during the 2005-2009 period; and (2) the Opportunity Sales would be excluded from Entergy Arkansas's Responsibility Ratio, affecting calculation inputs for five of the Service Schedules. *See*

*Opinion No. 548* PP 149-53, 196-99, JA \_\_\_\_-\_\_, \_\_\_\_-\_\_; *Opinion No. 548-A* PP 20-22, JA \_\_\_\_-\_\_.

**a. Bandwidth Payments**

As explained *supra* at p. 17, for each year the bandwidth remedy was in effect, Entergy would apply formulas in Sections 30.12 and 30.13 of Service Schedule MSS-3, JA \_\_\_\_-\_\_, to determine each Operating Company's actual production cost and its allocation of the System's average production cost. Entergy then would calculate the Operating Companies' respective deviations from average cost, and any Companies that were at least 11 percent below the average would make equalization payments to Companies with above-average costs in accordance with Section 30.11, JA \_\_\_\_-\_\_. (A low-cost Company would pay the amount needed to reduce its disparity to 11 percent.) For each bandwidth calculation during the period in which the Opportunity Sales occurred (that is, for a portion of 2005 and each year from 2006 through 2009), Entergy Arkansas made payments to the other Operating Companies because its production costs were more than 11 percent below the system average (and no other Company had below-average costs). *See Compliance Filing, Att. 2 at 1, JA \_\_\_\_.*

Because Entergy Arkansas had originally allocated lower-cost energy to the Opportunity Sales, its annual production costs calculated under the bandwidth formula in Service Schedule MSS-3 (using the system incremental cost of that energy as a formula input) would have been incorrectly low. *See Opinion No. 548 P 196, JA \_\_\_\_*. Therefore, Entergy Arkansas's proportionate costs fell farther below the bandwidth range — and other Operating Companies' proportionate costs were higher — than they should have been, so Entergy Arkansas made larger bandwidth payments and other Companies received larger amounts than they should have. *See id.; see also Opinion No. 565 P 76, JA \_\_\_\_-\_\_* (“[A]s a result of Entergy’s original improper accounting for the Opportunity Sales, Entergy Arkansas made additional bandwidth payments to the other Operating Companies.”). In that sense, the Operating Companies that were harmed by paying higher energy costs due to the misallocation also may have benefited from higher bandwidth payments. *See Opinion No. 565 P 76, JA \_\_\_\_*.

For that reason, the Commission reasonably found that, to achieve the remedial purpose of putting the parties, to the extent possible, in the position they would have had, the damages figure should reflect the

effects of the original misallocation on the annual bandwidth payments. *Opinion No. 548* P 196, JA \_\_\_\_\_. That finding did not rest only on the Commission's expertise with respect to the bandwidth remedy and annual calculation proceedings, or on the plain mathematical relations in the bandwidth formula. Contrary to Louisiana's claim (Br. 29), the Commission's finding was supported by substantial record evidence. *See Opinion No. 548* P 196 & n.288, JA \_\_\_\_; Entergy's [Phase II] Brief on Exceptions at 69-71, 75-76, R. 525, JA \_\_\_-\_\_, \_\_\_\_-\_\_ (explaining effects in formula, citing various testimony); Entergy Exhibit 124 at 174-76, R. 411, JA \_\_\_\_-\_\_ (citing statement by Louisiana's witness).

Though Louisiana contends that reducing the refunds on that basis would be "inequitable" (Br. 30), the Commission again noted the interrelation of the System Agreement's cost-sharing provisions: "If bandwidth payments were inflated as a result of the Opportunity Sales, it is more accurate to say that other Operating Companies have received a windfall of their own." *Opinion No. 548* P 197, JA \_\_\_\_-\_\_. Indeed, if the subtraction were large enough to counter an Operating Companies' share of Opportunity Sales damages, that could mean the Company already was made whole for the tariff violation, and that

further damages would be “duplicative.” *Id.*, JA \_\_\_\_-\_\_. Louisiana claims that the Commission had no basis to conclude that damages would be duplicative (Br. 29), but the Commission explained its rationale: if Operating Companies had received bandwidth payments that were inflated due to Entergy Arkansas’s erroneously low production cost calculations, then those Companies “ha[d] already derived a benefit in [those] years from the improper accounting for the Opportunity Sales . . . .” *Opinion No. 565* P 81, JA \_\_\_\_; *see also id.* at P 76, JA \_\_\_\_ (Operating Companies “would essentially receive double damages — first through increased bandwidth payments as a result of the original accounting for the Opportunity Sales and second through the damages ordered in this proceeding”).

The Commission also appropriately declined to cap the offsetting bandwidth payments because such limits would not serve the remedial purpose. *See Opinion No. 565* PP 75-76, JA \_\_\_\_-\_\_. At its core, Louisiana’s objection is that the Commission did not place the parties in the position they would have held if Entergy Arkansas had not made the Opportunity Sales at all. *See Br. 33-35; Opinion No. 565-A* P 23, JA \_\_\_\_-\_\_. But the Sales were permitted under the System Agreement

and remained valid. *Opinion No. 565* P 77, JA \_\_\_\_\_. Those Sales had economic consequences — both harms and windfalls — and the Commission sought “to balance out that effect.” *Opinion No. 565-A* P 23, JA \_\_\_\_-\_\_. If some of the Opportunity Sales turned out, after re-allocation, to have negative margins, the Commission found no reason to exclude them from the calculations. *Opinion No. 565* P 77, JA \_\_\_\_; *see also id.* at P 80, JA \_\_\_\_; *infra* pp. 65-66.

The Commission considered the totality of the record evidence on all issues — from Entergy’s conduct of the Opportunity Sales to the effects on intercompany payments — and concluded that a full re-run of the Intra-System Bill with the correct energy allocation, with an uncapped adjustment for bandwidth overpayments, “provided the best measure of damages.” *Opinion No. 565-A* P 21, JA \_\_\_\_\_. That remedy, in the Commission’s view, would place the parties as close as possible to the position they would have had if Entergy Arkansas had properly accounted for the energy for the Opportunity Sales — damages for the higher energy costs that the other Operating Companies had paid, minus the inflated portion of bandwidth payments they had received

because Entergy Arkansas's misallocation had lowered its energy cost inputs. *See id.* at PP 23, 34, JA \_\_\_\_-\_\_, \_\_\_\_.

Moreover, the bandwidth adjustment would not fully offset any Operating Company's damages, because most of the Opportunity Sales occurred in the period from 2002 to 2005, while the bandwidth remedy became effective only in mid-2005. *See Opinion No. 548* P 198, JA \_\_\_\_; *Opinion No. 565* P 81, JA \_\_\_\_; *see* Entergy Br. 39 (stating that Entergy Arkansas made nearly 75 percent of the Opportunity Sales in the period from 2002 through 2005). Indeed, all of the Operating Companies received substantial refunds. *See supra* pp. 30-31. Though Louisiana argues (Br. 3, 28) that the bandwidth reduction effectively required the other Operating Companies to pay damages to Entergy Arkansas, the total damages — after adjustments — to be paid by Entergy Arkansas for the entire refund period were nearly \$68 million before interest. *See supra* p. 30. (Of that amount, Entergy Louisiana and Entergy Gulf States Louisiana received approximately \$6.6 million and \$22.7 million, respectively, before interest (approximately \$14.9 million and \$43.7 million including interest). Compliance Filing at 8, JA \_\_\_\_.)

### **b. Responsibility Ratios**

Due to the System Agreement's central principle of proportionality of both obligations and benefits, any change to the calculation of the Companies' respective responsibilities can reverberate through multiple provisions of the Agreement. In particular, the Commission determined that, to provide damages that would put the parties as close as possible to the correct allocation, the calculations should include an adjustment to the Responsibility Ratio that carries through five of the Service Schedules. *See Opinion No. 548* PP 149-52 JA \_\_\_\_-\_\_.

Under Sections 2.16 through 2.18 of the System Agreement (JA \_\_\_\_-\_\_), each Operating Company's Responsibility Ratio is derived from its peak demand, with joint account sales excluded. *See Opinion No. 548* P 151, JA \_\_\_\_-\_\_. Having determined that Opportunity Sales should receive the same energy priority as joint account sales, the Commission found that joint account sales "are a closer analogy for purposes of . . . the Responsibility Ratio than the on-system native load sales made under [Section 30.03] . . . ." *Id.* at P 150, JA \_\_\_\_.

Louisiana argues (Br. 38) that this adjustment, based on the treatment of energy costs, had the effect of shifting the allocation of

other, fixed costs — for capacity, transmission, and power purchases — to the other Operating Companies. But the consistent treatment of off-system sales, whether for the joint account of all the Companies or at the sole responsibility of one, followed the language of the Agreement and the Commission’s reasonable interpretation. *Opinion No. 548-A* P 20, JA \_\_\_\_\_. Moreover, that interpretation did not favor Entergy Arkansas or disadvantage other Operating Companies, because any of them could likewise make off-system opportunity sales. *Id.* at P 21, JA \_\_\_-\_\_\_. They would not pay for the capacity used to service those sales, but also would not be able to draw upon cheaper energy for them (*id.* at P 20, JA \_\_\_\_\_); because such sales are given the lowest energy priority, “any potential unfairness” would be checked by the limited margins available. *Id.* at P 21, JA \_\_\_\_\_.

**2. Louisiana bore the burden of proof as to damages, including the adjustments**

Louisiana contends (Br. 22-28) that the Commission improperly placed the burden of proof on Louisiana with respect to adjustments to the refunds. Louisiana argues that Entergy should have borne the burden to justify any offsets. Br. 26. The Commission, however, properly concluded that Louisiana, as the complainant, bore the burden

of proving both liability and damages, “which includes the correct inputs” to use in re-running the Intra-System Bill. *Opinion No. 548-A* P 23, JA \_\_\_\_.

As discussed *supra* at p. 22, the goal of the refund calculations in this case was to determine the difference between the improper (actual) allocation of energy among the Operating Companies and what the proper (recreated) allocation would have been. *See Opinion No. 548* P 90, JA \_\_\_\_.

The refund calculations would not require or effect any modification or amendment of the System Agreement or its Service Schedules — to the contrary, the calculation would apply the existing provisions properly, to correct for Entergy Arkansas’s violation thereof. *Opinion No. 548-A* P 23 & n.53, JA \_\_\_\_.

In the Phase II proceedings, however, Entergy and Louisiana disagreed on whether the refund methodology should take into account the effect of energy reallocation on the Responsibility Ratios by removing the Opportunity Sales from Entergy Arkansas’s load under Section 2.16 of the Agreement, JA \_\_\_\_.

*See supra* Part B.1.b; *Opinion No. 548* PP 146-48, JA \_\_\_\_-\_\_.

Louisiana argues that Entergy, in proposing to “chang[e] its own practices” to include the Opportunity

Sales in determining Responsibility Ratios, was the “proponent of a rule or order” and therefore had the burden of proof. Br. 26 (citing 5 U.S.C. § 556(d)). But the damage calculations in this case did not depend on Entergy’s “practices”; the Commission consistently focused on “put[ting] the parties as close as possible to the position they would have been in” if Entergy had properly applied the System Agreement. *Opinion No. 548 P 149, JA \_\_\_\_*; *Opinion No. 548-A P 22, JA \_\_\_\_*. Indeed, Louisiana’s argument (Br. 25) that Entergy had a “consistent practice” of including Opportunity Sales in Entergy Arkansas’s load when determining Responsibility Ratios adds nothing, given that the very tariff violation that Louisiana had shown, and that the damages would remedy, *was* including Opportunity Sales in Entergy Arkansas’s load. *See Opinion No. 548-A P 23, JA \_\_\_\_*. Louisiana’s refund calculations were incorrect because they, too, included the Opportunity Sales as part of Entergy Arkansas’s load. *Id.*; *see also Opinion No. 548 P 148, JA \_\_\_\_* (“The issue of whether to include the other Service Schedules within the damage calculation is . . . . part of the initial damage calculation . . .”).

**C. The Commission Reasonably Determined That Neither Allocating Losses From The Opportunity Sales Nor Removing Their Effects From The Bandwidth Adjustment Was Appropriate**

Entergy and Louisiana also raise related — though opposite — objections to the refund methodology. When the Opportunity Sales were re-priced based on a lower allocation priority and higher-cost energy, some of those Opportunity Sales cost more than the revenues that Entergy Arkansas received for them. Both Entergy and Louisiana dispute the Commission’s treatment of the resulting “negative margins.” *See Opinion No. 565 P 9 n.25, JA \_\_\_\_* (negative margins refer to System costs that exceed revenues).

Entergy argues (Br. 35-37) that the System Agreement required all of the Operating Companies to share the negative margins and that the Commission erred by making Entergy Arkansas responsible for paying refunds. Entergy contends (*id.*) that, if the energy for Opportunity Sales is allocated with the same priority as joint account sales, then the margins must be proportionately shared in the same manner as for joint account sales. The Opportunity Sales, however, were not made for the joint account of the Operating Companies, nor did Entergy Arkansas share the revenues it collected for those Sales

with the other Companies. *See Opinion No. 548-A P 31, JA \_\_\_\_.*

Further, Entergy accuses the Commission of contravening Agreement provisions that either do not address margins at all (Section 30.04, JA \_\_\_\_ ) or do so specifically for joint account sales (Service Schedule MSS-5, JA \_\_\_\_). *See Opinion No. 548-A P 32, JA \_\_\_\_.*

Again, the reason that the Opportunity Sales themselves did not constitute tariff violations is that the System Agreement contemplated sales for which a single Operating Company “wish[ed] to assume sole responsibility.” Agreement, Sec. 4.05, JA \_\_\_\_; *see Opinion No. 521 P 109, JA \_\_\_\_-\_\_*; *supra* p. 38. (Entergy *itself* invoked this implicit authorization to defend the permissibility of the sales. *See Opinion No. 548-A PP 31-32, JA \_\_\_\_-\_\_.*) That “sole responsibility” includes all margins on such sales — whether positive or negative. *Opinion No. 548-A P 31, JA \_\_\_\_.* Entergy Arkansas was permitted to make the sales for itself, but it must accept the results.

Louisiana, for its part, claims that Entergy Arkansas nevertheless was able to distribute its negative margins to the other Operating Companies because the Commission did not remove the Opportunity Sales from the 2005-2009 bandwidth calculations. *See Br. 33-35.* As

discussed *supra* at pp. 57-58, however, the Commission concluded that it would not serve the purpose of remedying the misallocation to recalculate the bandwidth payments and receipts as though the Opportunity Sales had not even existed. *See Opinion No. 565-A* PP 20-21, JA \_\_\_\_-\_\_.

**D. The Commission Appropriately Declined To Address The Treatment Of The Damages And Adjustments For Purposes Of Retail Rates**

Arkansas's arguments on appeal center on the distribution of damages—and especially the offsetting adjustments—as between ratepayers and Entergy's shareholders.<sup>7</sup> But the Commission emphasized that the refund proceeding was limited to the allocation of costs among the Operating Companies, and appropriately declined to consider the retail rate treatment of those allocations.

From the first in this series of orders, the Commission made clear that this proceeding would be limited to “the allocation of costs among the Operating Companies under the System Agreement.” *Opinion No. 521* P 133 n.251, JA \_\_\_\_ (noting that a question regarding Entergy

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<sup>7</sup> As noted *supra* at note 2, though Louisiana raised related objections before the Commission, it failed to present any argument on this scope issue in its Opening Brief to this Court.

Arkansas's accounting for costs in its rates was "beyond the scope of this proceeding"); accord *Opinion No. 521-A* P 43 n.51, JA \_\_\_\_-\_\_. In Phase II, Arkansas asked the Commission, if it adopted a bandwidth adjustment to the damages, to require a reduction to bandwidth payments to be credited to Entergy Arkansas's retail ratepayers. The Commission, however, found that "the distribution of damages between ratepayers and shareholders is outside the scope of this proceeding." *Opinion No. 548* P 201, JA \_\_\_\_\_. Rather, "[t]he goal of the Commission in this proceeding is to put the Operating Companies, not all ratepayers, in the position they would have been in" if the energy for the Opportunity Sales had been allocated properly. *Opinion No. 548-A* P 11, JA \_\_\_\_\_.

Moreover, the bandwidth adjustment was not, as Arkansas suggests (Br. 20), actually an "[a]djustment of the bandwidth payments." Reducing damages to account for inflated bandwidth payments would be only a damages calculation — it "does not represent a recalculation of [any] bandwidth payments" themselves. *Opinion No. 548* P 201, JA \_\_\_\_\_; see also *Opinion No. 548-A* P 10, JA \_\_\_\_\_ (the damages adjustment "is not intended to be an out-of-period adjustment

to the bandwidth remedy amounts. . . . The purpose of this proceeding is to calculate damage payments to be made by Entergy Arkansas to the other Operating Companies”).

In any event, the Commission also emphasized that it had “made no findings in this proceeding as to how the bandwidth adjustment to damages owed by an Operating Company should be treated for purposes of retail rates” (*Opinion No. 548-A* P 11, JA \_\_\_\_ ) — nor should it. *See, e.g., Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39, 42 (2003) (state regulators establish the Operating Companies’ retail rates).

## CONCLUSION

For the reasons stated, the petitions should be denied and the challenged FERC orders should be affirmed in all respects.

Respectfully submitted,

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August 5, 2020

## CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and this Court's April 3, 2020 Order in this case, I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word, in 14-point Century Schoolbook) and contains 13,079 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

*/s/ Carol J. Banta*

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August 5, 2020

**CERTIFICATE OF SERVICE**

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 5th day of August 2020, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Carol J. Banta

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# **ADDENDUM**

## **Statutes & Regulation**

**TABLE OF CONTENTS**

<b>STATUTES:</b>	<b>PAGE</b>
Administrative Procedure Act:	
5 U.S.C. § 556.....	A1
5 U.S.C. § 706(2)(A) .....	A3
Federal Power Act	
Section 206, 16 U.S.C. § 824e.....	A5
Section 313(b), 16 U.S.C. § 825l(b).....	A8
<b>REGULATIONS:</b>	
18 C.F.R. §§ 35.19a(a)(2)(iii)(A) and (B) .....	A10

or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a non-public investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 385.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1005.	June 11, 1946, ch. 324, § 6, 60 Stat. 240.

In subsection (b), the words "is entitled" are substituted for "shall be accorded the right". The word "officers" is omitted as included in "employees" in view of the definition of "employee" in section 2105. The words "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time" are substituted for "with reasonable dispatch" and "except that due regard shall be had for the convenience and necessity of the parties or their representatives". The prohibition in the last sentence is restated in positive form and the words "This subsection does not" are substituted for "Nothing herein shall be construed either to".

In subsection (c), the words "in any manner or for any purpose" are omitted as surplusage.

In subsection (e), the word "brief" is substituted for "simple". The words "of the grounds for denial" are substituted for "of procedural or other grounds" for clarity.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 555 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2247 of Title 7, Agriculture.

**§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**

(a) This section applies, according to the provisions thereof, to hearings required by section

553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;
- (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
- (8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
- (9) dispose of procedural requests or similar matters;
- (10) make or recommend decisions in accordance with section 557 of this title; and
- (11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient

grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 386; Pub. L. 94-409, §4(c), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-251, §2(a)(1), Mar. 27, 1978, 92 Stat. 183; Pub. L. 101-552, §4(a), Nov. 15, 1990, 104 Stat. 2737.)

#### HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1006.	June 11, 1946, ch. 324, §7, 60 Stat. 241.

In subsection (b), the words “hearing examiners” are substituted for “examiners” in paragraph (3) for clarity. The prohibition in the second sentence is restated in positive form and the words “This subchapter does not” are substituted for “but nothing in this chapter shall be deemed to”. The words “employee” and “employees” are substituted for “officer” and “officers” in view of the definition of “employee” in section 2105. The sentence “A presiding or participating employee may at any time disqualify himself.” is substituted for the words “Any such officer may at any time withdraw if he deems himself disqualified.”

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

#### AMENDMENTS

1990—Subsec. (c)(6). Pub. L. 101-552, §4(a)(1), inserted before semicolon at end “or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter”.

Subsec. (c)(7) to (11). Pub. L. 101-552, §4(a)(2), added pars. (7) and (8) and redesignated former pars. (7) to (9) as (9) to (11), respectively.

1978—Subsec. (b)(3). Pub. L. 95-251 substituted “administrative law judges” for “hearing examiners”.

1976—Subsec. (d). Pub. L. 94-409 inserted provisions relating to consideration by agency of a violation under section 557(d) of this title.

#### EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94-409, set out as an Effective Date note under section 552b of this title.

#### HEARING EXAMINERS EMPLOYED BY DEPARTMENT OF AGRICULTURE

Functions vested by this subchapter in hearing examiners employed by Department of Agriculture not included in functions of officers, agencies, and employees

of that Department transferred to Secretary of Agriculture by 1953 Reorg. Plan No. 2, §1, eff. June 4, 1953, 18 F.R. 3219, 67 Stat. 633, set out in the Appendix to this title.

#### HEARING EXAMINERS EMPLOYED BY DEPARTMENT OF COMMERCE

Functions vested by this subchapter in hearing examiners employed by Department of Commerce not included in functions of officers, agencies, and employees of that Department transferred to Secretary of Commerce by 1950 Reorg. Plan No. 5, §1, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to this title.

#### HEARING EXAMINERS EMPLOYED BY DEPARTMENT OF THE INTERIOR

Functions vested by this subchapter in hearing examiners employed by Department of the Interior not included in functions of officers, agencies, and employees of that Department transferred to Secretary of the Interior by 1950 Reorg. Plan No. 3, §1, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to this title.

#### HEARING EXAMINERS EMPLOYED BY DEPARTMENT OF JUSTICE

Functions vested by this subchapter in hearing examiners employed by Department of Justice not included in functions of officers, agencies, and employees of that Department transferred to Attorney General by 1950 Reorg. Plan No. 2, §1, eff. May 24, 1950, 15 F.R. 3173, 64 Stat. 1261, set out in the Appendix to this title.

#### HEARING EXAMINERS EMPLOYED BY DEPARTMENT OF LABOR

Functions vested by this subchapter in hearing examiners employed by Department of Labor not included in functions of officers, agencies, and employees of that Department transferred to Secretary of Labor by 1950 Reorg. Plan No. 6, §1, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to this title.

#### HEARING EXAMINERS EMPLOYED BY DEPARTMENT OF THE TREASURY

Functions vested by this subchapter in hearing examiners employed by Department of the Treasury not included in functions of officers, agencies, and employees of that Department transferred to Secretary of the Treasury by 1950 Reorg. Plan. No. 26, §1, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, set out in the Appendix to this title.

#### § 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it

**§ 703. Form and venue of proceeding**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94-574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

**§ 704. Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

**§ 705. Relief pending review**

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such

conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

**§ 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof,

that: “This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].”

#### CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.	
801.	Congressional review.
802.	Congressional disapproval procedure.
803.	Special rule on statutory, regulatory, and judicial deadlines.
804.	Definitions.
805.	Judicial review.
806.	Applicability; severability.
807.	Exemption for monetary policy.
808.	Effective date of certain rules.

##### § 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency’s actions relevant to sections 603, 604, 605, 607, and 609;
- (iii) the agency’s actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency’s compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General’s report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

- (A) the later of the date occurring 60 days after the date on which—
  - (i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

- (i) on which either House of Congress votes and fails to override the veto of the President; or
- (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

- (A) necessary because of an imminent threat to health or safety or other emergency;
- (B) necessary for the enforcement of criminal laws;
- (C) necessary for national security; or
- (D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

- (A) in the case of the Senate, 60 session days, or
- (B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same

day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

**(2) Appeal**

If, pursuant to this subsection, a person seeks a rehearing under section 825(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825(b) of this title.

(June 10, 1920, ch. 285, pt. II, §205, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 851; amended Pub. L. 95-617, title II, §§207(a), 208, Nov. 9, 1978, 92 Stat. 3142; Pub. L. 115-270, title III, §3006, Oct. 23, 2018, 132 Stat. 3868.)

AMENDMENTS

2018—Subsec. (g). Pub. L. 115-270 added subsec. (g).  
1978—Subsec. (d). Pub. L. 95-617, §207(a), substituted “sixty” for “thirty” in two places.  
Subsec. (f). Pub. L. 95-617, §208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95-617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anti-competitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

**§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission**

**(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues**

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or

sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

**(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest**

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order re-

funds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

**(c) Refund considerations; shifting costs; reduction in revenues; “electric utility companies” and “registered holding company” defined**

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission’s order. For purposes of this subsection, the terms “electric utility companies” and “registered holding company” shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.<sup>1</sup>

**(d) Investigation of costs**

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

**(e) Short-term sales**

(1) In this subsection:

(A) The term “short-term sale” means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term “applicable Commission rule” means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by con-

tract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100-473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109-58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109-58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58, § 1295(b)(1), substituted “hearing held” for “hearing had” in first sentence.

Subsec. (b). Pub. L. 109-58, § 1295(b)(2), struck out “the public utility to make” before “refunds of any amounts paid” in seventh sentence.

Pub. L. 109-58, § 1285, in second sentence, substituted “the date of the filing of such complaint nor later than 5 months after the filing of such complaint” for “the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period”, in third sentence, substituted “the date of the publication” for “the date 60 days after the publication” and “5 months after the publication date” for “5 months after the expiration of such 60-day period”, and in fifth sentence, substituted “If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision” for “If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision”.

<sup>1</sup> See References in Text note below.

Subsec. (e). Pub. L. 109-58, §1286, added subsec. (e).  
1988—Subsec. (a). Pub. L. 100-473, §2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100-473, §2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

#### EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100-473, §4, Oct. 6, 1988, 102 Stat. 2300, provided that: "The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however,* That such complaints may be withdrawn and refiled without prejudice."

#### LIMITATION ON AUTHORITY PROVIDED

Pub. L. 100-473, §3, Oct. 6, 1988, 102 Stat. 2300, provided that: "Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.]."

#### STUDY

Pub. L. 100-473, §5, Oct. 6, 1988, 102 Stat. 2301, directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

#### § 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, §207, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 853.)

#### § 824g. Ascertainment of cost of property and depreciation

##### (a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property

of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

##### (b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, §208, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 853.)

#### § 824h. References to State boards by Commission

##### (a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

##### (b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

##### (c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, §311, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

**§ 825k. Publication and sale of reports**

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amend-

ed Pub. L. 113-235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

“Sections 1535 and 1536 of title 31” substituted in text for “sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])” on authority of Pub. L. 97-258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

“Director of the Government Publishing Office” substituted for “Public Printer” in text on authority of section 1301(d) of Pub. L. 113-235, set out as a note under section 301 of Title 44, Public Printing and Documents.

“Government Publishing Office” substituted for “Government Printing Office” in text on authority of section 1301(b) of Pub. L. 113-235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

**§ 825l. Review of orders**

**(a) Application for rehearing; time periods; modification of order**

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

**(b) Judicial review**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided

in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**(c) Stay of Commission's order**

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85-791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), "section 1254 of title 28" substituted for "sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)" on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58 inserted "electric utility," after "Any person," and "to which such person," and substituted "brought by any entity unless such entity" for "brought by any person unless such person".

1958—Subsec. (a). Pub. L. 85-791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted "transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for

"certify and file with the court a transcript of", and inserted "as provided in section 2112 of title 28", and in third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted "court of appeals" for "circuit court of appeals".

**§ 825m. Enforcement provisions**

**(a) Enjoining and restraining violations**

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

**(b) Writs of mandamus**

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

**(c) Employment of attorneys**

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

**(d) Prohibitions on violators**

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

- (1) acting as an officer or director of an electric utility; or
- (2) engaging in the business of purchasing or selling—
  - (A) electric energy; or
  - (B) transmission services subject to the jurisdiction of the Commission.

## Federal Energy Regulatory Commission

## § 35.21

above, specific reference thereto may be made in lieu of re-submission in response to the requirements of this part.

### § 35.19a Refund requirements under suspension orders.

(a) *Refunds.* (1) The public utility whose proposed increased rates or charges were suspended shall refund at such time in such amounts and in such manner as required by final order of the Commission the portion of any increased rates or charges found by the Commission in that suspension proceeding not to be justified, together with interest as required in paragraph (a)(2) of this section.

(2) Interest shall be computed from the date of collection until the date refunds are made as follows:

(i) At a rate of seven percent simple interest per annum on all excessive rates or charges held prior to October 10, 1974;

(ii) At a rate of nine percent simple interest per annum on all excessive rates or charges held between October 10, 1974, and September 30, 1979; and

(iii)(A) At an average prime rate for each calendar quarter on all excessive rates or charges held (including all interest applicable to such rates or charges) on or after October 1, 1979. The applicable average prime rate for each calendar quarter shall be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate values published in the *Federal Reserve Bulletin*, or in the Federal Reserve's "Selected Interest Rates" (Statistical Release H. 15), for the fourth, third, and second months preceding the first month of the calendar quarter.

(B) The interest required to be paid under clause (iii)(A) shall be compounded quarterly.

(3) Any public utility required to make refunds pursuant to this section shall bear all costs of such refunding.

(b) *Reports.* Any public utility whose proposed increased rates or charges were suspended and have gone into effect pending final order of the Commission pursuant to section 205(e) of the Federal Power Act shall keep accurate account of all amounts received under the increased rates or charges which became effective after the suspension period, for each billing period, speci-

fying by whom and in whose behalf such amounts are paid.

[44 FR 53503, Sept. 14, 1979, as amended at 45 FR 3889, Jan. 21, 1980; Order 545, 57 FR 53990, Nov. 16, 1992; 74 FR 54463, Oct. 22, 2009]

### § 35.21 Applicability to licensees and others subject to section 19 or 20 of the Federal Power Act.

Upon further order of this Commission issued upon its own motion or upon complaint or request by any person or State within the meaning of sections 19 or 20 of the Federal Power Act, the provisions of §§35.1 through 35.19 shall be operative as to any licensee or others who are subject to this Commission's jurisdiction in respect to services and the rates and charges of payment therefor by reason of the requirements of sections 19 or 20 of the Federal Power Act. The requirement of this section for compliance with the provisions of §§35.1 through 35.19 shall be in addition to and independent of any obligation for compliance with those regulations by reason of the provisions of sections 205 and 206 of the Federal Power Act. For purposes of applying this section *Electric Service* as otherwise defined in §35.2(a) shall mean: Services to customers or consumers of power within the meaning of sections 19 or 20 of the Federal Power Act which may be comprised of various classes of capacity and energy and/or transmission services subject to the jurisdiction of this Commission. *Electric Service* shall include the utilization of facilities owned or operated by any licensee or others to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein *Electric Service* is without regard to the form of payment or compensation for the sales or services rendered, whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise. For purposes of applying this section, *Rate Schedule* as otherwise defined in §35.2(b) shall mean: A statement of

(1) Electric service as defined in this §35.21,

(2) Rates and charges for or in connection with that service, and

(3) All classifications, practices, rules, regulations, or contracts which

2000-2009	Entergy Arkansas, Inc. made short-term off-system sales		
2003-2007	FERC proceeding regarding system allocation of long-term resources, in which Louisiana also challenged short-term off-system sales made by Entergy Arkansas		
December 2008	<i>Louisiana Pub. Serv. Comm 'n v. FERC</i> , 551 F.3d 1042 (D.C. Cir. 2008) (dismissing petition as to short-term sales for lack of aggravement)		
<b>FERC PROCEEDINGS AT ISSUE IN THESE CONSOLIDATED APPEALS</b>			
	<b>PHASE I (Liability)</b>	<b>PHASE II (Refunds)</b>	<b>PHASE III (Calculations)</b>
2009	June	Louisiana files complaint	
	December	Complaint set for hearing 129 FERC ¶ 61,205 [JA ___]	
2010	January	ALJ Proceeding begins	
	December	ALJ Decision, 133 FERC ¶ 63,008 [JA ___]	
2012	June	Opinion No. 521, 139 FERC ¶ 61,240 [JA ___] (determining liability; ordering Phase II ALJ Proceeding)	ALJ Proceeding begins
2013	August		ALJ Decision, 144 FERC ¶ 63,021 [JA ___]

	PHASE I (Liability)	PHASE II (Refunds)	PHASE III (Calculations)
2016	April Opinion No. 521-A, 155 FERC ¶ 61,064 [JA ____]	Opinion No. 548, 155 FERC ¶ 61,065 [JA ____] (determining refund method; ordering Phase III ALJ Proceeding)	
	May		
2017	July ALJ Decision, 160 FERC ¶ 63,009 [JA ____]		
	September (Second) Rehearing Order, 160 FERC ¶ 61,109 [JA ____]		
	November Opinion No. 548-A, 161 FERC ¶ 61,171 [JA ____] (Errata Notice [JA ____])		
2018	Energy appeals both Phase I and Phase II (No. 17-1251)		
	January Arkansas appeals (No. 18-1009) Louisiana appeals (No. 18-1010)		
2019	October Opinion No. 565, 165 FERC ¶ 61,022 [JA ____] (determining calculations)		
	December Opinion No. 565-A, 169 FERC ¶ 61,179 [JA ____]		
2020	January Louisiana appeals (No. 20-1023)		