
ORAL ARGUMENT NOT YET SCHEDULED

**In the United States Court of Appeals
for the District of Columbia Circuit****Nos. 20-1104 and 20-1356 (consolidated)**

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

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

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying agency docket are as stated in the Brief of Petitioner.

B. Rulings Under Review

Case No. 20-1104:

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

Case No. 20-1356:

3. Order Denying Complaint, *La. Pub. Serv. Comm'n v. Entergy Corp.*, 169 FERC ¶ 61,113 (Nov. 21, 2019), LR 18, JA ___; and
4. Order Addressing Arguments Raised on Rehearing, *La. Pub. Serv. Comm'n v. Entergy Corp.*, 172 FERC ¶ 61,056 (July 16, 2020), LR 21, JA ___.

C. Related Cases

This case has not previously been before this Court or any other court. In a case concerning an earlier challenge to other off-system energy sales (which are now at issue in Case Nos. 17-1251, *et al.*,

discussed below), 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).

The docket in Case No. 20-1104 was established by the Court in an order issued on April 3, 2020, in Case Nos. 17-1251, 18-1009, 18-1010, and 20-1023 (consolidated). In that order, 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 the severed issues a new docket number, Case No. 20-1104, and held it in abeyance pending the conclusion of a separate, ongoing FERC proceeding. Upon the conclusion of that FERC proceeding, Louisiana filed the petition for review in Case No. 20-1356. These petitions were consolidated by the Court's order issued on November 3, 2020.

The unsevered portions of Case Nos. 17-1251, *et al.* (*Entergy Servs., Inc., et al. v. FERC*), proceeded to briefing and oral argument on December 3, 2020, and remain pending before the Court.

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GLOSSARY

2009 Complaint	Complaint filed by Louisiana that initiated the proceeding in FERC Docket No. EL09-61
2015 Settlement	FERC-approved Settlement Agreement that terminated the System Agreement
2019 Complaint	Complaint filed by Louisiana that initiated the proceeding in FERC Docket No. EL19-50
<i>ALJ Decision</i>	<i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , 160 FERC ¶ 63,009 (2017), ER 644, JA ____
Br.	Opening brief of Petitioner Louisiana Public Service Commission
Commission or FERC	Respondent Federal Energy Regulatory Commission
<i>Complaint Order</i>	Order Denying Complaint, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , 169 FERC ¶ 61,113 (Nov. 21, 2019), LR 18, JA ____ (on review in Case No. 20-1356)
Entergy	Entergy Corporation (corporate parent of the Operating Companies) or Entergy Services, Inc. (acting on behalf of Operating Companies)
Entergy System or System	Generation and transmission facilities owned and operated by Entergy Operating Companies in Arkansas, Louisiana, Mississippi, and Texas

GLOSSARY

ER	Record Index filed in Case Nos. 17-1251, <i>et al.</i> , which included all record materials relevant to Case No. 20-1104
FPA	Federal Power Act
Grand Gulf Sales	Short-term, off-system sales of energy sourced from Entergy Arkansas's retained share of the Grand Gulf capacity, made from January through September 2000
Joint Account Sales	Off-system sales of System energy made for the joint account of all the Operating Companies, with proceeds divided among the Companies
JA	Joint Appendix
Louisiana	Petitioner Louisiana Public Service Commission
LR	Record Index filed in Case No. 20-1356
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 on Initial Decision, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , Opinion No. 521, 139 FERC ¶ 61,240 (2012), ER 297, JA _____

GLOSSARY

<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), ER 673, JA ____ (on review in Case No. 20-1104)
<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), ER 681, JA ____ (on review in Case No. 20-1104)
Opportunity Sales proceeding	Three-phase FERC proceeding concerning System Agreement violation and damages related to Opportunity Sales (on review in Case Nos. 17-1251, <i>et al.</i>)
Opportunity Sales	Short-term, off-system sales of energy, which were included in Entergy Arkansas's load for purposes of energy allocation, made by Entergy Arkansas for the benefit of its shareholders from October 2000 through 2009
P	Paragraph in a FERC order
<i>Rehearing Order</i>	Order Addressing Arguments Raised on Rehearing, <i>La. Pub. Serv. Comm'n v. Entergy Corp.</i> , 172 FERC ¶ 61,056 (July 16, 2020), LR 21, JA ____ (on review in Case No. 20-1356)
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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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 most of that period — starting in October 2000 and continuing through 2009 — Entergy Arkansas included those sales in its customer base for purposes of allocating energy resources and retained the proceeds for the benefit of

its shareholders. In 2009, Petitioner Louisiana Public Service Commission (Louisiana) challenged those sales in a complaint before the Commission. 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 Entergy Arkansas had violated the System Agreement by improperly treating the off-system sales for purposes of energy allocation (the Opportunity Sales). *See infra* pp. 17-18. In Phase II, the Commission determined the appropriate refund method to remedy that violation. *See infra* pp. 18-19. In Phase III, the Commission approved the final refund calculations for the entire period. *See infra* pp. 19-20. *See generally* Timeline of Relevant FERC Proceedings. The Commission orders in all three phases are pending on review before this Court in *Entergy Services, Inc., et al. v. FERC*, Case Nos. 17-1251, *et al.* (briefing completed; oral argument held Dec. 3, 2020).

In portions of the Phase III orders that were severed from that consolidated appeal, the Commission determined that two categories of

off-system sales were outside the scope of the proceeding, only one of which is at issue in this appeal: off-system sales that Entergy Arkansas made from its retained share of Grand Gulf capacity from January through September 2000.¹ *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 565 at PP 10-11, 84-128, 165 FERC ¶ 61,022 (2018), ER 673, JA ___, ___-___, ___-___, *reh'g denied*, Opinion No. 565-A, 169 FERC ¶ 61,179 at PP 7-9, 40-50 (2019), ER 681, JA ___, ___-___, ___-___, *on review in* Case No. 20-1104. *See also infra* pp. 9-11 (explaining Grand Gulf capacity and Entergy Arkansas's retained share).

In 2019, Louisiana filed a complaint with the Commission, claiming that the Grand Gulf Sales (and other sales outside the scope of the previous litigation) violated the System Agreement. The Commission denied the 2019 Complaint, finding that it was barred by a 2015 settlement agreement that terminated the Entergy System Agreement. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 169 FERC ¶ 61,113 (2019) (*Complaint Order*), LR 18, JA ___, *on reh'g*, 172 FERC

¹ The sales at issue here have been called the “Grand Gulf sales” (in *Opinion Nos. 565* and *565-A*), the “2000 Retained Share Sales” (in the 2019 Complaint and in the *Complaint* and *Rehearing Orders*), and the “2000 Grand Gulf Sales” (in Louisiana’s Opening Brief). For simplicity, this Brief refers to the relevant sales in 2000 as the “Grand Gulf Sales.”

¶ 61,056 (2020) (*Rehearing Order*), LR 21, JA ____, *on review in* Case No. 20-1356.

These consolidated appeals raise the following issues:

(1) Whether the Commission reasonably determined that Louisiana's claims regarding the Grand Gulf Sales, based on alleged violation of section 30.04 of the System Agreement (pricing of Joint Account Sales), were outside the scope of the proceeding to calculate the damages from violation of section 30.03 of the System Agreement (allocating Opportunity Sales as load);

(2) Whether the Commission reasonably determined:

(a) that Louisiana's 2019 Complaint challenging the Grand Gulf Sales was barred by the waiver provision in the 2015 settlement agreement; and

(b) that a provision excluding certain cost allocation disputes from the waiver did not apply to the claims in the 2019 Complaint.

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 under the Entergy System Agreement.² We begin with an

² 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 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.

overview of that unusual arrangement. (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*”).)

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); *Entergy Servs., Inc. v. FERC*, Case Nos. 17-1251, *et al.* (D.C. Cir. filed 11/21/2017 and later) (tariff violation and refunds for Opportunity Sales) (briefing completed; oral argument held December 3, 2020); *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 seven-month period in 2005; applicability of 2009 tariff amendment) (briefing completed; oral argument held December 10, 2020); *La. Pub. Serv. Comm’n v. FERC*, Case No. 21-1029 (D.C. Cir. filed Jan. 19, 2021) (tax-related inputs for certain bandwidth calculations) (briefing in progress).

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).

A. The Entergy System

At all times relevant to this appeal, the Entergy System comprised five or six Operating Companies selling electricity in Arkansas, Louisiana, Mississippi, and Texas.³ *See Louisiana 2008-I*, 522 F.3d at 383. The Operating Companies are owned by a multistate holding company, Entergy Corporation.⁴ *Id.* (The Entergy System originated under Middle South Utilities, Inc., which owned most of the Operating Companies' predecessors.) Until 2015, 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.

³ 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 Servs., Inc.*, 167 FERC ¶ 61,246 at P 1 n.4 (2019).

⁴ 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.

The Entergy System was highly integrated, with the Operating Companies' transmission and generation facilities operated as a single 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 Companies using a larger share of the System’s energy than their share of its System capacity pay Companies in the opposite position. *See Entergy La.*, 539 U.S. at 42-43. This Court recognized that this arrangement was “mutually beneficial because companies [with more capacity] have a ready outlet for their surplus energy and are thereby compensated for carrying excess capacity, while companies [with less] 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 Louisiana 2008-I*, 522 F.3d at 384, 386 (describing both instances).

Grand Gulf. By the early 1980s, the Entergy System’s investments in nuclear generation had “proved prohibitively expensive

and catastrophically uneconomical.” *Id.* at 384. As a result, the costs of the Grand Gulf nuclear facility in Mississippi and the Waterford 3 nuclear facility in Louisiana would impose disproportionate cost responsibility on the associated Operating Companies. *Miss. Indus.*, 808 F.2d at 1532. Accordingly, the Commission found that disparities in nuclear investment costs prevented rough equalization and ordered Entergy to reallocate those costs among the Operating Companies. *See id.* at 1553-58 (affirming Commission’s finding of undue discrimination and reallocation remedy); *see also Louisiana 2008-I*, 522 F.3d at 384. As relevant here, the Commission approved a settlement under which the Grand Gulf costs and energy would be allocated among what are now Entergy Arkansas, Entergy Mississippi, Entergy New Orleans and Entergy Louisiana. *See La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 111 FERC ¶ 61,311 at P 4 (2005).

(Louisiana’s claims in this proceeding center on sales involving a portion of Entergy Arkansas’s allocated Grand Gulf capacity. Under a settlement approved by state regulators, some of Entergy Arkansas’s share is excluded from its retail rates. Instead, Entergy Arkansas may sell that portion, called the Grand Gulf Retained Share, to third parties

and keep the proceeds; if it does sell the energy to its retail customers, the energy is priced at avoided cost.⁵ *See Complaint Order P 6 n.13, JA ____*. The energy for the Grand Gulf Sales at issue in this case came from the Grand Gulf Retained Share.)

Bandwidth Remedy. Two decades later, changes in fuel costs (in particular, increases in natural gas prices compared to coal) widened the differences in costs among the Operating Companies. *Louisiana 2008-I*, 522 F.3d at 385. In 2005, the Commission adopted a remedy that 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.*, 111 FERC ¶ 61,311 at PP 1, 14, 136, 144, *aff’d on reh’g*, 113 FERC ¶ 61,282 (2005), *aff’d in part, Louisiana 2008-I*, 522 F.3d at 391-94 (upholding Commission’s finding of undue discrimination and “bandwidth” remedy).

⁵ Avoided cost is defined as the cost a purchaser would have incurred had it generated the electricity itself or purchased the electricity from another source. *See, e.g., Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404 (1983).

B. Relevant Provisions of 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.

Under Article IV of the Agreement, which set forth various “Obligations” of the Operating Companies, Section 4.05 defined “Sales to Others for the Joint Account of All the Companies,” which were “[s]ales of capacity and energy to others for which any Company does not wish to assume sole responsibility. . . .” JA ___. Such Joint Account Sales were made by the Company that had 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.*

The Agreement included seven Service Schedules that governed compensation among the Companies for a variety of transactions, shared benefits, and coordinated operations. *See generally* Agreement Secs. 3.09, 4.12, JA ___, ___. Only two are relevant to arguments in this case: Schedule MSS-3 concerned pricing of exchanges of energy among

the companies, JA ____; and Schedule MSS-5 provided for distribution among the Companies of net revenues for Joint Account Sales, JA ____.

Schedule MSS-3 prescribed the order of priority for System energy to be allocated. Section 30.03, “Allocation of Energy,” provided 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.” JA ____-___. Section 30.04, “Energy for Sales to Others,” stated that “Energy used to supply others” would be provided in accordance with filed rate schedules and that the Company supplying the energy would be reimbursed for fuel costs for the specific resource. JA ____.

Entergy made inter-Company 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) (it also referred to “the inter-related set of computer programs and databases that are used to prepare th[at] invoice”).

C. Termination of the System Agreement

Entergy Arkansas terminated its participation in the System Agreement in December 2013 and Entergy Mississippi did so in November 2015. *See Council of New Orleans v. FERC*, 692 F.3d 172, 174-77 (D.C. Cir. 2012) (affirming FERC orders regarding terms of withdrawal). The System Agreement itself was terminated in 2016, pursuant to a settlement agreement (2015 Settlement) among Entergy Services, the remaining Operating Companies, and their respective retail regulators, including the Louisiana Commission. *See Entergy Arkansas, Inc.*, 153 FERC ¶ 61,347 (2015) (approving 2015 Settlement). All of the Entergy Operating Companies joined the multi-state Midcontinent Independent System Operator. *See* <https://www.ferc.gov/industries-data/market-assessments/overview/electric-power-markets>.

The 2015 Settlement included a waiver and release provision that provided:

The Settling Parties irrevocably waive and release any rights, claims, remedies, or causes of action they may have against any other Settling Party arising out of or relating to the System Agreement that are not filed and served upon the applicable parties as of the filing of the Settlement Agreement, including but not limited to any claims or causes

of action that would seek to extend any System Agreement obligations beyond the System Agreement Termination Date; provided, however, that nothing herein shall bar any action or proceeding to enforce the terms of this Settlement Agreement.

2015 Settlement, section G(1), attached to Entergy's Answer and

Motion to Dismiss Complaint (filed Mar. 19, 2019), LR 9, JA ___, ___.

The "filing of the Settlement Agreement" occurred on August 14, 2015.

See Complaint Order PP 2 n.4, 38, JA ___, ___.

The settlement further provided an exception to the waiver and release:

There shall be no post-withdrawal obligation to roughly equalize production costs for any cost incurred by any Operating Company after December 31, 2015. For the purpose of this provision, "cost incurred" means costs incurred for the production of electricity, not costs deferred from an earlier period that are subject to rough equalization in that earlier period. This Settlement Agreement shall have no effect on cost allocation disputes affecting costs incurred prior to January 1, 2016. The Entergy Operating Companies that are subject to rough production cost equalization ("RPCE") shall complete any FERC approved "rough equalization" payments and receipts based on the 2015 test year, by the System Agreement Termination Date or upon issuance of a final FERC order establishing the amount and timing of such payments, whichever is later.

2015 Settlement, section G(2), JA ___.

II. THE COMMISSION PROCEEDINGS AND ORDERS

A. Prior Proceedings and the 2009 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 a requirement in the System Agreement that an Operating Company give other Companies a right of first refusal before making certain off-system sales. 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 Louisiana's claims was mere dictum. *La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042, 1046-47 (D.C. Cir. 2008) ("*Louisiana 2008-II*").

For that reason, 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, again challenging the off-system sales based on the right of first refusal and further alleging other violations of the System Agreement and imprudent utility conduct. 2009 Complaint,

ER 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).

B. The Opportunity Sales Proceeding

Following that hearing, the administrative law judge found that, from 2000 to 2009, Entergy Arkansas had made off-system sales of energy for the benefit of Entergy's shareholders (the Opportunity Sales). *La. Pub. Serv. Comm'n v. Entergy Corp.*, 133 FERC ¶ 63,008 at P 343 (2010), ER 288, JA _____. On exceptions to that decision, the Commission determined that the System Agreement permitted an Operating Company to make off-system sales for its own account, but that section 30.03 does not provide authority for the Company to

allocate the energy associated with such sales as part of its “load.” *La. Pub. Serv. Comm’n v. Entergy Corp.*, Opinion No. 521, 139 FERC ¶ 61,240 (2012), ER 297, JA ____, *on reh’g*, Opinion No. 521-A, 155 FERC ¶ 61,064 (2016), ER 535, *on reh’g*, 160 FERC ¶ 61,109 (2017), ER 658. Rather, the Commission found, section 30.04 requires allocation of that energy as “sales to others,” which receive a lower priority (and higher-cost energy) than the Operating Company’s own loads and other Companies’ loads under section 30.03(a)-(b). Accordingly, the Commission found that Entergy had violated the System Agreement — not by making the Opportunity Sales, but by improperly accounting for those sales in load. *Opinion No. 521* P 124, JA ____.

The Commission concluded that Entergy Arkansas must pay 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 ____.

In the second phase of the Opportunity Sales proceeding, the parties, for purposes of litigating the refund methodology, provided detailed calculations only for a “Test Period” of three years: 2003, 2004, and 2006. *See La. Pub. Serv. Comm’n v. Entergy Corp.*, 144 FERC ¶ 63,021 at PP 26, 441 (2013). The Commission chose a refund methodology based on re-running the Intra-System Bill calculations with a full reallocation of energy, to correct for the improper allocation; Opportunity Sales and Joint Account Sales, both being “sales to others,” should have the same priority (under section 30.04) for purposes of energy allocation. *La. Pub. Serv. Comm’n v. Entergy Corp.*, Opinion No. 548, 155 FERC ¶ 61,065 (2016), *reh’g denied*, Opinion No. 548-A, 161 FERC ¶ 61,171 (2017). Having determined the appropriate methodology and certain adjustments to the refunds, 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” *Opinion No. 548 P 212*.

Following that third hearing, the Commission ruled on certain adjustments and affirmed the final calculations for the entire period of

the tariff violation. *See Opinion No. 565* PP 10-11, 141, JA ___, ___; *Opinion No. 565-A* PP 5-6, JA ___-___. The Commission also determined that two categories of disputed sales were outside the scope of the tariff violation and resulting remedy. *See infra* pp. 22-24.

Entergy, Arkansas, and Louisiana filed, among them, four petitions for review challenging various of the Commission's orders in all three phases of the Opportunity Sales proceeding. The parties agreed to consolidate the petitions, but to sever certain issues regarding the scope of the proceeding, raised in Louisiana's January 2020 petition for review of the Phase III orders (Case No. 20-1023). The Court granted that consolidation on April 3, 2020, and established a new docket, D.C. Cir. No. 20-1104, for the severed issues, which would be held in abeyance pending completion of the 2019 Complaint proceeding (*see infra* pp. 24-26). The consolidated appeals concerning the Opportunity Sales proceeded to briefing and oral argument (held on December 3, 2020).

C. Case No. 20-1104: Scope Rulings

1. Initial Decision

In the July 2017 initial decision concerning the final damages calculations in Phase III of the Opportunity Sales litigation, the

administrative law judge considered two other types of off-system sales that Louisiana alleged to have violated the System Agreement. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 160 FERC ¶ 63,009 (2017), ER 644, JA ___ (*ALJ Decision*).

First, in the course of the Phase III proceeding, Entergy stated that some off-system energy sales that it had previously identified as Opportunity Sales were instead made for the joint account of the Operating Companies. Specifically, Entergy stated that, from January 2000 through September 2000, Entergy Arkansas had accounted for sales from its Grand Gulf Retained Share (*see supra* pp. 10-11) as Joint Account Sales under section 30.04 of the System Agreement; in October 2000, it had begun treating sales from the Grand Gulf capacity as “load” under section 30.03, like other Opportunity Sales. *ALJ Decision* PP 57, 61-62, JA ___, ___. Louisiana claimed that, for the earlier sales, Entergy Arkansas had manipulated the sales prices in a manner that deprived the other Operating Companies of profits that should have been shared under the Joint Account Sales distribution set forth in Service Schedule MSS-5 of the System Agreement. *See id.* at PP 57-61, JA ___-___. The administrative law judge agreed and calculated

damages that Entergy Arkansas owed the other Companies, based on the difference between the pricing Entergy Arkansas had actually used and the pricing that it should have used. *Id.*

In addition, from 2000 to 2005, Entergy Arkansas made Opportunity Sales that it later converted, in part, to Joint Account Sales. *Id.* at P 66, JA _____. Louisiana contended that the converted sales violated the System Agreement and sought damages (*id.* at PP 67-68, JA ____-__); the administrative law judge rejected the claim. *Id.* at P 69, JA _____.

2. **Opinion No. 565**

On exceptions, the Commission found that both categories of sales were outside the scope of the proceeding because neither involved off-system sales that had been included in load under section 30.03. As discussed *supra*, in Phase I the Commission had found that Entergy had violated the System Agreement by accounting for Opportunity Sales as “load” under Section 30.03, rather than as “sales to others” under section 30.04. *Opinion No. 565* P 103, JA ____ (citing *Opinion No. 521* P 128, JA ____). The Grand Gulf Sales in January-September 2000, however, *had* been treated as “Sales to Others” — they “were not

improperly allocated under section 30.03.” *Id.*; *see also id.* at P 104, JA ___ (noting that Louisiana’s argument centered, instead, on “what reimbursement Entergy should have made to Entergy Arkansas for the sale under section 30.04”). After establishing the appropriate method for determining refunds (in Phase II), the Commission had initiated the Phase III hearing to calculate the full amount of damages for the improper allocation under section 30.03 found in Phase I. *See id.* at P 103, JA ___. Therefore, the dispute as to reimbursement under section 30.04 “goes beyond the violation the Commission identified in Opinion No. 521” and “beyond the scope of this phase of the proceeding” *Id.* at PP 104, 105, JA ___-___.

The Commission similarly concluded that the converted Joint Account Sales were outside the scope of the proceeding, as the sales had always been allocated as “sales to others” under System Agreement section 30.04. *Id.* at P 128, JA ___. The Commission thus “affirm[ed] on other grounds” the administrative law judge’s rejection of Louisiana’s claims, declining to address the merits. *Id.* at P 129, JA ___.

3. Opinion No. 565-A

Louisiana timely sought rehearing (ER 674, JA ___) of *Opinion No. 565*, which the Commission denied on December 3, 2019, in *Opinion No. 565-A*. The Commission affirmed its rulings on both the Grand Gulf Sales and the converted Joint Account Sales. *Opinion No. 565-A* PP 9, 40-50, JA ___-___, ___-___.

D. Case No. 20-1356: 2019 Complaint Proceeding

1. 2019 Complaint

On February 27, 2019, Louisiana filed a complaint before the Commission, alleging that the Grand Gulf Sales “violated the provisions of the System Agreement that govern the reimbursement for energy used to supply sales to others for the joint account of the Entergy Operating Companies . . . and the calculation of margins, or profits, for the joint account sales” 2019 Complaint at 2, LR 1, JA ___, ___; *see also id.* at 18, 21, JA ___, ___. Louisiana further alleged that the Grand Gulf Sales improperly denied the Entergy System and its customers “the benefits of off-System sales of low-cost System generating capacity” and that the treatment of the converted Joint Account Sales harmed consumers. *Id.* at 2, JA ___. The 2019 Complaint named Entergy Corporation, Entergy Services, and all of the Operating Companies as

respondents and focused on the alleged conduct of “Entergy,” as distinct from “Entergy Arkansas.” *See, e.g., id.* at 1, 5-6, 11-26, JA ___, ___-___, ___-___.

2. Complaint Order

Louisiana and Entergy each submitted multiple filings responding to one another’s arguments. [Entergy’s] Answer and Motion to Dismiss (filed Mar. 19, 2019), LR 9, JA ___; [Louisiana’s] Answer to Motion to Dismiss and Answer (filed Apr. 3, 2019), LR 10, JA ___; [Entergy’s] Reply (filed May 7, 2019), LR 11, JA ___; [Louisiana’s] Response (filed May 14, 2019), LR 14, JA ___. Though the Commission’s rules generally prohibit answers to answers, the Commission accepted all of the filings in this case. *Complaint Order* P 36, JA ___.

The Commission issued the *Complaint Order* on November 21, 2019. The Commission found that the 2015 Settlement barred the 2019 Complaint, as Louisiana and most of the named respondents were Settling Parties and the challenged Grand Gulf Sales and converted Joint Account Sales arose out of the System Agreement. *Complaint Order* PP 37-40, JA ___-___. The Commission further found that the substantive claims had not been alleged in the 2009 Complaint and

rejected Louisiana’s argument that they met the 2015 Settlement’s provision excluding certain cost allocation disputes from the waiver. *Id.* at PP 41, 43-44, JA ___, ___-___.

3. Rehearing Order

Louisiana timely filed a request for rehearing. LR 19, JA ___. On July 16, 2020, the Commission reached the same result in the *Rehearing Order*.⁶

Louisiana’s appeal in Case No. 20-1356 followed; Case No. 20-1104 was removed from abeyance and consolidated with the later appeal.

SUMMARY OF ARGUMENT

These consolidated appeals have their origins in the lengthy series of agency proceedings to determine the proper treatment of numerous Opportunity Sales over a ten-year period, which involved hundreds of

⁶ The Commission acknowledged that, pursuant to this Court’s intervening decision in *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc), the rehearing request “may be deemed denied by operation of law” because the Commission did not issue an order within 30 days after the request. Rehearing Order P 3 & n.5, JA ___. In the *Rehearing Order*, the Commission “modif[ied] the discussion in the 2019 Complaint Order and continue[d] to reach the same result” *Id.* P 3, JA ___.

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 Entergy had violated the System Agreement by not properly allocating the energy used for the Opportunity Sales; then determined the appropriate refund methodology; and finally considered the calculations for the entire period of the violation. (*See* Timeline of Relevant FERC Proceedings.)

The petitions now before the Court concern only the Grand Gulf Sales, made over a nine-month period in 2000. In the final phase of the Opportunity Sales proceeding, the Commission found that Entergy had not allocated the Grand Gulf Sales as Opportunity Sales; thus, the Commission found the Grand Gulf Sales were outside the scope of the proceeding. In Case No. 20-1104, Louisiana seeks review of that scope determination; in Case No. 20-1356, Louisiana seeks review of the Commission's denial of its 2019 Complaint separately challenging the Grand Gulf Sales.

Case No. 20-1104. The Commission appropriately excluded the Grand Gulf Sales from the damages for the Opportunity Sales violation. Throughout the Opportunity Sales proceeding, the Commission kept its

focus on the System Agreement violation to be remedied: the improper allocation of off-system sales as “loads” under section 30.03(a) of the Agreement, rather than the correct allocation as “sales to others” under section 30.04. When Entergy submitted that the Grand Gulf Sales in the first nine months of 2000 had been allocated as Joint Account Sales (“sales to others” under section 30.04), the Commission reasonably found that they were outside the scope of the violation, and the damages remedy, at issue in the Opportunity Sales proceeding. Moreover, to the extent that Louisiana alleged that the Grand Gulf Sales instead violated section 30.04 of the System Agreement, that claim was beyond the scope of Phase III, which the Commission had established to determine a final damages calculation for the already-established liability.

Excluding the Grand Gulf Sales was not a change to any previous finding; notwithstanding broad references in earlier orders to the time period in which Entergy misallocated the Opportunity Sales, the Commission did not consider the total damages calculation for the entire period of the Opportunity Sales until the third and final phase. At that time, the Commission found it appropriate to allow Entergy to

correct prior representations in the earlier phases, for the purpose of ensuring that the final damages calculation was consistent with the original violation. As such, the scope determination was within the Commission's prerogative to interpret its prior orders and its broad discretion to manage its proceedings.

Case No. 20-1356. The Commission reasonably concluded that the broad waiver and release in the 2015 Settlement barred the 2019 Complaint. First, Louisiana and most of the named respondents — including Entergy Services, which was responsible for much of the challenged conduct — were Settling Parties bound by the release. Though Entergy Arkansas was not (having previously terminated its participation in the System Agreement), the relief that Louisiana sought would require re-calculation and re-allocation of costs, net margins, and payments for all of the Operating Companies.

The Commission also determined that Louisiana had not filed and served the claims presented in the 2019 Complaint before the release became effective in 2015. In particular, Louisiana's 2009 Complaint was too vague to have specifically implicated the Grand Gulf Sales, especially with respect to violation of section 30.04 as to Joint Account

Sales. Moreover, the Commission concluded, based on the context of the entire 2015 Settlement, that the section G(2) exception to the waiver applied to the final bandwidth calculation proceeding. Louisiana's reading of one sentence, tucked in the middle of a paragraph discussing a bandwidth proceeding to be held in 2016, as an expansive loophole for *all* cost allocation disputes—long a mainstay of System Agreement litigation—was not a plausible interpretation. Finally, the Commission properly denied Louisiana's claims of estoppel or mutual mistake, finding both unsupported and the latter raised too late in the proceeding.

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).

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.

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. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). 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.”).

Finally, the Commission has broad discretion to manage its own proceedings. *See Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 214 (1991) (“[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures”) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 524-25 (1978)); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578 (D.C. Cir. 1992). Moreover, “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) (citation omitted); *accord La. Pub. Serv. Comm’n v. FERC*, 866 F.3d 426, 429 (D.C. Cir. 2017).

II. THE COMMISSION REASONABLY FOUND LOUISIANA’S CHALLENGE TO THE GRAND GULF SALES OUTSIDE THE SCOPE OF THE OPPORTUNITY SALES PROCEEDING [CASE NO. 20-1104]

The Commission reasonably determined that Louisiana’s claims regarding the Grand Gulf Sales were beyond the scope of the damages

calculation for Opportunity Sales. Specifically, the Commission found that the Grand Gulf Sales did not violate the System Agreement provision that was the focus of the proceeding, and that alleged violations of a different provision were beyond the scope of the damages calculation phase. Though Louisiana argues that the scope determination was “an irrational change of position” (Br. 22), the Commission’s approach was both reasoned and consistent.

A. The Grand Gulf Sales Were Not Allocated To Load Under Section 30.03 Of The System Agreement, Which Was The Basis Of The Phase I Liability Finding

First, the Commission’s decision to maintain the focus of Phase III on calculating damages for violations of section 30.03 of the System Agreement — specifically, Entergy’s misallocation of Opportunity Sales to load — was reasonable and within its broad discretion.

From its initial finding, in 2012, of Entergy’s liability for violating the System Agreement, the Commission based that finding on section 30.03: “The violation of the System Agreement the Commission found in Opinion No. 521 . . . is Entergy’s allocation of the Opportunity Sales under section 30.03 when they should have been treated as ‘Sales to

Others' under section 30.04." *Opinion No. 565-A* P 43, JA ____; *see Opinion No. 521* PP 106, 124-29, 134, JA ____, ____-__, ____.

But the Grand Gulf Sales, unlike the Opportunity Sales, *were* allocated under section 30.04 (as Joint Account Sales), and “not improperly allocated under section 30.03” of the System Agreement. *Opinion No. 565* P 103, JA _____. Thus, the dispute, in the Phase III proceeding, over the pricing of “sales to others” made under section 30.04 “goes beyond the violation” that the Commission identified in Phase I, and beyond the scope of the damages calculation in Phase III. *Id.* at P 104, JA _____.

Louisiana, however, disregards the Commission’s specific finding as to Entergy’s violation of the System Agreement in the Opportunity Sales proceeding. Instead, Louisiana substitutes its own, broader characterization of alleged misconduct, encompassing all off-system sales, whether under section 30.03 or 30.04, and arguing that the relevant violation was selling energy that could have served native load from baseload generation. *See* Br. 22 (“the energy allocation violation [for the Grand Gulf Sales] was the same as for other Opportunity Sales”); Br. 25-29. But Louisiana’s conflation of the two separate

sections cannot be squared with the Commission's focus on violations of section 30.03.

Louisiana also cites its own witness's calculation of purported damages for the Grand Gulf Sales as "irrefutable proof" (Br. 28) that those Sales entailed the same violation as the Opportunity Sales. *See* Exhibit LC-023 at 83-85, ER 597, JA ___, ___-__ (explaining how Louisiana's witness adjusted damage calculations to reflect damages that were "conceptually the same" and "what was actually occurring"), *cited in* Br. 31. But the Commission never endorsed Louisiana's calculation; *Opinion No. 565* (at P 85, JA ___) merely restated, in a background summary, the figure cited in the *ALJ Decision* (at P 57, JA ___) — which itself did not appear to support or explain that calculation.

More important, the Commission did make factual findings regarding the Grand Gulf Sales, based on substantial record evidence, rejecting Louisiana's argument that Entergy did not actually account for the Grand Gulf Sales under Section 30.04. Louisiana asserts that the Commission "cited no evidence" (Br. 25, 30) — overlooking the Commission's explicit reliance on record submissions by Commission

Staff. *See Opinion No. 565* P 104, JA ___; Tr. at 729-30 (May 12, 2017), ER 623,⁷ JA ___ - ___ (Staff witness explained that Grand Gulf Sales presented “a joint account off-system sale violation and not an opportunity sale violation”), *quoted in ALJ Decision* P 64, JA ___; *see also* Tr. at 725-28, JA ___ - ___ (further explaining witness’s analysis of the Grand Gulf Sales).

Based on that record evidence, the Commission found that “the Grand Gulf sales were originally allocated as Joint Account Sales” and that the dispute was “over what reimbursement Entergy should have made to Entergy Arkansas for the sales under section 30.04.” *Opinion No. 565* P 104, JA ___; *see also id.* at P 102, JA ___; *Opinion No. 565-A* PP 43, 44, JA ___, ___ (Grand Gulf Sales “in fact were allocated as Joint Account Sales under section 30.04” and “were correctly allocated”); *Rehearing Order* P 33 & n.78, JA ___. It was that dispute — whether Entergy committed a separate violation of a different provision of the System Agreement — that the Commission found beyond the scope of the Opportunity Sales damages calculation. In so doing, the

⁷ The transcript of the May 12, 2017 hearing is erroneously described on the FERC docket (and thus in the Record Index) as a transcript from April 21, 2017.

Commission appropriately exercised its broad discretion to manage its own proceedings and to fashion a remedy for the specific System Agreement violation that was the basis for the three-phase proceeding. *See Opinion No. 565-A* PP 45-46, JA ____-____. “There is nothing unfair or unreasonable about limiting the scope in the damages calculation phase of a proceeding to the violation the Commission originally identified.” *Opinion No. 565* P 107, JA _____. *Cf. Mobil Oil*, 498 U.S. at 214 (“The court clearly overshot the mark if it ordered the Commission to resolve [a particular issue] in this proceeding.”).

B. The Commission Did Not Make Any Finding As To The Grand Gulf Sales Prior To The Final Consideration Of The Full Disputed Period In Phase III

The Commission did not change its position on the Grand Gulf Sales, as Louisiana contends (Br. 32-33) — because it never took a position on those Sales prior to Phase III. Having found, in Phase I, that the Opportunity Sales were improperly included in Entergy Arkansas’s “loads” under section 30.03 of the System Agreement, the Commission consistently maintained, in all three phases, that the refund remedy aimed to put the Operating Companies in the position they would have held if the Opportunity Sales had been treated under

section 30.04 all along. *See Opinion No. 521-A*, 155 FERC ¶ 61,064 at P 57; *Opinion No. 548*, 155 FERC ¶ 61,065 at PP 90, 149, 196; *Opinion No. 548-A*, 161 FERC ¶ 61,171 at PP 3, 11, 22, 29; *Opinion No. 565* PP 76, 80-81, JA ___-___, ___-___; *Opinion No. 565-A* PP 12-14, JA ___-___.

Moreover, the Commission did not purport to determine the precise parameters of, and damages for, the Opportunity Sales until Phase III. *See Opinion No. 565-A* P 46, JA ___. In Phase I, the Commission found that Entergy had violated the System Agreement and concluded that refunds were warranted. *See supra* pp. 17-18. In Phase II, the parties submitted calculations for three of the ten years at issue, as test periods (year 2000 was not one of them) and the Commission determined the appropriate methodology for calculating damages. *See supra* pp. 18-19. Finally, only in Phase III, the full calculations for all of the misallocated Opportunity Sales were at issue.

The Commission did not, as Louisiana claims (Br. 33-37), determine in Phase I that the Grand Gulf Sales were Opportunity Sales. Louisiana points to the Commission's summary description of the sales contested in the proceeding, asserting that an introductory footnote conclusively "defined the scope of the Opportunity Sales" for

the entire proceeding (Br. 33-34). *See Opinion No. 521* PP 2 & n.5, JA ___ (explaining that the order would use “Opportunity Sales” to refer to the disputed off-system sales made from “2000 through 2009”). Yet nothing in the defined term “Opportunity Sales” suggested that the Commission thereby locked in liability for all sales made in 2000, and the order *said* nothing about other potential System Agreement violations related to sales that were instead allocated under section 30.04. *Cf. Opinion No. 565* P 106, JA ___ (sales that “were proper[l]y treated as Joint Account Sales” would “not [be] part of the violation the Commission identified in *Opinion No. 521*”).

Louisiana similarly imputes a substantive finding of liability to an errata notice that the Commission issued in November 2017, which amended a single sentence in its order on rehearing in Phase II. *See* Br. 33. But the errata notice merely confirms that the Commission reasonably waited to address the dispute over the Grand Gulf Sales on consideration of the full time period in Phase III. In rejecting an argument (not relevant here) raised by another party in Phase II, the Commission again emphasized its purpose of “put[ting] all the Operating Companies in the same position they would have been in had

Entergy correctly accounted for off-system sales made by Entergy Arkansas for its own account . . .” *Opinion No. 548-A*, 161 FERC ¶ 61,171 at P 10. In that sentence, the Commission described the improper accounting as occurring “during the period October 2000 through December 2009 . . .” *Id.*

Louisiana requested that the Commission modify that description because the dispute regarding the Grand Gulf Sales prior to October 2000 had been litigated before the administrative law judge — and not yet considered by the Commission—in Phase III. ER 568, JA ____. As such, Louisiana argued there was no record basis in Phase II to make such a distinction. *Id.* at 4, JA ____ (arguing that the reference to October must be either “inadvertent” or “premature”). The Commission issued the errata notice modifying the paragraph to delete both specific months and refer more broadly to “the period 2000 through 2009,” offering no further discussion, JA _____. The Commission addressed the dispute over the Grand Gulf Sales for the first time in its Phase III orders — the only point in the proceeding when “the total damages calculation for the entire period” was at issue. *Opinion No. 565* P 106, JA ____; *Opinion No. 565-A* P 46, JA _____. For that reason, when

Entergy revised its earlier representations that the Grand Gulf Sales had been Opportunity Sales, the Commission appropriately viewed those changes as factual corrections to ensure the proper calculation of damages, not as collateral attacks on its general finding of liability. *See Opinion No. 565 P 106, JA ___; Opinion No. 565-A P 46, JA ___-__.*

III. THE COMMISSION REASONABLY FOUND THE 2019 COMPLAINT BARRED BY THE 2015 SETTLEMENT [CASE NO. 20-1356]

In the 2019 Complaint proceeding, the Commission found that Louisiana's claims had been waived in the 2015 Settlement. That determination rested on the Commission's reasonable interpretation of provisions of the 2015 Settlement, on its determination that Louisiana had not previously raised the claims in its 2019 Complaint, and on its rejection of Louisiana's estoppel and mutual mistake arguments.

A. Louisiana's Claims Were Barred By The 2015 Settlement

1. Louisiana and most respondents named in the 2019 Complaint were parties to the 2015 Settlement.

The waiver provision in the Commission-approved 2015 Settlement broadly precludes most claims between the "Settling Parties" defined therein. 2015 Settlement, sec. G(1), *quoted in full*

supra at pp. 14-15. Louisiana named Entergy Services and all of the Entergy Operating Companies as respondents in the 2019 Complaint. *Complaint Order* P 39, JA ____; *Rehearing Order* P 27, JA ____.

Louisiana, Entergy Services, and all other parties except Entergy Arkansas and Entergy Mississippi (both of which had already terminated their participation in the System Agreement) were likewise Settling Parties. 2015 Settlement at 2 n.2, JA ____, *cited in Rehearing Order* P 27, JA ____.

Though Louisiana relies on the fact that the 2015 Settlement did not waive its claims against Entergy Arkansas (Br. 44-46), the 2019 Complaint was not so narrowly targeted.

First, Entergy Services is at the center of Louisiana's claims, as it made the Grand Gulf Sales, was responsible for accounting under the System Agreement, and handled operation and billing for System energy. *Rehearing Order* P 29, JA ____.

Entergy Services, not Entergy Arkansas, was responsible for the accounting and cost allocation that Louisiana challenged. *Id.* (As noted *supra* at p. 25, the 2019 Complaint describes conduct by "Entergy" as distinct from "Entergy Arkansas.")

Moreover, the Commission concluded that the relief that Louisiana sought would require re-calculating the net margins on the

Grand Gulf Sales and re-allocating costs for all of the Operating Companies, including Settling Parties; Louisiana could not press a claim against Entergy Arkansas alone without implicating the other Companies. *Id.* at P 28, JA ___; *see id.* at nn.63-64 (citing a number of allegations in the 2019 Complaint regarding System-wide accounting and inter-company payments). The “core issue” in its 2019 Complaint was not that making the Grand Gulf Sales violated the System Agreement, but that “the accounting methodology Entergy Services used to allocate [those Sales] . . . among all of the Operating Companies” did. *See id.* at P 28. And to remedy any improper allocation would require re-calculating and re-allocating costs, net margins, and payments for all of the Operating Companies. *See id.*, JA ___-___. Therefore, the Commission reasonably concluded that the 2015 Settlement waiver would apply to the claims in the 2019 Complaint, “regardless of whether Entergy Arkansas” had been a Settling Party. *See id.*, JA ___.

This is not “irrational” (Br. 46): it reflects the Commission’s long experience with allocation disputes arising from the Entergy System Agreement — such as the Opportunity Sales Proceeding spanning three

evidentiary hearings over the course of a decade. Indeed, even though Louisiana pressed its claims against Entergy Arkansas in that proceeding and the Commission directed that only Entergy Arkansas would pay damages, the ultimate calculations modified years of accounting among the companies. Most of the Operating Companies' retail regulators — including other Settling Parties — were active in that litigation. And, though all refund amounts were paid by Entergy Arkansas to other Companies, the Commission reduced the damages with adjustments to reflect that the Companies had also benefited from the misallocation. (Indeed, Louisiana itself argued that the adjustment “required the other Companies to pay Entergy Arkansas” in some years. *See* Final Brief for the Louisiana Public Service Commission at 28, *Entergy Servs., Inc. v. FERC*, D.C. Cir. Nos. 17-1251, *et al.* (filed Sept. 25, 2020).)

2. Louisiana's claims in the 2019 Complaint were not raised before 2015.

The Commission further determined that Louisiana had not filed and served its claims before “the filing of the Settlement Agreement” (*see supra* pp. 14-15) in August 2015. *Complaint Order* P 41, JA ____.

The claims in the 2019 Complaint were not presented in the 2009

Complaint, which alleged that Entergy Arkansas's off-system sales were not permitted under the System Agreement and were improperly allocated as though part of its customer base. *See Complaint Order* P 41 & n.65, JA ___; *Opinion No. 521* P 7, JA ___. Just as the Commission properly found Louisiana's claims regarding the Grand Gulf Sales outside the scope of the Opportunity Sales proceeding, the 2009 Complaint did not "provide any specific information that describes the use of an inflated avoided cost for energy for" the Grand Gulf Sales. *Complaint Order* n.65, JA ___. (In fact, it did not challenge any aspect of Joint Account Sales made under System Agreement section 30.04.) And the fact that the Grand Gulf Sales may have been misidentified as Opportunity Sales in the earlier phases of that proceeding did not preserve the distinct claim that the Grand Gulf Sales violated section 30.04. Louisiana relies on its broad allegations, in each complaint, that Entergy was selling System energy that it should have used to serve baseload customers (*see* Br. 40-41); the Commission, however, reasonably found the language "too vague" to have represented the 2019 Complaint allegations about the Grand Gulf Sales in the 2009 Complaint. *Complaint Order* P 41, JA ___.

3. Louisiana's claims did not fall under the exception to the 2015 Settlement's waiver.

The Commission also reasonably determined that the exception to the 2015 Settlement's waiver did not apply. Louisiana (Br. 42-44) focuses its argument on a single sentence in section G(2) of the 2015 Settlement, which provides: "This Settlement Agreement shall have no effect on cost allocation disputes affecting costs incurred prior to January 1, 2016." JA ____. But that sentence, standing alone, is stripped of necessary context. The Commission must review the entire agreement and must consider particular words, "not as if isolated from the context, but in light of the obligations as a whole and the intention of the parties as manifested therein." *Rehearing Order* P 41, JA ____ (quoting *Xcel Energy Servs. Inc. v. Am. Transmission Co.*, 140 FERC ¶ 61,058 at P 60 (2012)); see also *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.*, 119 FERC ¶ 61,314 at P 19 (2007) (rejecting expansive reading of contract provision where context limited its scope), *aff'd sub nom. Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 983-84 (D.C. Cir. 2009). To that end, the Commission appropriately considered section G(2) as a cohesive paragraph, rather than as disjointed sentences. See *supra* p. 15 (quoting section G(2) in full).

Here, the Commission properly understood each sentence to address a distinct step in terminating the rough equalization obligations under the System Agreement, which had been implemented through annual bandwidth remedy proceedings each year since 2007, using cost data for the previous calendar year. *See Complaint Order* P 45, JA ___; *see generally La. Pub. Serv. Comm’n v. FERC*, 866 F.3d 426, 428 (D.C. Cir. 2017) (explaining bandwidth remedy procedures). Section G(2) of the Commission-approved 2015 Settlement begins by providing that there is no “post-withdrawal obligation to roughly equalize production costs for any cost incurred by any Operating Company after December 31, 2015” (i.e., there would be no bandwidth equalization for costs beyond the 2015 calendar year). JA ___. The next sentence defines “cost incurred’ to mean costs incurred for the production of electricity” — in that year — not costs deferred from a previous bandwidth year. *Id.* The third sentence, on which Louisiana relies, states that the 2015 Settlement “shall have no effect on cost allocation disputes affecting costs incurred [production costs] prior to January 1, 2016.” JA ___. Finally, the provision prescribes the timing of the final bandwidth payments, to be determined in 2016 using 2015

cost data: the Operating Companies that are subject to rough equalization would “complete any FERC approved [bandwidth remedy] payments and receipts based on the 2015 test year” by the System Agreement Termination Date in 2016, or when the Commission issued a final order on the payments. *Id.* See *Complaint Order* P 45, JA ____.

In this full context, with the sentence about “cost allocation disputes” in the middle of a sequence of sentences addressing the handling of the last annual bandwidth remedy proceeding, the Commission appropriately concluded that all of section G(2) “pertains to the bandwidth calculation” and that the sentence merely clarified that Settling Parties could pursue cost allocation disputes related to that final bandwidth proceeding that would be filed in 2016, after the waiver date, using 2015 cost data. *Complaint Order* P 45, JA ____; see also *Rehearing Order* P 41, JA ____.

Given the nature of the Entergy System and its operation under the System Agreement, countless disputes that have arisen from that Agreement have involved cost allocation. See *supra* note 2 (citing cases, reflecting only those that reached the courts of appeals or the Supreme Court, leaving aside numerous FERC proceedings and other litigation).

The Commission justifiably concluded that interpreting the section G(2) exception to preserve *all* cost allocation disputes would render the broad waiver in section G(1) “meaningless.” *Rehearing Order* P 41, JA ____.

Having found “not plausible” Louisiana’s interpretation of one sentence, buried in the middle of a paragraph that otherwise concerned bandwidth remedy procedures, as a sweeping carveout from the general waiver, the Commission discerned no reasonable alternative to its own context-based interpretation. *Id.*, JA ____ (Commission “declines to find ambiguity where there is none”).

B. The Commission Reasonably Rejected Louisiana’s Arguments Regarding Estoppel Or Mutual Mistake

The Commission appropriately rejected Louisiana’s arguments to avoid waiver based on Entergy’s early representations that the Grand Gulf Sales were treated as Opportunity Sales.

First, as the Commission explained in the Phase III orders, for the purpose of “ensuring that the damages calculation” for the full period was consistent with the System Agreement violation that the Commission had identified, the Commission would not preclude a party from “correcting prior representations in earlier phases of the proceeding.” *Opinion No. 565-A* P 46, JA ____ . Because the total

damages had not been at issue before Phase III, and because the parties had been able “to fully question the treatment of the Grand Gulf Sales” in that phase, the Commission found “no reason to prohibit Entergy from correcting previous representations.” *Opinion No. 565* P 106, JA _____. While estoppel typically precludes a party from changing its position, the Commission appropriately emphasized its goal of calculating a correct remedy.

In the 2019 Complaint, Louisiana did not allege that Entergy knew that its representations about the Grand Gulf Sales in Phase I were false, nor did it allege that those early representations were made (during the litigation of Phase I in 2010) to induce Louisiana to release its claims five years later in the 2015 Settlement. *Rehearing Order* P 35, JA _____. Furthermore, the Commission found that, even if equitable estoppel were to apply, holding Entergy to the factually incorrect position that the Grand Gulf Sales had been Opportunity Sales would not provide the relief that Louisiana sought: the preservation of Louisiana’s claims that the Grand Gulf Sales violated section 30.04 of the System Agreement. *Id.* at P 36, JA ____-_____.

The Commission also properly found Louisiana’s mutual mistake argument waived because Louisiana first raised it on rehearing. *See, e.g., Omaha Pub. Power Dist.*, 164 FERC ¶ 61,238 at P 11 (2018) (“The Commission has long held that it will reject new arguments on rehearing that could have been made originally but were not.”). Moreover, Louisiana “had ample opportunity” to raise its arguments earlier — especially in this case, where Louisiana and Entergy had fully litigated the applicability of the 2015 Settlement waiver through multiple rounds of responses, which the Commission accepted notwithstanding its general rule of rejecting such back-and-forth filings. *Rehearing Order* P 38, JA ___ (noting Louisiana’s April 3 and May 14 filings); 18 C.F.R. § 385.213(a)(2) (precluding such responses “unless otherwise ordered” by the Commission); *see supra* p. 25. Because Louisiana raised mutual mistake for the first time on rehearing, Entergy had no opportunity to respond to the argument. *Rehearing Order* P 38, JA ___ (citing 18 C.F.R. § 385.713(d)(1), which bars answers to requests for rehearing); *see also Omaha Pub. Power Dist.*, 164 FERC ¶ 61,238 at P 11 (“allowing [a party] to introduce new arguments at the rehearing stage raises concerns of fairness and due process”).

In any event, the Commission was not persuaded that mutual mistake would apply, as Louisiana “presented no evidence that the parties’ shared impression that the [Grand Gulf] Sales were Opportunity Sales was a material fact that formed the basis of the 2015 Settlement” (*Rehearing Order* P 38, JA ___) — a settlement among all of the remaining Operating Companies and their retail regulators that released all future litigation, save one last bandwidth calculation, and terminated the decades-old System Agreement entirely.

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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March 5, 2021

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), 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 10,213 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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March 5, 2021

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 March 2021, served the foregoing via email through the Court's CM/ECF system.

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ADDENDUM

Statutes & Regulations

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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.¹

(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”.

¹ 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.

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(c) *Answers.* A person who is ordered to show cause must answer in accordance with Rule 213.

§ 385.210 Method of notice; dates established in notice (Rule 210).

(a) *Method.* When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(b) *Dates for filing interventions and protests.* A notice given under this section will establish the dates for filing interventions and protests. Only those filings made within the time prescribed in the notice will be considered timely.

§ 385.211 Protests other than under Rule 208 (Rule 211).

(a) *General rule.* (1) Any person may file a protest to object to any application, complaint, petition, order to show cause, notice of tariff or rate examination, or tariff or rate filing.

(2) The filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party.

(3) Subject to paragraph (a)(4) of this section, the Commission will consider protests in determining further appropriate action. Protests will be placed in the public file associated with the proceeding.

(4) If a proceeding is set for hearing under subpart E of this part, the protest is not part of the record upon which the decision is made.

(b) *Service.* (1) Any protest directed against a person in a proceeding must be served by the protestant on the person against whom the protest is directed.

(2) The Secretary may waive any procedural requirement of this subpart applicable to protests. If the requirement of service under this paragraph is waived, the Secretary will place the protest in the public file and may send a copy thereof to any person against whom the protest is directed.

§ 385.212 Motions (Rule 212).

(a) *General rule.* A motion may be filed:

(1) At any time, unless otherwise provided;

(2) By a participant or a person who has filed a timely motion to intervene which has not been denied;

(3) In any proceeding except an informal rulemaking proceeding.

(b) *Written and oral motions.* Any motion must be filed in writing, except that the presiding officer may permit an oral motion to be made on the record during a hearing or conference.

(c) *Contents.* A motion must contain a clear and concise statement of:

(1) The facts and law which support the motion; and

(2) The specific relief or ruling requested.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 225-A, 47 FR 35956, Aug. 18, 1982; Order 376, 49 FR 21705, May 23, 1984]

§ 385.213 Answers (Rule 213).

(a) *Required or permitted.* (1) Any respondent to a complaint or order to show cause must make an answer, unless the Commission orders otherwise.

(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.

(3) An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section.

(4) An answer to a notice of tariff or rate examination must be made in accordance with the provisions of such notice.

(b) *Written or oral answers.* Any answer must be in writing, except that the presiding officer may permit an oral answer to a motion made on the record during a hearing conducted under subpart E or during a conference.

(c) *Contents.* (1) An answer must contain a clear and concise statement of:

(i) Any disputed factual allegations; and

(ii) Any law upon which the answer relies.

(2) When an answer is made in response to a complaint, an order to show cause, or an amendment to such pleading, the answerer must, to the extent practicable:

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(i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and

(ii) Set forth every defense relied on.

(3) General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies, do not comply with paragraph (a)(1) of this section and may be a basis for summary disposition under Rule 217, unless otherwise required by statute.

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5) When submitting with its answer any request for privileged treatment of documents and information in accordance with this chapter, a respondent must provide a public version of its answer without the information for which privileged treatment is claimed and its proposed form of protective agreement to each entity that has either been served pursuant to §385.206(c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(d) *Time limitations.* (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, except as described below or unless otherwise ordered.

(i) If a motion requests an extension of time or a shortened time period for action, then answers to the motion to extend or shorten the time period shall be made within 5 days after the motion is filed, unless otherwise ordered.

(ii) [Reserved]

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

(i) If notice of the pleading or amendment is published in the FEDERAL REGISTER, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the

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FEDERAL REGISTER, not later than 30 days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 602, 64 FR 17099, Apr. 8, 1999; Order 602-A, 64 FR 43608, Aug. 11, 1999; Order 769, 77 FR 65476, Oct. 29, 2012]

§ 385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent

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(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver*. If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver*. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver*. Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule*. If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument*. When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review*. After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability*. (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under

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subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file*. A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request*. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled “Statement of Issues,” listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers*. (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay*. Unless otherwise ordered by the Commission, the filing of a request for rehearing does

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not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification

under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under paragraph (c) of this section, finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

Year(s)	Month(s)	Description of Event/Order/Proceeding	Citation	JA
2000	January-September	Entergy Arkansas makes Grand Gulf Sales from its retained share of Grand Gulf capacity		
	October-(through 2009)	Entergy Arkansas makes Opportunity Sales (including sales from Grand Gulf retained share, now included in load)		
2008	December	D.C. Circuit dismisses petition for review as to claim regarding short-term sales	<i>La. Pub. Serv. Comm'n v. FERC</i> , 551 F.3d 1042	
2009	June	Louisiana files complaint in EL09-61		
2010	April-August	Parties file evidence, conduct hearing before ALJ in Phase I		
2012	June	FERC finds Entergy violated System Agreement by including off-system sales in “loads” under sec. 30.03(a) [<i>Opinion No. 521</i>]	139 FERC ¶ 61,240	
2015	August	Settling Parties file 2015 Settlement		
2017	July	ALJ finds that Grand Gulf Sales violated System Agreement	160 FERC ¶ 63,009	
2018	October	FERC finds claims about Grand Gulf Sales outside the scope of the Opportunity Sales proceeding [<i>Opinion No. 565</i>]	165 FERC ¶ 61,022	
2019	February	Louisiana files 2019 Complaint in EL19-50		
	November	FERC denies 2019 Complaint [<i>Complaint Order</i>]	169 FERC ¶ 61,113	
	December	FERC denies rehearing as to scope [<i>Opinion No. 565-A</i>]	169 FERC ¶ 61,179	
2020	July	FERC affirms denial of 2019 Complaint [<i>Rehearing Order</i>]	172 FERC ¶ 61,056	