111 FERC ¶ 61,080
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Louisiana Public Service Commission
and the Council of the City of New Orleans

v. Docket No. EL00-66-003

Entergy Corporation

Entergy Services, Inc. Docket No. ER00-2854-004

Louisiana Public Service Commission

v. Docket No. EL95-33-005

Entergy Services, Inc.

OPINION NO. 468-A

ORDER DENYING REHEARING

(Issued April 18, 2005)

1. In this order, we deny rehearing of our order, *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation,* Opinion No. 468, 106 FERC ¶ 61,228 (2004), where we directed Entergy Corporation (Entergy)[1] to modify the Entergy System Agreement (System Agreement) prospectively to exclude interruptible load from the calculation of peak load responsibility in computing charges

for the Entergy system.[2] At the same time, however, we provide guidance on several questions concerning implementation of the order. This order benefits customers by

[1] Or, more precisely, Entergy's public utility operating companies.

[2] The Entergy system is comprised of Entergy Services, Inc. and its various public

ensuring that the Entergy system is allowed to recover the cost of its facilities from the load that causes it to incur those costs.

Background

2. Entergy's System Agreement consists of seven Service Schedules, which allocate costs among the Operating Companies. These are: MSS-l (Reserve Equalization); MSS-2 (Transmission Equalization); MSS-3 (Exchange of Electric Energy Among the Companies); MSS-4 (Unit Power Purchase); MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies); MSS-6 (Distribution of Operating Expenses of the System Operation Center); and MSS-7 (Merger Fuel Protection). Certain of the system costs are allocated among the Operating Companies in proportion to the load each Operating Company places on the system at the time of the system peak. This proportionate cost responsibility of each Operating Company under the System Agreement is called its "Responsibility Ratio."

3. Each Operating Company's Responsibility Ratio is calculated by determining the Operating Company's load responsibility (Company Load Responsibility) as a proportion of the load responsibility for all Operating Companies. The Company Load Responsibility is the average of the Operating Companies' twelve monthly loads coincident with the system's monthly peak load hour for the twelve-month period ending with the month prior to its application. Thus, the Responsibility Ratio of each Company is determined using a "rolling" average of an Operating Company's contribution to the system's monthly peak over the preceding twelve months.

4. Entergy historically included interruptible load in calculating the Responsibility Ratio if the system was actually serving interruptible load at the time of the system peak. In 1995, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint against Entergy seeking revision of the System Agreement, to exclude interruptible loads from the calculation of peak load responsibility. The Commission dismissed this complaint,[3] and later denied rehearing, finding that, if interruptible

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utility operating companies, i.e., Entergy Arkansas, Inc.; Entergy Louisiana, Inc.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Gulf States, Inc. (Operating Companies).

[3] *Louisiana Public Service Commission v. Entergy Services, Inc.*, 76 FERC ¶ 61,168 at 61,953 (1996) (*Louisiana I*), *reh'g denied*, 80 FERC ¶ 61,282 (1997) (*Louisiana II*).

customers are being served at the time of the system's peak, then this load can be included when calculating a company's peak load responsibility.

5. These orders were appealed to the United States Court of Appeals for the District of Columbia Circuit, and the court remanded the matters back to the Commission, noting that the Commission had failed to explain its departure from its precedent in *Kentucky Utilities Company*, Opinion No. 116, 15 FERC ¶ 61,002, *reh'g denied*, Opinion No. 116-A, 15 FERC ¶ 61,222 (1981) (*Kentucky Utilities*).[4] On remand, the Commission referred the matter to an Administrative Law Judge for hearing procedures.[5]

6. In the Initial Decision (ID), *Louisiana Public Service Commission, et al. v. Entergy Corporation, et al.*, 96 FERC ¶ 63,002 (2001), the presiding judge found that Entergy could continue to include pre-existing interruptible load when calculating peak load responsibility.

7. The parties filed exceptions to the ID. In Opinion No. 468, the Commission, among other actions, reversed the presiding judge's finding and directed Entergy to exclude interruptible load when calculating each Operating Company's peak load responsibility under the System Agreement. The Commission concluded, however, that, in this instance, it was not authorized by the Federal Power Act to order refunds.

8. The Commission thus ordered Entergy to modify the System Agreement, but only prospectively, effective April 1, 2004, to exclude interruptible load from the calculation of peak load responsibility under Schedules MSS-1 and MSS-5 of the System Agreement and from joint account purchases. For the reasons stated in Opinion No. 468, the Commission did not require Entergy to exclude interruptible load in calculating peak load responsibility for transmission costs under Schedule MSS-2 (Transmission Equalization) of the System Agreement. The Commission also concluded that certain sulfur dioxide emission allowance-related costs were not at issue in this proceeding.

9. Requests for rehearing of the Commission's findings in Opinion No. 468 were filed by: Louisiana Commission; the Council of the City of New Orleans (New Orleans Council); jointly, by the Arkansas Public Service Commission and Mississippi Public

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[4] *Louisiana Public Service Commission v. FERC*, 184 F.3d 892 (D.C. Cir. 1999).

[5] *Louisiana Public Service Commission v. Entergy,* 93 FERC ¶ 61,013 (2000) (*Louisiana III).* The Commission also consolidated the proceeding with two other then-pending proceedings (as shown in the caption of this order).

Service Commission (jointly, State Commissions); and Entergy. For clarity, we will discuss the arguments made in these pleadings issue-by-issue.

Discussion

A. Interruptible Load

10. New Orleans Council argues that, while Opinion No. 468 contemplates that interruptible customers should contribute to the Operating Companies' fixed costs through their rates, the exclusion of interruptible customers from peak load responsibility in Rate Schedule MSS-1 precludes the Operating Companies with interruptible customers from contributing on behalf of those customers to the Operating Companies' cost of investment as the Commission itself envisions. New Orleans Council concludes that an unintended consequence of the Commission's determinations in Opinion No. 468 is that the Operating Companies with interruptible customers make no contribution on behalf of those customers to fixed costs.

11. New Orleans Council also argues that the Commission's decision overlooks the fact that, unlike the situation in *Kentucky Utilities*, the interruptible customer here is the retail customer, and not the wholesale customer. New Orleans Council also argues that too little weight is given to the fact that the Operating Companies only interrupt service for reliability purposes, and not for economic reasons. It also points out that the record shows that interruptible customers receive benefits from Entergy's system capacity.

12. In this regard, New Orleans Council urges the Commission to consider the unfairness to firm customers that will result from the Commission allowing interruptible load to receive the benefits of the Entergy System capacity, while evading paying any of the system's fixed costs.

13. The State Commissions argue that the Commission should reinstate the presiding judge's determination that pre-1996 interruptible load should not be excluded from the calculation of peak load responsibility because, prior to 1996, Entergy's diversified generation mix was built to serve all of Entergy's load, including interruptible load. The State Commissions also dispute two conclusions that they contend the Commission made in Opinion No. 468. First, they argue that the Commission erred in finding that Entergy uses a coincident peak recovery method while Entergy, in fact, uses a so-called "12 CP" method. The State Commissions argue that this error invalidates the Commission's conclusion that "peak demand" determines how much Entergy will invest in capacity. Second, the State

Commissions argue that Opinion No. 468 erred when it found that Entergy built capacity in the 1970's and 1980's primarily to meet firm load, and that any benefits to interruptible customers were a "by-product." State Commissions argue to the contrary that Entergy built four nuclear units during this period, primarily to provide fuel diversity and fuel savings, and that these choices directly benefited interruptible customers.

14. The State Commissions also claim that Opinion No. 468 contains misstatements about the mechanics of Schedule MSS-1 of the System Agreement and point out that, under MSS-1, the "shortness" or "longness" of an Operating Company is determined *relative* to the overall shortness or longness of the entire Entergy System, and not based on an Operating Company's *absolute* shortness or longness.

Commission Conclusion

15. New Orleans Council essentially argues that, if interruptible load is excluded from Schedule MSS-1, the result will be that Operating Companies with interruptible customers make no contribution on behalf of those customers to fixed costs at the wholesale level. We find this argument unpersuasive for two reasons. First, it is not true that interruptible customers are receiving a "free ride." To the contrary, as we explained in Opinion No. 468,[6] the fact that interruptible customers are not "allocated" the cost of facilities does not mean that they make no contribution towards those costs.[7] Second, assuming *arguendo* that Entergy's interruptible customers are not paying a "fair share" of the Entergy system's fixed costs, the solution is not for the Commission to overturn its longstanding precedent in *Kentucky Utilities* and subsequent cases and allocate cost equally to firm and interruptible customers, but for Entergy to adopt rates for interruptible customers that include a greater contribution towards Entergy's fixed costs while still recognizing the interruptible nature of the service they take.

16. Along similar lines, New Orleans Council also argues that the Commission has given too little weight to the fact that the Operating Companies only interrupt service for reliability purposes, and not for economic reasons. It also contends (as do the State Commissions) that we ignore that Entergy's capacity additions in the 1970's and 1980's

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[6] Opinion No. 468, 106 FERC ¶ 61,228 at P 62.

[7] If the Commission were to require utilities to allocate costs to interruptible customers in the same manner that utilities allocate costs to firm customers, then the Commission effectively would be allowing interruptible and firm customers to be charged the same rate, notwithstanding the differences in the service each takes (i.e., the differences in the firmness of the service each takes).

were made primarily to provide fuel diversity and fuel savings, and that these choices directly benefited interruptible customers. We disagree. As we explained in Opinion No. 468,[8] the fact that service to interruptible customers is not interrupted does not mean that these customers are receiving firm service; Entergy is entitled to interrupt them, and, in fact, as needed, has done so. Moreover, utilities build capacity to serve firm load, not interruptible; hence, it is appropriate that the cost of that capacity is allocated to firm load, and not to interruptible load.[9] Entergy, like most utilities, uses a peak load responsibility method to allocate fixed costs, and so its costs should be allocated based on which customers cause it to incur those fixed costs, i.e., firm customers and not interruptible customers. In this regard, the record shows that Entergy now builds capacity to serve firm load, not interruptible load,[10] and the rates adopted in Opinion No. 468 are for the period April 1, 2004 and prospectively.

17. We also disagree with the argument that the validity of our findings in Opinion No. 468 is somehow undercut by the fact that Entergy does not use a single peak or "1 CP" peak load responsibility cost allocation method. This contention is refuted by a careful reading of Opinion No. 468, including the discussion in note four, which recognizes that Entergy uses the so-called "12 CP" method, which is a peak load responsibility cost allocation method, i.e., one based on the average of the 12 monthly peaks. In addition, while we do not dispute the State Commissions' explanation of the relative nature of the terms "short" and "long" in reference to Schedule MSS-1, this distinction does not dictate that we change our analysis or conclusions and provides no reason to change our findings in Opinion No. 468.

B. Refunds

18. Louisiana Commission argues that the Commission erred by denying refunds to companies and their customers who were injured by a tariff that the Commission has now found unjust, unreasonable and unduly discriminatory, even though the Commission explicitly allowed the rates to become effective, subject to refund. In this regard, Louisiana Commission argues that the Commission failed to provide a reasoned basis for its refusal to award refunds and argues that the statement in Opinion No. 468 (at P 86) that some parties oppose refunds cannot substitute for a reasoned analysis. Louisiana Commission also objects to the Commission finding that the testimony of Louisiana Commission's witness on the recoverability at retail of a FERC-ordered surcharge had "no probative

[8] Opinion No. 468, 106 FERC ¶ 61,228 at P 63, 65-66, 71.

[9] *Id.* at P 61, 65-69.

[10] *Id.* at P 68; *accord, id.* at P 69.

value."

19. Louisiana Commission cites the United States Supreme Court's decisions in *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354 (1988) (*Mississippi Power*) and in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission,* 539 U.S. 39 (2003) (*Entergy Louisiana*), for the proposition that states may not second-guess Commission determinations and cost allocations. Based on these cases, Louisiana Commission argues that the Commission may direct utilities to pay refunds, even though it would require State Commissions to allow surcharges to be collected in retail rates to do so.

20. Louisiana Commission also argues that, if the Commission believes that state law prohibits the collection of increased billings for past periods, then the Commission has the burden of explaining: (a) how Entergy routinely can bill for and collect surcharges for erroneous billings in past periods; (b) how the filed-rate doctrine or the rule against retroactive ratemaking, as a matter of state law, may prevent the collection of a surcharge for a prior period when actual notice of the possibility of a refund was given in the prior period because of explicit federal law; and (c) how a state's refusal to pass through a surcharge needed to make rates just and reasonable comports with the Supremacy Clause.

Commission Conclusion

21. Louisiana Commission's arguments overlook several important points. First, Louisiana Commission ignores the relevant statutory language, which limits our authority to order refunds in this comparatively unusual circumstance. We could not make the findings required by the statute; hence, we could not order refunds. Second, in any event, it is important to keep in mind that the Commission's authority to order refunds is discretionary. Thus, the fact that, in a particular case, we may have *authority* to order refunds, is not the same as a determination that in that case we *should* order refunds. The standard for refunds is not, as seems to be argued, that the Commission must order refunds unless it can show that none are warranted.

22. Third, we reject the argument that *Mississippi Power* and *Entergy Louisiana* essentially allow the Commission to order utilities to collect surcharges from their retail customers. This argument misreads the meaning of these cases and overlooks the fact that the Commission's jurisdiction is limited to jurisdiction over wholesale rates and it would exceed our authority to directly prescribe retail rates. The fact that state commissions, in setting retail rates, are not authorized to second guess our wholesale rate determinations is no way inconsistent with the Commission declining to overstep its bounds by directly prescribing retail rates.

23. Nor need we address the questions raised by Louisiana Commission; the statute does not require that we do so to justify not ordering refunds.

C. <u>Proceeding to Challenge Sulfur Dioxide Issues</u>

24. Louisiana Commission argues that the Commission should reconsider its decision that this proceeding is not the proper forum to determine whether replacement costs for sulfur dioxide allowances may be billed through Service Schedule MSS-3.

25. In this regard, Louisiana Commission notes that the initial decision in the so-called rough equalization case has already been issued and the sulfur dioxide issue was not tried in that case. *See Louisiana Public Service Commission v. Entergy Services, Inc., et al.,* 106 FERC ¶ 63,012 (2004) (Docket No. EL01-88-000). Louisiana Commission states that it does not oppose a decision on this issue in Docket No. EL01-88-000, nor does it oppose a decision on the issue on rehearing in this proceeding. However, it argues that it should not be denied a remedy in this case, and later be subjected to a ruling that the issue also was not properly included in Docket No. EL01-88-000. Alternatively, Louisiana Commission argues that, if the Commission does not believe it is appropriate to decide the issue here or in a case where the issue was not tried, it should set the matter for hearing so that the Louisiana Commission may be afforded a remedy.

<u>Commission Conclusion</u>

26. Louisiana Commission asks the Commission to reconsider its decision that the proper forum to determine whether replacement costs for sulfur dioxide emission allowances may be billed through Schedule MSS-3 is in the "rough equalization" proceeding in Docket EL01-88-000. Given that Louisiana Commission did not raise its concerns on this issue until it filed its exceptions to the initial decision, thus foreclosing consideration of this issue at hearing, we agree that Docket EL01-88-000 was not the suitable forum for this issue to be decided. Nevertheless, for the reasons stated in Opinion No. 468, we still are not prepared to decide this issue in this proceeding. Therefore, we affirm our finding in Opinion No. 468 denying Louisiana Commission’s request to add the replacement cost of sulfur dioxide emission allowances to costs billed under Schedule

MSS-3, without prejudice.[11] Louisiana Commission may renew this issue in the next case Entergy files regarding the System Agreement, or it may file a complaint raising this issue.

D. Implementation Issues

27. Entergy states that Opinion No. 468 requires a fundamental change in the manner in which Entergy determines each Operating Company's cost responsibility under the System Agreement. Entergy also states that calculating intra-system bills under the System Agreement is a complex, computerized process. To implement the fundamental changes required by Opinion No. 468, Entergy states it must address and resolve a number of complicated issues and make numerous conforming changes to its computer programs and algorithms that underlie the intra-system billing process.

28. In particular, Entergy has identified at least six specific steps that it must undertake to implement Opinion No. 468. These include: (1) identifying all interruptible service customers; (2) verifying the metering capability of each interruptible customer; (3) determining the billing cycle for each interruptible customer and, if necessary, seeking a change in the billing cycle to a calendar month basis; (4) building an interface between the customer billing and the intra-system billing; (5) developing a mechanism to calculate the adjusted Operating Company loads for responsibility ratio calculations; and (6) verifying and testing the new process for accuracy. Entergy states that it is currently undertaking these steps and hopes to have the process complete within the next few months.

29. Entergy argues that, to implement the findings in Opinion No. 468, it needs guidance on four unanswered questions regarding the implementation of the changes to the intra-system billing process required by Opinion No. 468. These are:

> (a) Should the Operating Companies' peak load responsibility be revised beginning with the new system peak in April 2004 such that the effect of Opinion No. 468 will be phased in prospectively over the ensuing twelve months? Entergy argues that, in calculating peak load responsibility beginning April 2004, Entergy should not have to adjust the system peaks for months prior to April 2004.
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> (b) When calculating peak load responsibility, how should Entergy reflect contract limitations for interruptible service? Entergy argues that interruptible loads should be excluded in determining peak load

[11] *Id.* at P 97-99.

responsibility only if the contractual limitations have not been reached.

(c) How should Entergy estimate a customer's interruptible load if the actual interruptible load data for that customer are not available during the calculation of system's hourly peak? Entergy argues that it should be allowed to estimate a customer's interruptible load served during the system peak if Entergy is unable to obtain the actual data.

(d) Should the Operating Companies' peak load responsibility used in assigning cost responsibility for the operating expenses of the System Operation Center under Schedule MSS-6 of the System Agreement be revised to exclude interruptible load? Entergy argues that the responsibility ratio for Schedule MSS-6 of the System Agreement should not be adjusted to exclude interruptible load.

Commission Conclusion

30. In Opinion No. 468, the Commission ordered Entergy to modify the System Agreement, prospectively, effective April 1, 2004, to exclude interruptible load from the calculation of peak load responsibility under Schedules MSS-1 and MSS-5 of the System Agreement and from joint account purchases. In contrast, in Opinion No. 468, the Commission did not require Entergy to exclude interruptible load in calculating peak load responsibility for transmission costs under Schedule MSS-2 of the System Agreement.

31. We offer the following guidance to aid Entergy in implementing these findings. First, in calculating peak load responsibility beginning April 2004, Entergy must adjust the system peaks and its rates beginning April 1, 2004, as required by Opinion No. 468.

32. Second, with regard to the exclusion of interruptible loads in determining peak load responsibility, Entergy points out that many of its interruptible customers have contracts that place limits on: (a) the number of times a month that the customer can be interrupted; (b) the number of hours a month the customer can be interrupted; or (c) the total number of megawatts that can be interrupted during a month. For customers with such contracts, once the contractual limit on interruptions has been met, service to the customer may no longer be interrupted. In light of these provisions, Entergy proposes to exclude the interruptible load of these customers from the determination of the peak load responsibility only during the time when the customer is subject to interruption of service. We agree. This is a practical and reasonable approach, as the customers are no longer interruptible once the contractual limitations are reached and, effectively, are then firm

customers.[12]

33. Third, if Entergy is unable to obtain actual data to determine a customer's interruptible load served during the system peak, it may estimate that customer's interruptible load during that period. Further, we agree with Entergy that it is appropriate that it develop systems to determine the interruptible load of each customer so that such estimates will not be necessary.

34. Fourth, Opinion No. 468 did not require Entergy to exclude interruptible load from the responsibility ratio for Schedule MSS-6 of the System Agreement. The Systems Operation Center incurs costs for load actually served at the time of the system peak, regardless of whether that load was interruptible or not. Thus, inclusion of the full load served is appropriate.

<u>The Commission orders</u>:

(A) The parties' requests for rehearing are hereby denied, as discussed in the body of this order.

(B) Entergy is hereby directed to make a compliance filing, within 30 days of the date of issuance of this order, consistent with the findings in this order.

By the Commission. Chairman Wood not participating.
Commissioner Brownell dissenting in part with a
(S E A L) separate statement attached.

Magalie R. Salas,

[12] As explained earlier, this is possible to do, because the calculation is made on a rolling 12-month basis.

Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Louisiana Public Service Commission and
The Council of the city of New Orleans

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v. Docket No. EL95-33-002

Entergy Services, Inc.

(Issued April 18, 2005)

BROWNELL, Commissioner, dissenting in part:

A brief summary of the history of this proceeding is helpful to give some context to the decision rendered today. This proceeding began on March 15, 1995 when the Louisiana Commission filed a complaint seeking to exclude interruptible load in the allocation of fixed capacity costs. The Commission dismissed the complaint, stating in part "the mere fact that a load *may be* curtailable does not mean that it should not be considered in allocating costs." The Commission continued "[i]f a load subject to curtailment is being served at the time of the peaks, then it properly should be considered in determining an operating company's load and determining its share of costs." *Louisiana Public Service Commission v. Entergy Services, Inc.*, 76 FERC ¶ 61,168 at 61,955-6 (1996), *reh'g denied*, 80 FERC ¶ 61,282 (1997). This decision was appealed.

In its remand order, the Court found that the Commission had failed to explain its departure from its precedent, in particular, *Kentucky Utilities Company, Opinion No. 116*, 15 FERC ¶ 61,002, *reh'g denied, Opinion No. 116-A*, 15 FERC ¶ 61,222 (1981) (*Kentucky Utilities)*. *Kentucky Utilities* stands for the proposition that interruptible load should be excluded from the allocation of fixed capacity costs because the facilities were constructed for firm load. However, the Court pointed out that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis". See *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57; 103 S.Ct. 2856; 77 L.Ed.2d 443 (1983).

This allocation issue was eventually set for hearing. The presiding judge distinguished *Kentucky Utilities* on two bases and found that interruptible load should be included in the allocation process. *Louisiana Public Service Commission, et al v. Entergy Corporation, et al,* 96 FERC ¶ 63,002 (2001). In Order No. 468, the Commission reversed the initial decision. Although continuing to uphold *Kentucky Utilities,* the Commission did expressly recognize that the capital investment to meet firm load made it possible to render interruptible service and interruptible load should contribute to fixed cost recovery in the design of rates. Opinion No. 468, 106 FERC ¶ 61,228 at P 62.

On rehearing, New Orleans Council, the Arkansas PUC and Mississippi PUC make a number of arguments that interruptible load should be included in the allocation of fixed capacity costs. In addition, New Orleans Council disagrees that the proper contribution to fixed cost recovery by interruptible load can be accomplished through the design of rates.

The majority denies rehearing and offers guidance on how to implement the order. Based on the rehearing requests and further consideration, my view about cost allocation is simply different than the rationale articulated in *Kentucky Utilities.* At its essence, *Kentucky Utilities* stands for the proposition that fixed costs are only allocated to firm load because facilities are planned and built to provide firm service. This rationale inherently creates a "free rider" or subsidy problem. No one disputes that facilities are built for firm load. Facilities are built for firm customers because financing requires a steady revenue stream. However, capacity is rarely used 100 percent of the time to serve firm load. Consequently, capacity is available for other uses such as interruptible service. It is in the allocation process where we are able to match those that use and benefit from a facility with the attendant cost responsibility.

The rationale of matching the use/benefit and cost responsibility, although at odds with *Kentucky Utilities,* is not new. As the Commission stated in <u>Texas Eastern Transmission Corp.</u>, 30 FERC ¶ 61,144 at 61, 273 (1985):

> We have used three-day peak volumes as peak allocation determinants traditionally because underutilized capacity is available for other uses. When the system is used on an actual basis differently from a contractual basis, allocation on three-day peak volumes takes into consideration these changes, determining cost responsibility on an actual basis.

This position was repeated in East Tennessee Natural Gas Co. 40 FERC ¶ 61,277 at 61,906 (1987). The Commission has also allocated fixed costs to interruptible gas transportation service by using the 100 percent load factor methodology.

The Commission has also included interruptible load in the allocation of electric transmission costs. In *Occidental Chemical Corporation v. PJM Interconnection, L.L.C. and Delmarva Power & Light Company*, 101 FERC ¶ 61,005 at 61,013 (2002), the Commission was presented with the issue whether transmission costs should be allocated to firm load, curtailable load, and curtailed load or only to firm load. The Commission decided that "[a]llocating costs based on a customer's load (firm and non-firm) coincident with the annual peak of the zone is a reasonable method of allocating costs based on a customer's use of the system when the system is under its greatest stress" and asked for further explanation why curtailed load would be appropriate. On rehearing, the Commission stated "[a]ccess charges for use of PJM's transmission system should be allocated to network customers based on a network customer's actual use of PJM's system, consistent with the principle of cost causation." 102 FERC ¶ 61,275 at P14 (2003).

As the electric market matures, becomes more regionalized and offers expanded service, it becomes more important that we recognize the nexus between use and benefit of a system on the one hand and cost responsibility for that system on the other. An allocation of fixed costs to interruptible service based on their action use gives the firm customer an appropriate upfront rates reduction. Second, it creates an incentive for the facility owner to keep costs low. Third, it creates an incentive for the facility owner to maximize the use of that capacity.

While it is true that *Kentucky Utilities* has been around a long time, there is equally long-standing Commission precedent that is in conflict with its rationale. The question presented is not what has been around longer, however, the question is what is most equitable on a going forward basis when markets are regionalizing, customers are provided more choice and service options. I do believe we need to reconcile our precedent. So, if not here, where? I would support opening a generic proceeding to receive comment from the industry on the issue.

For these reasons, I respectfully dissent in part.

Nora Mead Brownell
Commissioner