UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission	Docket Nos. EL01-88-002
	EL01-88-003
v.	
Entergy Services, Inc.	

OPINION NO. 480-A

ORDER DENYING REHEARING IN PART AND
GRANTING REHEARING IN PART

(Issued December 19, 2005)

1. In this order, we deny rehearing in part and grant rehearing in part of the Commission's order, *Louisiana Public Service Commission v. Entergy Services, Inc*., Opinion No. 480, 111 FERC ¶ 61,311 (2005) (Opinion No. 480), finding, *inter alia*, that the allocation of production costs among the Entergy Operating Companies (Operating Companies)[1] in the Entergy System Agreement (System Agreement) is no longer just and reasonable, and that a bandwidth remedy is necessary to assure the justness and reasonableness of the System Agreement and the cost allocations thereunder.

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[1] Entergy Arkansas, Inc. (EAI), Entergy Louisiana (ELI), Entergy Mississippi, Inc. (EMI), Entergy Gulf States, Inc. (EGSI), and Entergy New Orleans, Inc. (ENOI).

Background

2. A detailed history of this proceeding is provided in the Initial Decision[2] and in Opinion No. 480. In brief, this proceeding deals with the System Agreement, a Commission-accepted rate schedule that allocates costs among the Operating Companies in several states.[3] The Louisiana Public Service Commission (Louisiana Commission), the sole complainant,[4] presented four issues. The first was whether the cost allocations among the Operating Companies in the System Agreement have become unjust, unreasonable and unduly discriminatory or preferential in violation of sections 205 and 206 of the Federal Power Act (FPA).[5] If so, then the second issue was whether the System Agreement should be altered to fully equalize or more closely align the production costs of the Operating Companies. The third issue involved whether certain costs should be adjusted when comparing the production costs among the Operating Companies. Finally, the fourth issue was whether Service Schedules MSS-1 and MSS-3 should be modified as an alternative remedy.

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[2] *Louisiana Public Service Commission v. Entergy Services, Inc*., 106 FERC 3,012 (2004) (Initial Decision).

[3] Entergy Corporation is a registered public utility holding company that provides electric service at wholesale and retail through five operating companies -- EAI, EMI, ELI, EGSI, and ENOI. The Entergy Operating Companies are respectively regulated at retail by the Arkansas Public Service Commission (Arkansas Commission), the Mississippi Public Service Commission (Mississippi Commission), the Louisiana Commission, the Public Utility Commission of Texas (Texas Commission) and the Council of the City of New Orleans (New Orleans). Entergy Services, Inc. (ESI) provides operating services to the five operating companies, and acts as the agent for the parent corporation in the System Agreement.

[4] The case commenced on June 14, 2001, when the Louisiana Commission and New Orleans filed a complaint against Entergy Corporation, ESI, EAI, ELI, EMI, EGSI, ENOI and System Energy Resources, Inc. (SERI) (collectively known as Entergy). New Orleans withdrew as a complainant and became an intervenor as the result of a settlement between Entergy and New Orleans. *See* Notice of the Council of the City of New Orleans' Withdrawal as a Complainant and Motion to Remain a Party with Intervenor Status (June 6, 2003).

[5] 16 U.S.C. §§ 824d, 824e (2000).

3. As explained in Opinion No. 480, the presiding judge found in the Initial Decision that the production costs of the Operating Companies were no longer in rough equalization. The presiding judge, however, rejected the Louisiana Commission's remedy to fully equalize production costs. Instead, the judge defined and reinstituted rough production cost equalization by imposing numerical percentage bandwidths of 7.5 percent annually and 5 percent over a rolling three-years (commencing 2004-2006) on the Entergy system that establish the outside bounds by which production costs may deviate from the system average. The presiding judge further found that the 7.5 percent bandwidth remedy should commence in calendar year 2003. The presiding judge also ruled on the treatment to be accorded various production cost categories in the determination of rough production cost equalization, and also found that Vidalia Hydroelectric Power Plant (Vidalia) costs should be fully reflected in ELI's production costs in calculating whether the Entergy Operating Companies' production costs are roughly equal.

4. In Opinion No. 480, the Commission affirmed the presiding judge's finding that the Entergy system was no longer in rough production cost equalization and that a bandwidth remedy was just and reasonable, but reversed his determination on the appropriate bandwidth remedy in favor of a broader bandwidth. The Commission also affirmed the presiding judge's findings rejecting the proposed remedies of full production cost equalization and Entergy's Strategic Supply Resource Plan (SSRP). In addition, the Commission reversed the presiding judge on his findings that the allocation methodology for Service Schedule MSS-1 needed to be changed from a 12 CP (coincident peak) to a 4 CP and on his findings that Vidalia was planned as a system resource for the benefit of the Entergy system. With respect to the remaining issues, the Commission summarily affirmed the presiding judge for the reasons set forth in the Initial Decision.

5. Requests for rehearing were received by the Arkansas and Mississippi Commissions, New Orleans, the Louisiana Commission, Entergy, the Louisiana Energy Users Group (LEUG),[6] Arkansas Electric Energy Consumers, Inc. (AEEC) and Occidental Chemical Corporation (Occidental). The Louisiana Commission and Entergy filed answers.

Procedural Matters

6. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2005), prohibits answers to requests for rehearing. Accordingly, we will

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[6] LEUG incorporates by reference arguments made by the Louisiana Commission.

reject the answers and answers to answers filed by the Louisiana Commission and Entergy.

Discussion

A. **Rough Production Cost Equalization**

7. The System Agreement allocates the costs and benefits of generation resources in two ways. The first is the allocation of the costs and benefits of new generation resources. This allocation is long-term in nature and is the primary means for roughly equalizing production costs under the System Agreement. Historically, when the system has added generation, the Operating Committee[7] has assigned responsibility for this new generation to a particular Operating Company. This is then done on a rotational basis among the five Operating Companies. The Operating Company assigned the new generation is responsible for obtaining siting approval for the generation, financing its construction and bearing the fixed and variable costs of that generation plant.[8]

8. The second allocation in the System Agreement is the allocation of the costs and benefits of system integration on a short-term basis. This is achieved by Service Schedules MSS-1 through MSS-7. The Service Schedules allocate the costs and benefits associated with particular functions incident to the integrated operation of the system. Entergy operates the five Operating Companies' transmission and generation facilities as a single electric system, dispatching generation on a least cost basis system-wide and without regard to ownership (subject to reliability constraints). This pooling arrangement benefits the entire system by lowering energy and capacity costs to customers throughout the system.[9] Because the five Operating Companies' resources are pooled together, the Service Schedules allocate costs of any imbalances in the cost of those facilities used for the mutual benefit of all the Operating Companies. The charges paid pursuant to the System Agreement Service Schedules represent only a small fraction of the overall production costs of the Operating Companies.[10] Hence, the System Agreement has never

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[7] The Operating Committee is the entity that administers the System Agreement. It consists of a representative of Entergy Corporation and of each of the Operating Companies.

[8] Ex. ETR-41 (Testimony of Michael Schnitzer at 3).

[9] *Id*. at 4.

[10] Ex. ETR-1 (Testimony of Frank Gallaher at 5-6).

been structured to equalize all production costs among the Operating Companies, but has sought to roughly equalize costs through a combination of the two allocation methodologies.

9. The pattern of rough equalization of production costs broke down during the 1980s due to problems that Entergy encountered in constructing nuclear generation. The Commission made a decision to equalize among the Operating Companies only the nuclear investment costs and to do so through the allocation of the costs of the Grand Gulf nuclear unit. The Commission found it unnecessary to adopt a more comprehensive form of cost equalization because it determined that the costs associated with non-nuclear generation on Entergy's integrated system were roughly comparable. The United States Court of Appeals for the D.C. Circuit (D.C. Circuit) upheld the Commission's decision.[11]

10. After the Commission's Grand Gulf decision in 1985, the Entergy system remained in rough production cost equalization for the next fourteen years (1986-1999), with total deviations ranging from approximately 8 to 22 percent in that time period. After 1999, total deviations jumped significantly, caused primarily by an increase in natural gas prices raising the production costs of the Operating Companies that are the most reliant on natural gas fired resources. For the period 2000 through 2002, the total deviations averaged more than 33 percent, an even greater deviation than that which prompted the Commission's Grand Gulf decision in 1985.[12] In Opinion No. 480, the Commission found it appropriate to implement a remedy to achieve rough production cost equalization on Entergy's system.[13] The Commission noted that Entergy's SSRP is no guarantee that large disparities will be corrected in the future. However, the Commission explained that if Entergy's SSRP proves to be an effective remedy for production cost deviations, then the bandwidth the Commission established would not come into play.[14]

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[11] *Mississippi Industries v. FERC*, 808 F.2d 1525, 1565-66 (D.C. Cir. 1987) (*Mississippi Industries*).

[12] Opinion No. 480, 111 FERC ¶ 61,311 at P 30.

[13] *Id*. at P 28 and P 144.

[14] *Id*. at P 43-44.

Requests for Rehearing

11. The Arkansas and Mississippi Commissions argue that the Commission erred in finding that the Operating Companies' production costs are no longer roughly equal and that a remedy is necessary. While the Arkansas and Mississippi Commissions agree with the finding in Opinion No. 480 that a determination of rough production cost equalization requires an examination of historical disparities, they disagree with the Commission's approach. They argue that when the historical and projected deviations in production costs are determined on a "cents per kWh" basis and a "percentage deviation from system average" basis, it is apparent that the system has been and will continue to be in rough equalization.[15] They argue that both analyses must be considered, because reliance on a percentage deviation test alone could result in just and reasonable rates becoming unjust and unreasonable for the sole reason that costs have declined. They also argue that deviations that existed under prior System Agreements also support a finding that the Operating Companies have been and are still in rough production cost equalization. Specifically, they point to Exhibit AC-53 and state that EAI's production costs exceeded ELI's by 97 percent and 86 percent in 1976 and 1977, respectively. They claim that these disparities are part and parcel of "the pattern of rough equalization of production costs which had previously existed among the MSU pool members."[16]

12. AEEC disagrees with the Commission's conclusion that Entergy's system is no longer in rough production cost equalization. AEEC alleges that the Commission failed to properly take into consideration the history of rate payments under the System Agreement and the Commission should have considered the justness and reasonableness of the System Agreement over the "life of the contract."[17]

13. AEEC argues that the Commission's conclusion that the system is out of rough production cost equalization ignores that the Commission's rough-equalization standard

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[15] Arkansas and Mississippi Commissions Request for Rehearing at 6.

[16] *Id.*

[17] AEEC Request for Rehearing at 32-33 (citing *Pontook Operating Ltd. Partnership v. Pub. Serv. Comm'n. of N.H.,* 94 FERC ¶ 61,144 at 61,552 (2001) (citations omitted); *French Broad Elec. Membership Corp. v. Carolina Power & Light Co.,* 92 FERC ¶ 61,283 (2000) (*French Broad*); *San Diego Gas & Elec. Co. v. Pub. Serv. Comm'n of N.M.,* 95 FERC ¶ 61,073 (2001); *Soyland Power Coop., Inc. v. Cent. Ill. Pub. Serv. Comm'n.,* 51 FERC ¶ 61,004 (1990)).

was never intended to eliminate all production cost disparities.[18] It argues that, considered over time, the evidence demonstrates that the Entergy system's production costs are roughly equal. It maintains that because the five Operating Companies are not similarly situated, the disparities in production costs that are driving the Louisiana Commission's complaint do not indicate undue discrimination. In addition, it notes that Entergy's SSRP is designed to ensure that the Operating Companies should continue to have roughly equalized production costs in the future.

14. AEEC argues that the Commission is analyzing production cost disparities on the Entergy system using the nuclear plant-specific framework developed in the *Mississippi Industries* litigation.[19] It argues that this is an error, because the two proceedings are dissimilar.

Commission Determination

15. We will deny the requests for rehearing on this issue. As the Commission explained in Opinion No. 480, the significant deviations experienced since 2000 demonstrate that the system is out of rough production cost equalization.[20] Such large disparities are far more than the system experienced for the 14 previous years, and are comparable to the disparities experienced from 1983 through 1985, when the Commission previously found that the system was not in rough production cost equalization and, as a remedy then, required the equalization of nuclear investment costs. In addition, it appears likely that such large disparities will continue to exist in the near future. Petitioners have failed to show otherwise.

16. We also disagree with the Arkansas and Mississippi Commissions that a "cents per kWh" basis is a reliable determinant of whether the system is in rough production cost equalization. The presiding judge in the Initial Decision used percentage comparisons for cost disparities because they showed the relative effects of production costs and were the best way to make the comparisons over time.[21] The presiding judge also found that per kWh differences can be misleading since their significance changes as overall production

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[18] AEEC Request for Rehearing at 29.

[19] *Id*. at 41.

[20] Opinion No. 480, 111 FERC ¶ 61,311 at P 30.

[21] Initial Decision, 106 FERC ¶ 63,012 at P 29.

costs increase or decrease.[22] The presiding judge did not find it convincing to use per kWh differences and neither did the Commission. In Opinion No. 480, the Commission affirmed the presiding judge's determination that a percentage difference was the appropriate measurement in determining rough production cost equalization.[23]

17. The Commission is not convinced by the Arkansas and Mississippi Commissions' argument that deviations that existed under prior System Agreements support a finding that the Operating Companies have been and are still in rough production cost equalization. The Arkansas and Mississippi Commissions base their argument on Exhibit AC-53,[24] which is a comparison of average cost for electricity in cents per kWh from the years 1965-1982. This argument is flawed in several ways. First, the exhibit is based on a "cents per kWh" comparison which is different from the analysis performed by the Commission in Opinion No. 480, and is not directly comparable. Second, the Commission discusses the use of such a "cents per kWh" comparison *supra* and rejects it. Finally, we note that, upon examination of this exhibit during the hearing, the Arkansas Commission's witness was not clear and did not know whether this particular exhibit, in fact, portrayed a comparison of production costs.[25] The percentage deviations reflected in this exhibit thus do not support the Arkansas and Mississippi Commissions' claim[26] that "these are part and parcel of the pattern of rough equalization of production costs which had previously existed among the MSU pool members"[27] and their own witness was not sure exactly what these costs reflected.

18. In addition, AEEC is mistaken in arguing that the Commission ignored the fact that the rough production cost equalization standard was not intended to eliminate all

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[22] *Id*. The presiding judge stated "that percentage cost disparities provide a better measure of rough equalization than absolute dollar differences or cents per kWh differences." He gave an example of $10,000 from a $100,000 total is much more significant that a $10,000 disparity from a total of $1 million.

[23] Opinion No. 480, 111 FERC ¶ 61,311 at P 30.

[24] Ex. AC-53 includes MSS Exhibit No. 28 from Docket No. ER82-483-000.

[25] Tr. at 3695.

[26] Arkansas and Mississippi Commissions Request for Rehearing at 6.

[27] *See System Energy Resources*, Opinion No. 292, 41 FERC ¶ 61,238 at 61,617 (1987) (*System Energy Resources*).

production cost disparities. In fact, our remedy, as discussed in Opinion No. 480 and as discussed *infra*, was intended to come into play only when relatively large disparities exist on the Entergy system. We also disagree with AEEC's argument that the Commission has improperly analyzed production cost disparities in this proceeding. As explained in detail in Opinion No. 480, the Commission found that rough production cost equalization on the Entergy system had been disrupted based on the history of cost disparities on the system and reasonable projections of disparities in the future.[28] AEEC has failed to demonstrate that this analysis, which was based on the facts of this proceeding, was improper or how the analysis in *Mississippi Industries* precludes the approach taken by the Commission in this proceeding.

19. Contrary to AEEC's argument that we failed to properly take into consideration the history of rate payments under the System Agreement, the Commission did just that in Opinion No. 480. The Commission stated: "The record evidence shows that EAI and EMI experienced higher than average production costs prior to 1994-95 and lower than average costs thereafter, while ELI experienced lower than average production costs prior to 1996 and higher than average costs thereafter."[29] Further, AEEC's citations to orders regarding "life of the contract" have no application here. As Entergy's witness Schnitzer explained, the Entergy System Agreement is not a fixed-rate contract of the type at issue in *French Broad*,[30] and the presiding judge explicitly and properly rejected this argument in the Initial Decision.[31] As the presiding judge explained, the "life of the contract" argument

> makes sense when dealing with arm's-length, independent parties, when one has reaped the benefits of its bargain and then seeks to extricate itself when the benefits have shifted. But the cases are not in point when applied to the System Agreement. The "Agreement" here is implemented by Entergy parent company to regulate the dealings of its controlled affiliate Operating Companies. It is not the result of an open negotiation among independent parties.[32]

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[28] Opinion No. 480, 111 FERC ¶ 61,311 at P 28-33.

[29] *Id.* at P 141.

[30] Tr. at 5799.

[31] Initial Decision, 106 FERC ¶ 63,012 at P 35.

[32] *Id.*

We agree with the presiding judge and reject AEEC's arguments on this matter.

B. SSRP

20. The SSRP is Entergy's long-term plan for supplying the resources required to meet the needs of its customers over the 2003-2012 planning period.[33] The resource planning framework results in a sharing among the Operating Companies of the burden of providing each type of generation needed to serve customer load requirements through the coordinated dispatch of the Entergy system's resources. The SSRP resource additions reflect a combination of short-term power purchases and longer term Life of Unit resources provided through generation acquisitions or life of capacity purchased power agreements. Over the ten-year period of the resource plan, over 3,500 MW of additional long-term capacity is required. Most of this capacity is expected to be from generation that already is in service or under construction through either ownership of these generation plants or through long-term purchase power agreements.[34]

21. In Opinion No. 480, the Commission affirmed the presiding judge's determination that Entergy's SSRP will not restore rough production cost equalization.[35] The Commission further noted that projections for future cost disparities, assuming the successful implementation of Entergy's SSRP, were made under several scenarios. The Commission stated that while Entergy's SSRP may eventually narrow production cost disparities in the future without creating jurisdictional conflicts or reallocating the historical generating costs, there is simply no assurance that the SSRP will unfold as planned.

Requests for Rehearing

22. The Arkansas and Mississippi Commissions argue that the Commission erred in determining that the SSRP will not maintain rough production cost equalization.[36] They maintain that the SSRP is Entergy's long-term plan for meeting the resource needs of its customers over the 2003 through the 2012 planning period and argue that the SSRP

[33] Opinion No. 480, 111 FERC ¶ 61,311 at P 34-35.

[34] *Id.*

[35] *Id.*

[36] Arkansas and Mississippi Commissions Request for Rehearing at 7.

addresses the Louisiana Commission's principal complaint, i.e., ELI's mixture of generation resources and ELI's exposure to gas price volatility.

23. The Arkansas and Mississippi Commissions state that based on Opinion No. 480, there are two errors with the finding that the SSRP will not restore rough production cost equalization.[37] First, they argue that the SSRP was deemed inadequate in the Initial Decision because of the Initial Decision's flawed bandwidth criterion. Second, they argue that the Initial Decision erroneously prices the Vidalia contract at full price, and argue that, if the standard for rough production cost equalization is based on the actual historical differential in Operating Company production costs with Vidalia correctly priced at MSS-3, the SSRP will achieve rough production cost equalization on the Entergy system.

Commission Determination

24. The Arkansas and Mississippi Commissions have presented no arguments that would persuade us to change our finding that there are no assurances that the SSRP will unfold as planned. The projections in favor of the SSRP all assume both the timely and effective implementation of Entergy's SSRP, and the assumptions used in the projections are subject to much uncertainty.[38] As we explained in Opinion No. 480, with actual gas prices remaining high and no indication that this is likely to change, there is no guarantee that Entergy's SSRP will correct large disparities in the future.[39]

25. The Arkansas and Mississippi Commissions argue that we should reverse our finding because the presiding judge's ruling that the SSRP would not maintain rough production cost equalization was based on a narrower bandwidth and pricing the Vidalia contract at full price. However, our concerns were not based on aspects of the Initial Decision that were later overturned by Opinion No. 480, but instead were based on projections in the record that future cost disparities may be so severe that an additional remedy was warranted. In Opinion No. 480, the Commission explicitly noted that projections for future cost disparities were made under several scenarios.[40] The Commission specifically discussed a projection that, while pricing Vidalia at MSS-3,

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[37] *Id*. at 8.

[38] *See* Initial Decision, 106 FERC ¶ 63,012 at P 27.

[39] Opinion No. 480, 111 FERC ¶ 61,311 at P 43.

[40] *Id*.

predicted disparities with an average of more than 25 percent for the period of 2003-2005.[41] In addition, we disagree with the Arkansas and Mississippi Commissions' implication that we should look only to historical disparities when considering whether the SSRP will restore rough production cost equalization. Projections of future cost disparities, which are part of the record in this proceeding, indicate that the SSRP may not be able to maintain rough production cost equalization.[42] The Arkansas and Mississippi Commissions have not shown why the Commission should not rely on these projections.

26. It is also important to note that we do not reject the use of the SSRP as a means of mitigating cost disparities on the Entergy system. Rather, we find that there is no assurance that the SSRP by itself can maintain rough production cost equalization. If Entergy's SSRP does prove to be an effective remedy for production cost deviations, as the Arkansas and Mississippi Commissions maintain, then the bandwidth established in Opinion No. 480 will not come into play. As we noted in Opinion No. 480, the bandwidth remedy is an insurance policy in the event that particularly severe cost disparities (greater than +/-11 percent) continue into the future.[43] Accordingly, we see no reason to change our holding that the SSRP by itself may not be sufficient to bring the system back into rough production cost equalization.

C. Bandwidth

27. In Opinion No. 480, the Commission agreed with the presiding judge that rough production cost equalization had been disrupted on the Entergy system.[44] The Commission also agreed with the presiding judge that the use of a bandwidth is an appropriate methodology to keep the system in rough production cost equalization. However, the Commission disagreed with the presiding judge's recommendation to impose an annual bandwidth of +/-7.5 percent coupled with a three-year rolling average bandwidth of +/-5 percent, finding the three-year rolling average to be overly complex, vague and unworkable.[45]

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[41] *Id*. (citing Ex. ALJ-3).

[42] *Id*.

[43] *Id*. at P 44.

[44] *Id*. at P 136.

[45] *Id*. at P 138.

28. The Commission explained that production costs have deviated from the lows to the highs up to 22 percent during the time period that the system was determined by the presiding judge to be in rough production cost equalization. Based on this historical data, the Commission concluded that a bandwidth of +/-11 percent allowing for a maximum of a 22 percent spread of production costs, between Operating Companies on an annual basis, is just and reasonable and will help keep the Entergy system in rough production cost equalization.[46] The Commission stated that under this approach, in any given year, one Operating Company could be 11 percent below the system average while another company could be 11 percent above the system average and the system as a whole would still be in rough production cost equalization. The Commission found that this approach is consistent with precedent that it has never been the intent to fully equalize all production costs among Entergy's Operating Companies under the System Agreement. The Commission found that this approach also mitigates massive cost shifts among the Operating Companies. The Commission noted that a remedy would only be applied if the system exceeds historical cost disparities and would assist Entergy in eliminating drastic rate disparities in the future.

Requests for Rehearing

29. The Louisiana Commission argues that the Commission's choice of a +/- 11 percent bandwidth, permitting production cost disparities of up to 22 percent, cannot be squared with the FPA or precedent. It argues that the Commission's statements that a broader bandwidth would ease the severity of the remedy's impact or mitigate massive cost shifts only demonstrate the inadequacy of the remedy.[47] It continues that the Commission necessarily left in place disparities that impose a continuous rate shock. It argues that it cannot be a justification for denying a remedy for massive cost differences that the remedy will require massive cost shifts; otherwise, only small amounts of discrimination could be found "undue."

30. Occidental argues that the Commission's remedy for achieving rough production cost equalization is based on the Arkansas and Mississippi Commissions' Brief on Exceptions, in which the parties claim that a statistical basis for determining a reasonable bandwidth is to calculate a 95 percent probability interval from a sample period in which the presiding judge found the system was in rough production cost equalization.[48]

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[46] *Id*. at P 144.

[47] Louisiana Commission Request for Rehearing at 4 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 139 and 144).

[48] Occidental Request for Rehearing at 10-11.

Occidental argues that reliance on this statistical analysis is arbitrary and capricious. The Louisiana Commission also argues against the Commission's use of this statistical analysis.

31. The Louisiana Commission states that Opinion No. 480 attempts to support the +/- 11 percent bandwidth by averaging the maximum deviations in production costs for the period 1986-2002. It states that although the Commission asserts that values support a bandwidth of 22 percent, none of the averages are as great as this amount.[49] It states that the average data includes at least three years in which the Operating Companies were not even arguably in production cost equalization.[50] It argues that including these three years inflates the average. Further, it argues that including data that reflects Entergy's Texaco adjustment conflicts with a ruling of the presiding judge that was affirmed by the Commission.[51]

32. The Louisiana Commission also argues against the use of past disparities to set boundaries of permissible discrimination. It argues that adopting as a standard the maximum deviations that occurred over a 14-year past period has no relation to normative principles and no justification in the precedents. It argues that when these deviations occurred, they were never countenanced by the Commission or even brought to its attention. It argues that, therefore, they do not provide a foundation for determining the bounds of "due" discrimination. It argues that if "looking to the past" could provide the basis of applying non-discrimination standards, discrimination could never be eliminated.

33. The Louisiana Commission states that prior rulings have never permitted rate differences of more than two or three percent under the no-undue discrimination standard. It states that in *System Energy Resources,* where the Commission justified its Grand Gulf allocation after a court remand, the Commission relied heavily on antidiscrimination precedents to support its ruling.

34. The Louisiana Commission also argues that in rejecting full production cost equalization, a two or three percent bandwidth, and the presiding judge's bandwidth

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[49] Louisiana Commission at 7 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 143).

[50] *Id*. (citing Initial Decision, 106 FERC ¶ 63,012 at P 141).

[51] *Id*. (citing Initial Decision, 106 FERC ¶ 63,012 at P 106).

remedy, the Commission relied on the theory that a remedy should not intrude on the regulatory spheres of the states and the historical expectations of the parties.[52] It argues, however, that that is true only if the alternative choice of a remedy eliminates undue discrimination.

35. Occidental argues that the Commission erred in adopting a bandwidth deviation of +/-11 percent, allowing for a maximum 22 percent spread of production costs. It notes that only three years of the fourteen year period used in the Initial Decision did the deviation exceed 20 percent.[53] It further notes that by contrast during nine of the fourteen years the deviation was less than the 15 percent bandwidth adopted by the Initial Decision. It contends that the Initial Decision's remedy was more representative of the deviations experienced from 1986-1999.

36. The Arkansas and Mississippi Commissions argue that the Commission erred in adopting a bandwidth with a lower boundary. They argue that a lower boundary is not necessary to avoid conferring an undue preference under section 206 of the FPA. They note that in this case the fact that an Operating Company's production costs may be below the system average is not caused by any action by Entergy, but by the operation of factors such as fuel and purchased power prices. They argue that there is no reason to raise costs to one Operating Company's ratepayers when the other Operating Companies are less than 11 percent above the system average. They argue that the FPA does not permit, much less require, that rates be raised for one set of customers for the sole reason that costs are too low.[54]

37. The Arkansas and Mississippi Commissions argue that the Commission erred in adopting an inflexible symmetrical bandwidth. They argue that, if the Commission continues to believe that a bandwidth is necessary, a more flexible approach should be adopted.[55]

38. The Arkansas and Mississippi Commissions argue that the Commission should adopt a 22 percent bandwidth with a +11 percent upper band and a flexible lower band

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[52] *Id.*

[53] Occidental Request for Rehearing at 8.

[54] Arkansas and Mississippi Commission Request for Rehearing at 11.

[55] *Id.* at 12.

consistent with the 22 percent overall bandwidth.[56] They argue that such a flexible bandwidth would protect every Operating Company from having production costs more than 11 percent above system average. They argue that, without a flexible bandwidth, the regulators of high-cost Operating Companies will not have the incentive to accept high-capital cost projects in their jurisdiction, because the compensating payment due from the low-cost Operating Companies pursuant to a +/-11 percent bandwidth will reduce the production costs of the high-cost Operating Companies irrespective of any self-help on their part. They also note that the historical disparities among the relative production costs of the Operating Companies have never been perfectly symmetrical, and contend that implementing only an upper bound with a flexible 22 percent bandwidth would assure that the level of disparity is no greater than the historical level.

Commission Determination

39. Prior to Opinion No. 480, there was never a bright-line test for determining whether Entergy's system was in rough production cost equalization. This Commission and the courts never identified a percentage that would define with precision rough production cost equalization. Resolution of this issue is, in fact, a balancing act of preventing undue discrimination and not dramatically disrupting the system's historical operations and the states' settled interests and expectations; the System Agreement itself is designed to balance multiple objectives, including a desire to have each Operating Company in each state own an appropriate portfolio of resources.

40. We take issue with the Louisiana Commission's assertion that the driving principle behind our adoption of a broad bandwidth appears to be a reluctance to require the cost shifts that would accompany what they term a "real remedy." As just stated, the Commission has balanced a number of objectives. The decision to broaden the bandwidth from the presiding judge's recommendation in fact mitigates the magnitude of cost shifts that might otherwise occur, which is one legitimate objective, and no less critical and is in line with what has been experienced historically on the Entergy system.

41. In response to arguments that the Commission improperly used a statistical calculation, we remind the parties that the Commission did not use this statistical concept to determine the limits of "due" discrimination. In Opinion No. 480, the Commission noted simply that the Arkansas and Mississippi Commission's statistical study confirmed

[56] *Id*. at 15.

our primary analysis of historical deviations.[57] However, we agree with the Louisiana Commission that we should not have used the statistical study, and we grant rehearing on this point.[58]

42. We reject Occidental's argument that the Initial Decision's remedy was more representative of the deviations experienced from 1986-1999. In five of the 14 years during that time period, the deviation percentages were greater than the annual 15 percent bandwidth proposed in the Initial Decision. Indeed, in three of the years the deviations were greater than twenty percent. The historical data simply does not support Occidental's argument.

43. We also disagree with the Louisiana Commission's argument that the use of past disparities does not provide a foundation for determining the bounds of due discrimination. As explained in detail in Opinion No. 480, the prior history of the System Agreement establishes the principle of looking at the system through its historical operation and pattern of rough equalization.[59]

44. We also reject the Louisiana Commission's argument that prior rulings have never permitted rate differences like that found here under the no-undue discrimination standard. In Opinion No. 480, the Commission, in rejecting the Louisiana Commission's arguments for full production cost equalization, explicitly rejected the argument that the FPA allows no more than a temporary two to three percent disparity in rates, and likewise found it unnecessary to individually address the cases cited by the Louisiana Commission because they were not relevant to a determination of whether full production cost equalization was appropriate for the Entergy system. The Commission explained that "[w]hether to apply full production cost equalization or rough production cost equalization is a question that must be answered on the facts unique to the Entergy

[57] Specifically, the Arkansas and Mississippi Commission's statistical analysis' end result was that 95 percent of the time during the period 1986-1999 a 22 percent bandwidth was achieved. (In 1987 the deviation equaled 22.2 percent. In the context of identifying the boundaries of rough production cost equalization, this is an insignificant amount outside of the 22 percent bandwidth.)

[58] We also agree with the Louisiana Commission that averaging the maximum deviations in production costs to include the years of 2000-2002 inflates the average. These years were erroneously included as supportive of the 22 percent bandwidth, and, accordingly, we grant rehearing on this point.

[59] Opinion No. 480, 111 FERC ¶ 61,311 at P 28-30.

system."[60] This is the same for any public utility – under the FPA, the Commission must look to the facts relevant to each public utility in determining whether there is undue discrimination. Moreover, the Commission explained that the D.C. Circuit had in prior Entergy proceedings already recognized that full production cost equalization was too dramatic a departure from the system's historical operations, individual company autonomy and allocation methodologies, and rejected it as a remedy.[61] The Louisiana Commission has not shown that its self-defined "rule" has ever been applied to any public utility, let alone to the Entergy system, or that it should now be applied to the Entergy system. All that the Louisiana Commission has done is provide a number of cases that were decided based on the specific facts of each case and concluded that they somehow constituted a rule, all without citation to any case recognizing the existence of such a rule. The Commission, on the other hand, has considered the facts specific to the Entergy system, and Commission and court precedent, and concluded that full production cost equalization is not an appropriate remedy.

45. Further, the Louisiana Commission's challenge to the Commission's use of historical data in determining that the Entergy system is no longer in rough production cost equalization is unavailing. Its analogizing to cases involving racial discrimination simply has no relevance to the economic regulation that the Commission engages in pursuant to the FPA.[62] The Commission must often rely on historical data in meeting its obligations under the FPA,[63] specifically including setting rates for service. In virtually identical circumstances, the D.C. Circuit upheld the Commission's use of historical data to find that the Entergy System was no longer in rough production cost equalization.[64] Here, the Commission reviewed historical data and concluded that the Entergy system again was no longer in rough production cost equalization. The Louisiana Commission has not convinced us that our approach was in error.

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[60] Opinion No. 480, 111 FERC ¶ 61,311 at P 73.

[61] *Id*. at P 66.

[62] In *NAACP v. FPC*, 425 U.S. 662 (1976), in fact, the Supreme Court held that the FPA's economic regulation did not encompass racial discrimination.

[63] *See, e.g., Middle South Energy, Inc*., Opinion No. 234, 31 FERC ¶ 61,305 at 61,656 (1985) (*Middle South Energy*).

[64] *Mississippi Industries,* 808 F.2d at 1565-1566.

46. Finally, we disagree with the Arkansas and Mississippi Commissions' argument that the Commission erred in adopting an inflexible symmetrical bandwidth. Entergy's system is highly integrated, and therefore Entergy's system planning and operation affects the cost disparities among its five Operating Companies. It is only reasonable to impose a symmetrical boundary from the system average. Our decision to impose the 11 percent bandwidth is flexible and allows Operating Companies to deviate up to 11 percent from system average. A symmetrical remedy ensures that the system remains roughly balanced and does not instill an undue preference or undue discrimination on any operating company.

D. Effective Date

47. In Opinion No. 480, the Commission held that the +/- 11 percent bandwidth would be effective for calendar year 2006.[65]

Requests for Rehearing

48. The Louisiana Commission requests rehearing that the Commission's intention was for the bandwidth to be implemented in 2005 so that the first equalization payments could be made in 2006, rather than the bandwidth being implemented in 2006 resulting in the first equalization payments being made in 2007.[66]

49. In addition, the Louisiana Commission argues that the FPA mandates a prompt remedy. It notes that section 206 of the FPA states that when the Commission finds that rates are unjust and unreasonable and unduly discriminatory, "the Commission shall determine the just and reasonable charge . . . to be *thereafter* observed in force."[67] It cites dictionary definitions of the word "thereafter" as "after the time last mentioned"[68] to support its proposition that the Commission must place just and reasonable rates in effect to govern the period immediately after its determination.

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[65] Opinion No. 480, 111 FERC ¶ 61,311 at P 145.

[66] Louisiana Commission Request for Rehearing at 34.

[67] 16 U.S.C. § 824e(a).

[68] Louisiana Commission Request for Rehearing at 35 (citing Black's Law Dictionary (6th ed.) at 1478.

50. The Louisiana Commission states that the Regulatory Fairness Act of 1988 (RFA) amended section 206 to provide that remedies under that section should be implemented with the same promptness as section 205 rate filings. It further notes that this Commission has determined that refunds are not permitted under the RFA.[69] The Louisiana Commission adds that the Commission has an obligation to remedy unjust and unreasonable rates, and that this duty is not discretionary. It argues that an undue delay in providing a remedy is legal error.[70]

51. Occidental also requests that Commission direct that the rate remedy be implemented at the earliest possible date permitted by law, should the Commission not grant the Louisiana Commission's request for clarification. It further argues that waiting until 2007 would exclude unjust and unreasonable 2005 production costs from the remedy, notwithstanding that the Commission has issued Opinion No. 480 holding that rates are unjust, unreasonable, unduly discriminatory and preferential in violation of the FPA.[71]

52. Entergy also requests clarification of the effective date, stating that the only consistent reading of P 145 is that the annual bandwidth remedy would measure the level of any production costs disparities that occur during calendar year 2006, and that any analysis of the level of production cost disparities occurring during 2006 pursuant to the opinion would have to be made in 2007.[72]

Commission Determination

53. In Opinion No. 480, the Commission specifically provided that:

> Any reallocation of production costs among the Operating Companies necessitated by our percentage bandwidth remedy must be implemented prospectively. Thus, we will make the change to impose a +/-11 percent annual bandwidth that we order here for the calendar year 2006.[73]

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[69] *Id.*

[70] *Id.*

[71] Occidental Request for Rehearing at 13.

[72] Entergy Request for Clarification at 12.

[73] Opinion No. 480, 111 FERC ¶ 61,311 at P 145.

54. Any equalization payments would then be made in 2007. This has not delayed implementation, as maintained by the Louisiana Commission. Rather, the remedy will be implemented on a prospective basis, as required by section 206 of the FPA, after a full calendar year of data becomes available. In reaching this conclusion, we note that our discretion is at a zenith in determining an appropriate remedy.[74] In exercising that discretion, we determined in Opinion No. 480 that the use of the first calendar year of data following the issuance of Opinion No. 480 is the most appropriate and equitable way and time to implement the bandwidth remedy. Neither the Louisiana Commission nor Occidental has persuaded us otherwise. Moreover, adoption of a remedy that would involve prior years would necessarily result in refunds, which, as we explain further below, we are specifically prohibited from providing under section 206(c) of the FPA, in any event.[75]

E. <u>Refunds</u>

55. In Opinion No. 480, the Commission noted that the Initial Decision did not address the issue of refunds. However, the Commission noted that the evidentiary record demonstrated that the production costs of ELI and EAI would deviate from system average by more than 7.5 percent in both 2003 and 2004, thereby requiring refunds pursuant to the presiding judge's determination (the Commission further noted that the same would hold true for our +/- 11 percent bandwidth recommendation). The Commission held that section 206(c) of the FPA prohibits refunds among electric companies of a registered holding company to the extent one or more of the electric companies making refunds cannot surcharge its customers or otherwise obtain retroactive cost recovery. The Commission stated that it had addressed this same issue (*i.e.*, the reallocation of costs among Entergy Operating Companies) in another Entergy proceeding, *Louisiana Public Service Commission v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), reh'g denied, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005) and held unambiguously that refunds among the Operating Companies were prohibited. The Commission further stated that there is no evidence in this record indicating that the Operating Companies making refunds would be able to obtain retroactive cost recovery for those funds, and that any reallocation of production costs necessitated by our bandwidth must be implemented prospectively.

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[74] *El Paso Electric Co.*, 111 FERC ¶ 61,504 at P 19 (2005) (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

[75] Opinion No. 480, 111 FERC ¶ 61,311 at P 145.

Requests for Rehearing

56. The Louisiana Commission argues that the Commission should clarify whether Commission-ordered cost reallocations for a refund-effective period established pursuant to the FPA would be recoverable in retail rates. It notes that the Regulatory Fairness Act (RFA) provides that registered holding companies shall not be required to make refunds when the refund would result from the reallocation of cost responsibility among operation subsidiaries of such companies, rather than a decrease in overall system revenues, and when the costs may not be recovered in retail rates. It states that, to the extent that a holding company may be kept whole with respect to revenues from past periods, the equitable basis for exempting them from the refunds is removed.[76] It argues that, accordingly, the exemption from refund liability does not apply if the Commission determines that the holding company would not suffer any reduction in revenues resulting from an inability to pass through required cost reallocations.

57. The Louisiana Commission further argues that, from a wholesale rate perspective, the rule against retroactive ratemaking cannot preclude recovery of Commission-ordered refunds. It claims that the RFA explicitly permits the refund remedy, which eliminates any contention that a refund would violate the rule. In addition, it argues that a state agency's order passing through a Commission-ordered cost reallocation pursuant to the RFA could not be deemed retroactive ratemaking, due to the preemptive effect of federal law.

58. The Louisiana Commission argues that the Commission's unwillingness to make a finding as to the recoverability of cost allocations at retail is not explained adequately. It argues that section 206(c) gives the Commission the authority to reallocate costs and order refunds upon finding that any increased costs will be recoverable in retail rates.[77] It states that given the normal preemptive effect of Commission-ordered cost allocations, the Commission should make that finding as a matter of course unless an identifiable state legal rule, which would not be subject to preemption, precludes recoverability of the cost reallocations. It further argues that the Commission has failed to explain how a rule against retroactive ratemaking that prevented retroactive adjustments, applied evenhandedly, could cause Entergy to suffer a loss.

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[76] Louisiana Commission Request for Rehearing at 24 (citing S. Rep. No. 100-491 at 6 (1998) and 16 U.S.C. § 824e(c)).

[77] *Id*. at 26.

Commission Determination

59. We reject the Louisiana Commission's request for rehearing on the issue of refunds. As we stated in Opinion No. 480, we are prohibited by statute from ordering refunds in this narrow circumstance.[78] Unlike the more typical case that involves refunds of rates that were excessive, the instant case involves a reallocation of costs among the Operating Companies, and thus falls within the scope of section 206(c) of the FPA. And here, we cannot make the requisite finding that there would not be a reduction in revenues because the Operating Companies would be able to recover the monies that would be refunded as a result of the reallocation of costs among such companies. We cannot make the findings required by the statute; hence, we cannot order refunds.

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

F. Vidalia

61. In Opinion No. 480, the Commission found that the Vidalia contract was not entered into to benefit the Entergy system as a whole, and found that there were distinguishing factors regarding the Vidalia contract that warranted Vidalia being treated as an ELI-only resource.[79] The Commission stated that the factors we considered to be crucial were (1) the unusual structure of the Vidalia contract, including the Louisiana Commission's finding of prudency and the guaranteed flow through of costs; (2) the significant cost shifts that would occur if the Vidalia contract were fully reflected; (3) that Vidalia was not built as part of Entergy's overall system planning; and (4) subsequent to the contract being approved, the Louisiana Commission entered into a settlement with ELI under which significant tax benefits have flowed through directly to the retail customers of Louisiana.

62. The Commission held that Vidalia was built to benefit Louisiana and that the production costs of the plant should stay in Louisiana. The Commission stated that the Louisiana Commission made a decision to build the Vidalia plant and at that time assessed the risks and the benefits of the project. In 1990, the Louisiana Commission guaranteed full recovery of the Vidalia contract by the Louisiana ratepayers over the entire life of the contract. The Commission noted that the Louisiana Commission also determined at that time that the Vidalia contract was prudent. The Commission found

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[78] Opinion No. 480, 111 FERC ¶ 61,311 at P 145.

[79] Opinion No. 480, 111 FERC ¶ 61,311 at P 173.

that the evidence in this proceeding conclusively demonstrates that this project was not part of Entergy's overall system planning and that its costs should not now be spread throughout Entergy's system. The Commission noted that one of the Louisiana Commission's own witnesses admitted that capacity from Vidalia is small but the costs are significant. The Commission stated that to allow Louisiana to shift the escalating costs of this contract to other states on the Entergy system and not accept responsibility for its own decision making would be inappropriate.

Requests for Rehearing

63. The Louisiana Commission and Occidental argue that Vidalia is a system resource. The Louisiana Commission argues that Vidalia was approved by the Entergy Operating Committee and was acquired based on an economic study of system costs. It argues that it has been used to serve the base load of the entire system and has been regarded, until this proceeding, in all respects as a system unit. Occidental argues that for Vidalia to now be treated not as a system resource for purposes of calculating its production costs would be an abrupt change from Entergy's cost allocation.

64. The Louisiana Commission argues that the factual findings in the Initial Decision are entitled to deference and should control if supported by substantial evidentiary support.[80] It contends that in order to reverse the factual findings of the presiding judge, the agency decision must reflect attentive consideration of the underlying decision and must present substantial evidence supporting its adverse result.[81] It asserts that the Commission's decision regarding Vidalia does not meet this standard.

65. The Louisiana Commission and Occidental dispute the four "distinguishing factors" regarding the Vidalia contract relied upon by the Commission in finding that Vidalia should be treated as an ELI-system resource. First, the Louisiana Commission disputes the assertion in Opinion No. 480 that the Vidalia contract was "unusual" because it was designed to facilitate local economic and political objectives, no other regulator examined the prudence of the project, and the Louisiana Commission permitted a pass-through of the Vidalia costs.[82] It asserts that the Vidalia contract was entered by Entergy to diversify the fuel mix on the system, and it was supported by an economic analysis that demonstrated billions of dollars in benefits for the system. It states that the project did

[80] Louisiana Commission Request for Rehearing at 12.

[81] *Id*.

[82] *Id*. at 13 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 175-78).

create jobs, taxes and economic development, but notes that that is true of all Entergy resources. It argues that the fact that only the Louisiana Commission approved the Vidalia project makes Vidalia no different from the approval of other resources by the various Entergy Operating Companies.[83] It further argues that the Louisiana Commission's approval of fuel clause recovery for the contract is not equivalent to approval of 100 percent cost recovery from Louisiana ratepayers. It contends that the cost of any prudent resource on the Entergy system is recovered from ratepayers in the jurisdiction where the resource is located, except from compensation through the System Agreement. Additionally, it notes that the approval of automatic recovery through the fuel clause for the rising Vidalia costs does not distinguish that resource from other system resources.

66. Second, the Louisiana Commission argues that the significant cost shifts that would occur if Vidalia is included in the equalization formula do not justify excluding it. It states that this factor has nothing to do with system planning or cost causation. It argues that if this factor were important, Grand Gulf could never have been allocated beyond the borders of the Mississippi.[84] Occidental adds that excluding certain costs from system treatment because they would result in significant cost shifts frustrates the purpose of the System Agreement.

67. Third, the Louisiana Commission and Occidental argue that the finding that Vidalia was planned differently from other system planning has no factual basis. The Louisiana Commission contends that, in *Middle South Energy*, the Commission held that all system generation additions have been planned in basically the same manner.[85] It notes that two chief proponents of the Vidalia project headed Entergy's generation planning. It also argues that the Commission's statement that the Operating Committee did not approve the Vidalia contract conflicts with the evidence. It contends that Vidalia is used by Entergy as a system resource, indistinguishable from any other system resource.[86]

68. Fourth, the Louisiana Commission argues that the fact that the tax consequences of the Vidalia contract have been localized to ELI and its customers does not distinguish

[83] *Id*. at 14.

[84] *Id*. at 17.

[85] *Id*.

[86] *Id*. at 20.

Vidalia from other resources. It argues that the tax effects of investments and expenses associated with generating resources are always reflected on the books of the specific operating company that owns or acquires the resource. It claims that these tax effects are always dealt with in the retail regulatory cases of the affected jurisdiction.[87] It contends that, if costs are equalized, all the applicable benefits – including tax benefits due ratepayers for Vidalia – should be part of the equalization formula. Occidental argues that there is no evidence in the record to support an inference that the system did not regard Vidalia as a system resource because ELI entered into an arrangement for the treatment of tax benefits with its retail jurisdictional ratepayers.

69. The Arkansas and Mississippi Commissions seek clarification that the Commission reversed the presiding judge's ruling excluding evidence regarding Vidalia and request that the evidence be admitted into the record.

Commission Determination

70. We will deny the Louisiana Commission's and Occidental's requests for rehearing on the Vidalia issue. In Opinion No. 480, the Commission explained in detail its rationale for finding that Vidalia is an ELI resource and not a system resource.[88] The Commission also explained why, for future production cost comparison purposes, Vidalia's energy should be re-priced at the annual MSS-3 rate.[89] For example, in calculating ELI's production costs for the rough production cost comparisons, the Vidalia contract will only be reflected up to the annual MSS-3 rate. The majority of the Vidalia costs (full contract costs minus the costs priced at the MSS-3 rate) will be borne exclusively by ELI and excluded from production cost comparisons among the Operating Companies. The Louisiana Commission and Occidental have presented no arguments that would warrant reversing those determinations.

[87] *Id*. at 22.

[88] Opinion No. 480, 111 FERC ¶ 61,311 at P 173-184.

[89] *Id*. at P 32.

71. We disagree with the Louisiana Commission's assertion that we failed to give proper deference to the presiding judge.[90] In Opinion No. 480, the Commission accepted the presiding judge's determinations on numerous issues and, when it did not, the Commission made clear its awareness of what the presiding judge had concluded and provided substantial reasons for taking a different course.[91]

72. The Louisiana Commission's and Occidental's attempts to dispute the language of the Louisiana Commission's order of 1990 are unavailing. As we explained in Opinion No. 480,[92] the Louisiana Commission made a decision to build the Vidalia plant and at

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[90] A presiding judge's determinations, while entitled to deference, are not controlling. *People's Electric Cooperative*, 84 FERC ¶ 61,229 at 62,133 n.267 (1998), *reh'g denied*, Opinion No. 426-A, 93 FERC ¶ 61,218 (2000). If they were, there would be no point to allowing briefs on exceptions and opposing exceptions, or even rehearing. Rather, parties would instead be allowed to appeal a presiding judge's determinations directly to court. That, however, is not how the process works.

[91] The Arkansas and Mississippi Commissions ask that we overturn the presiding judge and admit certain stricken evidence that the presiding judge excluded, claiming that the Commission has already implicitly relied on the evidence because of Opinion No. 480's findings on Vidalia. However, as the above discussion makes clear, we did not rely on this evidence and are not persuaded to overturn the presiding judge. *See* Tr. at 2712-14. As the presiding judge explained with respect to whether ELI was enthusiastic about the project, the witness's response "is just not going to be helpful. It relies on, again, what Mr. Cunningham said at the state proceeding. And it's relying on it, as I see it here, for the truth of the matter asserted, given the fact that the question is, you know, was ELI enthusiastic." Tr. at 2712-13. In addition, we disagree with the Arkansas and Mississippi Commission's claim that stricken testimony discussing the appearance of former Governor Edwards at a public hearing demonstrates that the Vidalia contract was a product of local economic and political considerations. As the presiding judge noted, whether or not former Governor Edwards supported the Vidalia project is not pertinent as to whether or not Vidalia is a system resource. Tr. at 2714. The struck testimony concerning the appearance of former Governor Edwards at a public hearing does not, as the Arkansas and Mississippi Commissions argue, show that the Vidalia contract was a product of "local economic and political considerations, not system wide planning." Indeed, it is just as plausible that the former governor could have been supporting a regional or system wide project. Also, we note that the Commission mistakenly cited Ex. ETR-63 in fn. 133 and 134 of Opinion No. 480. The correct cite should have been to Ex. AC-11.

[92] Opinion No. 480, 111 FERC ¶ 61,311 at P 174.

that time assessed the risks and the benefits of the project. In 1990, the Louisiana Commission guaranteed *full recovery* of the Vidalia contract from the Louisiana ratepayers over the *entire* life of the contract.[93] The Louisiana Commission also determined at that time that the Vidalia contract was prudent. The Louisiana Commission's own order makes it clear that the Louisiana Commission was fully aware that, in approving Vidalia and its escalating rate path, ELI's customers would bear the entire costs of Vidalia.

73. We also disagree with the Louisiana Commission's and Occidental's claims that the significant cost shifts that would occur if Vidalia is included in the equalization formula do not justify excluding it. The Louisiana Commission and Occidental do not dispute the magnitude of the Vidalia costs, they simply assert that not allowing them to be shifted to other Operating Companies is unjust, unreasonable and unduly discriminatory. However, the Commission finds otherwise. Allowing cost shifts as a result of the Vidalia contract, whether they are large or small, from ELI to other Operating Companies, for all of the reasons explained in Opinion No. 480, would be unjust, unreasonable and unduly discriminatory. The Louisiana Commission contends that, if cost shifting were an important factor, Grand Gulf could never have been allocated beyond the borders of Mississippi. We disagree. Vidalia and Grand Gulf are distinguishable. Grand Gulf is a large baseload facility built at a time when Entergy's system plans were to increase nuclear capacity to serve the baseload requirements of the system as a whole.[94] In contrast, as the Commission explained in Opinion No. 480, Vidalia is a small run-of-the river hydroelectric facility that supplies only 0.38 percent of Entergy's system needs, and for the reasons above should be allocated solely to ELI.[95]

74. We further find that the Louisiana Commission's reliance on Opinion No. 234 as support for its argument that Vidalia was part of Entergy's overall system planning is misplaced. In Opinion No. 234, the Commission noted that there appeared to be no instances where an Operating Company has built a new unit without a recommendation to do so from the Operating Committee.[96] Significantly, however, Vidalia was built after

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[93] Ex. LC-83 (Louisiana Commission Order No. U-16246-A: this order clarified a previous order that certified the Vidalia contract).

[94] Opinion No. 292, 41 FERC ¶ 61,238 at 61,618.

[95] Opinion No. 480, 111 FERC ¶ 61,311 at P 180.

[96] *Middle South Energy, Inc.*, 31 FERC ¶ 61,305 at 61,651.

Opinion No. 234, and was not planned in a manner similar to other resources.[97] Indeed as the Commission emphasized in Opinion No. 480, there is no evidence in the record that Vidalia was part of any centralized and deliberate plan to increase the use of hydroelectric power for the benefit of the system as a whole.[98] This lack of evidence of system planning for Vidalia stands in stark contrast to the vast amount of evidence of the Operating Committee's planning and approval of Entergy's nuclear resources as discussed in Opinion No. 234. Indeed, as the Commission noted in Opinion No. 480, the purchase of Vidalia power was initiated by the Town of Vidalia, rather than the Entergy Operating Committee where power needs are normally assessed and capacity additions assigned to individual Operating Companies. Vidalia cost studies were prepared and presented only to the Louisiana Commission.[99] The Louisiana Commission and Occidental have not provided any new arguments to convince the Commission that Vidalia was planned as a resource for the benefit of Entergy's system.

75. Further, we reject the Louisiana Commission's and Occidental's arguments that purport to justify Vidalia as a system resource because it is given an MSS-1 capacity credit. This credit simply acknowledges that Vidalia provides a measurable but negligible contribution to system capacity. It only shows that Vidalia exists and can serve load. It does not prove why or for whom it was planned, and the fact that Entergy recognizes the existence of Vidalia and provides a capacity credit is no reason for shifting the Vidalia costs to other Operating Companies.

76. We also disagree with the Louisiana Commission's and Occidental's arguments that an exclusive tax settlement between ELI and the Louisiana Commission does not distinguish Vidalia from other resources. In 2002, ELI and the Louisiana Commission entered into a tax settlement as a result of the Vidalia contract that guarantees substantial credits to ELI's fuel adjustment clause. As we explained in Opinion No. 480, the Louisiana Commission order states that during the first ten years of the settlement, the ratepayers will receive a guaranteed credit of $88 to $110 million, and a potential

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[97] Vidalia is the only long-term resource added to Entergy's system since 1986, the period spanning the issuance of Opinion No. 234 and the filing of this complaint case. (Entergy's Brief on Exceptions at 36). Unlike previous resource acquisitions, the Vidalia contract was negotiated, approved, and executed by ELI alone. (Entergy Brief on Exceptions at 39). Entergy never built, owned or operated the Vidalia project. (Staff Brief on Exceptions at 21).

[98] Opinion No. 480, 111 FERC ¶ 61,311 at P 180.

[99] Ex. ETR-23 at 45.

additional $210 million, for a total of up to $320 million in credits for the first ten years.[100] Contrary to the assertions of the Louisiana Commission and Occidental, this tax settlement is for the exclusive guaranteed benefit of ELI and supports the Commission's finding that the Vidalia costs should stay with ELI.

G. MSS-3

77. In Opinion No. 480, the Commission summarily affirmed the presiding judge's findings concerning Service Schedule MSS-3 for the reasons set forth in the Initial Decision.[101]

Requests for Rehearing

78. The Louisiana Commission argues that the Commission should reconsider its decision to summarily affirm the presiding judge's rulings regarding MSS-3. It states that Service Schedule MSS-3 exists to permit economy energy transactions among the Operating Companies, in which each Operating Company should be able to lower its costs. It states that economy purchases should be cheaper than using a company's own generation. However, it contends that Entergy applies the tariff to transfer the highest cost of energy produced by a company that generates more energy than its load in a given hour, regardless of whether that energy was part of the economic dispatch. It claims these costs often are higher than the cost to the "purchaser" of using its own generation. It argues that Entergy's approach transfers the costs of energy generated or purchased for reliability – primarily the energy cost of "minimum run" units – even though these costs are not part of the economic dispatch and the purchasing companies already bear their own reliability costs. It argues that the Commission should reconsider this issue, to address it explicitly and reform MSS-3 so that it operates in a fair manner.[102]

79. The Louisiana Commission alleges that Entergy's application of Service Schedule MSS-3 is discriminatory. Section 30.03 of the System Agreement provides: "The system capability shall be operated as scheduled and/or controlled by the System

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[100] Opinion No. 480, 111 FERC ¶ 61,311 at P 183. ELI ratepayers will continue to receive credits through the fuel adjustment clause for the remaining twenty years of the contract. The total credits to ELI's ratepayers may total $671 million over the life of the contract.

[101] *Id.* at P 14.

[102] Louisiana Commission Request for Rehearing at 27.

Operator to obtain the lowest reasonable cost of energy to all the Companies consistent with the requirements of daily operating generation reserve, voltage control, electrical stability, loading of facilities and continuity of service to the customers of each Company."[103] The Louisiana Commission explains that the Entergy system employs "economic dispatch" to obtain the lowest cost of service to all customers on the system consistent with reliability constraints.[104] It states that to accomplish this objective, the System Operator dispatches the available resources with the most economic incremental cost to meet the system's incremental needs. It adds that from the standpoint of individual companies, it makes good sense to participate in a centralized pool that provides the benefits of economic dispatch. However, it argues that this arrangement is not mutually beneficial if resources that are not "available" in the economic sense for dispatch to minimize system costs are used to price the energy exchanges.[105] The Louisiana Commission states that ELI's cost is driven up through the pricing protocol to a level higher than the cost would be if it generated the electricity itself.[106]

80. The Louisiana Commission argues that Entergy's application of MSS-3 causes significant cost shifting. The Louisiana Commission further argues that in approving Entergy's application of MSS-3, the Initial Decision relied on the finding that all resources on the system are used to serve all the system loads.[107] However, it argues that while that may be true, the fact that these costs are system costs supports a proportionate allocation, not an allocation by accident that transfers 73 percent of the lowest cost company's share of these costs to higher-cost companies. It also contends that the Initial Decision failed to confront the current circumstances on the system.[108] It states that currently the system's load-following units in many off-peak hours are powered with coal, while the minimum run units and reliability purchases have costs reflecting gas prices. Additionally, it notes that the minimum run units for which cost transfers occur at night do not necessarily enter the exchange at the peak. It also agues that using an average heat rate for a unit that does not serve the incremental system load does not

[103] Ex. ETR-2 (Entergy's System Agreement).

[104] Louisiana Commission Request for Rehearing at 27

[105] *Id*. at 29.

[106] *Id*. at 29.

[107] *Id*. at 30 (citing Initial Decision, 106 FERC ¶ 63,012 at P 57).

[108] *Id*. at 31.

satisfy the requirement that cost allocations be based on cost causation. It claims that if a change in load causes a change in the level of coal-fired generation, that cost should be reflected in the economic dispatch.[109]

Commission Determination

81. We will deny the Louisiana Commission's request with respect to Service Schedule MSS-3.

82. The Louisiana Commission's argument that Service Schedule MSS-3 is discriminatory is without merit. On the one hand, the Louisiana Commission recognizes that it is beneficial for individual companies to participate in a pooling arrangement. On the other hand, the Louisiana Commission complains that it is unduly discriminatory if MSS-3 does not simultaneously produce the lowest cost to each individual Operating Company and to the System as a whole. The Louisiana Commission cannot have it both ways. Significantly, the Louisiana Commission's witness conceded this point on cross-examination[110] and also acknowledged that it is not possible to obtain the lowest cost for the System as a whole and simultaneously obtain the lowest cost for each individual Operating Company.[111] The goal of section 30.02 of Service Schedule MSS-3 is to provide for the lowest cost to all of the Operating Companies as a whole,[112] and allows the owning company to receive the benefit of the lowest cost energy out of the resources that it owns. The presiding judge recognized this and found that the Louisiana Commission had failed to establish that the current Service Schedule MSS-3 is unjust, unreasonable, and unduly preferential and discriminatory.[113]

83. We further disagree with the Louisiana Commission's argument that there has been a disproportionate transfer of reliability costs, specifically sales made into the MSS-3 Exchange of lower cost Operating Companies' minimum run units. During the hearing, the Louisiana Commission conceded that it did not perform a study to determine the

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[109] *Id.*

[110] Tr. at 812.

[111] Tr. at 813-14.

[112] Ex. ETR-3 at page 19 (Turner).

[113] Initial Decision, 106 FERC ¶ 63,012 at P 150.

benefits received by ELI from MSS-3 purchases.[114] Indeed, it specifically recognized that the benefits of economic joint dispatch of the Entergy System are probably more than the amount of allegedly inappropriate costs ($7 million) flowing through MSS-3. The Louisiana Commission also recognized that EAI, as a net seller into the MSS-3 Exchange, has likely forgone potential revenues by selling energy off-system, particularly in peak and shoulder periods.[115] The presiding judge took all of this into consideration in rejecting the Louisiana Commission's assertion that minimum run units and System purchases should be excluded from the Exchange.[116] The presiding judge also found that the Louisiana Commission had failed to prove that there had been a violation of Schedule MSS-3 of the Commission-approved System Agreement.[117] The Louisiana Commission has not shown why this finding was in error and we deny its rehearing request.

H. MSS-1

84. The Louisiana Commission argued for a change in Service Schedule MSS-1 from the current load responsibility factor of 12 CP to 4 CP if the Commission did not approve full production cost equalization. Service Schedule MSS-1 provides the basis for sharing the reserve costs among the Operating Companies. It requires that the "short" companies (*i.e.*, companies whose capacity is less than their responsibility ratio share of capacity) make payments to the "long" companies (*i.e.*, companies whose capacity exceeds their responsibility ratio share of capacity). This is based on the share of an Operating Company's load responsibility at the time of system peak demand. The issue here is whether to measure this based on the rolling average of the monthly CPs for the twelve previous months (12 CP), or on the average of the monthly CPs for the four summer months of June-September (4 CP).

85. In Opinion No. 480, the Commission reversed the presiding judge's determination, finding that the Louisiana Commission had failed to demonstrate that the use of a 12 CP allocator is no longer just and reasonable. The Commission stated that the Louisiana Commission failed to satisfy the Commission's requirements under 18 C.F.R. § 35.13(h)(28). This section requires comprehensive information regarding monthly

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[114] Tr. at 1041, 1044 (Baron).

[115] *Id*. at 1039-40.

[116] Initial Decision, 106 FERC ¶ 63,012 at P 154.

[117] *Id.*

availability of generating capacity reserves.[118] The Commission found that the reserve table provided by the Louisiana Commission was inadequate, as it fell short of the minimum standards required by Commission regulations.

Requests for Rehearing

86. The Louisiana Commission argues that the Commission did not provide an adequate basis for overturning the Initial Decision's finding that a 4 CP allocator rather than a 12 CP allocator should be used to allocate the costs of reserve capacity under Service Schedule MSS-1. It argues that Opinion No. 480 improperly applied a Commission regulation governing public utilities rates to a state regulator.[119]

87. It further argues that the Commission observed that the oil and gas units on the Entergy System serve a "load following" as well as a reserve function, and that because gas and oil-fired generating units serving both types of load are currently included in the billing for MSS-1, a 12 CP allocator is a better allocator of this load-following generation than a 4 CP.[120] It argues that this observation does not explain the basis for this conclusion because MSS-1 allocates only demand costs, and offers no entitlement to energy or to have the purchased capacity serve a "load following function." It notes that the Commission did not appear to contest the presiding judge's findings on this issue, specifically that Entergy is a summer peaking utility, making overturning the presiding judge's findings inappropriate.

88. The Council of the City of New Orleans and the State Commissions (collectively, the Retail Regulators) request clarification regarding the Commission's statements addressing the allocation methodology for Service Schedule MSS-1 in paragraphs 1 and 14 of Opinion No. 480.[121]

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[118] Opinion No. 480, 111 FERC ¶ 61,311 at P 89.

[119] Louisiana Commission Request for Rehearing at 32 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 89).

[120] *Id.* at 33 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 90).

[121] The Retail Regulators' are correct that Opinion No. 480 reversed the presiding judge's ruling to modify Service Schedule MSS-1, as discussed in Opinion No. 480 at P 86-92.

Commission Determination

89. In Opinion No. 480, contrary to the Louisiana Commission's claim, the Commission fully analyzed the factors underlying the proper allocator to be used to allocate the costs of reserve capacity under Service Schedule MSS-1 and concluded that a 12 CP allocator should continue to be used for Service Schedule MSS-1.[122] The Commission noted that it had previously rejected a similar attempt by the Louisiana Commission to change to a 4 CP method, and that the Louisiana Commission had failed to provide evidence that the Commission typically considers in selecting an allocation methodology.[123]

90. The Commission did not intend to imply that the Louisiana Commission must adhere, in the same manner as a public utility, with the requirements under 18 C.F.R. § 35.13. The Commission's intent was to highlight for the Louisiana Commission the type of information that it would have to provide before the Commission could determine whether a change from the pre-existing 12 CP method was warranted. The Commission emphasized this by setting forth the specific information (monthly reserve table) that a party advocating a particular CP allocator would have to provide.[124] The burden was on the Louisiana Commission to demonstrate that the 12 CP method was no longer just and reasonable and that its 4 CP method was just and reasonable. The Louisiana Commission's limited proffer of evidence failed to do so, as explained in Opinion No. 480, and the Commission properly rejected its proposal.

91. In Opinion No. 480, the Commission noted that the gas and oil generation equalized under MSS-1 is used to support load-following requirements in all hours, not just the four peak hours. The Commission found that a 12 CP allocator is a better allocator of this load-following generation than a 4 CP allocator.[125] The Louisiana

[122] Opinion No. 480, 111 FERC ¶ 61,311 at P 86-92.

[123] *Id.*

[124] We disagree with the Louisiana Commission's argument that it could not provide this information because it is uniquely within the possession of public utilities. The Louisiana Commission had the opportunity to obtain this information from Entergy through the discovery process and for whatever reason chose not to. The Louisiana Commission's evidence of one year of monthly reserve margins falls far short of meeting its burden of proof.

[125] Opinion No. 480, 111 FERC ¶ 61,311 at P 90.

Commission does not dispute the fact that under the current System Agreement, the Service Schedule MSS-1 payments are calculated using the gas and oil generation of intermediate generating units.[126] Intermediate generating units serve a load-following function. We disagree with the Louisiana Commission's argument that our observation does not explain the basis for our conclusion. The equalization payments reflect load following costs and not just peak generating costs. These payments are consistent with a 12 CP allocator since they reflect the peaks experienced throughout the year.

92. The Louisiana Commission is correct that the Commission did not contest the presiding judge's finding that Entergy is a summer peaking facility. In Opinion No. 480, the Commission noted that historically Service Schedule MSS-1 has allocated costs using the 12 CP method even though the Entergy system has been a summer peaking system throughout its history.[127] The Commission disagrees with the Louisiana Commission's assertion that, given this fact (that Entergy is a summer peaking system), overturning the Initial Decision was inappropriate. The fact that Entergy was and continues to be a summer peaking system does not by itself warrant a change to the current allocation methodology; every system peaks at one time or another during the course of a year, and that fact alone does not dictate the use of a particular allocation factor or mean that a 12 CP method is not appropriate.

I. Jurisdiction

Requests for Rehearing

93. AEEC argues that Opinion No. 480 trespasses on the authority of the several states and exceeds the Commission's jurisdiction by regulating power generation. AEEC maintains that, under section 201(b)(1) of the FPA, the Commission's authority is limited to exercising jurisdiction over facilities for the transmission of electric energy in interstate commerce and for the sale of electric energy at wholesale in interstate commerce.[128] It argues that the D.C. Circuit's more recent decision in *Mississippi Industries* was wrongly decided. It contends, instead, that the earlier *Connecticut Light & Power v. FPC,* 324 U.S. 515 (1945), applies to the instant case, and that the Commission cannot ignore the constraints on its jurisdiction over "generation facilities" simply because a facility's output is transmitted or sold in interstate commerce. AEEC also

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[126] Ex. ETR-2, System Agreement, Section 10.03 (Basis of Reserve Equalization).

[127] Opinion No. 480, 111 FERC ¶ 61,311 at P 90.

[128] AEEC Request for Rehearing at 12.

claims that a contract may affect wholesale rates, but it does not necessarily follow that the Commission has jurisdiction to reject that contract and replace it with a contract that the Commission believes would be just and reasonable, citing *FPC v. Conway*, 426 U.S. 271 (1976) (*Conway).*

94. AEEC argues that Opinion No. 480 burdens interstate commerce by allowing one state (here, Louisiana) to commandeer Commission jurisdiction over multistate energy pooling agreements. It also contends that Opinion No. 480 emasculates the Arkansas Commission's control over EAI's generation facilities, and that it forces EAI and its retail customers to share with other states the advantages of economical power from its own Arkansas plants and to share in the disadvantages of the less efficient plants located elsewhere in the Entergy system.

95. AEEC argues that Opinion No. 480 turns the System Agreement into an unconscionable contract.[129] It argues that, the Commission should consider the general commercial background, the commercial needs of the trade, the relative bargaining position of the parties, and the aggrieved party's awareness of the challenged position.[130]

96. AEEC argues that Opinion No. 480 rewrites a System Agreement that has achieved its purpose to keep generation costs roughly equal over time throughout the system and imposes an interpretation that denies the parties the benefit of their bargain.[131] AEEC contends that the Commission's interpretation of the System Agreement deprives EAI of the benefits of a depreciated base-load capacity after EAI's ratepayers have paid high front-end costs and awards those to Louisiana. It argues that if this interpretation is correct, then the System Agreement was not a valid contract.

97. AEEC further asserts that the Commission failed to properly review the "prudence" of the System Agreement.[132] It claims that Opinion No. 480 makes it possible that ratepayers of Arkansas and other States will be forced to subsidize the ratepayers of Louisiana.[133]

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[129] *Id*. at 48.

[130] *Id*.

[131] *Id*. at 49.

[132] *Id*. at 51.

[133] *Id*.

Commission Determination

98. On rehearing, AEEC launches an attack primarily directed, not at Opinion No. 480, but at the D.C. Circuit's decision in *Mississippi Industries* that concluded that when "generation capacity has been built and planned on a profoundly integrated basis, the Commission properly may examine its allocation as a cost component affecting wholesale rates."[134] AEEC takes issue with this fundamental conclusion, arguing that Opinion No. 480 is not viable because "EAI and its retail customers will be forced to share with utilities in other States both the advantages of economical power from its own Arkansas plants and the disadvantages of the less economically efficient plants throughout the Entergy system."[135]

99. AEEC's position highlights its fundamental misunderstanding of the Entergy System Agreement. As the D.C. Circuit explained in *Mississippi Industries*, the System Agreement "has sought to coordinate the addition of operating capacity by each individual operating company while achieving the greatest economies of scale."[136] Entergy acts, with respect to the planning and operation of the Entergy System's plants, for the benefit of all of the Operating Companies. Individual Operating Companies do not choose the system plants and power for which they should have cost responsibility, as AEEC would have it. Rather, in a public utility holding company system such as the Entergy System, Entergy makes the planning and operational decisions that guide cost responsibility.

100. To reach its contrary interpretation of the Entergy System Agreement, AEEC must ask the Commission to act inconsistently with the D.C. Circuit's decision in *Mississippi Industries*, including all of its findings distinguishing the cases now relied upon by AEEC, and to conclude that the Commission now no longer has jurisdiction over the allocation of costs under the Entergy System Agreement. We cannot do so.

101. In *Mississippi Industries*, the D.C. Circuit addressed and dismissed the same arguments that AEEC makes here.[137] It explicitly found that, when "generation capacity has been built and planned on a profoundly integrated basis, the Commission properly

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[134] *See Mississippi Industries,* 808 F.2d at 1549.

[135] AEEC Rehearing Request at 16.

[136] *Id*. at 7.

[137] *See Mississippi Industries,* 808 F.2d at 1540-49.

may examine its allocation as a cost component affecting wholesale rates."[138] In rejecting arguments that the Commission asserted jurisdiction over a generating facility in contravention of section 201(b) of the FPA, the court explained that the Commission was properly "acting pursuant to its exclusive rate authority over wholesale transactions and its remedial authority as set forth in sections 205 and 206."[139] The court also dismissed arguments that *Connecticut Light & Power* compelled a different result. It noted, among other things, that *Connecticut Light & Power* addressed only the "local distribution" exception found in section 201 of the FPA, not the "generating facilities" exception, and that the court accepted "the proposition that FERC may lawfully assert jurisdiction over matters pertaining to generation where it is found that generation facilities are used as facilities for interstate wholesale sales."[140] The court in *Mississippi Industries* concluded that "the Commission has been awarded jurisdiction over generating facilities 'to the extent provided in other sections,' including jurisdiction necessary to effectuate regulation of interstate wholesale rates."

102. The D.C. Circuit in *Mississippi Industries* also made abundantly clear:

> Having found that the agency may exercise authority under section 206 to modify an unlawful voluntary power pool arrangement negotiated by nonaffiliates, *a fortiori* we must conclude that FERC may intervene to reform an unlawful agreement made by affiliates in a fully integrated, commonly owned system.[141]

103. We further reject AEEC's claim that Opinion No. 480 results in one state (here, Louisiana) burdening interstate commerce. Rather, Opinion No. 480 concerns the Commission's authority to allocate costs among affiliated public utilities pursuant to its jurisdiction over wholesale power sale rates.[142] The cases cited by AEEC are inapposite.[143] Each of the cases cited by AEEC involve either a state or city establishing

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[138] *Id.* at 1540.

[139] *Id.* at 1543.

[140] *Id*. at 1544.

[141] *Id*. at 1546.

[142] *Id.* at 1518.

[143] AEEC Rehearing Request at 23-29.

a law or ordinance that arguably had some discriminatory effect on interstate commerce. That is not the case here. Similarly, in *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404 (1985) (*Middle South Energy*), which AEEC discusses at some length, the court held that the mere assertion of jurisdiction by the Arkansas Commission in an Arkansas Commission proceeding adversely affected Middle South Energy's ability to obtain investors and complete its project, thus interfering with the exclusive federal scheme for governing interstate transmission and power sales.[144] That is not the case here either.

104. Here, neither the Louisiana Commission nor the State of Louisiana has taken any such action that would impose a burden on interstate commerce to the detriment of Arkansas or any other state. They have not enacted any laws with respect to the matters at issue in this proceeding. Rather, all that the Louisiana Commission has done is ask the Commission to review the allocation of costs among the Entergy Operating Companies under the Commission-jurisdictional Entergy System Agreement – which is within the Louisiana Commission's rights, and within the Commission's authority under Federal Power Act to address.

105. We also reject AEEC's suggestion that Opinion No. 480 turns the Entergy System Agreement into an unconscionable contract. That is not a standard that the Commission is statutorily required to follow in reviewing contracts. Rather, the Commission acted pursuant to its statutory authority under the Federal Power Act – which gives it exclusive authority over wholesale power sales – to ensure that the rates, terms and conditions of jurisdictional power sales are just, reasonable and not unduly discriminatory or preferential. Moreover, contrary to AEEC's assertions, the Commission did not change the Entergy System Agreement in any regard.[145] It examined the allocation of costs

[144] *Middle South Energy*, 772 F.2d 404, 418.

[145] AEEC's citation to *Conway* as support for its assertion that, while a contract may affect wholesale rates, it does not follow that the Commission has plenary jurisdiction to reject that contract and replace it with a contract that the Commission believes is just and reasonable, is unavailing. First, as noted above, the Commission did not reject a contract. Second, *Conway* is inapposite. In *Conway*, the Supreme Court was dealing with a classic price squeeze situation, and explained that, while the Commission lacks authority to fix retail rates, it may take those rates into consideration when it imposes a remedy fixing a wholesale rate subject to its jurisdiction. 426 U.S. at 276-82. Here, the Commission examined the allocation of costs under the Entergy System Agreement, a matter that the D.C. Circuit has determined is jurisdictional to this Commission, and imposed a remedy.

under the Entergy System Agreement, which the D.C. Circuit has found it has the legal authority to do.

106. We further reject AEEC's arguments that the System Agreement has kept generation costs roughly equal over time and that Opinion No. 480 deprives EAI of the benefits of depreciated base-load capacity after it paid high front-end costs and awards those benefits to Louisiana. First, as discussed above, the Commission determined, contrary to AEEC's arguments, that the Entergy system was no longer in rough production cost equalization and that a remedy was necessary. In addition, AEEC's argument misunderstands the nature of the System Agreement. Entergy operates its system as a single integrated system and rotates the addition of capacity for the benefit of the entire system. EAI has experienced below system average costs since 1996[146] and thus has reaped benefits from its depreciated base-load capacity. EAI will continue to benefit from its depreciated base-load capacity, just not to the same degree. An individual Operating Company under the Entergy System Agreement is not guaranteed all of the benefits of its specific generation for an infinite amount of time. Rather, by the very nature of the System Agreement and the Operating Companies' participation in the System Agreement, benefits and burdens specific to each Operating Company have to be balanced with what is appropriate for the system as a whole.

107. Finally, we reject AEEC's claims that the Commission failed to properly review the "prudence" of the System Agreement. In Opinion No. 480, consistent with the D.C. Circuit's finding in *Mississippi Industries*, which concluded that "[w]hen, as here, generation capacity has been built and planned on a profoundly integrated basis, the Commission properly may examine its allocation as a cost component affecting wholesale rates,"[147] the Commission determined that the allocation of costs under the Entergy System Agreement was no longer just and reasonable and required a remedy that would assure the justness and reasonableness of that agreement and the cost allocations thereunder.[148] No further "prudence" review was required.

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[146] Ex. ETR-26 at 2.

[147] *Mississippi Industries*, 808 F.2d at 1540.

[148] Opinion No. 480, 111 FERC ¶ 61,311 at P 136.

The Commission orders:

The requests for rehearing are hereby denied in part and granted in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.