UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Louisiana Public Service Commission

v. Docket No. EL01-88-001

Entergy Services, Inc., et al.

OPINION NO. 480

OPINION AFFIRMING IN PART AND REVERSING IN PART INITIAL DECISION

Issued: June 1, 2005

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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OPINION AFFIRMING IN PART AND REVERSING IN PART INITIAL DECISION

(Issued June 1, 2005)

1. This case is before the Commission on exceptions to an Initial Decision issued February 6, 2004.[1] This case determines, inter alia, that the allocation of production costs among the Operating Companies in the Entergy System Agreement (System Agreement) is no longer just and reasonable, andestablishes a remedy to assure the justness and reasonableness of the System Agreement and the cost allocations thereunder. We affirm the presiding judge's finding that the Entergy system is no longer in rough production cost equalization and his use of a bandwidth as a remedial device, but reverse his determination on the appropriate bandwidth in favor of a broader bandwidth that eases the severity of the remedy's impact. We also affirm the presiding judge's findings rejecting the proposed remedies of full production cost equalization, Entergy's Strategic Supply Resource Plan (SSRP) and modification of the allocation methodology for Service Schedule MSS-1. In addition, the Commission reverses the presiding judge on his finding that Vidalia (a hydroelectric plant in Louisiana) was planned as a system resource for the benefit of the Entergy system. With respect to the remaining issues, we summarily affirm the presiding judge for the reasons set forth in the Initial Decision.

[1] *Entergy Services, Inc.*, 106 FERC ¶ 63,012 (2004) (Initial Decision).

2. This order benefits the public by ensuring that cost allocations among the Entergy Operating Companies are just, reasonable, and not unduly discriminatory or preferential.

Background

3. A detailed history of this proceeding is provided in the Initial Decision.[2] In brief, this proceeding deals with the System Agreement, a Commission rate schedule that allocates costs among the Entergy Operating Companies[3] in several jurisdictions. The Louisiana Public Service Commission (Louisiana Commission), now the sole complainant,[4] presents four issues. The first is 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 is whether the Entergy System Agreement should be altered to fully equalize or more closely align the production costs of the Entergy Operating Companies. The third issue involves whether certain costs should be adjusted when comparing the production costs among the Operating Companies. Finally, the fourth issue is whether System Service Agreement Schedules MSS-1 and MSS-3 should be modified as an alternative remedy.

4. Entergy Corporation is a public utility holding company that provides electric service at retail through five operating companies -- EAI, EMI, ELI, EGSI, and ENOI. The Entergy Operating Companies are respectively regulated 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 New Orleans. ESI provides operating services to the five operating companies, and acts as the agent for the parent corporation

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[2] Initial Decision, 106 FERC ¶ 63,012 at P 1-12.

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

[4] The case commenced on June 14, 2001, when the Louisiana Commission and the Council of the City of New Orleans (New Orleans) filed a complaint against Entergy Corporation, Entergy Services, Inc., EAI, ELI, EMI, EGSI, ENOI, and System Energy Resources (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).

in the System Agreement. System Energy Resources, Inc. (SERI) is a generating subsidiary of Entergy that owns a 90 percent interest in the Grand Gulf I Nuclear Generating Facility (Grand Gulf). Under the terms of a Unit Power Sales Agreement, SERI sells 90 percent of the capacity of the plant in fixed percentages to the four operating companies that are participants in the agreement, namely EAI, EMI, ELI and ENOI.

5. The Entergy system has operated for over fifty years under a System Agreement that acts as an interconnection and pooling agreement, provides for the joint planning, construction and operation of the Operating Companies' facilities, and maintains a coordinated power pool among the five companies. The current System Agreement was filed in 1982.

6. There are seven schedules in the System Agreement, only two of which are relevant in this proceeding. Service Schedule MSS-1 equalizes reserve capacity among the Operating Companies by requiring that the "short" companies (i.e., companies with reserve levels below system average) make payments to the "long" companies (i.e., companies with reserve levels above system average) under a formula based on the "long companies'" prior year's cost of gas and oil-fired steam generation. Service Schedule MSS-3 allocates energy each hour among the Entergy Operating Companies on an after-the-fact basis in a manner that each Operating Company that generates power in excess of its needs is deemed to sell energy into the system Exchange for the use of the other Operating Companies in the Entergy system. Furthermore, it is presumed that the selling company places its most expensive energy into the Exchange and keeps its cheapest energy in order to meet its own base load requirements.

7. The allocation of production costs among the Entergy Operating Companies has a very long history and is covered in the Initial Decision. We briefly review the major developments in order to put our decision today into the proper context. The Commission initially determined the justness and reasonableness of the 1982 System Agreement in Opinion Nos. 234, 234-A, 292 and 292-A.[6] Those decisions involved both the 1982 System Agreement and the allocation of capacity from the newly constructed

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[6] *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305, *reh'g denied*, Opinion No. 234-A, 32 FERC ¶ 61,425 (1985), *aff'd, Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir.), *vacated and rev'd in part and remanded*, 822 F.2d 1104 (D.C. Cir. 1987) (per curium), *cert. denied*, 484 U.S. 985 (1987), *order on remand*, *System Energy Resources*, Inc., Opinion No. 292, 41 FERC ¶ 61,238 (1987) (System Energy Resources), *reh'g denied*, Opinion 292-A, 42 FERC ¶ 61,091 (1988), *aff'd sub nom. City of New Orleans v. FERC*, 875 F. 2d 903 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

Grand Gulf under the Unit Power Sales Agreement. In its review, the Commission found that the Entergy system is highly integrated and that generation facilities are planned, constructed and operated for the benefit of the whole system.[7] The Commission further found that while production costs among the system's non-nuclear units were roughly equal and the cost of fuel for the nuclear units was approximately the same, great disparities in installed nuclear investment costs disrupted the rough equalization of production costs that had existed on the system and thereby produced undue discrimination.[8]

8. However, as explained by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), in affirming Opinion No. 234, the Commission rejected the arguments of the Louisiana Commission and the Commission Trial Staff (Trial Staff) in support of full production cost equalization as too dramatic a departure from the system's historical operations, individual company autonomy and allocation methodologies and an unwarranted disruption of the states' settled authority, interests and expectations.[9] Instead, the Commission ordered a less intrusive means of remedying the undue discrimination by adopting a Grand Gulf capacity allocation designed to equalize total nuclear investment costs per kW of total average demand for each Operating Company (i.e., annual energy consumption). That is, the Commission allocated Grand Gulf capacity such that each Operating Company would have the same investment in nuclear capacity per kW of average annual load (i.e., energy consumption). In sum, the Commission's finding of undue discrimination was premised largely on the integrated nature of the Entergy system, while its rejection of full production cost equalization in favor of rough production cost equalization was premised on the historical ownership and financing by the Operating Companies.

9. Subsequently in 1996, the Commission dismissed a complaint involving whether the System Agreement should be revised to remove interruptible load from the calculation of peak load responsibility.[10] The D.C. Circuit remanded that case to the Commission, instructing the Commission to explain its rough production cost

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[7] *System Energy Resources*, 41 FERC at 61,614.

[8] *Id.* at 61,615.

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

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

equalization standard.[11] The Commission set the remanded proceeding for hearing and consolidated it with another complaint and filing previously set for hearing (the retail competition case) to address whether the Entergy System Agreement should be revised to accommodate the introduction of retail competition in some of the jurisdictions where the Entergy Operating Companies provide service.[12]

10. During the course of the hearing in the retail competition case, the presiding judge certified questions to the Commission as to whether the record should be reopened to determine whether Entergy's production costs were roughly equalized among the Operating Companies, since preliminary evidence introduced at the hearing indicated that the System Agreement either is or soon will be no longer producing a rough equalization of production costs. In response, the Commission remitted for an additional hearing the rough production cost equalization issue. On June 15, 2001, a partial settlement of the issues in the consolidated proceedings was filed in which the issue of rough production cost equalization was deferred to this proceeding.[13]

11. Settlement efforts were initiated and a settlement judge was appointed prior to the hearing. These settlement talks failed and the Chief Judge terminated settlement proceedings on March 13, 2002. The hearing commenced on July 7, 2003 and concluded on August 22, 2003. Following the hearing, settlement proceedings were again instituted before another settlement judge. After considerable time and effort by all parties, these settlement discussions also ultimately failed and the Chief Judge again terminated settlement proceedings on February 13, 2004.

12. The presiding judge found in the Initial Decision that the production costs of the Entergy 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 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 system that establish the outside bounds by which production costs may deviate from the system average. The Initial Decision further ordered that the 7.5 percent bandwidth remedy commence in calendar

[11] *Louisiana Public Service Commission v. FERC*, 184 F.2d 892, 899 (D.C. Cir. 1999).

[12] *Louisiana Public Service Commission v. Entergy Services, Inc*. 93 FERC ¶ 61,013 (2000).

[13] The Commission approved the partial settlement on July 26, 2001. *Entergy Services, Inc*., 96 FERC ¶ 61,125 (2001).

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. The judge also found that Vidalia costs should be treated as system costs, rather than ELI costs, in calculating whether the Entergy Operating Company's production costs are roughly equal.[14]

13. Briefs on Exceptions were filed by Entergy, the Louisiana Commission, the Arkansas and Mississippi Commissions (jointly), Arkansas Electric Energy Consumers, Inc. (AEEC), Arkansas Cities and Cooperatives (ACC), the Louisiana Energy Users Group (LEUG), Occidental Chemical Corporation (Occidental) and Trial Staff.

Discussion

14. Having fully evaluated the Initial Decision, the parties' briefs, and the record before us, we affirm the presiding judge's finding that the Entergy system is no longer in rough production cost equalization and his use of a bandwidth as a remedial device, but reverse his determination on the appropriate bandwidth in favor of a broader bandwidth that eases the severity of the remedy's impact. We also affirm the presiding judge's findings rejecting the proposed remedies of full production cost equalization, Entergy's SSRP and modification of the allocation methodology for Service Schedule MSS-1. In addition, the Commission reverses the presiding judge on his finding that Vidalia was planned as a system resource for the benefit of the Entergy system. With respect to the remaining issues, we summarily affirm the presiding judge for the reasons set forth in the Initial Decision.

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[14] The Vidalia Hydroelectric Power Plant (Vidalia) was built forty miles below the Town of Vidalia, Louisiana, to harness the power of the water that overflows from the confluence of the Mississippi and Red Rivers into the Atchafalaya River through a series of channels. Failing to independently obtain financing for the construction of the plant, the Town of Vidalia entered into an agreement with Catalyst Energy Development Corporation to form the Catalyst Old River Hydroelectric Limited Partnership. On November 18, 1985, ELI (then Louisiana Power & Light) entered into a contract with Catalyst Old River Hydroelectric Limited Partnership whereby ELI would purchase up to 94 percent of the output of Vidalia, with the Town of Vidalia purchasing the remaining six percent of the output.

A. Production Cost Equalization

1. Whether the Entergy System is Currently in Rough Production Cost Equalization

a. Initial Decision

15. The presiding judge found that the Entergy system is not currently in rough production cost equalization. He stated that it was the view of the Commission and the courts that the equalization of nuclear investment costs commencing with the first year of Grand Gulf operation (1986) would lead to rough production cost equalization, because they believed that all other production costs were roughly equal among the Operating Companies.[15] However, the judge stated that beginning with the year 2000, the increase in natural gas prices and the dependence of ELI on gas-fueled generation had caused production costs to rise dramatically in relation to the system average.[16] The presiding judge found that there is now no assurance that rough cost equalization will be maintained by the System Agreement.

16. The presiding judge explained that the System Agreement roughly equalizes excess production costs, but not all production costs. The presiding judge found that rough production cost equalization generally could be maintained from 1986-1999, with variations from year-to-year, but without any long-term large bias for any one company or another. The judge explained further that in the past, prior to the 1985 Commission decision,[17] this was due to rotation of generating units as they were located in the various Operating Company jurisdictions. The presiding judge noted that there have been few new units since then, and no large base load units, and that now the large increase in natural gas prices since 2000 has had a dramatically disproportionate effect on ELI's relatively large amount of gas-fired generation, as compared to EAI's relatively large amount of cheaper coal base load capacity.[18] He also noted that the decisions on where, when and what types of units to locate were centrally made by the parent company for the benefit of the entire system. The presiding judge explained that "while there may be different costs for each Operating Company, on a central system basis differences in cost

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[15] Initial Decision, 106 FERC ¶ 63,012 at P 25.

[16] Ex. LC-1 at 36 (Brown).

[17] *Middle South Energy, Inc.*, 26 FERC at 65,100-01.

[18] Initial Decision, 106 FERC ¶ 63,012 at P 38.

allocations (relative to load share responsibility) among the Operating Companies are not supported by cost-causation factors."[19]

17. The presiding judge determined that these large disparities, both existing and projected, for the period from 2000 to 2009, based on Commission precedent as affirmed by the courts, required a remedy. He noted that there is no reasonable prospect of the situation self-correcting under the existing mechanisms of the System Agreement for equalizing only excess capacity and energy.[20] The presiding judge explained that one of Entergy's witnesses pointed out that the System Agreement does nothing to equalize benefits and burdens on an annual basis "except by accident."[21] He explained that the System Agreement can either widen or narrow production cost differentials as circumstances vary, thus confirming that the intent of the System Agreement is to balance production costs over time through the assignment of new resources.

18. The presiding judge noted that under Entergy's new SSRP, Entergy is planning new generation resources, which may lead to improvement. However, he held that there is no assurance that the SSRP will achieve rough production cost equalization, and every indication that it will not do so in the next four or so years. The judge further found that Entergy's view that the SSRP or other resource plans will only narrow costs "whenever possible" underscores the need for an additional overarching remedy to bring the system back into rough production cost equalization when resource acquisitions and allocations do not achieve that.

19. The presiding judge further found that, as noted by Trial Staff, the Commission's finding of undue discrimination in 1985 was premised on the integrated nature of the Entergy system, while its rejection of full production cost equalization in favor of rough production cost equalization as a remedy was premised on the historical ownership and financing by the Operating Companies.[22] He also noted that, as Trial Staff aptly pointed out in its Initial Brief, these principles are somewhat conflicting:[23] "The fully integrated nature of the Entergy system suggests that disparities should be small and not continue too long, while the Entergy history of individual company ownership, cost support and

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[19] *See System Energy Resources*, Opinion No. 292, 41 FERC at 61,614-17.

[20] Initial Decision, 106 FERC ¶ 63,012 at P 38.

[21] *Id*. at P 38 (quoting Tr. 5816-18).

[22] *See Middle South Energy*, 32 FERC at 61,959.

[23] Initial Decision, 106 FERC ¶ 63,012 at P 39 (citing Staff Initial Brief at 24).

financing suggests that disparities have some justification."[24] He concluded that he agreed with Staff, but differed with Staff as to the appropriate bandwidth limits and timing.

20. The presiding judge stated, however, that as the years proceed, there may come a time when the newer generation resources have substantially displaced the older units still in operation. He stated that for these new resources, the applicability of any historical settled expectation of how the system would be operated, including under predecessor agreements to the current 1982 System Agreement, may fairly be open to reexamination.

21. As discussed in a later section in this order, the judge imposed a bandwidth remedy to restore rough production cost equalization, and to ensure that rough production cost equalization will continue to exist if changes in available resources, such as an SSRP type plan, do not achieve the numerical limits on disparity.

b. Exceptions

22. The Arkansas Commission and the Mississippi Commission argue that the judge erred in finding that the Operating Companies are no longer in rough production cost equalization. They argue that the presiding judge's finding was based on a flawed criterion and incomplete analysis of the historical deviations in production costs. They contend that the Initial Decision's criterion for rough equalization, the +/-5 percent rolling three-year average and +/-7.5 percent annual limit, do not provide a meaningful review of the historical deviations that have occurred under the System Agreement.

23. The Arkansas Commission and the Mississippi Commission further contend that to determine what the Commission intended by the phrase "rough production cost equalization" requires looking at the historical variations since 1986, when the Commission's orders reallocating Grand Gulf took effect. They argue that the disparities between EAI and ELI in 2005 are less than the disparities that existed historically between ELI and EMI immediately following the Commission's reallocation of Grand Gulf. They note, for example, that there was a 15 percent spread between ELI and EMI in 1986, a 22 percent spread between ELI and EMI for both 1987 and 1988, and again a 15 percent spread between ELI and EMI in 1989, the four years immediately following the Commission's decision in the Grand Gulf cases. They argue that there is an irreconcilable contradiction in the Initial Decision's finding that the system was in rough production cost equalization from 1986 to 1999 during periods of spreads as wide as 22 percent and the narrower bandwidths proposed as a remedy by the presiding judge.

[24] *Id*. (quoting Staff Initial Brief at 24-25).

24. The Arkansas Commission and the Mississippi Commission maintain that the use of the phrase "roughly equal" was not inadvertent, because the Commission's stated intent in Opinion No. 234-A was only to eliminate drastic rate disparities. They contend that the Commission described its decision as a balancing of equities, with explicit recognition of the interests of the individual companies in retaining the benefits of units they own to the fullest extent possible. The Arkansas Commission and the Mississippi Commission further argue that there has been rough equalization on the Entergy system, and the fact that this will continue is readily discernible from a comparison of the historical production cost differentials with both current and projected differentials among the Operating Companies.

25. AEEC contends that rather than looking at a "snapshot in time," the Commission's "life of the contract" standard reveals the system's rough equalization, referring to the notion that benefits and burdens of a long-term contract must be viewed over the full term of the contract.[25] They argue that this approach also prevents a customer from benefiting from the lower rates typically at the beginning of the life of the contract and later challenging, as unjust, the higher rates towards the end of the life of the contract.[26] AEEC argues that the Louisiana Commission is seeking to exclude the years of favorable cost allocations that it enjoyed, and that the presiding judge supports the Louisiana Commission's approach. AEEC also contends that the presiding judge erred in stating that the System Agreement is not an arm's-length agreement, noting that the ratepayers of Arkansas and Mississippi are at arm's-length from Entergy.

26. AEEC also argues that production cost disparities in this proceeding are not unduly discriminatory because those disparities rest on the premise that each Operating Company retains the fruits of the generation units its ratepayers financed and constructed. AEEC contends that therefore any rate disparities on the Entergy system are lawful and not unduly discriminatory.

c. Briefs Opposing Exceptions

27. Occidental argues that the presiding judge properly found that the Entergy system is no longer in rough production cost equalization, and properly relied upon precedent

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[25] *See Pontook Operating Ltd. Partnership v. Pub. Serv. Co. of N.H.*, 94 FERC ¶ 61,144 at 61,552 (2001) (citations omitted); *see also*, *French Broad Elec. Membership Corp. v. Carolina Power & Light Co.,* 92 FERC ¶ 61,283; *San Diego Gas & Elec. Co. v. Pub. Serv. Co. of N.M.*, 95 FERC ¶ 61,073 (2001).

[26] AEEC Brief on Exceptions at 23 (citing San Diego Gas & Elec. Co., 99 FERC ¶ 61,160 at 61,652, n. 20).

and record evidence. Occidental adds that the rotational assignment of new resources, as supported by Entergy, will not achieve rough production cost equalization.
The Louisiana Commission argues that the "life of the contract" theory adopted by AEEC has no application when the Commission is required to establish nondiscriminatory rates. The Louisiana Commission argues that this approach has never been used before in evaluating rough equalization of costs by Entergy or any other party.

d. **Commission Determination**

28. We will affirm the presiding judge's determination that the System Agreement is not currently in rough production cost equalization and deny the exceptions filed by the Arkansas Commission, the Mississippi Commission and AEEC. Because we conclude that the Entergy Agreement is no longer just and reasonable and is not unduly discriminatory or preferential, a just and reasonable remedy is needed. While history shows that production cost disparities have always existed, large disparities among the Operating Companies started to arise in 2000 and appear likely to continue into the future.

29. It is undisputed that the System Agreement allocates generation costs on a long-term basis through the assignment of individual resources to particular Operating Companies and that the intent of the System Agreement is to balance costs *over time* through the assignment of new resources.[27] Entergy sought to accomplish this by using a rotational scheme of adding new resource acquisitions to narrow production costs whenever possible. The large and increasing disparities among the Operating Companies are now arising because the rotational scheme has been inactive for a lengthy period and rising gas prices have adversely impacted ELI, which relies heavily on gas-fired production facilities.[28]

30. The historical data support the presiding judge's determination that the Entergy system is no longer in rough production cost equalization. As shown in the chart below, total deviations from 1983 through 1985 averaged 31 percent. Because of these large deviations, the Commission found it necessary to get Entergy's system back into rough production cost equalization by fully equalizing nuclear investment costs.[29] After the Commission's decision, the Entergy system, as can be seen from the chart below, remained in rough production cost equalization for the next fourteen years, with total

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[27] Entergy System Agreement, §§ 3.05, 4.01.

[28] Initial Decision, 106 FERC ¶ 63,012 at 30.

[29] *Id*. at 25.

deviations ranging from 7.71 to 22.20 percent. At the end of that period, total deviations jumped significantly. For the period 2000 through 2002, the total deviations averaged more than 33 percent, an even greater deviation than that which spurred the Commission to act in 1985. Based on these figures, we agree with the presiding judge that the Entergy system is no longer in rough production cost equalization and, as discussed further below, a remedy is needed to get the system back into rough production cost equalization.

31. Below are the total deviation percentages from the system average for the years 1983 through 2002. These total deviation percentages were calculated from Exhibit ETR-26, page 2. This exhibit reprices the Vidalia contract at the MSS-3 rate and incorporates each Operating Companies' load factor.[30]

Year	Total Deviation
1983	35.15.%
1984	25.32%
1985	32.90%
1986	14.85%
1987	22.20%
1988	21.58%
1989	16.18%
1990	21.34%
1991	12.13%
1992	16.70%
1993	8.53%
1994	10.48%
1995	7.71%
1996	11.55%
1997	10.76%

[30] Each of Entergy's five Operating Companies has different load factors. Variable production costs (which take into account each Operating Companies' load factor) are added to fixed production costs so that the total production costs among the Operating Companies can be fairly evaluated. This adjustment eliminates the relative differences in load factor among the Operating Companies.

1998	14.00%[31]
1999	12.39%
2000	33.26%
2001	39.79%
2002[32]	27.60%

32. Pricing the Vidalia energy at the MSS-3 rate for production cost comparisons is a reasonable adjustment which accounts for Vidalia making a minimal contribution (0.38 percent) to System capacity. The average price for energy under Service Schedule MSS-3 was used as a proxy price for replacement energy and was approximately $37/MWh for the relevant period. By setting the Vidalia energy at the MSS-3 price, ELI is deemed to have paid for the purchase of power from all other Entergy resources had it not purchased energy from Vidalia. Staff Brief on Exceptions at fn. 31.

33. Future production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26, which accounts for Vidalia by re-pricing the energy at the annual MSS-3 rate. We note that Entergy, the Arkansas Commission, the Mississippi Commission, the Arkansas Electric Energy Consumers and the Trial Staff all favored pricing Vidalia at the MSS-3 rate for use in production cost comparisons.

2. Entergy's Strategic Supply Resource Plan as a Remedy

a. Initial Decision

34. Entergy stated that it is currently short on capacity to meet the 2003 peak plus reserve requirement, short of base load resources for the 2003 firm base load requirement, and that there is a projected increase in base load requirements by 2007. Entergy stated that it has designed the SSRP to address these deficiencies through selective and targeted resource acquisition, and to help bring all of the Operating Companies closer to the system average production cost over the period from 2003-2010.

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[31] As pointed out in the Arkansas and Mississippi Commission's Brief on Exceptions at 29, n. 17, the 1998 numbers as listed in the exhibit are not accurate. The deviation for 1998 as listed in the exhibit shows a deviation of 24.67 percent. This number includes an input error for EMI. The actual percentage deviation is much smaller and closer to 14 percent.

[32] The 2002 data uses 12 months ending August 31, 2002, while the data for the other years is on a calendar-year basis.

35. The presiding judge found that Entergy's SSRP, which is a long-term power supply plan that includes the purchase of base load and load-following generation from 2003 through 2012 alone will not achieve, as claimed by Entergy, rough production cost equalization on the Entergy system.[33] He found that even using Entergy's own data regarding the optimal scenario for the SSRP, but with Vidalia at full contract price, the SSRP fails to bring the system within rough production cost equalization.[34] The judge noted that from 2003 through 2010, the last year projected, Entergy's own data for the SSRP base case shows both ELI and EAI outside the rough production cost equalization bandwidth established earlier in the presiding judge's opinion.[35] He added that for the same period Entergy's data for the possible high gas case with Vidalia shows EAI at -15 percent and ELI at +9 percent of system average, in excess of the bandwidth.[36] The presiding judge continued that while there is a general trend close to system average for the first few years from -23 percent for EAI in 2003 to -12 percent in 2006, EAI's deviation plateaus at -12 percent for the remainder of the projected period. He stated that likewise, ELI trends generally toward the system average for the first few years going from +12 percent in 2003 to +8 percent in 2006, but then plateaus at +7 percent for the remainder of the projected period to 2010. The presiding judge stated that he found no assurance that, as presently planned, Entergy's SSRP will restore roughly equal production costs. He added that if, due to changes in Entergy's SSRP plan or any other circumstances that unfold in future years, the rough production cost equalization bandwidth is satisfied, then that overarching remedy established to assure rough equalization would not be triggered.

b. Exceptions

36. Entergy argues that the presiding judge improperly rejected Entergy's SSRP remedy, which it claims would narrow production cost disparities without creating jurisdictional conflicts or reallocating the historical generation costs that Opinion No. 234 sought to put to rest. Entergy argues that the SSRP narrows production cost disparities

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[33] Through a mix of purchases of solid fuel generation and combined cycle gas turbine generation, long and short-term contracts, and System-owned and merchant-owned generation, Entergy seeks to "lower System production costs, improve the portfolios of individual Operating Companies, reduce production cost disparities, and reduce System and ELI exposure to gas price volatility." Entergy Initial Brief at 62.

[34] Ex. ETR-107C at 1.

[35] *Id*.

[36] *See* Entergy Initial Brief at 10 n. 9, 11 and Attachment 1 (citing the record bases for the data).

significantly, and it does so through the same method – new resource allocations – that had been the traditional tool for cost sharing on the Entergy system and that had been the tool used by the Commission in Opinion No. 234 to produce rough production cost equalization. Entergy states that the SSRP addresses the root cause of production cost disparities – the higher cost and volatility of natural gas supplies. It maintains that the SSRP will lower the production costs of the higher cost Operating Companies without unduly raising the production costs of the lower cost companies. Entergy further argues that any concerns over the certainty or magnitude of the SSRP could have easily been addressed.

37. The Arkansas Commission and the Mississippi Commission also argue that the presiding judge erred in determining that Entergy's SSRP will not maintain rough production cost equalization. They argue that the presiding judge made two errors. First, they argue that the conclusion that the SSRP is inadequate appears to be based on the fact that Entergy's data shows both ELI and EAI outside of the rough production cost equalization bandwidth established by the presiding judge. Second, they argue that the presiding judge erroneously priced the Vidalia contract at full price. The Arkansas Commission and the Mississippi Commission argue that if the standard for rough production cost equalization is based on the actual historical differentials in Operating Company production costs, the SSRP will achieve rough production cost equalization on the Entergy system. They argue further that even with the Initial Decision's pricing of Vidalia at full cost, the SSRP will accomplish the upper bandwidth standard of +/-11 percent for all Operating Companies during the years 2004-2010.

38. The Arkansas Commission and the Mississippi Commission further argue that the presiding judge's conclusion that the SSRP will not achieve rough production cost equalization is based not on reasoned decision making but merely a general review of criticisms of the SSRP without specific factual findings. They contend that the Louisiana Commission's criticisms of the SSRP, and their contention that the SSRP will not maintain rough production cost equalization, are not credible. They further argue that the presiding judge erred in relying on the Louisiana Commission witnesses without addressing the evidentiary value of the Louisiana Commission's positions.

39. The Arkansas Commission and the Mississippi Commission note that although the presiding judge questions the certainty of the SSRP in light of pending litigation in Docket No. ER03-583-000, the Initial Decision does not address the likely result if the power purchase agreements (PPAs) at issue therein are not approved. They note that the apparent assumption in the Initial Decision is that Entergy's planning processes will revert to business as usual, i.e., short-term purchases to meet system peak, and that future costs differences will either remain the same or increase. However, they argue that if the SSRP is not fully implemented due to the above-referenced litigation, the PPAs will be replaced with less expensive resources, and the cost differences among the Operating Companies will diminish even further than projected.

c. Briefs Opposing Exceptions

40. The Louisiana Commission and Occidental argue that the presiding judge was correct in finding that there is no assurance that Entergy's SSRP will restore rough production cost equalization. The Louisiana Commission argues that no party provided a basis for overturning the presiding judge on this issue. Occidental argues that, in order to make its case, Entergy looked solely to current data of 2003-2010, instead of relying on historical data. Occidental contends that this severely undercuts Entergy's argument that rough equalization should be determined by averaging cost data over the 25-year period.

41. Also, Occidental notes that if Entergy is correct that the SSRP will alleviate large disparities by bringing production costs roughly in line with what has occurred historically (which Occidental defines as the -1.02 percent to the +4.32 percent range), then the bandwidth remedy will not be triggered.

d. Commission Determination

42. We will deny the exceptions filed by Entergy and affirm the presiding judge's determination that Entergy's SSRP will not restore rough production cost equalization.[37] Entergy's SSRP is the Operating Companies' long-term plan for supplying the resources required to meet the needs of its customers over the 2003-2012 planning period. 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. A significant portion of the resources in the plan will be provided by short-term purchases through a variety of products including combined cycle gas turbine or combustion turbine generators. The resource additions in the SSRP also include long-term capacity resources. Over the ten-year period of the resource plan, over 3,500 MW of additional long-term Life of Unit 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.

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[37] *See* Initial Decision, 106 FERC ¶ 63,012 at P 73-79.

43. Projections for future production cost disparities, assuming the successful implementation of Entergy's SSRP, were made under several scenarios.[38] In Exhibit ALJ-3, for the period of 2003-2005, it was projected that the total disparities, assuming Vidalia priced at MSS-3[39] and high gas prices, would continue to be high: 31 percent in 2003, 27 percent in 2004 and 18 percent in 2005 (or an average of more than 25 percent for the period). However, 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. As the presiding judge pointed out, the projections assume both the timely and effective implementation of Entergy's SSRP, and the assumptions used in the projections are subject to much uncertainty.[40] 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.

44. However, if Entergy's SSRP proves to be an effective remedy for production cost deviations, then the bandwidth we are establishing in this proceeding will not come into play. It is only if the deviations become particularly severe (greater than +/- 11 percent) that the bandwidth remedy becomes applicable. In effect, the bandwidth remedy is an insurance policy in the event that Entergy's SSRP fails to keep the Entergy system in rough production cost equalization.

3. Full Production Cost Equalization as a Remedy

a. Initial Decision

45. The presiding judge found that full production cost equalization is unnecessary and that the implementation of the Louisiana Commission's full production cost equalization proposal would substantially affect the relationship between the Commission and various retail regulatory entities. The presiding judge stated that his finding should not be surprising when a comparison is made between the existing Entergy system Agreement and Louisiana Commission's proposed methodology. He stated that it may be true, for instance, that the allocation process among the Operating Companies would not be affected, since this process would continue to be under Commission jurisdiction. The presiding judge stated that it is also correct that "allocation" would be done on the

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[38] *Id*. at P 25.

[39] We focus on this scenario because of our decision later in this order concerning the Vidalia contract.

[40] Initial Decision, 106 FERC ¶ 63,012 at P 27.

same factors under the present System Agreement and in full production cost equalization, i.e., the same responsibility ratios whether it be 12-CP, 4-CP, or some other allocation factor for fixed costs.[41] However, the presiding judge also found that what matters most is the huge increase in costs that would be put into play outside of the jurisdiction presently available to the retail regulators.

46. The presiding judge also found that the record indicates that the adoption of full production cost equalization would result in retail regulators having less authority over the costs of the Operating Companies within their respective jurisdictions. The presiding judge noted that this is to be expected since production costs comprise about 72 percent of the total costs of the Operating Companies. In short, the presiding judge found that under the Louisiana Commission's proposal the Commission would assume a much greater regulatory role over the Entergy system's production resources.

b. Exceptions

47. The Louisiana Commission argues that the Commission should adopt or phase in full production cost equalization because it is the only way to allocate costs in a non-discriminatory manner on a system that has a single production cost. The Louisiana Commission contends that a full production cost equalization tariff that allocates fixed costs based on demand would recognize the profoundly integrated nature of the system, satisfy Commission precedent allowing only the narrowest practicable differences in cost allocations, and promote better centralized least-cost planning. The Louisiana Commission further contends that, contrary to the presiding judge findings, a wholesale cost equalization tariff would not displace state regulation.

48. The Louisiana Commission argues that full cost equalization is necessary because the system has adopted a monolithic planning approach and only full equalization will fairly allocate the costs and burdens of the system's operation. The Louisiana Commission argues that Entergy centralized its generation planning 1990, and that the Operating Companies are merely shell corporations, maintained for legal reasons rather than to accomplish the delivery of electricity. It argues that the full equalization proposal appropriately allocates the costs of one single set of resources among the Operating Companies, equally in proportion to each company's demand and energy responsibility.

49. The Louisiana Commission maintains that full production cost equalization is necessary to comply with Commission precedent holding that the FPA allows no more than a temporary two to three percent disparity in rates, and ultimately requires the total elimination of discrimination. For example, it argues that the courts and the Commission

[41] *Id*. at P 127.

have held that some small differences in costs, less than three percent, may be tolerated for a time, but the goal is to eliminate cost differences entirely if they are not attributable to differences in cost causation.[42] The Louisiana Commission also argues that a recent decision of the D.C. Circuit held that cost misallocations of $12-24 million annually on the Entergy system facially are unduly discriminatory.[43]

50. The Louisiana Commission further argues that when faced with a rate disparity, precedent requires that the Commission must search for a factual basis for the discrepancy, and if it does not find such a basis, disallow the rate as unduly discriminatory.[44] The Louisiana Commission contends that the Commission has consistently struck down as unduly discriminatory disparities much smaller than 10 or 15 percent. In addition, the Louisiana Commission argues that the Commission often looks at "rate of return" analyses, comparing the "returns" produced by contributions from different classes of customers in a test period. In this case, the Louisiana Commission submitted a rate of return analysis based on actual data for the 2001 test year. The analysis showed that the system produced an average rate of return of 8.81 percent. The ELI rate of return was 24.13 percent, or 15.32 percent *above* average, while EAI's rate of return was minus 10.98 percent, or 19.79 percent *below* average. The Louisiana Commission argues that this rate of return approach accords with cost causation principles because it permits a consolidated presentation after fixed costs are allocated based on demand and variable costs are allocated based on usage.

51. The Louisiana Commission contends that the Commission and the courts have provided additional guidance concerning undue discrimination in numerous "price squeeze" decisions. Price squeeze is a form of price discrimination that occurs when a utility's wholesale rate in relation to cost is higher than its retail rate in relation to cost. Such price discrimination has an anti-competitive effect, making it difficult for the wholesale customer to pay the wholesale rate and resell power at a rate competitive with its supplier's rate. It argues that price squeeze decisions are instructive here because price squeeze claims are allegations that a utility's proposed increased rates are unduly

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[42] *Citing Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20 (D.C. Cir. 1982), *Cities of Riverside and Coulton v. FERC*, 765 F.2d 1434 (9th Cir. 1985), *affirming Southern California Edison Co.,* 25 FERC ¶ 61,324 (1983).

[43] *Louisiana Public Service Comm'n v. FERC*, 184 F.3d 892, 899 (D.C. Cir. 1999).

[44] Louisiana Commission Brief on Exceptions at 43 (citing *Public Service Co. of Indiana v. FERC*, 575 F.2d 1204, 1212 (7th Cir. 1978)).

discriminatory.[45] The Louisiana Commission notes that in price squeeze cases, the Commission in general has found that disparities in rate of return of less than half a percent do not constitute undue discrimination, while disparities of more than 2.5 percent do constitute undue discrimination.

52. The Louisiana Commission argues that full production cost equalization is necessary because it is sound in principle and will promote rational least-cost system planning and harmony among retail regulators. It would allow Entergy to plan for system cost minimization and acquire resources regardless of type or location. It claims that in contrast to that unified approach, and in order to preserve the status quo, Entergy has now begun to engage in individual company planning by seeking to allocate resources to individual jurisdictions, producing harmful cross-effects on other jurisdictions.

53. The Louisiana Commission also argues that the Commission should adopt full equalization to fulfill its statutory duty to eliminate undue discrimination, regardless of some states' interest in maintaining discriminatory cost allocations. It contends that full equalization or a more narrow bandwidth will not materially alter the jurisdiction of the Commission and state regulators. Second, the Louisiana Commission argues that full equalization, or at least a bandwidth of three percent or less, is necessary to achieve lawful rates under the FPA.

c. Briefs Opposing Exceptions

54. AEEC opposes the Louisiana Commission's exceptions that support full production cost equalization. AEEC argues that the testimony presented during the hearing demonstrates that the implementation of full production cost equalization would create higher cost disparities and unreasonably and discriminatorily shift costs to Arkansas and Mississippi ratepayers. AEEC further argues that the Entergy system never contemplated such a drastic remedy, and has always contemplated only roughly equalizing costs on the system.

55. The Arkansas Commission and the Mississippi Commission argue that the presiding judge correctly refused to impose full production cost equalization, and that the Louisiana Commission has not met its burden of showing that there has been any change in circumstances that would render the System Agreement no longer just, reasonable and not unduly discriminatory.

56. The Arkansas Commission and the Mississippi Commission argue that the imposition of full equalization is not supported by Commission precedent. They argue

[45] *Id*. at 43-46 (citing *Southern California Edison Co*., 40 FERC at 62,167).

that the Operating Companies are not similarly situated because they have borne different levels of cost responsibility.[46]

57. Trial Staff contends that Louisiana Commission's arguments ignore the historical and current operation of the System Agreement which assigns cost responsibility for particular generating units to each operating company and allows each operating company to retain associated energy benefits. Trial Staff argues that this fact was critical when the Commission fashioned a rough production cost equalization standard that specifically recognized that the individual companies should retain the benefits of the generating units they constructed and financed. Trial Staff contends that as a result, the establishment of the rough equalization standard recognizes that there has always been some production cost disparity on the Entergy system. Trial Staff adds that the alternative proposal for a +/-1.5 percent bandwidth had never been advocated before by the Louisiana Commission and is too similar to full equalization and should be rejected for the same reasons full equalization is rejected.[47]

58. Trial Staff disagrees with the Louisiana Commission's argument that full production cost equalization would promote harmony for the system and state jurisdictions. Trial Staff disagrees and claims that neither the evidentiary record nor case precedent supports such a proposition. Trail Staff argues that the Louisiana Commission's full production cost equalization proposal raises the same problems that caused the Commission to reject full cost equalization in 1985. First, Trial Staff contends that the proposal is somewhat unfair to the ratepayers who provided cost support for high cost coal-fired generation in the initial years of operation (when gas prices were low) and now must relinquish their depreciated coal generation for gas-fired generation (when gas prices are high). Further, Trial Staff notes that some cost differences among Operating Companies are entirely permissible; the FPA prohibits only undue discrimination.

59. Entergy opposes the Louisiana Commission's exceptions in favor of full production cost equalization. First, Entergy disputes the Louisiana Commission's assertion that full equalization is required because Entergy is a "single system", and the full equalization is required by the System Agreement and the FPA. Entergy contends that these are the same arguments that were rejected by the Commission and the D.C. Circuit in the Grand Gulf proceedings. Entergy notes that each found that full production cost equalization was theoretically permissible, but each refused to impose full equalization on the theory that it was antithetical to the history and purpose of the System

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[46] Arkansas Commission and Mississippi Commission Brief Opposing Exceptions at 9-10.

[47] Staff Brief Opposing Exceptions at 33.

Agreement. Entergy argues that if single system operation necessarily required full equalization, the Commission would have imposed such conditions twenty years ago.

60. Entergy also disputes the Louisiana Commission's assertion that a change of circumstances warrants the adoption of full cost equalization. Entergy states that the Louisiana Commission is wrong to suggest that system planning has changed in any meaningful way since 1985; Entergy contends that the only change that has occurred is a consolidation of certain administrative functions to make the Operating Companies more efficient. Entergy notes that Louisiana Commission's other argument for a change of circumstance – the continuing cost escalations from the Vidalia resource – does not provided a basis for any remedy at all, since, Entergy contends, Vidalia was a Louisiana economic development project, not part of an overall system foray into run-of-the-river hydroelectric power.[48]

61. Entergy also opposes the Louisiana Commission's rate of return and price squeeze arguments, arguing that they are have no relevance to the rough production cost equalization standard applicable to the System Agreement.[49] Entergy argues that the rate of return cases cited by the Louisiana Commission are entirely inapposite because, in each of them, all the components of the cost of service that should be allocated to and borne by each of the customers had already been determined and the only question at issue was how to design rates to recover those cost components.

62. AEEC opposes the Louisiana Commission's exception that the Initial Decision fails to remedy adequately the undue discrimination on the Entergy System. Specifically, AEEC disagrees with the Louisiana Commission's claim that the FPA requires full equalization. Instead, AEEC contends that a rate disparity among a utility's customers or, as is the case here, between the rates of separate utilities that happen to be under common control by a parent, is not unlawful discrimination so long as there is a reason for the disparity.[50] AEEC further argues that if the FPA meant what the Louisiana Commission argues or the Initial Decision imposes, then the Commission would have equalized the rates of both the Southern Company and Western Resources systems.

63. AEEC also argues that numerous factors militate against imposing further equalization of production costs on the Entergy System. For example, AAEC contends that the Entergy System itself presumes that each individual operating company will have

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[48] Entergy Brief Opposing Exceptions at 13.

[49] *Id*. at 17.

[50] AEEC Brief Opposing Exceptions at 2.

or acquire its proportionate share of base generating units to serve its customers. In addition, AEEC contends that each Entergy operating company's retail customers have historically borne the burdens and received the benefits of the generating units that operating company owns. Also, AEEC contends that each of Entergy's Operating Companies constructed various generating units at various times with different fuel types, operating characteristics, and under various economic and regulatory conditions, all of which significantly impact their individual operations and costs.

64. AEEC argues that the Louisiana Commission's claim that adoption of full production cost equalization will promote harmony on the Entergy system is not realistic. Instead, AEEC contends that full equalization would incite further hostility between the states and their regulatory commissions and promote additional expensive litigation.[51]

d. Commission Determination

65. We will deny the exceptions of the Louisiana Commission and affirm the presiding judge on this issue. The presiding judge found full production cost equalization too intrusive and not a necessary remedy. One of the Louisiana Commission's own witnesses demonstrated that during the 2001 test year, over $321 million in costs would be shifted to EAI and EMI from the other Operating Companies if the Louisiana Commission's plan were adopted.[52] As the presiding judge pointed out in his decision, while the Commission is charged with eliminating undue discrimination, it does not have to eliminate all forms of discrimination.[53] In Opinion No. 234[54] the Commission held:

> What our decision purports to do is to eliminate drastic rate disparities at the wholesale rate level which are associated with units used for the mutual benefit of all companies, and to do so in a manner which disturbs the historical operation of the System as little as possible, and which allows the individual companies to retain as fully as possible the benefits of units they have financed and constructed.

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[51] *Id*. at 22.

[52] Initial Decision, 106 FERC ¶ 63,012 at P 127 (citing Ex. LC-3 and Ex. LC-5 (Baron Exhibits dealing with 2001 production cost data)). *See also* Ex. LC-8 at 50.

[53] *Id*. at P 130.

[54] *Middle South Energy, Inc.,* 32 FERC at 61,959.

66. Moreover, the Commission rejected full production cost equalization in Opinion No. 234 as a remedy for the undue discrimination occasioned by the tremendous disparities in nuclear investment costs among the Operating Companies. Instead, the Commission decided to equalize nuclear capacity costs through an allocation of the Grand Gulf nuclear unit to the Operating Companies. The intent of this allocation was to restore the pattern of rough production cost equalization which previously existed among the Operating Companies under the System Agreement.

67. An additional reason the Commission rejected full production cost equalization, and which we find equally applicable to this proceeding, was the impact that full equalization would have on state regulatory authority. As noted by Trial Staff, the Commission adopted Judge Head's ruling concerning the importance of state regulatory bodies in recognizing the existence of its jurisdiction "must be tempered and weighed against the policy consideration that generation facility should be left to the states …"[55] As a result, the Commission noted that "the interests of the states involved in this case weighed heavily in favor of our decision not to adopt full production cost equalization."[56]

68. The court on review found that the Commission had properly considered state regulatory interests in not ordering full equalization. The court affirmed the Commission's decision as rational, noting that full production cost equalization "would represent a dramatic disruption . . . of the states' settled interests and expectations."[57] In addition, the court quoted the observation of Judge Head, which was adopted by the Commission, that "the practical effect of ordering production cost equalization would be to bind the local state commissions in many of their rate base determinations."[58] Finally, the court quoted approvingly Judge Head's conclusion that "the reasons favoring equalization 'are not so compelling that they justify the extensive intrusion into an area normally subject to regulation by the State commissions.'"[59]

69. In its brief on exceptions, the Louisiana Commission argues that full production cost equalization would "promote least-cost system planning and harmony among retail

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[55] Staff Brief on Exceptions at 38 (citing *Middle South Energy*, 32 FERC at 61,952).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

regulators." This argument rings hollow as Entergy already engages in single-system planning. Indeed, the system has been operated and planned on a single system basis for many years and the Commission previously found that achieving economies of scale through coordinated planning and operation is one of the objectives of the System Agreement.[60] Further, we agree with Entergy that full production cost equalization will undermine system planning by producing a mismatch between regulatory responsibility over certificates of need, which are issued by a single state, and the resulting costs of a new certificated resource that would be spread across the entire system under full production cost equalization. As Entergy points out in its brief opposing exceptions, under full production cost equalization, any time a resource is added there would be five retail base rate cases filed to recover the costs, five prudence reviews and five sets of appeals.[61] The significant shifting of costs and responsibilities that would be occasioned by a shift to full production cost equalization would hardly lead to "harmony among retail regulators" as claimed by the Louisiana Commission.

70. We reject the Louisiana Commission's argument that full production cost equalization is required by the system Agreement and the FPA if a utility operates on a single system basis. The history of Entergy and the System Agreement indicate otherwise. As explained in Opinion Nos. 234 and 234-A and the subsequent court opinion, the Commission and the D.C. Circuit both refused to impose full production cost equalization on the Entergy system. They both determined that the imposition of full production cost equalization would be antithetical to the history and purpose of the System Agreement and because it "would represent a dramatic disruption of the system's historical operations and of the states' settled interests and expectations."[62] If, as the Louisiana Commission asserts, single system operations are required by the System Agreement and the FPA, full production cost equalization would have been imposed years ago. Indeed, full production cost equalization has never been imposed and the Louisiana Commission has provided no support for its assertion that it must be imposed.

71. The Louisiana Commission argues that full production cost equalization should be imposed because there has been a change in circumstances. Its contention that in 1985 Entergy did not conduct generation planning as a "monolithic" entity and the evidence in this case shows that Entergy now does operate as a 'monolithic' entity is unavailing. In the Opinion No. 234 proceeding, both the Commission and the D.C. Circuit not only rejected full production cost equalization, but found contrary to the Louisiana

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[60] Opinion No. 234 at 61,645-46.

[61] Entergy's Brief Opposing Exceptions at 16.

[62] *Mississippi Indus. v. FERC,* 808 F.2d 1525, 1565 (D.C. Cir. 1987).

Commission's assertion, that Entergy comprised "a highly coordinated integrated electric system" in which "planning, construction and operations…are conducted primarily for the system as a whole." Moreover, the Louisiana Commission has provided no evidence to support its argument that there are changed circumstances on the Entergy system that would warrant adoption of full production cost equalization. As Entergy points out, since 1985, "[t]he only change that has occurred is a consolidation of certain administrative functions…intended to make the Operating Companies more efficient. This does not make Entergy a "monolith;" it simply reduces costs."[63]

72. We also reject the Louisiana Commission's argument that the FPA allows no more than a temporary two to three percent disparity in rates, and ultimately requires the total elimination of discrimination. The Louisiana Commission cites to a number of rate of return cases to support its assertion that the Commission has held that the rate of return analysis is the best method to determine whether price discrimination exists. It maintains that the Commission's goal in rate design is to produce the same approximate earned rate of return from each wholesale customer. The Louisiana Commission also cites to a number of "price squeeze" cases to support its assertion that disparities of more than 2.5 percent constitute undue discrimination.[64] It further asserts that the Commission and the courts have held that disparities of $1 and $2 million give rise to undue discrimination and that $10 million is a difference of "severe magnitude." The cases cited by the Louisiana Commission and the conclusions it draws from those cases are inapposite to the System Agreement and to the analysis of whether full production cost equalization or rough production cost equalization should be applied.

73. Whether to apply full production cost equalization or rough production cost equalization is a question that must be answered based on the facts unique to the Entergy system. As the presiding judge in this proceeding and the Commission and the D.C. Circuit in prior Entergy proceedings have all recognized, full production cost equalization is too dramatic a departure from the system's historical operations, individual company autonomy and allocation methodologies. The simple "rule" that the Louisiana Commission has divined from its reading of a number of Commission orders concerning rate of return and price squeeze, even if true, is irrelevant to the analysis that the Commission must perform in determining how to treat production costs on the Entergy system. Neither the Commission nor the courts have ever applied such a "rule" to the Entergy system, and the Louisiana Commission has provided no convincing justification to do so now. Indeed, the Louisiana Commission's "rule" completely ignores the history

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[63] Entergy Brief Opposing Exceptions at 11.

[64] Louisiana Commission Brief on Exceptions at 45.

of the Entergy system and cannot be considered a rational basis upon which to support a move to full production cost equalization for the Entergy system.

4. Service Schedule MSS-1 as a Remedy

a. Initial Decision

74. The Louisiana Commission argued for a change in Service Schedule MSS-1 from the current load responsibility factor of 12 CP (Coincident Peak) to 4 CP if full production cost equalization is not adopted.[65] MSS-1 is designed to allocate costs for maintaining the reserve responsibility capacity among the Operating Companies. This is based on the share of an Operating Company's demand to and 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 only on the average of the monthly CPs for the four summer months of June-September (4 CP).

75. The Louisiana Commission's witness Baron stated that the Entergy system is a summer peaking utility. He stated that in recent years, the Entergy system has been short of capacity and has been required to purchase 2,000 to 3,000 megawatts annually to meet its summer peak.[66]

76. Entergy responded at the hearing that nothing has changed to demonstrate that the use of a 12 CP allocator approved in prior System Agreement cases is no longer just and reasonable.[67] The Louisiana Commission now is advocating the use of 4 CP to allocate MSS-1 costs, which results in averaging the four summer monthly peak loads.

77. The presiding judge stated that this issue is about cost-causation principles. He explained that not only do the annual peak loads occur during the summer, but Entergy has been required to purchase 2,000 to 3,000 megawatts annually to meet its summer peak. The judge continued that in addition, the reserve margin on the Entergy system is dramatically smaller during the summer of 2002 than during the other months of the year.[68]

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[65] Initial Decision, 106 FERC ¶ 63,012 at 155.

[66] *Id*. at 156 (citing Ex. LC-1 at 90-92).

[67] *Id*. at 158 (citing Tr. 5999-6000 (Sammon)).

[68] *Id*. at P 160 (citing Ex. LC-27 at 126 (Baron)).

78. The judge found that the evidence in support of using 4 CP was convincing. He stated that Entergy now incurs fixed production costs on a 4 CP basis, and the meaningful cost-causation measure of load responsibility for MSS-1 is the capacity contribution of the Operating Companies to meet that summer peak load. He noted that this is measured by comparing their monthly CP to the system peak only for June through September. The presiding judge found that the Louisiana Commission has established that use of the 12 CP for MSS-1 is unjust, unreasonable, and unduly preferential and discriminatory. Therefore, based on cost incurrence, Entergy shall allocate fixed production costs in Schedule MSS-1 using a 4 CP responsibility ratio.

b. Exceptions

79. Entergy argues that the Initial Decision erred in adopting the Louisiana Commission's proposal to change the definition of load responsibility ratios used to determine whether an Operating Company is long or short for the purpose of billings under Service Schedule MSS-1 (Reserve Equalization). Entergy contends that the Initial Decision based its adoption of the Louisiana Commission's 4 CP proposal on the understanding that the Entergy system now incurs fixed production costs on a 4 CP basis and on the assertion of cost-causation principles.[69] Entergy argues that the Initial Decision's finding misses the point 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. A 12 CP allocator is a better measurement of this load-following generation than a 4 CP allocator. Entergy contends that in adopting the Louisiana Commission's proposal, the Initial Decision referred to, but failed to explain or distinguish, ESI's argument on brief that the Louisiana Commission failed to meet its burden of proof as is required by the proponent of a change in rates under section 206 of the FPA.

80. New Orleans contends that any changes in the operation of the System Agreement, such as the Louisiana Commission's proposed change from the 12 CP method to the 4 CP method of allocating fixed production costs, would affect the relative production costs of each of the Operating Companies and may reduce or eliminate the progress achieved by the SSRP in reducing production cost disparities on the system. New Orleans further contends that any change to the System Agreement should be considered only after the proposed change and its effect on the Operating Companies' relative production costs have been adequately modeled and documented in the record. New Orleans argues that the impact of the proposed change from the 12 CP to the 4 CP method on the production costs of the Operating Companies has not been demonstrated.

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[69] *Id*. at P 159-160.

81. New Orleans also argues that the Initial Decision erred in adopting the Louisiana Commission's position on fixed production cost allocation. New Orleans states that the Louisiana Commission did not satisfy the prerequisites for considering a change from the existing 12 CP method. New Orleans notes that in a previous complaint brought by the Louisiana Commission in 1996, also advocating a 4 CP method, the Commission dismissed the complaint, saying that the Louisiana Commission had failed to address any of the factors the Commission typically considers in selecting an allocation methodology.[70]

82. New Orleans contends that the Commission's regulations, 18 C.F.R. 35.13(h)(28), requires a discussion of production power supply reliability, the effect of same on facility planning and purchased power planning, five years of monthly data, itemized net peak load, itemized available dependable capacity, available reserves in megawatts, and available reserves as a percent of peak load. New Orleans argues that Louisiana Commission provided at best one of the many required elements and for only one of the five years.

83. The Arkansas Commission and the Mississippi Commission argue that the Initial Decision erred in recommending that a 4 CP allocation method be adopted for Service Schedule MSS-1. The Arkansas Commission and the Mississippi Commission contend that the Initial Decision errs in its failure to recognize that there are no changed circumstances to warrant a finding that the 12 CP method is no longer just and reasonable. Further, the Arkansas Commission and the Mississippi Commission contend that no evidence has been introduced to indicate that the differences in reserve margins between summer months and non-summer months are more pronounced now than in the past twenty years, when the 12 CP method was used. The Arkansas Commission and the Mississippi Commission also argue that two advantages of the 12 CP method relative to the 4 CP method are that the 12 CP method provides greater rate stability and is less dependent upon aberrations in hourly usage.

c. <u>Briefs Opposing Exceptions</u>

84. The Louisiana Commission argues that the Initial Decision is fully supported by record evidence demonstrating that the reserve margin on the Entergy system is dramatically smaller in the summer, and that use of the 4 CP method is consistent with principles of cost-causation. The Louisiana Commission explains that in recent years, the Entergy system has been short of capacity and has been required to purchase 2,000 to

[70] *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 76 FERC ¶ 61,168 at 61,955 (1996) (footnotes omitted), *reh'g denied*, 80 FERC ¶ 61,282 (1997), *rev'd on other grounds*, 184 F.3d 892 (1999).

3,000 MWs annually to meet its summer peak. It continues that the summer peaks cause the costs associated with the annual summer purchases to be incurred, and principles of cost causation require that those costs be allocated based on those 4 CP summer peaks as well. The Louisiana Commission also argues that the substantial purchases that Entergy has made in recent years to meet the summer peak constitutes a changed circumstance that would allow the switch from 12 CP to 4 CP.

85. Occidental also opposes the exceptions, arguing that what is relevant to determining the appropriate method to allocate these reserves costs among Operating Companies, consistent with Commission precedent, is whether the system experiences a seasonal peak. Occidental argues that the record evidence shows that the Entergy system experiences a summer season peak, and that Entergy's planning to accommodate this peak has become more pronounced in recent years. Occidental also disputes New Orleans' contention that the presiding judge failed to consider the factors that the Commission considers when selecting an allocation methodology, noting that the judge considered whether Entergy had sufficient available capacity to meet its summer peak and that the Entergy had to purchase 2,000 to 3,000 MW to meet its capacity requirements.[71]

d. Commission Determination

86. We reverse the presiding judge's findings on this matter. As an alternative to full production cost equalization, the Louisiana Commission advocates modifying the allocation methodology for Service Schedule MSS-1. Service Schedule MSS-1 defines the method for equalizing among the Operating Companies the capability and ownership costs associated with the reserve generating capability on the system. The issue is whether to allocate costs for maintaining the reserve responsibility capacity among the Operating Companies based on a 12 CP (Coincident Peak) factor or a 4 CP factor. Currently, an Operating Company's load responsibility is based on the relationship of that company's coincident peak demand to the system's peak demand for the most recent twelve months (i.e., a rolling 12 CP average). The Louisiana Commission advocates using an average of the monthly CPs for the four summer months of June-September (4 CP).

87. The presiding judge found the Louisiana Commission's evidence convincing in support of a 4 CP factor and that the meaningful cost-causation measure of load responsibility for MSS-1 is the capacity contribution of the Operating Companies to meet the summer peak load.

[71] Occidental Brief Opposing Exceptions at 49-50.

88. Previously, the Commission dismissed a complaint brought by the Louisiana Commission in 1996 also advocating a 4 CP method:

> In any event that the Entergy system may be a summer-peaking system is, by itself, insufficient to justify instituting an investigation to change the cost allocation methodology in the System Agreement. The Louisiana Commission has addressed none of the factors that this Commission typically considers in selecting an allocation methodology (available capacity, purchases from and sales to other systems, scheduled maintenance, available reserves), any of which can result in selection of an allocator different than the seasonal peak.[72]

89. Similar to the case cited above, in this case the Louisiana Commission has failed to satisfy the Commission's requirements under 18 C.F.R § 35.13 (h)(28). This section requires comprehensive information regarding monthly availability of generating capacity reserves. As Trial Staff pointed out in testimony,[73] a party advocating a particular CP allocator would have to present a monthly reserve table. This reserve table would have to show for each month for five years, the installed system capacity, scheduled maintenance, monthly peak load, firm and non-firm purchases, and firm and non-firm off-system sales. The Louisiana Commission provided limited evidence of a one-year reserve table to support its proposal. According to Entergy's brief on exceptions, the Louisiana Commission's data showed monthly reserve margins based only on aggregated data, it did not itemize the capacity, and was limited to one year's worth of data.[74] This reserve table is inadequate evidence as it falls far short of the minimum standards required by Commission regulations.

90. Further, Service Schedule MSS-1 historically has allocated costs using the 12 CP method. The Entergy system has been a summer peaking system throughout its history. Currently, the pricing under MSS-1 is based on the costs associated with all gas and oil-

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[72] *Louisiana Public Service Commission v. Entergy Services, Inc.,* 76 FERC ¶ 61,168 at 61,955 (1996) (footnotes omitted), *reh'g denied*, 80 FERC ¶ 61,282 (1997), *rev'd on other grounds*, 184 F.3d 892 (1999).

[73] Staff direct and answering testimony at 45.

[74] Entergy Brief on Exceptions at 47.

fired generating units of a long[75] company. As Entergy notes in its Brief on Exceptions, 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.[76] Gas and oil-fired generating units can serve one of three functions: reserve (or peaking), load following, or base load. The costs of gas and oil-fired generating units that serve a reserve function and the costs of gas and oil-fired generating units that serve a load following function are *both* included in the calculation of MSS-1. 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 measurement of this load-following generation than a 4 CP.

91. The Louisiana Commission has failed to demonstrate that the use of a 12 CP allocator is no longer just and reasonable. We find that no evidence supports the need to modify Service Schedule MSS-1 under the current System Agreement at this time.

92. We note that issues pertaining to Service Schedule MSS-1 in Docket No. ER05-696 have recently been set for hearing and settlement judge procedures.[77] The allocator factor for MSS-1 has not been raised in Docket No. ER05-696-000. However, Docket No. ER05-696-000 will investigate issues related to the specific function (reserve or load-following) of gas and oil-fired units and how these units' costs will be reflected in the MSS-1 billing. Therefore, the issue of the appropriate allocator factor, whether a 12 CP, 4 CP or other methodology can be explored in that forum.

5. The Numerical Bandwidth Remedy

a. Initial Decision

93. The presiding judge held that a numerical bandwidth remedy is necessary to bring the Entergy System into rough production cost equalization. The judge stated that because year-to-year variations are to be expected when equalizing production costs, he found it appropriate to impose a limit measured over a rolling multi-year average. The presiding judge also found it appropriate to impose a higher annual limit to achieve some

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[75] Long companies are Operating Companies that have more capability than capability responsibility. Under MSS-1, long companies receive payments from companies with less capability (short companies) than capability responsibility. The payments are made under a formula based on each long company's prior year's cost of gas and oil-fired generation.

[76] Entergy Brief on Exceptions at 46.

[77] *Entergy Service, Inc.*, 111 FERC ¶ 61,198 (2005).

relief for the first year, to limit large swings in future individual years, and to start the muti-year rolling average toward smoother, achievable results. The judge stated that he was mindful of the large amount of dollars represented by percentage differences, which militate both ways in considering a reasonable balance to implement the Commission's unquantified standard. The presiding judge stated that he found the Trial Staff and the Louisiana Commission recommendation of a bandwidth of +/-5 percent from system average to be reasonable, but disagreed with the Louisiana Commission that it should be applied each year. He stated that it is sufficiently less intrusive than full equalization, but is not so large as to permit unduer discrimination. The judge found that it would be sufficient and not undue discrimination, taking into account annual variations shown in the past record prior to 2000, to apply the +/-5 percent limit to a rolling three-year average.[78]

94. The presiding judge also provided the remedy of an annual limit +/- 7.5 percent deviation from system average.[79] He stated that the annual limit and the three-year rolling average limit each will apply in tandem in the future. The judge found that the 7.5 percent limit allows for greater annual variation than five percent, but not so much more as to cause large annual swings in the amount of money needed to achieve the overall five percent criterion on a rolling three-year average basis. The presiding judge stated that he considered the 7.5 percent annual limit as one of the means to assist in the main criterion of the five percent rolling three year limit.

95. The judge continued that he felt that the historical record of deviations gave him some discretion in when to implement these remedies. In order to minimize the disruption to Entergy, the state commissions and ratepayers caused by the timing of the implementation of this remedy, the presiding judge ordered that the +/-7.5 percent annual remedy be effective beginning with all of the previous calendar year of 2003. He also directed that the first three-year period for the rolling average of +/-5 percent be 2004-2006. He stated that thereafter, there will be a new rolling three-year period each year. He explained that therefore the first year to which the annual +/-7.5 percent bandwidth would be applied, 2003, would not be counted in the first three-year rolling average period.[80]

b. <u>Exceptions</u>

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[78] Initial Decision, 106 FERC ¶ 63,012 at P 42.

[79] *Id*. at P 43.

[80] *Id*.

96. As discussed above, the Louisiana Commission advocates full cost production equalization over the presiding judge's bandwidth remedy. In addition, the Louisiana Commission argues that the Initial Decision allows a disparity much greater than any the Commission and the courts have ever permitted. Whereas the Commission consistently has struck down disparities of 2.5 percent or more, the presiding judge's standard allows for a 10 percent disparity, which is allowed to recur year after year in perpetuity.[81] The Louisiana Commission further argues that the standard would also allow many times the dollar differentials that the Commission has struck down as unduly discriminatory. They contend that the difference in absolute dollars between ELI at plus five percent and EAI at minus five percent would be in the range of $130 million. The Louisiana Commission argues that such a 10 percent disparity would make a $5.3 million annual difference to a large industrial customer in ELI's service area, and almost certainly would affect that customer's decision on where to locate.[82]

97. The Louisiana Commission further argues that in adopting the +/-5 percent standard for the Entergy system, the judge did not provide any explanation for departing from standards applied by the Commission in past cases. The Louisiana Commission argues that this failure to address precedent is impermissible because an agency must provide a reasoned explanation for failure to adhere to its own precedents.

98. The Louisiana Commission also argues that the reasoning provided by the presiding judge is inadequate. The Louisiana Commission notes that the presiding judge did not explain why past annual variations justify 10 percent disparities now, and why he rejected the other parties' attempt to preserve the status quo by averaging in past data to diminish current disparities.

99. The Louisiana Commission also argues that the judge's reason for permitting 10 percent deviations – that variation from year-to-year is always part of system planning and operation – is in fact a result of not adopting full equalization, not a reason for adopting it.[83] The Louisiana Commission claims that the System Agreement exists to eliminate periodic variations, and that holding that a full remedy is not justified because there would be deviations without that remedy simply begs the question.

100. Numerous other parties took exception with the judge's bandwidth from a different perspective from the Louisiana Commission, arguing that the presiding judge's bandwidth is too narrow rather than too broad. For example, Entergy, the Arkansas

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[81] Louisiana Commission Brief on Exceptions at 51.

[82] *Id.*

[83] *Id.* at 52.

Commission and the Mississippi Commission argue that the remedy proposed in the Initial Decision would be very similar to full production cost equalization. Entergy contends that like full production cost equalization, the proposed remedy will undermine the state regulatory process and incite state-state and federal-state conflicts to an extent similar to full production cost equalization. Entergy explains that because of the number and size of the Operating Companies, the combination of a +/- 7.5 percent annual outer boundary and a +/- 5 percent triennial outer boundary will push production cost disparities to nearly zero in many cases. Entergy contends that as an illustration of this point, imposing the bounds set forth in the Initial Decision produces disparities from the system average on the order of one percent or less when applied to the period 1986-2003.

101. Parties also argue that the Initial Decision's bandwidth remedy will impede the implementation of resource planning on the Entergy system. Entergy explains that higher cost jurisdictions will have little incentive to expose their ratepayers to fixed costs over the long term because those jurisdictions can rely instead on annual transfer payments from lower cost jurisdictions under the bandwidths proposed in the Initial Decision. Entergy further argues that at the same time, states also will have the incentive to support questionable resource acquisitions that have localized benefits (e.g., jobs and economic development) because they can use the Initial Decision's remedy to export the costs of those projects to other jurisdictions. Entergy argues that this is not a rational regulatory outcome, and will not produce an environment in which effective resource planning can be performed.

102. The Arkansas Commission and the Mississippi Commission add that higher cost jurisdictions would have little, if any, incentive to engage in cost-reducing measures which would lower the system average and reduce their revenues from other jurisdictions. They contend that this result would be irrational and would be economically inefficient and, over the long run, injurious to ratepayers. The Arkansas Commission and the Mississippi Commission explain that the bandwidth will create perverse incentives that will raise system costs overall, such as reducing the incentive and ability of jurisdictions with lower costs to reduce costs to their jurisdictional ratepayers because the majority of any achieved savings will inure to the benefit of other jurisdiction's ratepayers. They argue that by the same token, the bandwidth remedy will reduce the incentive of higher jurisdictions to take action to reduce their costs because any costs incurred above the bandwidth will simply be passed on to other jurisdictions. They contend that this will result in the impairment of least-cost planning, and argues that state commissions will have every incentive – so long as their costs are, or will be, above the bandwidth – to approve local, politically favored projects such as Vidalia rather than more cost effective projects. They argue that on the other side of the coin, regulators in jurisdictions with costs below the bandwidth will have incentives to favor higher-cost local projects over lower-cost resources.

103. Parties also argue that the remedy in the Initial Decision is inconsistent with the history, structure, and precedent regarding the System Agreement. The Arkansas Commission and the Mississippi Commission argue that the numerical bandwidth remedy recommended by the presiding judge is arbitrary, unworkable and inequitable and will raise Entergy's system costs.[84] They contend that the narrow +/-5 percent bandwidth represents a radical departure from the previous operation of the System Agreement, which has achieved rough production cost equalization through resources planning and allocation, such as the current SSRP. Entergy notes that the Commission has never adopted a strict numerical test for defining rough production cost equalization; rather, it has recognized that production costs may vary over time but that, though the rotational allocation of new resources, production cost disparities should balance out over time. Entergy notes that the Commission stated in Opinion No. 234-A that there has never been a stated intent to equalize all costs under the System Agreement.[85] Rather, the remedies in prior System Agreement cases have been chosen in order to eliminate only drastic rate disparities at the wholesale level. Entergy states that the Initial Decision's effort to slash the current disparities virtually to zero, and to do so overnight, imposes a severe and unprecedented standard that must be rejected.

104. Entergy contends that the Initial Decision's remedy ignores the historical pattern of production cost disparities on the system and would result in massive, sudden transfers of costs between groups of ratepayers. Entergy argues that Louisiana customers enjoyed production costs below the system average for approximately ten years after the Grand Gulf allocation and, during this same period, EAI and EMI had production costs above the system average. Entergy notes that had the Initial Decision's remedy been in effect during the 1986 to 2002 time period, ELI, as a below system average company, would have had to pay between $779 million and $851 million on a net present value basis (depending on how one interprets the Initial Decision's remedy). Entergy also argues that the Initial Decision improperly ignores this history and turns the tables, finding it irrelevant that production cost disparities have always existed and that they have evened out over time.

105. Entergy argues that the bright-line, numerical standards proposed in the Initial Decision are arbitrary and are not the product of reasoned decision-making. Neither the annual +/-7.5 percent standard nor the rolling, three-year +/-5 percent standard was discussed by any witness in this case. Entergy contends that the reasons cited by the Initial Decision for these bright-line tests have little or no record of support. The Arkansas Commission and the Mississippi Commission further contend that the Initial Decision provides no rational basis for the adoption of a bandwidth remedy, that the 5

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[84] Arkansas Commission and Mississippi Commission at 40.

[85] Opinion No. 234-A, 32 FERC ¶ 61,425 at 61,959 (1985).

percent figure is not supported by substantial evidence, and that the 7.5 percent figure is not supported by any evidence at all. Further, the Arkansas Commission and the Mississippi Commission argue that there is no evidence that, in establishing the rough production cost equalization standard, the Commission intended it to be +/-5 percent, or any other specific bandwidth. The Arkansas Commission and the Mississippi Commission also argue that the adoption of a three-year rolling average bandwidth is supported neither by any evidence of record nor by explanation or analysis.

106. The Arkansas Commission and the Mississippi Commission further argue that the bandwidth is unsupported by substantial evidence or reasoned analysis, its application would violate the ratepayer protection purpose of the FPA by raising power costs. This is because application of a +/-5 percent bandwidth would lead to the result of requiring cost shifts for no other reason than the fact that system costs have declined overall. The Arkansas Commission and the Mississippi Commission argue that this result is dictated by simple mathematics; as the system's average costs decline, cents per kwh cost differentials appear larger because they are a larger percentage of a lower cost.

107. The Arkansas Commission and the Mississippi Commission contend that if the Commission decides that a numerical standard is required, a reasonable means for determining a bandwidth for rough production cost equalization is to examine, in detail, the 1986-1999 period, when the system was in rough production cost equalization. They state that a straightforward statistical basis for determining a reasonable bandwidth, based on the percentage deviations from that record, is to calculate a 95 percent probability interval from that sample period. They note that the Commission relied on this type of analysis in *Trunkline Gas Company*, Opinion No. 441, 90 FERC ¶ 61,017 at 61,056-57 (2000). They argue that given that the 1986-1999 period was a time of rough production cost equalization, the 95 percent probability interval provides a reasoned basis for setting the bandwidth for future application. The Arkansas Commission and the Mississippi Commission note that the standard deviation and corresponding 95 percent probability interval bandwidth for 1986-1999 is +/-11 percent; i.e., on average 95 percent of the observed production cost differences fall within a +/-11 percent bandwidth.

108. Entergy further argues that the Initial Decision's numerical standards are so complex that they would be difficult to implement for the Commission, state regulators and Entergy. Entergy notes that at one level the remedy might appear straightforward: in each year subsequent to 2003, money would have to be transferred after the fact such that no company had production costs that deviate from the system average by more than +/-7.5 percent, and in each year subsequent to 2005 money would have to be transferred such that no company had production costs that deviated from the system average over an historical three-year rolling average by more than +/-5 percent. However, Entergy contends that the Initial Decision requires a further test: the transfer of money to one Operating Company cannot make that company better off than an Operating Company that was not otherwise due any money as a result of the application of the applicable

bandwidth.[86] Entergy argues that determining which company will be owed money will be a difficult process, and will become more difficult in 2006 when it will become necessary to make the calculation twice: first for the 7.5 percent rule, then for second 5 percent rolling three-year average rule. In addition to being unnecessarily complex, Entergy claims that the remedy proposed is ambiguous because data necessary to implement the proposed remedy will not be available until April of the following year for which the cost disparities are to be measured. This delay poses the question of whether the money to be paid or received in 2005 should be reflected in the determination of relative production costs for 2005.

109. The Arkansas Commission and the Mississippi Commission also express concerns about how the remedy would be implemented, arguing that it is unclear how the three-year rolling average deviations will be calculated, and how the calculations of the three-year deviations will reflect receipts or payments due on the one-year +/-7.5 percent annual bandwidth.[87] In addition, the Arkansas Commission and the Mississippi Commission argue that the Initial Decision does not explain how payments and receipts for the three-year 5 percent bandwidth will be reflected in production cost calculations.

110. Some parties argued that as an alternative, the Commission should consider a broader bandwidth. For example, Entergy argues that if, notwithstanding their previous arguments, a short-term bright-line standard were deemed necessary, it should, at a minimum, reflect a +/-10 percent deviation from system average production costs and should be implemented over a longer term. Entergy argues that the appropriate bandwidth for measuring rough production cost equalization should be the range of production cost disparities historically experienced on the Entergy system, making a 10 percent deviation more consistent than other alternatives. The Arkansas Commission and the Mississippi Commission argue that a +/-11 percent bandwidth would be less intrusive and make it less likely that increases or reductions would be shifted to other jurisdictions. The Arkansas Commission and the Mississippi Commission also argue that the +/-11 percent bandwidth should be applied annually, with no "rolling average" calculations, as it is unclear how such a bandwidth would or should work.

111. The Arkansas Commission and the Mississippi Commission argue that the presiding judge erred in recommending a lower boundary for his numerical bandwidth remedy.[88] First, The Arkansas Commission and the Mississippi Commission argue that a lower boundary will not constitute an undue preference under the FPA. The Arkansas

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[86] *See* Initial Decision, 106 FERC ¶ 63,012 at P 47-50.

[87] Arkansas Commission and Mississippi Commission Brief on Exceptions at 49-50.

[88] *Id*. at 51.

Commission and the Mississippi Commission argue that the Initial Decision offered no reason why the FPA permits, much less requires, that rates be raised for one set of customers for the sole reason that their rates are too low. The Arkansas Commission and the Mississippi Commission argue that the goal should be to hold the Operating Companies' costs within a reasonable range above the system average, not to penalize any Operating Company for having costs below the system average. Second, the Arkansas Commission and the Mississippi Commission argue that the lower boundary will create disincentives to lowering system production costs, resulting in higher overall system costs and creating an impediment to the development of independent transmission operation in the Entergy region.

112. The Arkansas Commission and the Mississippi Commission also contend that the numerical bandwidth remedy will intrude on state jurisdiction because all costs lying outside the bandwidth would be reallocated pursuant to a Commission tariff.[89] The Arkansas Commission and the Mississippi Commission further contend that the loss of jurisdiction due to the narrow bandwidth remedy would unnecessarily burden state and federal regulators. The Arkansas Commission and the Mississippi Commission contend because each Operating Company's costs will be included in the calculation of the bandwidth, each retail regulator will have to review all five operating companies' books to determine if their costs were reasonable and prudent. If an unreasonable or imprudent cost is identified, a complaint would have to be filed with the Commission.

113. AEEC contends that the Commission stated in *Blue Ridge Power Agency v. Appalachian Power Company*, 58 FERC ¶ 61,193 (1992), that the existence of trapped costs would only prevent the ordering of refunds under the Regulatory Fairness Act, if the ordering of refunds effectively required taking money from another affiliated public utility, where that other utility could not itself be made whole. AEEC argues that this is the exact same situation as the instant case, which results in the reallocation of cost responsibilities among utility subsidiaries of a registered holding company, such as Entergy and its Operating Companies.

114. AEEC argues that the Commission lacks jurisdiction over the Louisiana Commission's complaint.[90] AEEC contends that the presiding judge's decision attempts to regulate power generation by rewriting the System Agreement, and that this attempt exceeds the Commission's jurisdiction under the FPA. In addition, AEEC argues that the

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[89] *Id*. at 62.

[90] AEEC Brief on Exceptions at 7.

Initial Decision invades the states' power to regulate utilities that generate electric energy.

115. AEEC also argues that the dormant aspect of the Commerce Clause of the U.S. Constitution bars the Louisiana Commission's complaint.[91] AEEC contends that the Commission is duty bound to protect ratepayers against pooling agreements that make the ratepayers of some states subsidize the ratepayers of another state, arguing that such a subsidy constitutes unconstitutional economic protectionism.

116. AEEC also argues that the presiding judge's decision turns the System Agreement into an unconscionable contract that is unreasonable and unfair. AEEC contends that the presiding judge's decision 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.

117. With regard to the bandwidth remedy, New Orleans argues that the Commission should clarify whether interest is paid on balances. New Orleans contends that the Initial Decision does not determine whether interest would be paid on the balances determined to be due and to be paid under the bandwidths from the end of each subject period through the reconciliation period. In addition, New Orleans requests that the Commission clarify whether interest would accrue in some fashion during the subject periods (the 12 month period for the annual bandwidth and the 36 month period for the triennial bandwidth). If interest would accrue during the subject periods, New Orleans requests that the Commission specify how that would occur.

118. New Orleans also requests that the Commission clarify the timing and process of any bandwidth reconciliation filings. Specifically, New Orleans requests clarification of when the filings would be made, whether there would be separate bandwidth filings or a single combined filing, and whether the Operating Company production costs for purposes of the triennial bandwidth are adjusted by the annual bandwidth mechanism for any of the three subject years. New Orleans further requests that the Commission clarify how balances determined to be owed under the bandwidths will be collected from and paid to individual Operating Companies. Lastly, New Orleans requests that the Commission clarify timing and process for the initial annual bandwidth filing for 2003.

119. Numerous parties, including Trial Staff, Entergy, AEEC, the Arkansas Commission and the Mississippi Commission, oppose the presiding judge's decision to require refunds, arguing that the decision would allow for retroactive cost recovery. Trial Staff explains that while the Initial Decision does not discuss the issue of refunds, the evidentiary record shows that the production costs of ELI and EAI (and other Operating Companies depending on the assumptions used for Vidalia contract costs discussed

[91] *Id*. at 15.

below) will deviate from the system average by more than 7.5 percent in both 2003 and 2004. Therefore, Trial Staff contends that refunds will be the necessary result of the presiding judge's decision.

120. Parties also note that section 206(c) of the FPA prohibits refunds among electric companies of a registered holding company (such as the Entergy Operating Companies) to the extent one or more of the electric companies making refunds cannot surcharge its customers or otherwise obtain retroactive cost recovery. Parties add that the Commission very recently addressed the issue of reallocation costs among Entergy Operating Companies in another Entergy proceeding, Opinion No. 468, and held unambiguously that refunds among the Operating Companies were prohibited. Trial Staff notes that the Commission determined that it could not 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."[92] Trial Staff argues that the Commission's recent decision refusing to order Entergy to make refunds based on section 206(c) of the FPA is squarely on point and controls the disposition of that same issue in this docket.

121. Parties also argue that apart from the statutory prohibition on refunds, refunds should not be ordered as a matter of policy and equity. Entergy argues that under the remedy adopted in the Initial Decision, purchasers cannot know the consequences of their purchasing decisions until long after those decisions have been made. Trial Staff notes that while natural gas and purchase power costs have increased since 2000, ELI also benefited from much lower gas and purchase power costs in past years. Likewise, EAI and EMI incurred high mixed investment costs (relative to gas units) associated with coal generation in earlier years which have since declined due to the units' depreciation. Trial Staff argues that as a result, the record evidence shows that EAI and EMI experience 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. Consequently, over the period 1986-2002 on an actual unadjusted per books basis the production costs of ELI and EGSI were below system average by -0.20 percent and -0.48 percent, respectively. Trial Staff argues that under the circumstances, should the statutory refund prohibition not apply for some reason, the Commission's discretion to order refunds stemming from production cost disparities in 2003 and 2004 should not be exercised.

122. AEEC adds that the legislative history of section 206(c) of the FPA is revealing of why Congress exempted operating companies of registered electric holding companies from paying refunds in certain situations involving the reallocation of system costs.

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[92] *Louisiana Public Service Commission v. Entergy Corp.,*, Opinion No. 468, 106 FERC ¶ 61,228 (2004).

AEEC argues that Senate Report No. 10-491 (Legislative History) states that refunds in such allocation situations may unfairly burden shareholders because of the inability of a holding company's subsidiaries to recover rate increases for past periods along with the rate decreases upon which refunds are based.

c. Briefs Opposing Exceptions

123. The Louisiana Commission argues that parties made arguments against the standards adopted by the presiding judge by relying on brief-borne calculations that were never introduced at the hearing.[93] The Louisiana Commission notes that Entergy, the Arkansas Commission and the Mississippi Commission claim that the Commission should rely on Entergy's rotation of generating units, rather than the System Agreement to equalize costs. The Louisiana Commission argues that they offer new standards that were never introduced in evidence, relying on interpretations of past data and a statistical calculation based on past differentials.

124. The Louisiana Commission also disputes Entergy's contention that resource rotation provides the historical basis for equalizing costs on the ystem.[94] The Louisiana Commission claims that Entergy has never rotated resources to equalize costs because it used the System Agreement for that purpose. The Louisiana Commission also argues that a bandwidth remedy is not too extreme or difficult to apply, and that this argument provides no basis for tolerating discrimination.

125. The Louisiana Commission, Occidental and Trial Staff oppose the exceptions of Entergy, the Arkansas Commission and the Mississippi Commission that the remedy proposed by the presiding judge is indistinguishable from full production cost equalization. Trial Staff notes that even assuming the SSRP is implemented and is as successful as forecasted, the disparities in costs are expected to plateau and decrease slightly over time. Trial Staff contends that the record evidence shows that each percentage point move by a company closer to system average requires approximately $15 million of costs to be shifted. Trial Staff argues that consequently, under the presiding judge's standard, the Operating Companies could have a difference in costs as high as $150 million per year when averaged over a three year period that would need no correction, and as high as $225 million in any single year. Trial Staff argues that these disparities are significant enough that they cannot reasonably be considered full equalization by any measure.

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[93] Louisiana Commission Brief Opposing Exceptions at 18.

[94] *Id*. at 20.

126. The Louisiana Commission and Trial Staff also dispute Entergy's contention that the presiding judge's remedy would produce a significant cost-shift that would result in a rate shock similar to the kind that would be created by imposing full cost equalization. Parties argue that this argument is misplaced because if such a dramatic cost shift is required under the presiding judge's remedy even when assuming that as much as $225 million difference between Operating Companies is allowed to remain in any one year, then clearly very exorbitant cost disparities exist that must be corrected.

127. Trial Staff also opposes exceptions by Entergy and the Arkansas Commission and the Mississippi Commission that the rough equalization standard adopted by the presiding judge will create disincentives or impede resource planning.[95] Trial Staff argues that these arguments have no real validity because Entergy plans and operates on a system-wide basis and will presumably only propose resource additions that benefit the system as a whole and not favor one jurisdiction's desire for local benefits at the expense of others.

128. Trial Staff opposes exceptions by Entergy that the rough cost equalization standard adopted by the presiding judge is not consistent with the System Agreement. Trial Staff argues that the presiding judge understood that the System Agreement was not meant to equalize all costs and that this, in fact, was a reason to advance a rough cost equalization standard.[96]

129. Trial Staff also opposes the exception of Entergy and the Arkansas Commission and the Mississippi Commission that rough production cost equalization does not properly take into account the history of system production cost disparities.[97] Trial Staff contends that the presiding judge carefully examined the historical cost disparities among the Entergy companies, including the seventeen years following the Grand Gulf reallocation. Trial Staff notes that the presiding judge reasonably focused on the 1991-1999 period, after the initial impact of the Grand Gulf allocation had faded, and noted that with the exception of EMI in 1998, that for the most part the production costs of the Operating Companies stayed within +/-7.5 percent of the system average.

130. Trial Staff and Occidental oppose the exception of Entergy that the bandwidth proposed by the presiding judge is not rational and not supported by the evidence.[98] Trial

[95] Staff Brief Opposing Exceptions at 13.

[96] *Id*. at 15.

[97] *Id*. at 17.

[98] *Id*. at 21.

Staff notes that the judge explained that his selection of +/-7.5 percent bandwidth was based on a review of the historical disparities experienced by the Operating Companies for 1991-1999 that showed very few instances of an Operating Company exceeding this bandwidth. Occidental states that a +/- 5 percent bandwidth was discussed in the Louisiana Commission's original complaint and supported by Trial Staff at the hearing.

131. Trial Staff notes that the +/-5 percent bandwidth is also supported by the record. Trial Staff argues that it flows logically that the more years of production cost data that are used in a rough equalization process, the tighter the disparity bandwidth should be for determining rough cost equalization. Thus, the judge's +/-7.5 percent deviation standard is appropriate to apply to an annual period, while over a three-year term a standard closer to +/-5 percent is more appropriate.[99]

132. Trial Staff opposes the exception of Entergy that the remedy adopted by the judge is unduly vague or overly complex.[100] Trial Staff contends that the remedy is not overly complex for a system that renders monthly bills under Service Schedule MSS-3 and MSS-1, a process that requires analysis and computations pertaining to many different resources. Trial Staff also notes that while the Initial Decision does not explain how to perform the three year rolling average calculation, a straightforward method would be to sum for the three years each Operating Company's production costs and each Operating Company's load factor adjusted generating energy, divide the total costs by the total energy generated, and compare the percentage difference between that figure and a calculation of each company's costs divided by energy for the same three year period. In addition, the Initial Decision does not state in what year the remedies are to be reflected.

133. Trial Staff adds that they understand that the presiding judge designed a cost equalization standard that had not been proposed in all its elements by any party, but contends that the spreadsheets and workpapers provided by Entergy are not of the type that should be provided for the first time in brief. Trial Staff also contends that Entergy was not without notice of the possibility of a +/-5 percent standard on an annual basis since the Louisiana Commission proposed that standard as an alternative remedy.

134. Trial Staff opposes the exception of Entergy and the Arkansas Commission and the Mississippi Commission that a deviation of +/-10 or +/-11 percent from system average production costs measured over a long period of years is reasonable.[101] Trial

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[99] *Id*. at 23.

[100] *Id*. at 24.

[101] *Id*. at 29.

Staff contends that such bandwidths are too excessive, and that the ratepayers of an operating company should not be burdened with such high production costs over a long period of time.

135. LEUG opposes the exceptions filed to the Initial Decision by Entergy, the Arkansas, Mississippi and New Orleans parties, and Trial Staff. LEUG states that while the judge's remedy does not cure the entire subsidy issue, the remedy would provide a reasonable formula basis and percentage bandwidths that will restore rough production cost equalization among the Entergy Operating Companies and insure that it continues to exist over time. LEUG accordingly urges that the judge's bandwidth mechanism be approved by the Commission and implemented beginning with the year 2003 as proposed in the Initial Decision.

d. Commission Determination

136. We agree with the presiding judge that rough production cost equalization has been disrupted on the Entergy system. We also agree with the presiding judge that a bandwidth is an appropriate methodology to keep the system in rough production cost equalization. However, we disagree 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.

137. The presiding judge devised the annual +/- 7.5 percent bandwidth coupled with the three-year average bandwidth of +/- 5 percent. The presiding judge's specific remedy was never proposed by any party in this proceeding, and is not tied to specific evidence in the record. The only explanation the presiding judge gave in the Initial Decision was that "the 7.5 percent limit allows for greater annual variation than 5 percent."[102] The likely success of a triennial +/- 5 percent limitation, coupled with +/- 7.5 percent standard, is not clear from the record. Also, no party recommended a three-year rolling average approach, and the only bandwidths recommended in the proceeding were on an annual basis.

138. As Entergy points out in its Brief on Exceptions, the three-year rolling average limitation is overly complex, vague and unworkable.[103] Indeed, the record does not explore how this three year rolling average would be implemented except that it would commence in the years 2004-2006. Under the three-year rolling average limitation,

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[102] Initial Decision, 106 FERC ¶ 63,012 at P 43.

[103] Entergy Brief on Exceptions at 25-29.

fundamental questions arise that remain unanswered. For example, how does the money get transferred among the Operating Companies and shifted from below system average Operating Companies to above system average Operating Companies at the same time, while using an annual and a triennial bandwidth, and what year does the data get reflected – the year the production costs were incurred or the year the production costs were paid?

139. Further, the presiding judge's proposal would result in substantial cost shifting across a multi-state region. Each percentage point of production costs is approximately $11.8 million.[104] In his Initial Decision, the presiding judge pointed out that the difference in absolute dollars if ELI were at +5 percent and EAI were at -5 percent would be approximately $130 million.[105] Incorporating the presiding judge's remedy would result in a significant and immediate rate shock to below system average companies to the benefit of companies with costs currently above the system average. Accordingly, we will reverse the presiding judge on his annual bandwidth recommendation coupled with his rolling three-year average bandwidth recommendation.

140. We will deny the exceptions of the Louisiana Commission and Trial Staff and adopt a larger annual bandwidth as the remedy to bring the Entergy system back into rough production cost equalization and to ensure that the System Agreement is just and reasonable, and not unduly discriminatory or preferential. The Commission has never adopted a strict numerical test for defining rough production cost equalization. In Opinion No. 234-A the Commission stated that "there has never been a stated intent to equalize all costs" under the System Agreement.[106] Rather, the remedies in prior System Agreement cases have been chosen in order to eliminate only "drastic rate disparities at the wholesale rate level."[107] However, because we have now found that rough production cost equalization has been disrupted and that a bandwidth methodology is an appropriate approach to bring the system back into rough production cost equalization, we need to determine the appropriate bandwidth necessary to achieve that goal. In determining what the specific bandwidth remedy should be, we conclude that it is necessary to understand the historical disparities that have occurred on the Entergy system.

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[104] Tr. 5735-39 (Schnitzer).

[105] Initial Decision, 106 FERC ¶ 63,012 at P 28.

[106] Opinion No. 234-A, 32 FERC ¶ 61,425 at 61,959 (1985).

[107] *Id.*

141. The presiding judge found that rough production cost equalization generally was maintained from 1986-1999."[108] During this time frame total deviations varied, but the highest total deviation was 22 percent. These levels of production cost disparities among Operating Companies have always existed to some degree on Entergy's system and have varied over time, with certain years having wider disparities than others. The pendulum of production cost disparities has swung back and forth from negative to positive among the Operating Companies. These swings have generally evened out over time, with certain Operating Companies enjoying lower production costs in some years and higher costs in other years. For example, Louisiana customers had production costs below the system average for the years 1986-1993, while during this same period EAI and EMI had production costs above the system average. While natural gas costs have increased since 2000 (thus raising the gas dependent production costs of ELI), ELI also benefited from much lower gas costs in past years. Likewise, EAI and EMI incurred high fixed investment costs (relative to gas units) associated with coal generation in earlier years which have since declined due to the units' depreciation. 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.[109]

142. We agree with Entergy and the Arkansas and Mississippi Commission in their briefs on exceptions and with Trial Staff's filed testimony that a larger numerical bandwidth (in the range of 10-11 percent) is appropriate for Entergy's system. Entergy advocated that if a bandwidth is adopted, at a minimum, it should reflect a +/- 10 percent deviation from system average.[110] The Arkansas and Mississippi Commission's proposed that a +/- 11 percent deviation be the standard for rough production cost equalization.[111] Trial Staff advocated a +/- 10 percent bandwidth deviation.[112] We agree with the Arkansas and Mississippi Commission that a straightforward statistical basis for determining a reasonable bandwidth is to calculate a 95 percent probability from 1986-1999.

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[108] Initial Decision, 106 ¶ 63,012 at P 37.

[109] *See* Ex. ETR-25 at 2 (Louiselle) and Ex. AC-20 at 2 (Berry).

[110] Entergy Brief on Exceptions at 34-36

[111] Arkansas and Mississippi Commissions' Brief on Exceptions at 32.

[112] Staff direct and answering testimony at 24.

143. The proper standard for measuring production costs in this case should be based on the facts and history relevant to Entergy's system. Production costs have deviated up to 22 percent during the time period that the system was determined by the presiding judge to be in rough production cost equalization.[113] If the maximum deviations are averaged over the period (1986-2002) since the Grand Gulf allocation, the result is an average total bandwidth of 17.9 percent,[114] 18.3 percent,[115] and 20.5 percent,[116] depending on which scenario the data is based on (load factor, Texaco adjustment, Vidalia pricing, etc.) These values support a bandwidth of 22 percent (+/- 11 percent).

144. Based on this historical data, we conclude that a bandwidth remedy 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. For example, 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. As the Arkansas and Mississippi Commission show, on average, 95 percent of the observed production cost differences fall within out +/-11 percent bandwidth. This remedy is consistent with Commission precedent, which the courts have previously upheld, that it has never been the intent to equalize all production costs among Entergy's Operating Companies under the System Agreement. This remedy also mitigates massive cost shifts among the Operating Companies. We note that this bandwidth remedy only gets applied if the system exceeds historical cost disparities and will assist Entergy in eliminating drastic rate disparities in the future.

145. The presiding judge directed that the +/- 7.5 percent annual remedy be effective beginning with calendar year 2003 and that the first three-year rolling average period for implementing the 5 percent remedy should encompass the 2004-2006 period.[117] However, the Initial Decision does not discuss the issue of refunds. The evidentiary record shows that the production costs of ELI and EAI will deviate from system average

[113] Ex. ETR-26 at 2.

[114] Ex. ETR-25.

[115] Ex. ETR-26.

[116] Ex. ETR-27.

[117] Initial Decision, 106 FERC ¶ 63,012 at P 42-43, 50-51.

by more than 7.5 percent in both 2003 and 2004[118] and thus refunds would be required pursuant to the presiding judge's determination. (The same would hold true for our 11 percent bandwidth recommendation). 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 addressed this same issue (i.e., the reallocation of costs among Entergy Operating Companies) in another Entergy proceeding and held unambiguously that refunds among the Operating Companies were prohibited.[119] There is no evidence in this record indicating that the Entergy Operating Companies making a refund would be able to obtain retroactive cost recovery for those refunds. 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 effective for the calendar year 2006.

B. Whether the Contract Price of Energy from the Vidalia Hydroelectric Power Plant Should be Fully Reflected

1. Initial Decision

146. The presiding judge found that there is sufficient evidence to conclude that Vidalia was planned as a system resource for the benefit of the Entergy system. The Louisiana Commission advocated that the actual costs of Vidalia should be included in the production cost calculations because Vidalia is a system resource. Further, the Louisiana Commission claimed that ELI planned the acquisition of Vidalia as a system resource, with the knowledge and consent of the Entergy Operating Committee.

147. Entergy disagreed with the Louisiana Commission's argument that Vidalia is a system resource. It argued, inter alia, that the absence of system planning and approval, when combined with the unusual structure of the Vidalia contract, demonstrate that Vidalia was never intended to be a system resource.[120] Further, Entergy characterizes Vidalia as a generation project undertaken not with an eye towards fulfilling system

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[118] *See* Ex. ALJ-3, at 9-10. Ex. ALJ-3 was prepared by Entergy at the request of the presiding judge during the trial.

[119] *Louisiana Public Service Commission v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004).

[120] Entergy Initial Brief at 44.

generation needs, but toward satisfying the political and economic policy needs of the State of Louisiana, at the direction of the Louisiana Commission.[121]

148. The presiding judge found Entergy has treated Vidalia since its inception as a resource that would provide benefits for the system as a whole. The judge noted that after Vidalia went into service, it provided energy that was ultimately used to serve the loads on the system, which was noted by the system Operating Committee. The presiding judge also noted that this is the first proceeding in which Entergy has taken the position that Vidalia is not a system resource. The judge commented that what was more significant is the fact that even in internal studies done for the use of the system Operating Committee to determine whether the system is in rough production cost equalization. The presiding judge noted that Vidalia's full contract costs have always been included in the calculation of ELI's production costs, until the present case. Therefore, given that Entergy recognizes Vidalia's contribution to the system through MSS-1 and has previously included it as part of the system for calculating overall production costs for purposes of rough production cost equalization, it follows that the power from Vidalia is used for the system's benefit to serve one load: the system load.[122]

149. The presiding judge found that the resolution of system-status of Vidalia leads to this question: if Vidalia has been established as a system resource, should the costs be accepted at actual contract levels, or should there be an adjustment applied to levelize Vidalia's contract costs over the life of the contract? Consistent with its view of Vidalia as a system resource, the Louisiana Commission believes that the full contract price for Vidalia's output should be counted as part of ELI's production costs.[123] The Louisiana Commission also stated that if Vidalia is to be treated as a system resource, then the Louisiana Commission believes there should be no special treatment accorded to Vidalia that would have the effect of understating ELI's true production costs. The judge noted that an alternative that was explored at the hearing was to levelize the contract for Vidalia so as to eliminate the effect of the escalating costs of the power purchase contract path, thus giving Vidalia a uniform value for its energy contribution to the system over the life of the contract.[124]

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[121] *Id*. at 50.

[122] Initial Decision, 106 FERC ¶ 63,012 at 30 (citing Tr. 4217-18 (Gallaher)).

[123] *Id*. at 30 (citing Louisiana Commission Reply Brief at 59).

[124] *Id*. at 31 (citing Entergy Initial Brief at 45).

150. After considering the competing proposals, the judge found that the Vidalia contract should be accepted at full contract value, rather than at a levelized value. The presiding judge found that the contract was agreed to by ELI for the system, and the energy output provides a benefit for the system. He noted that the phased-in contract rate path was chosen by ELI and the Louisiana Commission to protect the ELI ratepayers from rate shock, as the Vidalia plant was going on line close to when the ELI ratepayers were paying a significant portion of the financing costs of the Waterford nuclear plant. The judge found that it was in the interests of the Entergy system that wanted to acquire this purchased power resource to find a means by which the state regulator with jurisdiction, here the Louisiana Commission, would approve a contract. The judge also found that Entergy has long accepted the full Vidalia contract costs as part of the total production costs of the system and should not be permitted to reject them now because of the upcoming increases scheduled in Vidalia's rate path.

2. Exceptions

151. Entergy contends that unlike other resources on the system, Vidalia was conceived by third parties to support local economic objectives, not by Entergy to "diversify" the system into hydroelectric generation or to meet any other system-wide planning objective. Rather, the Vidalia project was supported as a public works project that would bring jobs, tourism and other economic development to the area.

152. Entergy also contends that the State of Louisiana bears responsibility for the unusual rate path it designed to recover the cost of Vidalia from ELI's ratepayers. It asserts that the Louisiana Commission approved the very steep escalation in contract prices that it now seeks to avoid – and shift to other jurisdictions. It points out that under the rate path approved by the Louisiana Commission, prices were lower in the initial years, but later climbed considerably higher than the peak price in the original proposal. Entergy further asserts that the Louisiana Commission guaranteed that ELI would "recover the total cost of energy over the entire duration of the contract from its customers by including the total cost incurred as a fuel cost in [its] monthly fuel adjustment charges."[125] Thus, according to Entergy, when ELI agreed to the contract, it most certainly was not accepting responsibility for the obligations on behalf of its sister Operating Companies. Indeed, Entergy notes, Louisiana Commission's own witness conceded that he was not aware of any evidence that "other Operating Companies believed they would be responsible to bear the Vidalia costs."[126]

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[125] Entergy Brief on Exceptions at 38 (citing Ex. LC-83 at 2).

[126] *Id*. at 38 (citing Tr. 1497 (Kollen)).

153. Entergy also argues that a complaint under section 206 must establish changed circumstances to show that existing rates have become unjust and unreasonable, and that the Louisiana Commission has failed to make such a showing. Entergy argues that it would be grossly unfair for the Commission to permit the Louisiana Commission to avoid the consequences of its own actions, and indeed to use those actions as the changed circumstances supporting a dramatic reallocation of costs on the Entergy system.

154. Entergy disputes the presiding judge's suggestion that Vidalia was planned in a manner similar to other resources.[127] Entergy argues that in Opinion Nos. 234 and 292, the Commission found that the Operating Committee had engaged in a centralized and deliberate strategy to diversify fuel sources by relying on a massive increase in nuclear capacity. Entergy asserts that the Vidalia contract shares none of these characteristics in terms of planning, scale, or the nature of the energy it provides, and argues that the Vidalia contract was not part of a system decision to rely on hydroelectric power.

155. Entergy also argues that the Initial Decision was wrong to find that there is sufficient evidence to conclude that Vidalia was planned as a resource for the benefit of the Entergy system.[128] Entergy argues that there is nothing in the record to support a claim that the Operating Committee or any Operating Company other than ELI itself planned, approved, desired, or relied upon the Vidalia contract.

156. Entergy maintains that it was unfair of the presiding judge to claim that this proceeding marks the first time Entergy has taken the position that Vidalia is not a system resource, because this proceeding, according to Entergy, is the only proceeding since the Grand Gulf case in which a party has requested that production costs be allocated among the operating companies.

157. Trial Staff argues that the presiding judge erred in ruling that the full contract price of energy from Vidalia should be used in determining whether the production costs of the Operating Companies are roughly equal. Trial Staff contends that the evidence shows that the Vidalia project is an ELI resource and not a system resource. First, 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. Trial Staff contends that neither Entergy nor ELI ever planned, built, owned or operated the Vidalia project. Further, Trial Staff notes that no evidence was presented showing that any studies were ever provided to the Operating Committee evaluating either the need for or the economics of the Vidalia purchase.

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[127] *See* Initial Decision, 106 FERC ¶ 63,012 at P 67.

[128] *Id*. at P 65.

158. Trial Staff further argues that contract rates for the Vidalia project were not developed on traditional cost of service principles but were based solely on ELI's avoided costs, not the system's avoided costs. In addition, Trial Staff notes that as early as 1984 ELI made clear to the Louisiana Commission that it would oppose the Vidalia contract if all the costs of the Vidalia power were not flowed through to ELI ratepayers under a fuel adjustment clause.

159. Lastly, Trial Staff contends that the rate path approved by the Louisiana Commission for the Vidalia contract was structured differently from the contract initially proposed by ELI. Trial Staff notes that the contract has much lower costs ($65/MWh) in the first years of operation than originally proposed and higher escalating costs in later years. Currently, the contract price is $145/MWh (2004) and increases each year until it reaches $205/MWh from 2010 to 2013, then decreases in increments before reaching a plateau of $150/MWh from 2016 to 2031. Trial Staff argues that since ELI ratepayers received the benefit of relatively low prices the first eight years of operation, it is inappropriate now for the Louisiana Commission to attempt to shift the much higher and escalating Vidalia costs on to the other Operating Company ratepayers located in other jurisdictions. Trial Staff contends that the presiding judge did not adequately address this argument in his decision.

160. New Orleans argues that the presiding judge's finding that Vidalia was planned as a system resource should be reversed. New Orleans states that Vidalia was not intended to be a system resource, and the contract rates were not developed on a traditional cost of service basis like other system resources. New Orleans also argues that the Louisiana Commission's order which required the exclusive use of the tax benefits associated with Vidalia by ELI and its customers supports a determination that Vidalia not be treated as a system resource. The tax benefits associated with Vidalia are described in Louisiana Commission Order No. U-20925, issued October 16, 2002.[129]

161. New Orleans notes that as described in that order, the Louisiana Commission opened an investigation into the Vidalia contract in 1999 which was settled in 2002. The settlement states that ELI would share with ELI customers a portion of the tax deduction that ELI believed it could take until 2031. The Louisiana Commission order states that benefits to ELI customers would last a minimum of 8 years and possibly as long as 30 years. New Orleans argues that the exclusive use of the tax benefits associated with Vidalia by ELI and its customers supports a determination based on this record that Vidalia not be treated as a system resource.

[129] Ex. CNO-1.

162. New Orleans further argues that if the Initial Decision is upheld on this issue, the Commission should affirm that the tax benefits associated with the Vidalia contract shall be credited against the Vidalia purchase power cost.

163. The Arkansas Commission and the Mississippi Commission argue that the presiding judge erred in finding that the costs of the Vidalia purchase power contract should be spread among all the Operating Companies. The Arkansas Commission and the Mississippi Commission also contend that the judge's finding that the Vidalia plant was planned for the benefit of the system as a whole is not supported by substantial evidence. To the contrary, the Arkansas Commission and the Mississippi Commission argue that Vidalia was not planned by the system at all.

164. In addition, the Arkansas Commission and the Mississippi Commission argue that the Initial Decision erred in relying on the fact that the Operating Committee gave MSS-1 credit to ELI for the Vidalia contract. They contend that this cannot constitute evidence that the Vidalia Contract was planned for the benefit of the system as a whole, because the decision was made five years after the Vidalia Contract was executed.

165. The Arkansas Commission and the Mississippi Commission also argue that the judge erred in basing his finding on the assumption that the Vidalia contract brings benefits to the system. They note that even staff of the Louisiana Commission, which had previously found the contract to be prudent, concluded that the contract prices were excessive.[130]

166. The Arkansas Commission and the Louisiana Commission also contend that the judge's refusal to admit evidence that may have demonstrated that the reason ELI signed the contract was to accommodate certain local interests that would inure to Louisiana only. They argue that the judge's refusal to admit portions of testimony of Mississippi Commission witness Hugh Larkin is in error because the witness' testimony would have helped to determine whether the Vidalia contract was entered into to obtain local benefits and whether the costs of Vidalia should be spread to other jurisdictions.

167. The Arkansas Commission and the Mississippi Commission argue if the costs of the Vidalia contract are shared with other jurisdictions, then the back-loaded rate path required by the Louisiana Commission should be levelized. They argue that it is inequitable for non-ELI ratepayers to bear the increasing costs of an exorbitant contract, while the ratepayers of the jurisdiction that approved the contract and directed that the rates be backloaded escape their fair share of the costs. They argue that it is an "outrage" for the Louisiana Commission to be permitted to export what the Arkansas Commission and the Mississippi Commission characterize as a "spendthrift decision" to ratepayers in

[130] Tr. 1863-64.

Arkansas and Mississippi, and that the Commission can correct the situation by levelizing Vidalia's costs.

168. The Arkansas Commission and the Mississippi Commission also argue that if the costs of the Vidalia project are spread among all the Operating Companies, the benefits of the Louisiana Commission's Vidalia Settlement should also be shared with the other jurisdictions. On September 18, 2003, the Louisiana Commission approved a settlement agreement in Louisiana Commission Docket No. U-20925, which resolved issues in a docket initiated by the Louisiana Commission to investigate, among other things, whether Vidalia had prudently managed the Vidalia contract. The Arkansas Commission and the Mississippi Commission note that in the Initial Decision, the judge noted that according to the settlement agreement, the tax benefits stemming from the Vidalia contract were to be shared with ELI customers. However, the presiding judge did not order the benefits to be shared, possibly relying on the Louisiana Commission's representations that they would "flow through" to other system ratepayers. The Arkansas Commission argues that the Commission should order the Louisiana Commission to share the benefits of the settlement agreement with all system ratepayers in order to protect all ratepayers from the market costs associated with the Vidalia contract.

169. AEEC also argues that the presiding judge's decision about Vidalia should be overturned. AEEC contends that the Louisiana Commission has maintained until this proceeding that only Louisiana ratepayers would pay for Vidalia. AEEC also argues that the decision validates future efforts by the Louisiana Commission to have any other Louisiana plant or contract declared an Entergy system matter. AEEC further argues that the record is barren of any evidence that any Arkansas ratepayer received notice of the propriety of Vidalia or the associated contract, and the absence of a chance to be heard renders the presiding judge's decision unconstitutional.

170. AEEC contends that Louisiana Commission is judicially estopped from passing Vidalia's full costs on to the Entergy system. AEEC notes that judicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to a position taken by the party in prior legal proceedings. The Louisiana Commission argues that the Commission should not allow the Louisiana Commission to abuse the federal administrative process by asserting a position in a proceeding that is 180 degrees contrary to the position that Louisiana Commission maintained in related proceedings.

3. Briefs Opposing Exceptions

171. The Louisiana Commission argues that contrary to arguments made by parties opposing ELI's Vidalia purchase, Vidalia was planned by the Entergy system's top planners using an Entergy system database. The Louisiana Commission claims that the Entergy Operating Committee was kept well informed regarding the Vidalia negotiations, approved the project by including it in the system's resource plan, and provided it cost

equalization credit under the System Agreement. The Louisiana Commission also argues that ELI has never borne the full cost of Vidalia, because it has received MSS-1 credits since the unit began providing capacity to the system. Further, the Louisiana Commission argues that Vidalia has always been used as a system resource, as it provides capacity to the system, avoids the need for the system to buy capacity at the peak, and is included in the system's dispatch. The Louisiana Commission argues that Vidalia has always been included at full cost prior to this case in relative production cost studies. The Louisiana Commission adds that objections to including the cost of Vidalia as a system cost have no evidentiary basis, and that no party has offered a valid basis for levelizing the Vidalia rate path in allocating costs among the Operating Companies.

172. Occidental argues that the presiding judge properly found that Vidalia is an Entergy resource and should be reflected at the full contract price for rough equalization purposes. It claims that arguments that there is no evidence in the record demonstrating the Operating Committee planned and approved Vidalia are without merit.

4. Commission Determination

173. We conclude that the presiding judge ignored distinguishing factors regarding the Vidalia contract that warrant Vidalia being treating as an ELI-only resource, and, accordingly, we reverse the presiding judge on this issue. The distinguishing factors that we consider crucial are discussed in more detail below: (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) 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.

174. As discussed in detail below, we conclude that the Vidalia contract was not entered into to benefit the Entergy system as a whole. The hydroelectric plant was built to benefit Louisiana and that is where the production costs of the plant should stay. 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 Louisiana Commission also determined at that time that the Vidalia contract was prudent. 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. As the Louisiana Commission's own witness admitted, the capacity from Vidalia is small but the costs are significant. 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 is inappropriate.

a. Unusual Structure of the Vidalia Contract and Guaranteed Flow Through of Contract Costs

175. The Vidalia contract was the product of a unique accommodation between the Louisiana Commission and ELI meant to facilitate the local economic and political objectives of Louisiana without exposing ELI (or the system) to the cost risks associated with a substantial generation project. During the hearing, the Louisiana Commission conceded that the Operating Committee did not direct ELI to enter into the Vidalia contract and did not vote to approve the contract.[131] Entergy's Reply Brief explains that the Operating Committee chose not to interfere with ELI's execution of the Vidalia contract in reliance on the conditions imposed by the Louisiana Commission, namely, that all costs were to be borne by ELI's ratepayers for the life of the contract.[132]

176. Other evidence in the record shows that, from the contract's inception, it was planned to benefit the State of Louisiana and was agreed to by ELI (formerly LP&L) under very strict circumstances. Beginning in 1984 ELI made it clear to the Louisiana Commission that it would oppose the Vidalia contract if all the costs of the Vidalia power were not flowed through to ELI ratepayers under a fuel adjustment clause.[133] In Exhibit ETR-63,[134] the following information on the contract includes these statements, "LP&L proposes to collect the cost of the electricity purchased from Catalyst[[135]] through the fuel adjustment clause. LP&L would oppose the project if it could not flow the total cost through the fuel adjustment factor." "Approximately 800 construction jobs will be created by this project, tax collections to the State and local bodies are estimated to be $7 million. Annual payroll is estimated to be $1 million. A major tourist attraction will be created similar to those at other hydropower sites, particularly since this is Louisiana's first major hydropower facility utilizing the world's largest bulb turbines."

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[131] Tr. 1483, 1578.

[132] Entergy's Reply Brief at 28, referencing Tr. 4900-01 (Harlan) and Ex. ETR-106 at 140 (Saacks deposition excerpt).

[133] Ex. ETR-63 at 2; Ex. No. ETR-23 at 47 (Louiselle).

[134] Ex. ETR-63 is a Louisiana Commission memorandum from 1984 that discusses the application for certification of the proposed Vidalia contract.

[135] Catalyst Old River Hydroelectric Limited Partnership (Catalyst) is an investor owned partnership formed to finance, build, own and operate the Vidalia hydroelectric plant.

177. No non-Louisiana retail regulator or any other Operating Company ever found, or had the opportunity to determine, that the Vidalia contract was prudent.[136] As Staff points out in its brief opposing exceptions, an allocation of the Vidalia costs to other state retail jurisdictions in this proceeding will almost certainly produce litigation before the Commission as each retail jurisdiction will likely file prudence challenges in an attempt to reduce or eliminate the share of Vidalia costs that each would be allocated under the presiding judge's recommendation.[137]

178. Further, the Louisiana Commission guaranteed that all of ELI's purchase costs would be borne by ELI's customers via ELI's Fuel Adjustment Clause. In the Louisiana Commission's Order No. U-16246-A,[138] which issued August 22, 1990, pertaining to the Vidalia contract with ELI, the Louisiana Commission specifically states that "LP&L made a prudent purchasing decision in the purchase of the supply of energy pursuant to the rates and terms of the Contract, and LP&L was prudent in selecting this supply of energy over other sources." In this finding of prudency by the Louisiana Commission, it explained that "LP&L shall recover the total cost of energy over the entire duration of the Contract from its customers by including the total cost incurred as a fuel cost in the monthly fuel adjustment charges." Thus, the Louisiana Commission itself did not envision the cost of this contract being spread to the rest of Entergy's system, but found that it would remain with ELI for the duration of the contract. Since the purchases first began, the full contract costs have continually been recovered via the ELI fuel clause.

b. <u>Significant Cost Shifts if Vidalia is Fully Reflected</u>

179. Significant costs are associated with the Vidalia contract and these costs will remain at over $100 million per year through the term of the contract, which ends in 2031. Between the years 2005 and 2031, the contract energy rate will range from $150 - $205 per MW hour.[139] An example of the annual costs associated with the Vidalia contract is as follows: In 2005, the contract rate for Vidalia is $155/MWh. The average MWh produced annually equals 779,804 MWh.[140] Multiplying these two numbers

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[136] Ex. S-1 at 57 (Sammon).

[137] Staff Brief on Exceptions at n. 58.

[138] Ex. LC-83.

[139] *See* Ex. ETR – 61, Appendix A.

[140] The estimated megawatthours produced number was taken from Exhibit ETR-110 and is the average for the years 1991- 2002. This number equals 779,804

results in an estimated $121 million for 2005 for the Vidalia contract. As stated above, ELI has always recovered the full cost of the Vidalia contract through its fuel clause. The Vidalia costs are so significant, that they alone can increase ELI's production costs from the system average by approximately five percent, as compared to ELI purchasing energy through the MSS-3 exchange.[141] Allowing the full contract costs of Vidalia to be forced onto other Operating Companies would produce significant cost shifts among the Operating Companies and greatly impact other retail jurisdictions.

c. Vidalia Was Not Built as Part of Entergy's Overall System Planning

180. In Opinion Nos. 234 and 292, the Commission explicitly found that the Operating Committee had engaged in a centralized and deliberate strategy to diversify fuel sources by relying on a massive increase in nuclear capacity to serve the baseload requirements of the system as a whole.[142] In choosing to equalize the costs of all the nuclear plants on Entergy's system, the Commission concluded that all of the nuclear units were built primarily for the benefit of the system as a whole.[143] In contrast, there is no evidence in this 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. Indeed, the Louisiana Commission's own witness admitted that Vidalia was not part of a deliberate system strategy to rely on hydroelectric power.[144] Further, in contrast to the large share of base load capacity and energy provided by nuclear power for the benefit of the entire system, Vidalia contributes less than one percent of the system's capacity. In this regard, the Louisiana Commission's witness Kollen confirmed that Vidalia provided only 0.38 percent of the total capacity on Entergy's system. It was only in terms of dollars that the Vidalia capacity was very significant.[145] This minimal capacity would hardly be of any interest to the Entergy system as a whole and was not of the magnitude of the nuclear

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megawatthours and is the average megawatthours produced by Vidalia that ELI was obligated to pay for under the Vidalia "take and pay" contract.

[141] Entergy Brief on Exceptions at 36-37. If ELI purchased energy through service schedule MSS-3 it would be approximately $37/MW hour. This is significantly cheaper than what ELI is paying under the Vidalia "take and pay" contract.

[142] Opinion No. 292, 41 FERC at 61,618-19.

[143] Opinion No. 292 at 12.

[144] Tr. 1488 (Kollen).

[145] Tr. 1885-1887.

power that the Operating Committee made part of a centralized and deliberate strategy to diversify fuel sources for the benefit of the entire Entergy system.

181. Moreover, Trial Staff pointed out that 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.[146] Entergy witness Gallaher testified that the Operating Committee did not approve the Vidalia purchase as a system purchase[147] and we have found no evidence in the record showing that any studies were ever provided to the Entergy Operating Committee evaluating either the need for or economics of the Vidalia purchase. Instead, Vidalia cost studies were prepared and presented only to the Louisiana Commission. Entergy's witness Harlan testified during the hearing that the studies he prepared for the Louisiana Commission showed the effects of the Vidalia purchase only on ELI's customers.[148]

182. Considering all of the evidence in this proceeding, we conclude that Vidalia was not planned as a resource for the benefit of Entergy's system. Accordingly, we reverse the presiding judge's finding that Vidalia was planned as a resource for the benefit of the Entergy system.

d. Through a Settlement with ELI, Significant Tax Benefits Have Accrued Solely to the Benefit of Louisiana Retail Ratepayers

183. The Louisiana Commission opened an investigation into the Vidalia contract in 1999 which was subsequently settled in 2002. Pursuant to that settlement, ELI would share with ELI customers a portion of an accelerated deduction that ELI believed it could take over the remaining life of the Vidalia contract, until 2031.[149] The Louisiana Commission order[150] states that during the first ten years, the ratepayers will receive a guaranteed credit of $88 to $110 million, and a potential additional $210 million, for a total of up to $320 million in credits for the first ten years. The ratepayers will continue to receive credits through the fuel adjustment clause for the remaining twenty years of the

[146] Staff Initial Brief at 45-46.

[147] Ex. ETR-1 at 41.

[148] Ex. ETR-102 at 2-3 (Harlan) and Tr. 4862 (Harlan).

[149] *See* Ex. CNO-1 at 5-6 (citing LPSC Order No. V-20925)

[150] *Id*.

contract. The total credits to ratepayers may total $671 million over the life of the contract.

184. The presiding judge noted that substantial tax benefits associated with the Vidalia project have been exclusively retained by ELI pursuant to this settlement approved by the Louisiana Commission.[151] He determined that these tax benefits should now flow through to all of the other system ratepayers. Trial Staff points out that the presiding judge failed to address arguments that the sharing of such tax benefits only with ELI ratepayers demonstrated that Vidalia was not a system resource, noting simply that the tax benefits should be flowed through to all other system ratepayers. Trial Staff further asserts that "not only is it not clear how such a flow-through should be effectuated, but to the extent tax benefits have already been passed through to Louisiana ratepayers, the FPA section 206(c) refund prohibition may well be triggered, thus nullifying the Judge's proposed solution."[152] We disagree with the presiding judge's apparent decision to dismiss the significance of the tax benefits issue. If the tax benefits from Vidalia were being exclusively retained by ELI, such behavior strongly suggests that Vidalia is an ELI-only resource. Moreover, because we have determined that Vidalia was planned as a resource to benefit ELI, we will reverse the presiding judge on his determination that the tax benefits should flow through to other jurisdictions.

C. Procedural Matters

1. Motion to Strike

185. On May 3, 2004, the Louisiana Commission filed a motion to strike nine appendices attached to Entergy's Brief on Exceptions, Appendix 1 of the Arkansas Commission and the Mississippi Commission's Brief on Exceptions, and the textual references to those appendices found in the parties' briefs. The Louisiana Commission argues that the appendices are new, extra record materials that were never presented to the presiding judge and were not subject to cross examination.

186. The Arkansas Commission and the Mississippi Commission oppose the motion, arguing that its appendix is merely a statistical analysis of evidence relied on by the presiding judge in the Initial Decision. The two state commissions also point to *Kentucky Utilities Co.*, 24 FERC ¶ 61,158 (1983), in which the Commission denied a similar motion, finding that performing certain calculations with numbers that are part of the record did not constitute new evidence. Entergy argues that its appendices are necessary

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

[152] Staff Brief on Exceptions at n. 50.

because the presiding judge adopted a remedy not discussed by any party during the hearing. Like the two state commissions, Entergy also argues that its appendices make use of existing data, and are necessary to allow Entergy to appropriately discuss the ramifications of the pressing judge's bandwidth remedy.

187. We will deny the Louisiana Commission's motion. As discussed below, the judge did, in fact, create a remedy that was not discussed at hearing. We therefore find that it is not inappropriate for parties to reexamine data from the hearing in light of the presiding judge's remedy.

2. Motion to Expedite Ruling and Take Official Notice of Recent Entergy Production Cost Data

188. On January 26, 2005, the Louisiana Commission filed a motion to expedite ruling and to take official notice of recent Entergy production cost data. LEUG filed a memorandum in support of the Louisiana Commission's motion. The Louisiana Commission argues that the Commission should take official notice, pursuant to Rule 508 of the Commission's Rules of Practice and Procedure,[153] of production cost data filed by Entergy in *Entergy Services, Inc.*, Docket No. ER03-583-000 (ETR-270). The Louisiana Commission claims that the data further establishes the gravity of the discrimination on the Entergy system and the need for an expedited ruling.

189. Entergy, AEEC, New Orleans, and the Arkansas Commission and the Mississippi Commission (jointly) filed responses opposing the motion. Parties argue that had the exhibit been introduced in this case in support of the Louisiana Commission's position, it would have been subject to analysis and dispute. Parties further argue that the probative value of the exhibit would have been debated, as it offers only a one year "snapshot in time" of data.

190. We will deny the Louisiana Commission's motion. We find that the existing record before us provides sufficient evidence from all parties on cost differentials on the Entergy system, and we see no reason to provide official notice to new exhibits at this late date. We further find that issuance of this Opinion renders moot the motion to expedite ruling.

3. Motion to Hold the Proceeding in Abeyance or Reopen the Record

191. On April 22, 2005, the Arkansas Commission filed a motion to hold the proceeding in abeyance, or in the alternative, to reopen the record. It argues that the

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[153] 18 C.F.R. § 385.508 (2004).

Commission should withhold any ruling until the effects of two recent developments on cost differentials among the Operating Companies can be determined: (1) the implementation of an Independent Coordinator of Transmission (ICT) for the Entergy system, and (2) the effect of potential cost savings identified in a draft study of plant retirements recently released by the staff of the Louisiana Commission. In the alternative, the Arkansas Commission argues that pursuant to Rule 716 of the Commission's Rules of Practice and Procedure,[154] the record in this proceeding should be reopened so that the Commission and the parties can explore the most likely effect of these developments on the Operating Companies' relative production costs. The Louisiana Commission opposed the motion.

192. In light of our decision in this proceeding, the Arkansas Commission's motion to hold this proceeding in abeyance is moot and is, therefore, denied. In addition, we decline to reopen the record. The decision whether to reopen a record is within the Commission's discretion.[155] In this instance, we conclude that the reopening of the record is not warranted due to the remedy provided by this Opinion. If the Arkansas Commission is correct that the changes discussed in their motion hold the promise of reducing production cost differences among the Operating Companies, then the changes will simply make it more likely that any cost disparities will fall within the permissible bandwidth provided for in this Opinion, and no shifting of costs will be necessary.

The Commission orders:

The Initial Decision is hereby affirmed in part and reversed in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

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[154] 18 C.F.R. § 385.716 (2004).

[155] *East Texas Coop., Inc. v. Central and South West Services, Inc.*, 95 FERC ¶ 61,066 at 61,177 (2001).