ORAL ARGUMENT IS SCHEDULED FOR SEPTEMBER 16, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1271

ENTERGY SERVICES, INC.,
PETITIONER,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

DENNIS LANE
SOLICITOR

JUDITH A. ALBERT
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

JUNE 29, 2004

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

The parties and amici are as stated in the brief of Entergy Services, Inc.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Entergy Services, Inc. et al*., 103 FERC ¶ 61,125 (2003); and

2. *Entergy Services, Inc. et al*., 104 FERC ¶ 61,061 (2003).

C. Related Cases:

The orders on review have never been before this Court or any other court. Counsel is aware of no other related cases pending in this or in any other court.

Judith A. Albert
Attorney

June 29, 2004

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

STATUTES:

Federal Power Act

REGULATIONS:

GLOSSARY

Entergy	Entergy Services, Inc.
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
GIA	Generator Imbalance Agreement
IA	Interconnection Agreement
OATT	Open Access Transmission Tariff
PURPA	Public Utility Regulatory Policies Act of 1978
QF	A cogeneration facility or a small power production facility that meets the statutory and regulatory requirements to be a qualified facility

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1271

ENTERGY SERVICES, INC.
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Commission properly determined that it has the authority to order Entergy Services, Inc. ("Entergy") to refund charges for a wholesale, interstate service subject to FERC jurisdiction that Entergy had improperly assessed and collected under a retail rate schedule.

2. Whether the Commission properly determined that its orders as to what is the appropriate penalty for generator energy imbalances did not result in a rate design change for the affected wholesale service.

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSTION BELOW

The orders under review are *Entergy Services, Inc., et al.*, 103 FERC ¶ 61,125 (2003) ("*First Order*") (R 224, JA 397);[1] and *order denying rehearing*, 104 FERC ¶ 61,061 (2003) ("*Rehearing Order*") (R 230, JA 425). These orders found unreasonable and unduly discriminatory Entergy's practice of deeming a "qualifying facility's" ("QF") output first to serve the QF's scheduled load on the Entergy system in the event of a shortfall in electric energy in the QF's generation of electric energy. This means that Entergy deems any shortfall that it must supply will serve the QF's "host" load under Entergy's retail rates.[2] Entergy has petitioned for review of only the portion of the orders directing it to refund, with interest, the charges it collected under this practice.

---

[1] "R" refers to the record item number in the Certified Index to the Record. "JA" refers to the Joint Appendix page number.

[2] "Load" refers to the amount of energy that a customer receives from the electric system. As discussed in more detail, *infra*, "host" refers to the industrial customer associated with and, typically, interconnected with, a QF.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

Section 201(b) of the Federal Power Act ("FPA") confers upon the Commission jurisdiction over all rates, terms, and conditions of electric transmission service provided by public utilities in interstate commerce, as well as the sale by public utilities of electric energy at wholesale in interstate commerce. 16 U.S.C. § 824(b). FPA §§ 205(a) and (b) require such utilities to charge rates that are just and reasonable and not unduly discriminatory. 16 U.S.C. §§ 824d(a) and (b).

Under FPA § 211, as amended by the Energy Policy Act of 1992,[3] any generator of electric energy for sale for resale may ask the Commission for an order requiring a transmitting utility to provide it transmission. Ultimately, Order No. 888[4] found that public utilities controlling facilities used for transmitting electric energy in interstate commerce were exercising their control to favor their

---

[3] Pub. L. No. 102-486, Title VII.

[4] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles [Jan. 1991-June 1996] ¶ 31,036 (1966) ("Order No. 888"), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles [July 1996-Dec. 2000] ¶ 31,048 ("Order No. 888-A"), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) ("*TAPS*"), *aff'd sub nom. New York v. FERC*, 535 U.S. 1, 122 S.Ct. 1012 (2002).

own sales, resulting in systemic and pervasive undue discrimination in the transmission of electric power. *See TAPS*, 225 F.3d at 682-83. To remedy this, the Commission required each transmission-providing utility, *inter alia*, to file an open access transmission tariff ("OATT") containing minimum terms and conditions for non-discriminatory transmission service substantially similar to those set out in a Commission-prescribed *pro forma* tariff, and to take transmission service for its own wholesale sales and purchases of electric energy under the same terms and conditions as it offers that service to others. *See id.* at 682.

Title II of the Public Utility Regulatory Policies Act of 1978 ("PURPA") was enacted to encourage the development of cogeneration and small power production facilities. *See Connecticut Valley Elec. Co., Inc. v. FERC*, 208 F.3d 1037, 1039 (D.C. Cir. 2000). A "cogeneration facility" produces both electric energy and steam or some other form of usable energy. *Id.*, *citing* 16 U.S.C. § 796(18)(A). A "small power production facility" produces less than 80 megawatts ("MW") of electricity using biomass, waste, renewal resources, or geothermal resources as the primary energy source. *Id.*, *citing* 16 U.S.C. § 796(17)(A). A small power or cogeneration facility meeting statutory and regulatory requirements

is a "qualifying facility" ("QF") and is exempt under PURPA from most public utility regulation.[5]

B. Events Leading To The Challenged Orders

QFs, particularly cogeneration facilities, are typically affiliated with an industrial entity, *i.e.*, a "host," that uses some of the energy the QF produces. As the host cogenerates energy with the QF,[6] the host load is "behind-the-meter" *(i.e.*, behind the QF's Point of Interconnection with the transmission grid). In other words, the QF transmits electric energy directly to the host without using facilities on the grid.[7] A QF producing more energy than its host load needs, however, can sell the excess electric energy to traditional utilities or other customers, and will use transmission service on the grid to deliver this energy.

When a QF or other generator sells excess electric energy, it submits to the transmission provider, here Entergy, an hour-by-hour schedule of the energy it

---

[5] This includes exemption from the Public Utilities Holding Company Act of 1935, most state public utility regulation, and much of the FPA. In addition, traditional utilities are required to purchase electricity from QFs. *See Connecticut Valley Elec. Co., Inc.*, 208 F.3d at 1040. The Commission's regulations pertaining to QFs are contained in 18 C.F.R. Part 292

[6] Cogeneration occurs, for example, when the host produces steam during the industrial process which the QF then uses to generate electric energy.

[7] Entergy's opening brief at 5 states that, "When QFs engage in transactions on the Entergy system, such transactions are either scheduled or unscheduled," and at 6 states that "in unscheduled transactions a buyer identifies a generator as a resource." To the extent Entergy is suggesting that host are "buyers" here, or that host loads, which are unscheduled loads, are transacted on the Entergy system, Entergy's statements are incorrect. This case is about host loads which are behind the QFs' Point of Interconnection with Entergy. *See* Joint Movers Init. Br. at 3. JA 222.

commits to produce. Once a QF or other generator submits a schedule, Entergy transmits the scheduled amount of electric energy to receiving parties, regardless of whether the generator actually provides the scheduled amount of energy. *First Order* at 7 (JA 400), International Paper Init. Br. at 7 (R 206, JA 280).[8] A generator imbalance occurs when a generator provides to the transmission provider a different amount of energy than it had scheduled. The transmission provider makes up the difference (either by increasing its own supply to the system or by shedding load), so that the grid remains in balance. The case here involves imbalances resulting from the generator's providing less energy than it has scheduled.

The Commission addressed energy imbalances in Order No. 888-A, determining, *inter alia*, that the type of energy imbalances at issue here, *i.e.*, mismatches between the energy scheduled and energy generated, would not be designated as Schedule 4, Energy Imbalance Service under the OATT. Rather, it observed that a generator will have an interconnection agreement ("IA") with the transmission provider to specify the requirements for the generator to meet its schedule. Order No. 888-A at 30,230.

[8] Citations for the *First Order* and *Rehearing Order* are to paragraph numbers. Citations to the briefs filed before the Commission are to the page numbers.

On May 28, 1999, Entergy filed unexecuted Generator Imbalance Agreements ("GIA") "to fulfill the requirement that the transmission provider and the generator arrange appropriate provisions for generator imbalance in their interconnection agreement." Joint Movers Init. Br. at 10, quoting Original GIA Transmittal Letter. R 205. JA 229. After further negotiations, Entergy filed a final form of the GIA, which was approved on March 17, 2000, and made part of each generator's IA with Entergy. *Id.* at 11; s*ee Entergy Services, Inc*., 90 FERC ¶ 61,272 (2000); Entergy Init. Br. Before the Commission at 6 ("Entergy Init. FERC Brief"). R 203. JA 148.

On June 1, 2001, Entergy sought to revise its GIA to require, *inter alia*, a "schedules first" allocation of a generator's output to scheduled and unscheduled transactions.[9] Under this method, a generator's output would be allocated to scheduled transactions first and any deficiency would be attributed to unscheduled transactions.[10] Various parties, including some that either own[11] or purchase

[9] Entergy's opening brief at 5 states that the allocation issue arose during the settlement discussions. To the extent Entergy is suggesting that the issue regarding the schedules first methodology was initiated by the settlement talks and not by Entergy's revised GIA, this is not correct. *See Rehearing Order* at 8 (describing protests to the methodology filed in response to Entergy's revised GIA and statements by Entergy's witness describing the effects of the revisions). JA 427.

[10] A deficiency will be attributed to the unscheduled transaction until the deficiency exceeds the unscheduled transaction, at which point any remaining deficiency will be attributed to the scheduled transaction. Calpine Central, LP Init. Br. at 2 (R 204, JA 191); International Paper Init. Br. at 2 (R 206, JA 275).

[11] Air Liquids America Corporation, L.L.C; Dow Chemical Company, Exxon Mobile Chemical Company and Exxon Mobil Refining & Supply Company, Georgia

electric energy from[12] QFs, protested the filing. On July 27, 2001, the Commission ordered certain revisions to the filing, suspended the revised filing, made collections under the filed tariff subject to refund, and established hearing procedures. On March 28, 2002, the Commission consolidated with this proceeding a complaint proceeding initiated January 8, 2002 by a generator coalition contending that Entergy's GIA was unjust, unreasonable, and unduly discriminatory.[13]

Ultimately, all issues pertaining to the GIA filing were settled except for the allocation of QF output. On July 26, 2002, the Administrative Law Judge granted the parties' joint motion for waiver of the initial decision and the parties briefed the issue directly to the Commission.

C. The First Order

Under Entergy's schedules first allocation methodology, "where a [generation] facility simultaneously transacts in both scheduled and unscheduled sales and experiences a reduction in output, the facility's output is deemed to serve scheduled transactions first, and the remainder is deemed to serve unscheduled

---

Golf Corporation, Occidental Chemical Corporation, PPG Industries, Inc., and Calpine Central, Inc.

[12] International Paper Company.

[13] The allocation of QF output, the issue here, was not an issue in the generator coalition complaint. Entergy Rehearing Request at 3. R 226. JA 413.

transactions." Entergy's Init. FERC Br. at 1-2. JA 143-44. As a consequence, when Entergy has to provide energy to make up for the reduction in output, that energy will be deemed to serve unscheduled load. Where the unscheduled load is behind-the-meter (as the host load is for QFs), Entergy provided the deficient energy under a retail sale tariff that includes a demand ratchet.[14] *First Order* at 9 (JA 400-01).

For generators that do not serve a host load, the deficiency applies to their scheduled loads and Entergy supplies the deficient energy under its lower GIA rates.[15] The GIA also allows these generators to limit their exposure to extra charges by opting for an automatic schedule curtailment under which Entergy will cut the schedules after fifteen minutes. International Paper's Init. Br. at 19-20. JA 292-93.

The Protestants argued that the schedules first methodology is unjust and unreasonable because resulting rates, including the demand ratchet, are significantly higher than Entergy's Deficient Energy charges under the GIA.

---

[14] Under the demand ratchet, the host will be required to pay a monthly capacity charge for the remaining contract term based on the size of the deficiency, regardless of whether it has another deficiency during that period and even if it never again takes energy. *See First Order* at 9, fn. 17, JA 401 (giving example).

[15] There can also be unscheduled loads that are not behind the meter (for example, a customer taking network service) and under those circumstances, Schedule 4 of Entergy's OATT would apply. *See* Calpine Central Init. Br. at 2, fn. 2. Moreover, as indicated, *supra* at n. 7, if the deficiency is large enough, it will affect both scheduled and unscheduled loads. With Entergy's schedules first policy, the GIA charge for a QF will come into play only to the extent the QF's deficiency exceeds its host load requirements.

Calpine Central, LP Init. Br. at 17 (JA 206-07); International Paper Init. Br. at 20-21 (JA 293-94). Entergy's own witness cited an example where the cost to a QF for deficient energy if calculated under the GIA would be $184,800, but if the deficiency were calculated under the schedules first methodology, the cost to the host would be $544,000 in capacity charges in the first year, plus another $89,000 in energy charges, and then capacity charges under the demand ratchet of $475,200 annually for the life of the contract. *Id*. The Protestants' witness showed that for a deficiency, the schedules first charges could be over 1800 times what the GIA charge would be. *Id.*

The Protestants also argued that the schedules first policy is unduly discriminatory because it imposes costs on QFs and their hosts that are much higher than those experienced by other generators for the same service. *First Order* at 23 (JA 405); Joint Movers Init. Br. at 17-18 (JA 236-37); Calpine Init. Br. at 15-18 (JA 204-07). Both groups receive the same service (imbalance energy), but where there are no host loads, GIA deficient energy rates apply while for generators with hosts, the hosts are faced with much higher rates which include demand ratchets. Moreover, generators without hosts may cut costs further by invoking GIA automatic schedule adjustments while generators with hosts may not. *Id.* at 18. The cost disparity effectively excludes QFs from the wholesale electric market. Joint Movers Init. Br. at 17-18. JA 236-37.

Protestants observed, moreover, that some industrial hosts and QFs have written contracts that specify the amounts of QF electric energy the hosts can take. For example, International Paper has the right to take a certain amount of energy from the QF associated with its Pine Bluff Mill. These Protestants contended that Entergy's schedules first methodology for QF deficiencies interfered with the Protestants' contractual rights to take QF energy. International Paper Init. Br. at 27. JA 300. Because their contracts are with the QF, the Protestants state that the QF, not the transmission provider, should have the right to determine whether the energy a QF generates serves host loads or scheduled loads first. *Id*., Calpine Init. Br. at 7 (JA 196).

The Commission found Entergy's schedules first policy unreasonable and unduly discriminatory because it does not treat QFs comparably to other generation. *First Order* at 1. JA 397. Insofar as other generation is not subject to a schedules first policy, neither should be QF generation. *Id*. at 26. JA 406. Under the schedules first policy, a QF host load is subject to higher rates than a network customer when both receive imbalance energy and does not have the added benefit of automatic schedule adjustments. *Id*. at 28. JA 406. Therefore, Entergy's schedules first charges are excessive and unduly discriminatory in that they treat QFs markedly and unjustifiably from the way Entergy treats other generation on its system. *Id*. at 27 and 29. JA 406, 407.

The Commission also rejected Entergy's argument that because it billed the host loads under retail tariffs, QFs and their host loads can only properly raise their objections with state commissions, not FERC. FERC found that the question is what service QFs are entitled to receive from Entergy when they schedule delivery of energy to the transmission grid. This is a wholesale question subject to FERC's jurisdiction, and FERC found that QFs are entitled to take Deficient Energy under the GIA to make up for shortfalls. *First Order* at 32. JA 408. In contrast, the host load is served by the QF, not by Entergy. Thus, Entergy improperly used the schedules first methodology to give the appearance of a retail sale by Entergy to QF hosts. What Entergy seeks "is to improperly deprive QFs of their right to take energy imbalance service (i.e., pay for Deficient Energy) under the GIA, which is a Commission-jurisdictional service." *Id.*

The Commission next rejected Entergy arguments that a "host loads first"[16] methodology was technically infeasible, found Entergy's schedules first methodology unreasonable and unduly discriminatory, and directed Entergy to implement a host loads first method. *Id*. at 33-36. JA 408-09. FERC also ordered Entergy to make refunds, with interest, of charges it had collected under its

[16] Under a "hosts first" methodology, QF supply is first allocated to unscheduled (*i.e*., host) loads, and then to scheduled load. This means deficiencies would be deemed to occur on scheduled loads to which the GIA applies.

schedule first methodology, within 60 days of the date of the order. *Id*. at 36. JA 409.

D. The Rehearing Order

Entergy requested rehearing only of the requirement that it make refunds. Denying rehearing, the Commission rejected Entergy's argument that "the [*First Order*] violates the Commission's policy that changes in rate design should be prospective only." *Rehearing Order* at 15. JA 430. The *First Order* did not involve a change in rate design, but rather, found that Entergy had billed the wrong customers at the wrong rates. *Id.*

FERC also observed that even if this could be considered a rate design change (which it cannot), "the rationale underlying a policy of prospective application, *i.e*. that customers cannot undo past economic decisions, would not apply here." *Id*. at 16. JA 430. [citations omitted]. Rate design changes are typically made effective prospectively because "rate design affects customer consumption patterns, and a rate design change cannot affect those consumption patterns retroactively since consumption (based on the prior rate design) has already taken place." *Id*. Here consumption patterns are not at issue; instead, the issue is simply whether a QF's shortfall of scheduled electric energy should have been billed to QF host loads or to the QFs as Deficient Energy under Entergy's revised GIA. *Id*.

The *Rehearing Order* also rejected Entergy's argument that FERC has no jurisdiction to direct Entergy to make refunds of charges collected under what Entergy terms "state utility commission-approved tariffs." *Id*. at 18. JA 431. The ordering of refunds had nothing to do with the regulation of retail rates, but rather, with Entergy providing a FERC-jurisdictional wholesale service that should have been charged a wholesale rate. *Id*. The Commission has the authority under FPA § 205 to direct refunds of amounts improperly charged for Commission-jurisdictional services. *Id*. at 19. JA 431.

SUMMARY OF ARGUMENT

The Commission has jurisdiction to require refunds here regardless of the fact that Entergy charged state-approved bundled retail rates for what was a wholesale service. The jurisdictional service being provided to the QFs consisted of Deficient Energy, the need for which was triggered by the QFs' scheduled transmission of wholesale electric energy on Entergy's system. Because Entergy charged unlawful rates for this jurisdictional service, the Commission has authority under FPA § 205 to require refund of the unlawful charges.

Even if Entergy were correct in contending that retail rate regulation is implicated here, its argument that the Commission has no jurisdiction over bundled retail rates is too sweeping. In Order No. 888, the Commission chose not to assert jurisdiction over bundled retail rates, but did not hold itself powerless to claim jurisdiction where necessary, as here, to prevent undue discrimination. The Supreme Court upheld this policy choice, and declined to decide the issue itself.

Entergy's argument that the Commission changed the rate design, so that refunds are inappropriate, is incorrect. Rate design is the process by which costs are allocated to jurisdictional customers and translated into unit charges. The Deficient Energy charge is not a means for allocating Entergy's cost of service among all customers, but is, instead, a penalty imposed upon a generator who fails to produce the energy scheduled.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the APA's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b); *Louisiana Public Service Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Where the issue is the extent of the Commission's jurisdiction, the Court applies the methodology set forth in *Chevron, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). The Court must first determine whether "Congress has directly spoken to the precise question at issue," and if it has, the Court "must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. If the Court determines that "the statute is silent or ambiguous with respect to the specific issue," the court should defer to an agency's interpretation if its construction of the statute is reasonable. *Id*. at 843.

II. THE COMMISSION'S DETERMINATION THAT IT HAS AUTHORITY TO ORDER REFUNDS WAS REASONABLE.

Entergy does not challenge either the Commission's authority to determine that Entergy's schedules first policy is unjust and unduly discriminatory, or the Commission's authority to require Entergy to dispense with that policy in the future. Rather, Entergy's claim is limited to a contention that the Commission lacks authority to require refunds of the excess charges Entergy collected. As demonstrated below, Entergy's position is without merit.

Entergy first expends considerable effort arguing that FERC lacks jurisdiction over bundled retail rates.[17] Br. at 10-15. That argument is not relevant because FERC is not exercising authority over bundled retail rates here. FERC made no pronouncements as to the reasonableness of Entergy's bundled retail rates or whether the bundled retail rates as applied to retail service were unduly discriminatory. Thus, the challenged orders have no effect on Entergy's bundled retail rates, which continue to apply where Entergy provides bundled retail service.

The Commission found instead that the retail rates being charged to QF hosts under the schedules first methodology were really for wholesale services.

---

[17] *See e.g.*, summary of argument at 8 ("First, FERC has exceeded its statutory authority under the Federal Power Act by requiring Entergy to refund amounts collected under state-approved retail rates.") and at 8-9 ("Since the state commissions have not ordered refunds of the previously-collected bundled retail rates in this proceeding, FERC cannot order such refunds. By ordering Entergy to refund amounts collected under state-approved rates, the orders under review usurp the right of the states to regulate retail service.").

"Entergy was providing a wholesale service, *i.e.*, the provision of Deficient Energy under its GIA, [for which] Entergy should have been charging a wholesale rate, *i.e.*, charging QFs Deficient Energy charges." *Rehearing Order* at 18 (JA 431); *First Order* at 32 (JA 408). In other words, the service that Entergy had been categorizing as retail service should have been categorized as wholesale service, and charged under wholesale rates.

FERC's finding is correct. The QFs interconnected with Entergy's transmission grid in order to transmit their excess energy (*i.e.*, energy above what they have contracted to provide their hosts) for sale in the wholesale market. Joint Movers Init. Br. at 2, 12 (JA 221, 231); Dauphinais testimony at 9 (R 99, JA 115). To obtain transmission service for particular sales, QFs must schedule their loads with Entergy. The Commission reasonably found that when a QF scheduled a wholesale, jurisdictional load for transmission service, and failed to provide the full, scheduled wholesale load (thus precipitating an imbalance on the system), Entergy, when it provided energy to alleviate the imbalance, should have charged the QF for Deficient Energy under the GIA, the tariff that applies to the wholesale, jurisdictional transmission being used by the QF, rather than charging the host load for the deficiency under a bundled retail rate schedule.

Entergy's argument seems to be that its application of a bundled retail rate subject to state jurisdiction should control the jurisdictional question, rather than

the type of service actually being provided. Under Entergy's theory, the Commission lacks authority to order refunds because Entergy improperly charged retail rates even though the transactions were FERC-jurisdictional.[18] This overlooks the fact that only the Commission has authority to set the lawful rates for jurisdictional transactions. FPA §§ 205(a) and (b). The rates Entergy charged here, whether or not they were lawful retail rates, were not lawful rates for a FERC-jurisdictional service. Thus, the Commission acted within its authority in ordering Entergy to refund the excess because the service being provided was a FERC-jurisdictional service, not a retail service.[19]

Indeed, as the *Rehearing Order* states, Entergy's "argument, if successful, would create a gap in regulation analogous to the gap in regulation that the FPA was intended to fill; that is, charging for services that are Commission-jurisdictional, but escaping Commission regulation by claiming the rates being charged are state-jurisdictional." *Rehearing Order* at 19, fn. 29; *citing generally, Jersey Central Power & Light Company*, 319 U.S. 1, 61 (1943); *FPC v. Florida*

---

[18] Entergy has not argued, either on rehearing or in its opening brief, that it is providing a different service operationally now from what it provided before the challenged orders issued. *See* fn. 17, *supra*. Rather, the issue that Entergy has joined is whether Entergy may "deem" the energy imbalance as arising from the host load rather than from the scheduled load.

[19] As the *Rehearing Order* states, "Entergy's rates to host loads were not the rates on file with the Commission for Deficient Energy, and under Section 205 of the FPA, 16 U.S.C. §824d (2000), any rate for a Commission-jurisdictional service that is not on file with the Commission is 'unlawful'." *Rehearing Order* at 19, fn. 27. JA 431.

Power & Light Company, 404 U.S. 453 (1972); *cf. Connecticut Light & Power Company v. FPC*, 342 U.S. 515 (1945); *cf. Public Utilities Commission v. Attleboro Steam Company*, 273 U.S. 83 (1927). Presumably, if host loads sued Entergy for refunds before a state commission, Entergy could argue that the state commission has no authority to order refunds of charges incurred for FERC-jurisdictional transactions. Thus, "if the services being provided are Commission-jurisdictional, the rates being charged also must be Commission-jurisdictional." *Rehearing Order* at 19, fn. 29. JA 432.

Entergy's contentions (Br. at 15-16) that the challenged orders conflict with *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239 (D.C. Cir. 1996) and *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999) are without merit. *Altamont* held that the Commission overstepped its jurisdictional bounds when it lowered a utility's authorized rate of return in an effort to create an incentive for the state regulatory authority and the utility's affiliate to behave in a particular way. *Altamont Gas Transmission Co. v. FERC*, 92 F.3d at 1242, 1247. The issue in Northern States was "whether FERC has the jurisdiction to affect the curtailment practices [of a utility] when [the utility is] dealing with [its] native/retail consumers." *Northern States Power Co. v. FERC*, 176 F.3d at 1094. Here the challenged orders do not affect (nor were they intended to affect)

Entergy's dealings with its retail customers. Instead, the orders simply required Entergy to charge wholesale rates for wholesale services.

In any event, even if Entergy were correct in contending that retail rate regulation is implicated here, its argument that the Commission has no jurisdiction over bundled retail rates is too sweeping. In Order No. 888, the Commission chose not to assert jurisdiction over bundled retail rates, but did not hold itself powerless to claim jurisdiction where necessary to remedy undue discrimination related to FERC-jurisdictional service. *See New York v. FERC*, 535 U.S. at 24, *citing* Order No. 888 at 31,699. The Supreme Court likewise explicitly declined to decide the issue. *Id.* Thus, although the Commission neither needed to, nor asserted, jurisdiction over bundled retail rates in the challenged orders, if it had, Entergy's contention that judicial and Commission precedent bars such an assertion would still be incorrect.

III. THE COMMISSION'S DETERMINATION THAT THIS CASE DOES NOT INVOLVE A CHANGE IN RATE DESIGN WAS REASONABLE.

The challenged orders rejected Entergy's argument that a change in rate design had ensued, observing that the Commission had, instead, found only that Entergy had billed the wrong customers at the wrong rate. *Rehearing Order* at 15. JA 430. Entergy's response (Br. at 17), that a rate design is any "methodology that determines how the supplier will be paid," is so broad that it would seem to cover

virtually any situation in which the Commission has found that a regulated entity has charged unlawful rates, and is incorrect.

Rate design is the last step in the development of a cost-of-service rate, and is the process by which costs are allocated to jurisdictional customers and translated into unit charges. *Northern Indiana Pub. Service Co. v. FERC*, 782 F.2d 730, 734 (7th Cir. 1986). The purpose of rate design, *inter alia*, is to provide appropriate market signals to customers by the matching the costs of providing service to customers with the rates they pay. *Id.*, *Union Electric Co. v. FERC*, 890 F.2d 1193, 1198 (D.C. Cir. 1989).

The challenged orders did not involve the development of a cost-of-service rate, but rather, involved which existing rate Entergy should charge to QFs for Deficient Energy. The orders found that Entergy had billed the wrong customers (QFs) at the wrong rates (retail rates) for FERC-jurisdictional services. *Rehearing Order* at 15. JA 430. Under these circumstances, payment of refunds was a reasonable means to place the QFs hosts in the same position they would have been in had Entergy billed this service correctly.

Moreover, the Deficient Energy rates under the GIA, which are often higher than market rates, are intended to act in the nature of penalty charges. *See*

International Paper Init. Br. at 24.[20] Consequently, Entergy's invocation of rate design principles is inappropriate as the purpose of these rates is not to allocate Entergy's cost of service in a way that gives appropriate price signals to jurisdictional customers, and thus encourage efficient use of energy in the future. Rather, the Deficiency Energy rates give generators an incentive to schedule transmission responsibly by imposing extra costs on them for failure to do so. *Cf.*, *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 77 (1st Cir. 2002).

Here, Entergy's schedules first methodology imposed much higher costs on QF hosts, not on the QFs (the generators), and thus did not serve, except indirectly, as an incentive to QFs, and was, in addition, a far more onerous charge than applied to other generators who failed to schedule responsibly. *See First Order* at 27, JA 406. Indeed, the methodology has the perverse incentive of "effectively excluding QFs from the wholesale market in the Southeast." *Id*. In contrast to a reasonable rate design that can influence future consumption behavior, and thus is applied prospectively, Entergy's unreasonable schedules first methodology created perverse incentives contrary to FERC's overall pro-competitive policies as well as

[20] Stating that " . . . Deficient Energy in the GIA is "floored" at the market price (in fact, it is often substantially higher) and there is a 110% adder . . . ." JA 297. *See also* Entergy's revised GIA at 8 which states that Deficient Energy shall be purchased at 110 or 125 percent of ESIC, depending on circumstances. ESIC (or Entergy System Incremental Cost) is the higher of (1) the energy cost of the most expensive source of energy generated or purchased by Entergy or (2) the Daily Market Price. *Id*. at 2-3. JA 53-54.

charging the wrong customers the wrong rates, and thus was properly the subject of refunds to rectify these problems. Moreover, the refunds were anticipated when Entergy's revised GIA was initially suspended and set for hearing.

Finally, contrary to Entergy's contention, the cases it cites (Br. at 17) demonstrate that no rate change design occurred here. In *Wisconsin*, the issue was how to devise a rate to recover costs the utility incurred in buying out certain coal contracts.[21] In the instant case, the rates already exist, and the issue is which rate to apply, GIA rates or bundled retail rates.

Similarly, the *Union Electric* case involved the allocation of fixed (capacity) costs.[22] A demand charge is a sum certain payable by a customer regardless of the level of purchases, that recovers fixed costs. Demand charges are generally assigned on a peak basis because peak demand determines how much capacity the utility must invest in and thus what its fixed costs will be. *Union Electric Co. v. FERC*, 890 F.2d at 1198. In *Union Electric*, the utility brought a very expensive nuclear power plant into service, and the issue was whether some portion of the fixed costs for the plant could be assessed to off-peak customers. *Id*. at 1198-99.

---

[21] Wisconsin Public Service Corporation proposed to "recover [certain coal contract buyout] costs by assigning those costs to replacement fuel to be burned during 1991-1993, and to recover them through the wholesale fuel clause applicable from 1991-1993, when ratepayers will realize savings as a result of the buy out." *Wisconsin Public Service Corporation*, 50 FERC ¶ 61,387 at 62,205 (1990), *reh'g denied*, 51 FERC ¶ 61,347 [order cited by Petitioner].

[22] The *Union Electric* order cited by Petitioner, 64 FERC ¶ 61,355 (1993), issued on rehearing after *Union Electric Co. v. FERC* had remanded earlier FERC orders.

Again, the instant case does not involve how to assign system-wide fixed costs among all customers, but whether Entergy must refund charges collected from the wrong entity (the host) at the wrong rate (bundled retail instead of wholesale).[23]

[23] Entergy again makes the statement that "the schedules first allocation policy [was] in effect since the GIA was first implemented." Br. at 18. As discussed, *supra* at fn. 9, this is not correct. Entergy made filed rate doctrine arguments before FERC on the theory that the allocation of QF output had not been an issue set for hearing. The Rehearing Order rejected that argument, finding that:

> "In testimony submitted in support of the proposed revisions, Entergy's witness noted that under the revised GIA, the output of a facility now would be 'deemed to go to serve the Network Load.' Two of the intervenors . . . protested this schedules first policy. These intervenors argued that Entergy's schedules first policy would expose QF hosts to 'potentially millions of dollars of required purchases of Entergy's more expensive retail backup power, with demand ratchets' . . . . ."

Rehearing Order at 8. To the extent that Entergy is suggesting that FERC caused it to change a long-standing practice, that suggestion is without merit.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Dennis Lane
Solicitor

Judith A. Albert
Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6046
Fax: 202-273-0901

June 29, 2004

ENTERGY SERVICES, INC. **Docket No. ER01-2201, et al.**
V. FERC
D.C. Cir. No. 03-1271

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains approximately 5,951 words, not including the tables of contents and authorities, the certificate of counsel, this certificate, and the addendum.

_____
Judith A. Albert
Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6046
Fax: 202-273-0901

June 29, 2004