ORAL ARGUMENT IS SCHEDULED FOR JANUARY 13, 2012

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 11-1043 and 11-1044

COUNCIL FOR THE CITY OF NEW ORLEANS, LOUISIANA AND LOUISIANA PUBLIC SERVICE COMMISSION,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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SEPTEMBER 19, 2011
FINAL BRIEF: NOVEMBER 8, 2011

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

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

B. Rulings Under Review

1. Order Accepting Notices of Cancellation, *Entergy Servs., Inc.*, Docket No. ER09-636, 129 FERC ¶ 61,143 (Nov. 19, 2009) ("Withdrawal Order"), R. 32, JA 1; and

2. Order Denying Requests for Rehearing, *Entergy Servs., Inc.*, Docket No. ER09-636, 134 FERC ¶ 61,075 (Feb. 1, 2011) ("Rehearing Order"), R. 48, JA 22.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this or any other court.

/s/ *Carol J. Banta*
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GLOSSARY

2007 Complaint Order	*La. Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,224 (2007)
Commission or FERC	Federal Energy Regulatory Commission
Entergy	Entergy Corporation (corporate parent of the Operating Companies) or Entergy Services, Inc. (acting on behalf of Operating Companies)
Entergy Arkansas	Entergy Arkansas, Inc.
Entergy Louisiana	Entergy Louisiana, LLC
Entergy Mississippi	Entergy Mississippi, Inc.
Entergy New Orleans	Entergy New Orleans, Inc.
Entergy System or System	Generation and transmission facilities owned and operated by Entergy Operating Companies in Arkansas, Louisiana, Mississippi, and Texas
FERC Orders	Collectively, Withdrawal Order and Rehearing Order
FPA	Federal Power Act
Louisiana I	*La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999)
Louisiana II	*La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999)
Louisiana III	*La. Pub. Serv. Comm'n v. FERC*, 375 F.3d 418 (D.C. Cir. 2007)
Louisiana IV	*La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008)

GLOSSARY

Louisiana V	*La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008)
Louisiana VI	*La. Pub. Serv. Comm'n v. FERC*, No. 07-1228, 2009 U.S. App. LEXIS 15426 (D.C. Cir. July 6, 2009)
Louisiana Commission	Petitioner Louisiana Public Service Commission
Louisiana Regulators	Collectively, Petitioners Louisiana Commission and New Orleans
New Orleans	Petitioner Council of the City of New Orleans
Operating Companies	Individually or collectively, Entergy Arkansas; Entergy Mississippi; Entergy Gulf States Louisiana, LLC; Entergy Louisiana; Entergy New Orleans; and Entergy Texas, Inc.
Rehearing Order	*Entergy Servs., Inc.*, 134 FERC ¶ 61,075 (2011), R. 48, JA 22
System Agreement	FERC-approved rate schedule that acts as an interconnection and pooling agreement for the Entergy System and provides for joint planning, construction, and operation of electric generation, transmission, and other facilities
Withdrawal Order	*Entergy Servs., Inc.*, 129 FERC ¶ 61,143 (2009), R. 32, JA 1

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably determined that Entergy Arkansas and Entergy Mississippi are permitted to withdraw from participating in the Entergy System Agreement, following the eight-year notice period required by that Agreement, without additional conditions or obligations that are not provided in the Agreement.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

INTRODUCTION

This appeal is the latest in a long line of cases concerning the unique arrangement among six affiliated Entergy Operating Companies. The Operating Companies serve electric customers in four states and, for decades, have operated their transmission and generation facilities as a single, integrated system. This case arises from the decision by two of those companies, Entergy Arkansas, Inc. and Entergy Mississippi, Inc., to withdraw from the Entergy System Agreement. Invoking the Agreement's provision for unilateral withdrawal after eight years advance notice, Entergy Arkansas and Entergy Mississippi gave such notice to the other Operating Companies in 2005 and 2007, respectively.

In the FERC orders challenged here, the Commission ruled that Entergy Arkansas and Entergy Mississippi were permitted to withdraw from the System Agreement at the end of the eight-year notice periods. *Entergy Servs., Inc.*, 129 FERC ¶ 61,143 (2009) ("Withdrawal Order"), R. 32, JA 1, *reh'g denied*, 134 FERC ¶ 61,075 (2011) ("Rehearing Order"), R. 48, JA 22.[1] Over the opposition of the Louisiana Public Service Commission ("Louisiana Commission") and Council

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

for the City of New Orleans ("New Orleans," and together with the Louisiana Commission, the "Louisiana Regulators"[2]), the Commission found no basis to require the withdrawing Operating Companies to compensate the remaining Operating Companies for the generation resources that their exits would withdraw from the Entergy System, nor to impose any continuing, post-withdrawal obligations related to cost equalization.

Finding no such requirements in the System Agreement itself, the Commission considered the history and operation of the Entergy System and concluded that, even with the System's coordinated planning and shared cost allocations, the Entergy Operating Companies have always financed, constructed, and owned their own generation facilities. The Commission also found that the eight-year notice provision gives the Operating Companies ample time to plan and obtain generation resources needed to serve their customers. Furthermore, the Commission emphasized that it will review Entergy's post-withdrawal arrangements to ensure that they are just and reasonable and not unduly discriminatory, as required by the Federal Power Act.

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[2] In Louisiana, jurisdiction over retail electric service is divided between the Louisiana Commission and home-rule cities, such as New Orleans, that regulate utilities within their borders. *See generally New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 460 n.19 (5th Cir. 1984); *State ex rel. Guste v. Council of City of New Orleans*, 309 So. 2d 290, 292-93 (La. 1975).

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Section 201 of the Federal Power Act ("FPA") gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e). A change in any jurisdictional rate, charge, or contract requires 60 days' advance notice to the Commission and the public, unless the Commission orders otherwise. FPA § 205(d), 16 U.S.C. § 824d(d).

Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates are lawful. If the Commission, on its own initiative or on a third-party complaint, finds that an existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and set the just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

Under FERC regulations, when a jurisdictional rate schedule "is proposed to be cancelled or is to terminate by its own terms," the utility must notify the

Commission at least 60 days before the proposed termination date. 18 C.F.R. § 35.15(a) (notices of cancellation or termination).

II. THE COMMISSION PROCEEDINGS AND ORDERS

A. The Entergy System Agreement

This case marks the latest episode in decades of litigation arising from the Entergy System Agreement. Much of this litigation is familiar to this Court. *See Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (filing of 1982 System Agreement); *Miss. Indus. v. FERC*, 808 F.2d 1525 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987) (allocation of nuclear investment costs); *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989) (same, after remand); *City of New Orleans v. FERC*, 67 F.3d 947 (D.C. Cir. 1995) (costs of future replacement capacity after spin-off of generation plants); *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999) ("*Louisiana I*") (determination of Operating Companies' available capability for purposes of cost equalization); *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) ("*Louisiana II*") (allocation of capacity costs); *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) ("*Louisiana III*") (same, after remand); *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) ("*Louisiana IV*") (rough equalization of production costs); *La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008) ("*Louisiana V*") (allocation of generation resources); *La. Pub.*

Serv. Comm'n v. FERC, No. 07-1228, 2009 U.S. App. LEXIS 15426 (D.C. Cir. July 6, 2009) ("*Louisiana VI*") (calculation of equalization payments). The multi-state nature of the Entergy System also has brought cost allocation disputes to the U.S. Supreme Court. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) (preemption of state regulatory jurisdiction as to cost allocation); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988) (same).

The Entergy System comprises six Operating Companies selling electricity in Arkansas, Louisiana, Mississippi, and Texas: Entergy Arkansas; Entergy Mississippi; Entergy Gulf States Louisiana, LLC[3]; Entergy Louisiana, LLC; Entergy New Orleans, Inc.; and Entergy Texas, Inc. *See* Withdrawal Order at P 1 n.1, JA 1; *Louisiana IV*, 522 F.3d at 383. The Operating Companies are owned by a multistate holding company, Entergy Corporation.[4] *Id.* (What is now the Entergy System originated under Middle South Utilities, Inc., which owned most of the Operating Companies' predecessors.)

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[3] Previously, an Operating Company named Entergy Gulf States, Inc. sold electricity in both Louisiana and Texas. In 2007, that company separated into Entergy Gulf States Louisiana, LLC and Entergy Texas, Inc. *See Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007) (authorizing separation plan).

[4] For purposes of this Brief, "Entergy" refers either to Entergy Corporation, the corporate parent of the Entergy Operating Companies and their affiliates, or to Entergy Services, Inc., a service affiliate that acted on behalf of the Operating Companies in the underlying FERC proceeding.

Transactions among the Entergy Operating Companies are governed by the System Agreement. *Miss. Indus.*, 808 F.2d at 1529. Over its history, Entergy's predecessor filed three successive System Agreements with the Commission, in 1951, 1973, and 1982. *Id.* The last of those Agreements, as since modified, still governs the Entergy System today. *Louisiana IV*, 522 F.3d at 383. (A copy of the System Agreement was attached to the Louisiana Commission Rehearing Request, R. 35, JA 598, and appears in the Joint Appendix at JA 40-122.)

The Entergy System is highly integrated, with the Operating Companies' transmission and generation facilities operated as a single electric system,. *See Louisiana IV*, 522 F.3d at 383; *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 113 FERC ¶ 61,282 at P 8 (2005), *aff'd in part by Louisiana IV*. The Entergy System operates generation facilities for the benefit of the whole system, dispatching generation on a least cost basis system-wide. *See* 113 FERC ¶ 61,282 at P 8; *see also Middle S. Energy, Inc.*, 31 FERC ¶ 61,305, *reh'g denied*, 32 FERC ¶ 61,425 (1985), *aff'd, Miss. Indus.*, 808 F.2d 1525. This pooling arrangement benefits the entire System by lowering energy and capacity costs to customers throughout the System and increasing reliability and efficiencies in operation. *See Sys. Energy Res., Inc.*, 41 FERC ¶ 61,238 at 61,622-23 (1987), *on reh'g*, 42 FERC ¶ 61,091 (1988), *aff'd*, *City of New Orleans*, 875 F.2d 903; *see generally Louisiana IV*, 522

F.3d at 394 ("the operating companies are collaborators in the Entergy System functioning for their *mutual* benefit").

Under the System Agreement, new generation facilities also are planned through a centralized process. *See Louisiana IV*, 522 F.3d at 383. A systemwide Operating Committee, composed of representatives of all of the Operating Companies and Entergy Corporation, assigns new resources to individual Operating Companies using a rotational approach. *See id.*; System Agreement § 5.01, JA 62. The Operating Committee makes "the major decisions concerning general timing, location and size of plant additions, in view of the overall needs of the system, while accommodating individual company needs wherever possible." *Miss. Indus.*, 808 F.2d at 1556 (citation omitted); *accord Louisiana IV*, 522 F.3d at 383. Notwithstanding the coordinated planning, each Operating Company assumes the responsibility for financing and bearing the costs of its assigned new generation plant. *Louisiana IV*, 522 F.3d at 383-84; *see infra* pp. 29-30.

In return for bearing these costs and associated risks, the System Agreement allows an Operating Company and its customers to retain the benefits of the energy produced by units assigned to the Operating Company. *See Louisiana V*, 551 F.3d at 1043 ("although [the System Agreement] creates an integrated system, it allots to each affiliate the primary responsibility for and benefit from the generation facilities in the affiliate's jurisdiction"); *Miss. Indus.*, 808 F.2d at 1530 & n.7

(companies owning low-cost generation resources have first claim to that energy). Each Operating Company makes any excess capacity, beyond that needed to serve its own loads, "available to its sister companies as a backstop for when demand exceeds selfgenerated supply." *Louisiana I*, 174 F.3d at 220.

The System Agreement also allocates imbalances in the cost of facilities used for the mutual benefit of all the Entergy Operating Companies. *Entergy La.*, 539 U.S. at 42 ("[K]eeping excess capacity available for use by all is a benefit shared by the operating companies, and the costs associated with this benefit must be allocated among them."). The System Agreement requires that production costs be roughly equal among the Operating Companies. *Louisiana IV*, 522 F.3d at 384; *see also Miss. Indus.*, 808 F.2d at 1530 (affirming FERC orders that allocated costs of nuclear generation investments to operating companies in proportion to demand for System energy). Thus, since the first System Agreement in 1951, the System has sought to iron out inequities through "equalization payments." *Id.*

The current System Agreement, filed in 1982, allocates production costs by requiring that "short" companies (those that contribute a smaller share of System capacity than the share of System energy they use) pay "long" companies (those having excess capacity). *See Entergy La.*, 539 U.S. at 42-43; *Louisiana I*, 174 F.3d at 221. This Court has recognized that "[t]his arrangement is mutually beneficial because companies that are long have a ready outlet for their surplus energy and

are thereby compensated for carrying excess capacity, while companies that are short enjoy the benefit of a low cost and dependable way of meeting their energy requirements." *Louisiana II*, 184 F.3d at 895. Those payments, however, equalize only the costs of excess capacity, and represent a small fraction of overall production costs. *See* Rehearing Order at P 29 (citing 113 FERC ¶ 61,282 at P 8), JA 33-34. Accordingly, over the long history of the System Agreement, the Commission has twice (in 1985 and 2005) found that disparities in production costs among the Operating Companies had disrupted the rough equalization required by the System Agreement and resulted in undue discrimination, requiring a Commission-ordered remedy. *See Louisiana IV*, 522 F.3d at 384, 386 (describing both instances); *Miss. Indus.*, 808 F.2d at 1553-58 (affirming Commission's 1985 finding of undue discrimination and remedy of reallocating nuclear investment costs).

In the more recent of those instances, in 2005, the Commission determined that cost allocations under the System Agreement had become unduly discriminatory because the Operating Companies' production costs were no longer roughly equal. As a result, the Commission imposed a "bandwidth" remedy under the System Agreement that would reallocate production costs that deviated beyond +/- 11 percent from the System average. *See Louisiana IV*, 522 F.3d at 391-94 (affirming bandwidth remedy).

B. Notices of Termination

On December 19, 2005, Entergy Arkansas — at that time a "long" company (providing more generating capacity to the Entergy System than it took) with relatively low production costs that required it to make substantial equalization payments under the bandwidth remedy — notified the other Operating Companies that it would terminate its participation in the System Agreement eight years thereafter, on December 18, 2013. *See* Withdrawal Order at P 2, JA 1. On December 18, 2006, the Louisiana Commission filed a complaint before the Commission against Entergy Corporation, Entergy Services, and all of the Entergy Operating Companies, seeking a remedy for Entergy Arkansas's withdrawal. The Commission denied the complaint. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,224 (2007) ("2007 Complaint Order").

The Commission noted that it would determine later whether the post-withdrawal Entergy arrangements, as well as any new Entergy Arkansas jurisdictional wholesale arrangements, would be just and reasonable. *Id.* at P 47. Nevertheless, the Commission observed that the eight-year (96-month) notice period under the System Agreement would provide the other Operating Companies "the opportunity to make reasonable alternative resource arrangements if they believe it appropriate to do so, and for all members to try to address disputes, before the departure of Entergy Arkansas actually occurs." *Id.* at P 48. Because

the Commission did not yet know what arrangements might replace the existing ones and what other factors, such as changes in various fuel costs, might arise, the Commission found that it "would be premature for us to attempt to address these issues at this time." *Id.* "A more sound approach to addressing these issues would be to address them at the time that Entergy makes [an FPA § 205] filing to reflect Entergy Arkansas'[s] withdrawal from the System Agreement." *Id.* at P 50. No party filed a request for rehearing or a petition for review of that order.

On November 8, 2007, Entergy Mississippi likewise gave notice to the other Operating Companies that it would terminate its participation in the System Agreement eight years later, on November 7, 2015. *See* Withdrawal Order at P 2, JA 1.

C. Withdrawal Order

On February 2, 2009, Entergy submitted to the Commission, on behalf of Entergy Arkansas and Entergy Mississippi, notices of cancellation pursuant to 18 C.F.R. § 35.15 to terminate those Operating Companies' participation in the System Agreement. Entergy provided additional operational information, explaining that it anticipated a post-withdrawal "4-1-1 scenario," whereby Entergy Arkansas, Entergy Mississippi, and the Entergy System (then comprising the other four Operating Companies) each would operate as an individual balancing authority and would become a network customer under the Operating Companies'

open access transmission tariff. *See* Transmittal Letter of Entergy Services at 7 (filed Feb. 2, 2009), R. 1, JA 123, 129.

On November 19, 2009, the Commission issued its Withdrawal Order, in which it concluded that Entergy Arkansas and Entergy Mississippi were permitted to leave the System under the System Agreement, and were not required to compensate, and would have no continuing post-withdrawal obligations to, the remaining Operating Companies under that Agreement. Withdrawal Order at PP 58-62, JA 18-19. The Commission found that the System Agreement provided for any company to withdraw from the Agreement after eight years (96 months) notice, and did not contain any other restrictions or conditions for withdrawal. *Id.* at P 59, JA 18. The Commission further determined that the Agreement also contained no provisions that would require any payment or compensation for withdrawal, in contrast to exit conditions found in other operating agreements, and that various obligations under the System Agreement applied only during an Operating Company's participation under that Agreement. *Id.* at PP 60-62, JA 18-19.

Nevertheless, the Commission noted that Entergy "has an obligation to ensure that any future operating arrangement is just and reasonable . . . ." *Id.* at P 63, JA 19. It therefore encouraged Entergy "to make its [FPA] section 205 filing

for the post-2013 arrangements as soon as possible in order for the Commission to review the replacement arrangement prior to the withdrawals." *Id.*

D. Rehearing Order

The Louisiana Commission and New Orleans filed timely requests for rehearing. On February 11, 2011, FERC issued its Rehearing Order denying those requests.

The Commission clarified that it had considered not only the contractual language of the System Agreement, but also the history and circumstances of the Entergy System, and had determined that placing additional conditions on withdrawal from the Agreement was not justified. Rehearing Order at PP 25-28, JA 30-32. In particular, the Commission found that the history of the System Agreement demonstrated that generation resources were intended to be owned by the individual Operating Companies, rather than owned collectively by the System or shared among the Operating Companies. *Id.* at PP 28, 30, JA 32, 34. The Commission found that, even within the Entergy System's centralized planning processes, the Operating Companies had been able to procure generation to meet their individual needs, and would be afforded ample time by the Agreement's eight-year advance notice period to adjust their long-term plans and acquire any needed capacity in anticipation of the pending withdrawals. *Id.* at PP 33-34, JA 36-37.

The Commission further concluded that the rough equalization of the Operating Companies' production costs under the System Agreement applied only to the parties to that Agreement, was not tied to the termination provision, and would no longer apply to Entergy Arkansas and Entergy Mississippi once their withdrawals became effective. *Id.* at PP 31, 35, JA 35, 37. In addition, the Commission reaffirmed its view that a "two-part analysis," in which it first considered the Operating Companies' ability to withdraw under the terms of the System Agreement, and would review the justness and reasonableness of Entergy's successor arrangements separately, was the best way to review the withdrawals from the System Agreement. *Id.* at P 27, JA 32.

These petitions followed.

SUMMARY OF ARGUMENT

The decades-old System Agreement governs the coordinated operations and transactions among the affiliated Entergy Operating Companies. In this latest of many disputes arising from the Entergy System to come before this Court, the Commission properly held, over the objections of two Louisiana Regulators, that two of those Operating Companies are permitted to withdraw from the System Agreement pursuant to its terms, with no additional conditions or further obligations.

Beginning with the terms of the System Agreement itself, the Commission reasonably found that the contract terms contain no restrictions or conditions on an Operating Company's withdrawal, beyond the stated requirement of eight years (96 months) advance notice to the other Operating Companies. The termination provision has been in place since 1982. No interested party has sought to amend it to include further conditions, nor has the Commission previously ruled that any additional requirements apply.

The Commission also considered the history of the Entergy System —in particular, its resource allocation and cost-sharing mechanisms — and reasonably found no reason to overturn the contractual terms or to impose additional exit conditions or post-withdrawal obligations. Notwithstanding the Entergy System's central planning of generation resources to benefit the System as a whole,

individual Operating Companies have always paid to construct and operate their assigned facilities and retained the benefits of the energy produced. The Operating Companies have actively participated as collaborators in such planning, seeking resources both for service of their own loads and for their mutual benefit.

The eight-year notice period affords the various Operating Companies adequate time to adjust their long-term resource planning and to acquire any needed capacity before exiting Companies withdraw generation resources from the System. Because the bandwidth remedy for rough equalization of production costs is grounded in the System Agreement's cost-sharing provisions, the obligations under that remedy no longer apply to the withdrawing Operating Companies once they cease to be parties to the Agreement.

Finally, the Commission's consideration of the withdrawals does not end with these challenged FERC Orders. The Orders resolved only the limited and immediate question of whether, and under what conditions, Entergy Arkansas and Entergy Mississippi could withdraw from the System Agreement. Having decided that those Operating Companies are permitted to leave the Entergy System at the end of their respective eight-year notice periods, keeping their own generation resources and having no further obligations under the System Agreement's cost equalization requirements, the Commission stated its intention to review any successor arrangements, such as transmission operations and wholesale electricity

transactions, to ensure that such arrangements are just and reasonable and not unduly preferential or discriminatory. To that end, the Commission urged Entergy to submit its filing concerning post-2013 arrangements as soon as possible.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Louisiana IV*, 522 F.3d at 391; *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) ("Because issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly

deferential.") (internal quotation marks and citations omitted); *accord NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 802 (D.C. Cir. 2007). *See also Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) ("In reviewing FERC's orders, we are 'particularly deferential to the Commission's expertise' with respect to ratemaking issues.") (citation omitted).

II. THE COMMISSION REASONABLY DETERMINED THAT THE ENTERGY SYSTEM AGREEMENT PERMITS OPERATING COMPANIES TO WITHDRAW WITHOUT CONDITIONS OR CONTINUING OBLIGATIONS

In considering the withdrawal notices, the Commission addressed three main issues: First, the Commission determined whether Entergy Arkansas and Entergy Mississippi are permitted to leave the Entergy System under the terms of the System Agreement. Second, the Commission considered whether they are required to compensate the remaining Operating Companies before they are allowed to withdraw. Finally, the Commission addressed whether the withdrawing Companies will have any continuing obligations to the remaining Companies under the System Agreement. Withdrawal Order at P 58, JA 18; *see also* Rehearing Order at P 24, JA 30.

The Commission considered each of these questions in turn and reasonably concluded that the language of the System Agreement permits the Operating Companies to leave the System after eight years (96 months) notice, with no further conditions or continuing obligations.

A. The Commission Reasonably Determined That The Withdrawing Operating Companies Can Leave The Entergy System

1. The Agreement Provides For Termination After 96 Months Notice

The very first section of the System Agreement provides for any Operating Company to withdraw from the System unilaterally, after an eight-year (96-month) notice period:

> This Agreement shall become effective on August 1, 1982, or such later date as may be fixed by any requisite regulatory approval or acceptance for filing and shall continue in full force and effect until terminated by mutual agreement of the Companies. Notwithstanding this, any Company may terminate its participation in this Agreement by ninety-six (96) months written notice to the other Companies hereto; . . . .

System Agreement § 1.01, JA 45, *quoted in* Withdrawal Order at P 3 n.3, JA 2. Based on that language, and the absence of any other language in the Agreement qualifying it, the Commission found that "[t]he System Agreement contains no restrictions on Operating Companies' ability to withdraw, nor does it place any further conditions on withdrawal beyond the 96 month notice requirement." Withdrawal Order at P 59, JA 18. *See generally Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (Commission receives substantial

deference in its interpretation of filed tariffs even where the issue simply involves the proper construction of language).

Here, Entergy Arkansas and Entergy Mississippi each gave written notice of withdrawal, with effective dates eight years (96 months) after their respective notices. *See* Withdrawal Order at P 2 (notice by Entergy Arkansas on December 19, 2005, of withdrawal effective December 18, 2013; notice by Entergy Mississippi on November 8, 2007, effective November 7, 2015), JA 1. No party disputed that the notices were proper. *See id.* at P 59, JA 18.

2. The Commission Had Not Previously Determined That An Operating Company's Right To Exit After The Notice Period Was Conditional

The Louisiana Regulators contend that the Commission's interpretation of the System Agreement is inconsistent with an earlier order that, they argue, conditioned withdrawal on a finding that rough equalization of production costs would continue. Br. 40, 41, 53, 56 (citing *La. Pub. Serv. Comm'n v. Entergy Corp.*, 95 FERC ¶ 61,266 (2001)). But the Louisiana Regulators misunderstand the Commission's ruling in that case.

In 2000, the Louisiana Regulators were concerned about the impact on the Entergy System of retail restructuring initiatives in the states of Arkansas and Texas. The Louisiana Commission and New Orleans filed a complaint asking the Commission to investigate and address the effect of retail competition on rates

under the System Agreement and on the Operating Companies' capacity and production costs. *See La. Pub. Serv. Comm'n v. Entergy Corp.*, 92 FERC ¶ 61,171 at 61,599 (2000). Entergy proposed amendments to the System Agreement, including an amendment to § 1.01 that would trigger the withdrawal of an Operating Company from all aspects of the System Agreement except transmission, effective upon implementation of retail restructuring in that Company's state. *See id.* The Commission consolidated those filings and set them for hearing. *Id.* at 61,602.

In the course of that hearing, the administrative law judge observed that — "wholly unrelated to retail competition" (the core issue in the hearing) — the System Agreement was, or soon would be, failing to produce rough equalization of production costs. *See* 95 FERC at 61,943. The administrative law judge asked the Commission whether he should hold proceedings on that separate issue. *Id.* The Commission concluded that it could not "reach a meaningful decision on the effect of retail access" on rough equalization without *first* determining whether the System Agreement was already, and for other reasons, failing to equalize costs. *Id.* at 61,944. The Commission directed the administrative law judge to adjudicate the issue of rough equalization, and expedited the Commission's review of his findings. *Id.*

In short, the Commission decided in 2001 that the effects of then-imminent state regulatory changes (retail restructuring) on equalization under the System Agreement could not be determined until the already-existing problems with equalization under the Agreement were addressed. *See* Rehearing Order at P 27 n.28 (Commission needed to make "some determination . . . on the effect of retail competition on the rough equalization of production costs" before such retail competition began), JA 32. The 2001 order said nothing, however, about an Operating Company's contractual right to terminate its participation in the System Agreement after eight years notice — a right that no Operating Company had invoked. (Indeed, the Louisiana Commission urged FERC to *enforce* the notice requirement and bar any Operating Company from exiting sooner. *See* 92 FERC at 61,599.) Thus, the Commission's application of the Agreement in the Orders challenged here does not conflict with its ruling in 2001. *See* Rehearing Order at P 27 n.28 (2001 order "is not relevant here" because that case focused on effects of impending introduction of retail competition), JA 32; *see generally NSTAR Elec. & Gas Corp.*, 481 F.3d at 799 (Commission receives substantial deference in interpreting its own precedents).

Nor is the Commission's analysis in the challenged Orders inconsistent with its 2007 Complaint Order, as the Louisiana Regulators suggest (Br. 39, 55). Though the Commission posited that it *might*, upon further review, determine that

"transition measures or other conditions" could "ultimately be appropriate" (2007 Complaint Order at P 47), it did not prejudge the issue. Indeed, the Commission noted that the System Agreement "is silent as to the rights and obligations of a departing member," though it assured that it nevertheless would not consider a proposed exit "in a vacuum." *Id.* (As discussed further in Part III, *infra*, the Commission followed through on that assurance, considering the history and nature of the Entergy System in addition to the language of the System Agreement. *See, e.g.*, Rehearing Order at PP 26, 28, JA 31-32.) The Commission did, however, unequivocally determine — consistent with the Orders on review — that there was "no basis" to require "what in effect would be involuntary continuation of the existing integrated system arrangements, or the virtual equivalent, in perpetuity." 2007 Complaint Order at P 47, *cited in* Rehearing Order at P 35, JA 37; *see also infra* p. 37.

B. The Commission Reasonably Determined That Withdrawal Is Not Conditioned On Compensation Or Any Continuing Obligations To The Remaining System Participants

As to the second and third issues the Commission identified (*see supra* p. 19), the Commission also reasonably determined that Entergy Arkansas and Entergy Mississippi are not required to compensate the remaining Operating Companies as a condition of withdrawing, and will have no continuing obligations under the System Agreement once their withdrawals become effective. *See*

Withdrawal Order at P 60 (Agreement "contains no provisions requiring withdrawing Operating Companies to pay a fee or otherwise compensate other remaining Operating Companies prior to withdrawing"), JA 18; *id.* at P 62 (Agreement "requires no continuing obligation on the part of the withdrawing Operating Companies"), JA 19; *see also* Rehearing Order at P 27 (finding no extrinsic evidence "to support placing additional conditions upon the withdrawing parties"), JA 31.

The Louisiana Regulators agree that the System Agreement says nothing about any exit conditions or obligations beyond the notice requirement:

> Section 1.01 is the only provision in the Agreement that addresses termination. It merely requires a 96 month notice period before unilateral withdrawal is effective. The Agreement says nothing about the rights and obligations of withdrawing Companies regarding System assets.

Br. 55.[5]

The current System Agreement has been in place since 1982. Any interested party — such as the Louisiana Commission or New Orleans — could have sought, in a filing with FERC, to amend the System Agreement exit provisions. Withdrawal Order at P 60, JA 18. In the nearly three decades that Section 1.01 has

[5] Louisiana Regulators contend that the Agreement's silence on the matter renders the Agreement ambiguous. They also assert a "conflict between withdrawal and the purpose of the Agreement" — notwithstanding the Agreement's unequivocal provision for withdrawal in its very first section. *Id.*

provided for unilateral withdrawal with advance notice, with no other conditions, no party has sought such a change; indeed, the Commission noted that "no party has before now raised a concern" about that provision. *Id.*; *see also id.* at P 61 ("[P]arties could have sought to amend the exit provisions at any time to lengthen the notice [period] or add additional requirements. No such filings were made."), JA 19. (Louisiana Regulators point out that they did object to an attempted withdrawal by Entergy Arkansas in 2000 (*see* Br. 53) — they did not, however, suggest amending the exit provision, but in fact *relied* upon it in that earlier proceeding. *See supra* p. 23; 92 FERC at 61,599 (noting that Louisiana Commission and New Orleans had asked FERC to enforce the eight-year notice provision to prevent Operating Companies from withdrawing sooner).) Accordingly, the Commission appropriately declined to upend the terms of the Agreement "merely because they turn out to be unfavorable at the time of enforcement." Rehearing Order at P 31, JA 35.

Given its longstanding lack of exit conditions, the System Agreement stands in contrast to other operating agreements, such as those governing various regional transmission organizations, that expressly condition withdrawal on payment of exit fees and/or fulfillment of other requirements. *See* Withdrawal Order at P 60, JA 18. For example, the agreement governing the PJM transmission system in the mid-Atlantic region requires continuing liability for obligations incurred under the

agreement. *See Duquesne Light Co.*, 122 FERC ¶ 61,039 at PP 31, 52, 81 (2008), *cited in* Withdrawal Order at P 60 n.24, JA 18. Similarly, the Midwest Independent System Operator's tariff requires an exiting party to pay an exit fee that is based on financial obligations under the tariff. *See Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282 at PP 52-60 (2006), *cited in* Withdrawal Order at P 60 n.24, JA 18. Accordingly, the Commission here noted that, if the Entergy companies had wished to impose similar conditions on withdrawal from the Entergy System Agreement, "they could have done so," or any other interested party could have later filed to amend the System Agreement. Rehearing Order at P 30, JA 34; *accord* Withdrawal Order at 60, JA 18.

Contrary to the Louisiana Regulators' charge that the Commission abdicated its statutory duty (*e.g.*, Br. 33-34), the Commission's focus on the terms of the System Agreement is, in fact, consistent with its responsibilities under the Federal Power Act. In two recent decisions, the Supreme Court has afforded significant weight to the Federal Power Act's respect for "the important role of contracts," enforcement of which is a "key source of stability." *Morgan Stanley*, 554 U.S. at 551; *see also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693, 699-700 (2010) (Court in *Morgan Stanley* "emphasized the essential role of contracts as a key factor fostering stability in the electricity market, to the longrun benefit of consumers"); *cf. id.* at 701 (recognizing longstanding FERC policy of

"promoti[ng] . . . the stability of supply arrangements which all agree is essential to the health of the energy industry") (internal quotation marks, alteration, and citation omitted). Notwithstanding the Louisiana Regulators' objection that they are not parties to the System Agreement (*see* Br. 25, 51), the Supreme Court also has noted that contracts "could scarcely provide [such] stability" if the Commission enforced their terms only as between the parties thereto but deemed them "inoperative as to everyone else — consumers, advocacy groups, state utility commissions, elected officials . . . ." *NRG*, 130 S. Ct. at 701.

III. THE COMMISSION'S ANALYSIS IS CONSISTENT WITH THE HISTORY OF THE ENTERGY SYSTEM AND WITH EXISTING COST EQUALIZATION RESPONSIBILITIES

The Commission did not, however, end its analysis with the language of the System Agreement. As it had previously indicated in its 2007 Complaint Order (*see* 119 FERC ¶ 61,224 at P 47) that it would, the Commission looked to the history of the Entergy System and its cost-sharing requirements, addressed in the long line of Entergy cases before the Commission and this Court, and found no reason to overturn the contractual terms in the System Agreement or to place additional conditions upon the withdrawals. *See* Rehearing Order at PP 25-27, JA 30-32.

A. Allowing The Withdrawing Operating Companies To Retain Ownership Of Their Generation Facilities Is Consistent With The History Of The Entergy System

The Louisiana Regulators object to the Commission's decision that Entergy Arkansas and Entergy Mississippi are not required to compensate the remaining Operating Companies. Br. 9-10. The Louisiana Regulators contend that all generation facilities were built to serve the Entergy System and that those assets must be left with the System, while the withdrawing Operating Companies must separately obtain their own new resources. *See* Br. 9, 30, 57. The Commission, however, considered the history of the Entergy System and reasonably determined that "generation in the Entergy system is, and was intended to be, owned by the individual Operating Companies, rather than by the system as a whole or shared among the various Operating Companies." Rehearing Order at P 28, JA 32.

1. Under The Entergy Agreement, Individual Operating Companies Own Their Generation Facilities

Entergy System facilities have long been centrally planned for the purpose of benefitting the integrated System. *See Louisiana IV*, 522 F.3d at 383; *Louisiana I*, 174 F.3d at 227. As explained *supra* at p. 8, the Operating Committee, in which each of the Operating Companies is represented, assigns new generation facilities to individual Operating Companies. *See Louisiana IV*, 522 F.3d at 383. The Committee decides the timing, location, and size of new facilities, but the assigned Operating Company bears the responsibility for the construction and for the costs

of operating the facilities. *Id.* (citing *Miss. Indus.*, 808 F.2d at 1556). The Operating Company then recovers those costs from its own retail customers. *See* Rehearing Order at P 29 ("The fixed costs of these facilities are included in the Operating Company's retail rates, and are borne by the retail customers in that jurisdiction."), JA 33.

In return, that Operating Company also retains the benefits of the energy produced, serving its own customers first and then providing any excess capacity to other Operating Companies. *See id.* (citing Service Schedule MSS-3 in System Agreement); *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 111 FERC ¶ 61,311 at P 6 (2005) (under System Agreement, "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"); *see also Louisiana I*, 174 F.3d at 220 ("[E]ach subsidiary makes its capacity available to its sister companies as a backstop for when demand exceeds selfgenerated supply.").

If the Entergy parties had intended to share ownership of generation facilities, "it would have been simple enough either to write such requirements into the System Agreement, or to decide to share ownership through the Operating Committee planning process." Rehearing Order at P 30, JA 34. To the contrary, however, the System Agreement reflects an intent that each Operating Company have its own resources sufficient to serve its customers: "Each Company shall

normally own, or have available to it under contract, such generating capability and other facilities as are necessary to supply all of the requirements of its own customers." System Agreement § 4.01, JA 55, *quoted in* Rehearing Order at P 28 n.29, JA 32; *see also* System Agreement § 3.05 ("It is the long term goal of the Companies that each Company have its proportionate share of Base Generating Units available to serve its customers either by ownership or purchase."), JA 52; Withdrawal Order at P 62 n.25 (citing § 3.05 and § 4.01 as supporting "the proposition that each Operating Company should have enough generating capacity to serve its own customers"), JA 19. The Commission has long recognized this key goal of the System Agreement. *See, e.g.*, *La. Pub. Serv. Comm'n*, 113 FERC ¶ 61,282 at P 39 ("the System Agreement itself is designed to balance multiple objectives, including a desire to have each Operating Company in each state own an appropriate portfolio of resources").

Moreover, contrary to the Louisiana Regulators' claim that the Operating Companies have no ability, given the Operating Committee's centralized planning, to plan for their own generation needs (*see* Br. 48), the Commission has long understood that the Operating Companies actively participate in the System's planning with an eye to their own needs as well as to the mutual benefits of the System. *See, e.g.*, *Middle S. Energy*, 31 FERC ¶ 61,305 at 61,649 ("there is no doubt that the individual companies have had input in Committee decisions and

recommendations, and have actively sought to build certain generation units based on the needs of their individual loads"), *quoted in* Rehearing Order at P 33, JA 36; *see also Louisiana I*, 174 F.3d at 226-27 (rejecting argument that Operating Companies lack autonomy); *Miss. Indus.*, 808 F.2d at 1555-56 (Operating Companies "were intimately involved in the planning stages of new generation units and sought to promote their own interests").[6]

Rather than powerless pawns controlled by a monolithic System, as portrayed by the Louisiana Regulators (*see, e.g.*, Br. 9, 47-50), the Operating Companies are properly understood (as this Court noted in *Louisiana IV*) as "collaborators in the Entergy System functioning for their *mutual* benefit." 522 F.3d at 394. Based on that understanding of the collaborative relationship among the Entergy Operating Companies, the Commission has repeatedly rejected

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[6] The case that Louisiana Regulators cite is not to the contrary. *See Ark. Elec. Energy Consumers, Inc. v. Entergy Corp.*, 126 FERC ¶ 61,051 (2009), *cited in* Br. 22, 48. There, as in the orders challenged here, the Commission held that Entergy Arkansas remains subject to the terms of the System Agreement until its withdrawal becomes effective in 2013, at the end of the eight-year notice period. 126 FERC ¶ 61,051 at P 37.

In that case, a complainant asked FERC to determine that Entergy Arkansas could no longer participate in System planning and could acquire a generation facility solely for its own use without committing any share of the output to another Operating Company. *Id.* at PP 34, 37. (In response, Entergy told the Commission, among other things, that the Operating Committee had begun to reflect the pending withdrawals in its long-term planning process. *Id.* at P 35.) FERC denied the complaint.

arguments that the Operating Companies share ownership of Entergy System resources. Louisiana Regulators contend (Br. 10-11, 38) that the Commission's earlier finding of undue discrimination underlying the bandwidth remedy was premised on the integration of the Entergy System, but they miss the Commission's further explanation that its choice of rough cost equalization "was premised on the historical ownership and financing by the Operating Companies." 111 FERC ¶ 61,311 at P 8. *See id.* at P 70 ("We reject the Louisiana Commission's argument that full production cost equalization is required by the [S]ystem Agreement and the FPA if a utility operates on a single system basis. The history of Entergy and the System Agreement indicate otherwise."); *id.* at P 71 (rejecting claim that Entergy operates as a "'monolithic' entity"); 113 FERC ¶ 61,282 at P 39 (individual Operating Companies' ownership of resources is one objective of System Agreement). Consistent with those earlier holdings, likewise based on the history of the Entergy System, Commission again found no evidence that the Entergy parties had intended to share ownership of generation facilities. Rehearing Order at P 30, JA 34.

2. The Exit Notice Period Provided In The Entergy System Agreement Allows For All Parties To Adjust Their Long-Term Plans

The Commission further explained that, to the extent that any of the Operating Companies — exiting Entergy Arkansas or Entergy Mississippi or any

of the four remaining affiliates — is concerned that its own mix of capacity is lacking, the System Agreement's eight-year notice period is "intended to provide time for individual Operating Companies to adjust their long-term plans and acquire any needed capacity." Rehearing Order at P 33, JA 36; *accord* Withdrawal Order at P 61, JA 19.

Indeed, eight years is a substantial time period for generation resource planning. In the context of regional transmission organizations' efforts to address local capacity shortages, for example, the Commission has approved rate designs that operate on the premise that new generation resources can enter the market within as little as *three* years. *See Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 (D.C. Cir. 2011) (three-year "lag time" under forward capacity market adopted in mid-Atlantic region "allows competition from new suppliers that lack the capacity to deliver electricity now but could develop that capacity within three years of winning a bid."); *Blumenthal v. FERC*, 552 F.3d 875, 879 (D.C. Cir. 2009) (noting that similar auction mechanism adopted in New England region provided "advance time [that] will allow potential new generators to compete in the auctions and plan for market entry"). And, as this Court recently observed, actual experience affirmed that premise. *Md. Pub. Serv. Comm'n*, 632 F.3d at 1285 (noting that independent report showed first few years of auctions had

"spurred an unprecedented amount of potential new resources," including new generation projects).

Furthermore, with the benefit of advance notice of the withdrawals by Entergy Arkansas and Entergy Mississippi, the other Entergy Operating Companies have continued to seek long-term resources to serve their customers. *See* Rehearing Order at P 34 (citing Transmittal Letter at 7-8, JA 129-30), JA 36-37; *see also id.* at P 29 n.38 ("individual Operating Companies have continued to pursue ownership of their own facilities to meet the needs of their load"), JA 34.

In particular, Entergy Louisiana and Entergy New Orleans have been "pursuing additional baseload capacity," for instance by taking steps to acquire ownership interests in an existing plant that will provide those Operating Companies "with a permanent source of additional coal-fired[] baseload capacity." Transmittal Letter at 8, JA 130. In addition, Entergy Louisiana has received approval from the Louisiana Commission to begin construction of a new baseload facility. *Id.* Also, both Entergy New Orleans and Entergy Louisiana will continue to purchase baseload capacity (110 megawatts each) from Entergy Arkansas under life-of-unit contracts that began in 2003. *See id.* at 8 n.15, JA 130. (Those Louisiana Operating Companies obtained the contracts over the strong opposition of petitioner Louisiana Commission in the litigation that culminated in *Louisiana V* — there, the Louisiana Commission challenged the assignment of

those long-term contracts to Entergy New Orleans and Entergy Louisiana, claiming that Entergy's allocation of those low-cost generation resources was unduly discriminatory against another Operating Company, Entergy Gulf States, Inc. *See Louisiana V*, 551 F.3d at 1043-44, 1045; *cf.* Br. 13.)

B. The Operating Companies' Obligations Under The System Agreement's Cost Equalization Requirements Will End When They Cease To Be Parties To That Agreement

At the core of the Louisiana Regulators' objection is that, after the eight-year notice periods, low-cost generation resources owned by Entergy Arkansas, in particular, will no longer be included in calculating the rough equalization of production costs (under which Entergy Arkansas has been required to make equalization payments to other Operating Companies). *See*, *e.g.*, Br. 14 ("There is no reasonable prospect that the Production Costs of [Entergy Arkansas] and the other Companies will remain roughly equal if [Entergy Arkansas] withdraws absent a continuing remedy."). Their argument rests on their view that the requirement of rough cost equalization, and the bandwidth remedy imposed by the Commission, are based only on the history of the Entergy System's centralized planning and are not tied to the Entergy Agreement. *See* Br. 36-39.

But the Commission rejected that fundamental premise of Louisiana Regulators' argument as "simply wrong":

> [These] arguments, including the claim that the withdrawals constitute cross-subsidization[] and the suggestion that Entergy Arkansas and

> Entergy Mississippi are withdrawing to improperly avoid bandwidth payments, assume that the Operating Companies are entitled to bandwidth payments in perpetuity, regardless of whether the Operating Companies making the payments are still parties to the Entergy System Agreement.

Rehearing Order at P 35, JA 37. Rather, "[t]he rough production cost equalization remedy only applies when an Operating Company is part of the System Agreement. Once Entergy Arkansas and Entergy Mississippi exit the System Agreement, any obligations that they have with respect to [the bandwidth remedy] would end." Withdrawal Order at P 62, JA 19; *see also* Rehearing Order at P 35 ("Once Entergy Arkansas and Entergy Mississippi withdraw from the Entergy system, they are no longer affiliates of the other Entergy Operating Companies for the purposes of the bandwidth formula."), JA 37; *cf.* 2007 Complaint Order at P 47 ("We find no basis to support the Louisiana Commission's request for what in effect would be involuntary continuation of the existing integrated system arrangements, or the virtual equivalent, in perpetuity.").[7]

The bandwidth remedy is rooted in the System Agreement itself, which states that the Agreement "provides a basis for equalizing among the Companies

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[7] The Commission also rejected Louisiana Regulators' contention that Entergy Arkansas had been pressured by Arkansas state regulators to withdraw from the Entergy System; while the Commission found no evidence of improper influence, it explained that the motivation behind the withdrawal was "irrelevant to our analysis of the Entergy System Agreement." Rehearing Order at P 35 n.49, JA 37.

any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies." System Agreement § 3.01, JA 52; *see also* Rehearing Order at P 31 (Commission imposed bandwidth remedy "to ensure that the purpose of the System Agreement is achieved"), JA 35. The System Agreement does not tie the production cost equalization requirement to the withdrawal provision, and the Commission saw no reason to do so now. *See* Rehearing Order at P 31 ("[The bandwidth] remedy applies while the System Agreement is in effect and bears no relationship to whether or not the 96-month withdrawal period is just and reasonable."), JA 35.

The Commission's focus on the System Agreement is entirely consistent with the Commission's earlier orders imposing the bandwidth remedy. *See La. Pub. Serv. Comm'n*, 111 FERC ¶ 61,311 at P 28 (Commission found "the System Agreement is not currently in rough production cost equalization"); *La. Pub. Serv. Comm'n*, 113 FERC ¶ 61,282 at P 1 ("a bandwidth remedy is necessary to assure the justness and reasonableness of the System Agreement and the cost allocations thereunder"). This Court has similarly focused on the System Agreement as the basis for the Commission's cost reallocation remedies. *See Louisiana V*, 551 F.3d at 1043 ("we have long viewed the System Agreement as requiring that affiliates share the costs of power generation in roughly equal proportion"); *Louisiana IV*, 522 F.3d at 384 (noting that, in *Mississippi Industries*, Court had agreed with

FERC that the System Agreement was intended to roughly equalize capacity costs among the Operating Companies); *id.* at 390 (adhering to previous holding that FERC had "jurisdiction to modify the capacity cost allocation in the System Agreement"); *Miss. Indus.*, 808 F.2d at 1554-55 ("The operating companies intended to roughly equalize the System's capacity costs among themselves by executing . . . the 1982 System Agreement.").

Accordingly, when the Louisiana Regulators object (Br. 14, 27) that Entergy Arkansas, once it leaves the System Agreement, will no longer be in rough production cost equalization with the remaining parties to the Agreement, they may be correct — but missing the point. The Commission reasonably concluded, based on the terms of the System Agreement and on its own (and this Court's) precedents concerning the Entergy System, that its bandwidth remedy was grounded in the cost equalization requirements of the Agreement and intended to address undue discrimination among the parties — not former parties or other non-parties — to that Agreement.

IV. THE COMMISSION APPROPRIATELY DETERMINED THAT IT WILL SEPARATELY CONSIDER POST-WITHDRAWAL ARRANGEMENTS

Finally, the Commission's review of the impact of the withdrawals on the Entergy System did not end with the challenged FERC Orders. The Commission decided only the limited question of whether, and under what conditions, Entergy

Arkansas and Entergy Mississippi may withdraw from the System Agreement. While the instant proceeding resolved the exiting Companies' ability to leave the Entergy System with no further obligations under that Agreement, the Commission expected all interested parties "to move forward and develop the details of all needed successor arrangements." Withdrawal Order at P 63, JA 19. The Commission emphasized that it would review those post-withdrawal arrangements to ensure that they are just and reasonable and not unduly discriminatory. *See id.* ("we note that Entergy has an obligation to ensure that any future operating arrangement is just and reasonable"); *id.* at P 67 ("Entergy will have to file under [FPA § 205] to reflect the arrangements to be in place after the withdrawal of Entergy Arkansas and Entergy Mississippi from the System Agreement."), JA 21; *accord* Rehearing Order at P 3, JA 23. At that later stage, the Commission would address concerns "regarding the structure of the post-withdrawal Entergy system . . . ." Rehearing Order at P 37, JA 38; *see also* Withdrawal Order at P 67 ("any interested party will be able to comment on the successor arrangements"), JA 21.

Accordingly, to the extent that the Louisiana Regulators raise concerns regarding the adequacy of post-withdrawal arrangements — whether related to transmission operations or to wholesale power supply contracts (*see* Br. 23 (noting that the System's "shared power flows will require continuing transmission and

generation-sharing arrangements")) — the Commission will consider whether such arrangements are just and reasonable and not unduly preferential or discriminatory, pursuant to FPA §§ 205 and 206, 16 U.S.C. §§ 824d, 824e. Indeed, the Commission identified two issues raised by the Louisiana Commission in this case that would be "more appropriately raised in a future proceeding regarding the structure of the post-withdrawal Entergy system": the structure and impact of a settlement concerning Union Pacific coal transportation, and allocation of transmission costs related to Entergy Arkansas's purchase of the Ouachita power plant.[8] Rehearing Order at P 37 n.54, JA 38; *see also* Louisiana Commission Rehearing Request, R. 35 at 30, JA 630.

Likewise, the Commission will continue to oversee the relationships among the four Operating Companies that will remain as parties to the System Agreement. In particular, the rough equalization requirement of the System Agreement, and the FERC-ordered bandwidth remedy thereunder, will continue in effect as to the remaining parties to that Agreement, and the Commission will address any

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[8] Entergy Arkansas acquired the Ouachita plant after it gave notice of its withdrawal from the System Agreement; because it remains a party to the Agreement until the end of the eight-year notice period, however, Entergy Arkansas committed one-third of the plant's capacity and energy, for the life of the unit, to (remaining member) Entergy Gulf States Louisiana pursuant to the terms of the System Agreement concerning resource allocation. *See Ark. Elec. Energy Consumers*, 126 FERC ¶ 61,051 at PP 7, 37-38, *discussed supra in* note 6.

disputes that arise regarding that arrangement. *Cf.* Br. 41 (bandwidth remedy is necessary as a "backstop" against cost shifts resulting from System resource allocation decisions); Br. 43 ("The circumstances that required the [bandwidth] Remedy will continue after [Entergy Arkansas] withdraws.").

The Commission's choice to consider those post-withdrawal arrangements in a separate, second phase is entirely appropriate. It is within the Commission's purview to determine how best to allocate its resources for the most efficient resolution of matters before it. *See, e.g., Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities"; lower court "clearly overshot the mark" if it required the agency to resolve a particular issue in a particular proceeding) (internal citations omitted); *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) ("An agency has broad discretion to determine when and how to hear and decide the matters that come before it.") (citing cases).

Here, the Commission determined that "this two-part analysis is the best way to review the potential withdrawal of Entergy Arkansas and Entergy Mississippi from the Entergy system . . . ." Rehearing Order at P 27, JA 32. The Commission encouraged Entergy to make its filing under FPA § 205 for the post-2013 arrangements "as soon as possible in order for the Commission to review the

replacement arrangement prior to the withdrawals." Withdrawal Order at P 63, JA 19; *accord* Rehearing Order at P 27, JA 31-32. Accordingly, the Commission will continue its active oversight of all jurisdictional Entergy activities, consistent with its mandate under the Federal Power Act, to ensure that the rates, terms, and conditions of electric service to Entergy customers — including those represented by the Louisiana Regulators — continue to be just, reasonable, and not unduly preferential or discriminatory.

CONCLUSION

For the reasons stated, the petitions for review should be denied and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondents contains 9,586 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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November 8, 2011

ADDENDUM

Statutes and Regulations

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for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate,

charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term ''short-term sale'' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term ''applicable Commission rule'' means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by

[1] See References in Text note below.

the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100–473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109–58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 1295(b)(1), substituted ''hearing held'' for ''hearing had'' in first sentence.

Subsec. (b). Pub. L. 109–58, § 1295(b)(2), struck out ''the public utility to make'' before ''refunds of any amounts paid'' in seventh sentence.

Pub. L. 109–58, § 1285, in second sentence, substituted ''the date of the filing of such complaint nor later than 5 months after the filing of such complaint'' for ''the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period'', in third sentence, substituted ''the date of the publication'' for ''the date 60 days after the publication'' and ''5 months after the publication date'' for ''5 months after the expiration of such 60-day period'', and in fifth sentence, substituted ''If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision'' for ''If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision''.

Subsec. (e). Pub. L. 109–58, § 1286, added subsec. (e).

1988—Subsec. (a). Pub. L. 100–473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100–473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 4 of Pub. L. 100–473 provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.''

LIMITATION ON AUTHORITY PROVIDED

Section 3 of Pub. L. 100–473 provided that: ''Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].''

STUDY

Section 5 of Pub. L. 100–473 directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, § 207, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission on inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, § 208, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

fuel cost adjustment clause so that it is consistent with paragraphs (a)(1) and (a)(2)(iii) of this section. Such amendment shall state the system reserve capacity criteria by which the system operator decides whether a reliability purchase is required. Where the utility filing the statement is required by a State or local regulatory body (including a plant site licensing board) to file a capacity criteria statement with that body, the system reserve capacity criteria in the statement filed with the Commission shall be identical to those contained in the statement filed with the State or local regulatory body. Any utility that changes its reserve capacity criteria shall, within 45 days of such change, file an amended fuel cost and purchased economic power adjustment clause to incorporate the new criteria.

(ii) Reserve capacity shall be deemed adequate if, at the time a purchase was initiated, the buyer's system reserve capacity criteria were projected to be satisfied for the duration of the purchase without the purchase at issue.

(iii) The total cost of the purchase must be projected to be less than total avoided variable cost, at the time a purchase was initiated, before any non-fuel purchase charge may be included in F_m.

(iv) The purchasing utility shall make a credit to F_m after a purchase terminates if the total cost of the purchase exceeds the total avoided variable cost. The amount of the credit shall be the difference between the total cost of the purchase and the total avoided variable cost. This credit shall be made in the first adjustment period after the end of the purchase. If a utility fails to make the credit in the first adjustment period after the end of the purchase, it shall, when making the credit, also include in F_m interest on the amount of the credit. Interest shall be calculated at the rate required by § 35.19a(a)(2)(iii) of this chapter, and shall accrue from the date the credit should have been made under this paragraph until the date the credit is made.

(v) If a purchase is made of more capacity than is needed to satisfy the buyer's system reserve capacity criteria because the total costs of the extra capacity and associated energy are less than the buyer's total avoided variable costs for the duration of the purchase, the charges associated with the non-reliability portion of the purchase may be included in *F*.

(Approved by the Office of Management and Budget under control number 1902–0096)

(Federal Power Act, 16 U.S.C. 824d, 824e and 825h (1976 & Supp. IV 1980); Department of Energy Organization Act, 42 U.S.C. 7171, 7172 and 7173(c) (Supp. IV 1980); E.O. 12009, 3 CFR part 142 (1978); 5 U.S.C. 553 (1976))

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 421, 36 FR 3047, Feb. 17, 1971; 39 FR 40583, Nov. 19, 1974; Order 225, 47 FR 19056, May 3, 1982; Order 352, 48 FR 55436, Dec. 13, 1983; 49 FR 5073, Feb. 10, 1984; Order 529, 55 FR 47321, Nov. 13, 1990; Order 600, 63 FR 53809, Oct. 7, 1998; Order 714, 73 FR 57532, Oct. 3, 2008; 73 FR 63886, Oct. 28, 2008]

§ 35.15 Notices of cancellation or termination.

(a) *General rule*. When a rate schedule, tariff or service agreement or part thereof required to be on file with the Commission is proposed to be cancelled or is to terminate by its own terms and no new rate schedule, tariff or service agreement or part thereof is to be filed in its place, a filing must be made to cancel such rate schedule, tariff or service agreement or part thereof at least sixty days but not more than one hundred-twenty days prior to the date such cancellation or termination is proposed to take effect. A copy of such notice to the Commission shall be duly posted. With such notice, each filing party shall submit a statement giving the reasons for the proposed cancellation or termination, and a list of the affected purchasers to whom the notice has been provided. For good cause shown, the Commission may by order provide that the notice of cancellation or termination shall be effective as of a date prior to the date of filing or prior to the date the filing would become effective in accordance with these rules.

(b) *Applicability*. (1) The provisions of paragraph (a) of this section shall apply to all contracts for unbundled transmission service and all power sale contracts:

(i) Executed prior to July 9, 1996; or

(ii) If unexecuted, filed with the Commission prior to July 9, 1996.

(2) Any power sales contract executed on or after July 9, 1996 that is to terminate by its own terms shall not be subject to the provisions of paragraph (a) of this section.

(c) *Notice.* Any public utility providing jurisdictional services under a power sales contract that is not subject to the provisions of paragraph (a) of this section shall notify the Commission of the date of the termination of such contract within 30 days after such termination takes place.

[Order 888, 61 FR 21692, May 10, 1996, as amended by Order 714, 73 FR 57532, Oct. 3, 2008]

§ 35.16 Notice of succession.

Whenever the name of a public utility is changed, or its operating control is transferred to another public utility in whole or in part, or a receiver or trustee is appointed to operate any public utility, the exact name of the public utility, receiver, or trustee which will operate the property thereafter shall be filed within 30 days thereafter with the Commission with a tariff consistent with the electronic filing requirements in § 35.7 of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 714, 73 FR 57533, Oct. 3, 2008]

§ 35.17 Withdrawals and amendments of rate schedule, tariff or service agreement filings.

(a) *Withdrawals of rate schedule, tariff or service agreement filings prior to Commission action.* (1) A public utility may withdraw in its entirety a rate schedule, tariff or service agreement filing that has not become effective and upon which no Commission or delegated order has been issued by filing a withdrawal motion with the Commission. Upon the filing of such motion, the proposed rate schedule, tariff or service agreement sections will not become effective under section 205(d) of the Federal Power Act in the absence of Commission action making the rate schedule, tariff or service agreement filing effective.

(2) The withdrawal motion will become effective, and the rate schedule, tariff or service agreement filing will be deemed withdrawn, at the end of 15 days from the date of filing of the withdrawal motion, if no answer in opposition to the withdrawal motion is filed within that period and if no order disallowing the withdrawal is issued within that period. If an answer in opposition is filed within the 15 day period, the withdrawal is not effective until an order accepting the withdrawal is issued.

(b) *Amendments or modifications to rate schedule, tariff or service agreement sections prior to Commission action on the filing.* A public utility may file to amend or modify, and may file a settlement that would amend or modify, a rate schedule, tariff or service agreement section contained in a rate schedule, tariff or service agreement filing that has not become effective and upon which no Commission or delegated order has yet been issued. Such filing will toll the notice period in section 205(d) of the Federal Power Act for the original filing, and establish a new date on which the entire filing will become effective, in the absence of Commission action, no earlier than 61 days from the date of the filing of the amendment or modification.

(c) *Withdrawal of suspended rate schedules, tariffs, or service agreements, or parts thereof.* Where a rate schedule, tariff, or service agreement, or part thereof has been suspended by the Commission, it may be withdrawn during the period of suspension only by special permission of the Commission granted upon application therefor and for good cause shown. If permitted to be withdrawn, any such rate schedule, tariff, or service agreement may be refiled with the Commission within a one-year period thereafter only with special permission of the Commission for good cause shown.

(d) *Changes in suspended rate schedules, tariffs, or service agreements, or parts thereof.* A public utility may not, within the period of suspension, file any change in a rate schedule, tariff, or service agreement, or part thereof, which has been suspended by order of the Commission except by special permission of the Commission granted upon application therefor and for good cause shown.

(e) *Changes in rate schedules or tariffs or parts thereof continued in effect and which were proposed to be changed by the suspended filing.* A public utility may

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 8th day of November 2011, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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