ORAL ARGUMENT NOT YET SCHEDULED

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

No. 05-1161

LOUISIANA PUBLIC SERVICE COMMISSION,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MAY 15, 2006

CERTICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties:

All parties and intervenors appearing in the proceedings below and in this Court are listed in Petitioner's Circuit Rule 28(a)(1) certificate.

B. Rulings Under Review:

1. *Louisiana Public Service Comm'n, et al. v. Entergy Corp., et al.*, 106 FERC ¶ 61,228 (March 8, 2004) (Initial Order), JA 282-321.

2. *Louisiana Public Service Comm'n, et al. v. Entergy Corp., et al.*, 111 FERC ¶ 61,080 (April 18, 2005) (Rehearing Order), JA 362-376.

C. Related Cases:

This case was previously before this Court as *Louisiana Public Service Comm'n v. FERC*, No. 97-1661, 184 F.3d 892 (1999) ("*Louisiana I*"), JA 12-24.

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Monique Watson
Attorney

May 15, 2006

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GLOSSARY

ALJ Order	*Louisiana Public Service Comm'n v. Entergy Corp*., 96 FERC ¶ 63,002 (2001).
Compliance Order	*Louisiana Public Service Comm'n v. Entergy Corp*., 112 FERC ¶ 61,192 (2005).
Entergy	Entergy Corporation
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Initial Order	*Louisiana Public Service Comm'n v. Entergy Corp*., 106 FERC ¶ 61,228 (2004).
Louisiana Commission	Louisiana Public Service Commission
Louisiana I	*Louisiana Public Service Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999)…
MSS-1	Service Schedule MSS-1 prescribed the method for equalizing among Entergy's operating companies the capability and ownership incident to reserve generating capacity on the Entergy system.
MSS-3	Service Schedule MSS-3 determines how energy will be allocated among the Entergy operating companies each hour.
Operating Companies	Entergy Louisiana, Inc., Entergy Gulf States, Inc., Entergy Arkansas, Inc., Entergy Mississippi, Inc. and Entergy New Orleans, Inc.
Presiding Judge	Administrative Law Judge

GLOSSARY
(continued)

Rehearing Order	*Louisiana Public Service Comm'n v. FERC*, 111 FERC ¶ 61,080 (2005).
System Agreement	Entergy Corporation's System Agreement

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

The issues presented for review concern:

1. Prospective relief - Whether this Court has jurisdiction to review objections by petitioner Louisiana Public Service Commission ("Louisiana Commission") concerning the timing of prospective relief afforded by the Federal Energy Regulatory Commission ("FERC") in a ratemaking proceeding, when the Louisiana Commission did not preserve its objections on rehearing before the FERC and the FERC did not address the Louisiana Commission's concerns until a

later order not challenged in the instant appeal.

2. Retroactive relief - Whether the FERC, after agreeing with the Louisiana Commission that Entergy Corporation ("Entergy") must remove interruptible load when allocating costs among its utility operating companies in various states, reasonably exercised its remedial discretion in denying refunds based on its interpretation of section 206(c) of the Federal Power Act ("FPA"), 16 U.S.C. § 824e(c), and the Louisiana Commission's failure to demonstrate that the operating companies paying refunds would be able to recover their costs from retail ratepayers.

3. Issue in controversy - Whether the FERC reasonably upheld the determination of the Administrative Law Judge that certain ratemaking issues relating to sulfur dioxide emission allowances were not properly part of the underlying proceedings.

STATUTES

Pertinent sections of the FPA are set out in the Addendum to this brief.

COUNTERSTATEMENT OF JURISDICTION

The first of the Louisiana Commission's arguments, concerning the timing of prospective relief, *see* Br. at 2, 24-33, is not properly before this Court. *See infra* Argument, Section II. While the FERC granted the Louisiana Commission's complaint and directed Entergy to stop including interruptible load when allocating

costs among its utility operating costs, the Louisiana Commission nevertheless objects to the FERC's "phase-in" of prospective relief. The FERC did not, however, adopt the purported "phase-in" in the challenged orders but rather did so in a later "compliance" order that is not part of this appeal and instead is part of a proceeding that is still ongoing. Accordingly, the Louisiana Commission is not "aggrieved" by the challenged orders on this issue, within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), and judicial standing analysis. Nor did the Louisiana Commission raise its objections in its request for rehearing to the FERC in this proceeding, as required under FPA § 313(b).

STATEMENT OF THE CASE

I. Nature Of The Case, Course Of Proceedings And Disposition Below

This appeal concerns the resolution of a 10-year old complaint proceeding. Many of the issues are complex, concerning the manner in which Entergy allocates certain costs among its utility operating companies under the FERC-filed Entergy System Agreement. This is the second time that the Court has confronted the matter; it earlier directed the FERC on remand to consider further the cost allocation issues raised by the Louisiana Commission's complaint. *See Louisiana Public Service Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) ("*Louisiana I*"), JA 12-24.[1]

[1] "R" refers to a record item. "JA" refers to the Joint Appendix page number. "P"

On remand, the issues were set for hearing. The Administrative Law Judge ("Presiding Judge") found that the Louisiana Commission had not proved its complaint that all interruptible loads should be removed from Entergy's ratemaking calculations. *See Louisiana Public Service Comm'n v. Entergy Corp.*, 96 FERC ¶ 63,002 (2001) ("ALJ Order"), JA 199-243. In the two orders now on appeal, the FERC reversed the Presiding Judge on the removal of interruptible loads and granted the Louisiana Commission's complaint. *See Louisiana Public Service Comm'n v. Entergy Corp.*, 106 FERC ¶ 61,228 (2004) ("Initial Order"), JA 282-321, *reh'g denied*, 111 FERC ¶ 61,080 (2005) ("Rehearing Order"), JA 362-376.

Thus, the merits of the Louisiana Commission's complaint, concerning the cost allocation issues that were presented to the Court in *Louisiana I*, no longer are before the Court – they were resolved in the Louisiana Commission's favor. The principal issues remaining concern the availability of prospective and retroactive relief. (The FERC determined, here, that refunds were not appropriate and, later, that prospective relief should be phased-in, for billing purposes, over twelve months.) The other issue concerns whether a particular ratemaking issue should have been adjudicated in the underlying proceeding. (The FERC, agreeing with the Presiding Judge, determined that the ratemaking treatment of sulfur dioxide

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refers to the internal paragraph number within a FERC order.

emission allowances was best heard in another proceeding.)

II. STATEMENT OF FACTS

A. Statutory And Regulatory Framework

FPA § 201(b), 16 U.S.C. § 824(b), confers upon the FERC jurisdiction over the rates, terms and conditions of wholesale power and transmission service provided by public utilities in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002). 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).

Under FPA § 206, 16 U.S.C. § 824e, the FERC, acting either on its own initiative or after receiving a complaint, can investigate the existing rates and terms of utility service. *See*, *e.g.*, *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 4, 10 (D.C. Cir. 2002). In order for the FERC to change an existing rate or utility practice, it "must first prove that the existing rates or practices are 'unjust, unreasonable, unduly discriminatory or preferential.'" *Id*. at 10 (quoting 16 U.S.C. § 824e(a)). The FERC must then show "that its proposed changes are just and reasonable." *Id*. (citing *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988)).

The FERC's remedial authority under FPA § 206, if it makes these showings and revises a FERC-jurisdictional rate or service, is mainly prospective. *See* 16 U.S.C. § 824e(a) (FERC, upon making necessary findings, can determine a revised rate "to be thereafter observed and in force"). As revised by the Regulatory Fairness Act of 1988, Pub. L. No. 100-473, 102 Stat. 2299 (1988), however, FPA § 206 does confer to the FERC some limited refund authority. Specifically, FPA § 206(b) allows the FERC to provide for refunds for the 15-month period following a refund effective date established under FPA § 206(a) upon the filing of a complaint. 16 U.S.C. § 824e(b). The FERC's limited refund authority under FPA § 206(b) is further limited by FPA § 206(c), which applies in the case of a holding company (like Entergy) with "two or more electric utility companies." *Id.* § 824e(c). In that circumstance, the FERC cannot order refunds if, among other things, a utility operating company is unable to recover a resulting increase in its costs. *Id*. *See also Connecticut Light and Power Co.*, 45 FERC ¶ 61,370 at 62,163-64 (1988) ("*CL&P*") (examining FPA 206's statutory text and legislative history).

B. Events Leading to the Challenged Orders

1. Examination Of The Entergy System Agreement

This proceeding began on March 15, 1995, when the Louisiana Commission filed a complaint seeking to exclude interruptible load in the allocation of fixed

capacity costs in Entergy's System Agreement. Entergy's System Agreement is a FERC-approved rate schedule entered into by the operating companies, which allocates Entergy's system costs based on a formula rate. *See* (Arts. 2.16 – 2.18), JA 386-387. *See also Entergy Louisiana, Inc. v. Louisiana Public Service Comm'n*, 539 U.S. 39, 42-43 (2003) ("*Entergy Louisiana*") (describing multi-state Energy system and allocation of costs under the System Agreement); *Louisiana I*, 184 F.3d at 894-95, JA 14-15 (same).

Initially, the FERC dismissed the complaint. It decided that the System Agreement was designed to distribute fairly system costs among Entergy operating companies, and that the Louisiana Commission had not demonstrated that Entergy's billing practices had upset the "equalization among companies" of the fixed costs of Entergy's system. *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 76 FERC ¶ 61,168 (1996), *reh'g denied*, 80 FERC ¶ 61,282 at 62,007 (1997). JA 1-8 and JA 9-11.

The Louisiana Commission appealed to this Court, which, in *Louisiana I*, remanded the matter back to the FERC. The Court directed the FERC either to adhere to the principles that it articulated in *Kentucky Utils. Co.*, 15 FERC ¶ 61,002, *reh'g denied*, 15 FERC ¶ 61,222 (1981) (rejecting the inclusion of interruptible load in allocating capacity costs), or to provide a reason for including interruptible load in the allocation of capacity costs. *See Louisiana I*, 184 F.3d at

900, JA 24.

On remand, the FERC set this allocation issue for hearing before the Presiding Judge.

2. Sulfur Dioxide Amendment to System Agreement

On November 1, 1999, in a separate proceeding to comply with a FERC Policy Statement setting forth the conditions under which it would allow utilities to recover the cost of emission allowances through their wholesale rates, Entergy filed an amendment to Schedule MSS-3 of the System Agreement. The amendment proposed to include the incremental replacement cost of sulfur dioxide emission allowances that operating companies use in connection with the generation of electric energy that they exchange among themselves. JA 34, (Attachment A at 3). The purpose of the amendment was to ensure recovery of all sulfur dioxide costs that the operating systems incur in complying with certain laws. *Id.* at 2, JA 33.

On December 28, 1999, the FERC accepted Entergy's filing subject to the outcome of the instant interruptible complaint proceeding. *See Entergy Services, Inc.*, 89 FERC ¶ 61,331 at 62,004-05 (1999).

3. ALJ Order

On July 6, 2001, the Presiding Judge issued an Initial Decision. ALJ Order, 96 FERC ¶ 63,002, JA 199-243. Specifically, the Presiding Judge ruled that

Entergy should: (1) continue to include interruptible loads in the calculation of the responsibility ratio if that load was serviced in 1995 (when Entergy stopped planning and constructing capacity to serve both firm and interruptible loads) and Entergy continued to serve it; (2) remove interruptible load as contracts expire; and (3) not consider newly-acquired interruptible load in the calculation of peak load responsibility ratios. The Presiding Judge also ruled that refunds were appropriate. *Id.* at 65,024, JA 239.

As for the sulfur dioxide issue, the Presiding Judge found that it was not properly before him because the FERC already had ruled that Entergy's sulfur dioxide amendment was just and reasonable. *Id.* at 65,025, JA 242. The Presiding Judge also held that the parties had removed the issue from the underlying proceeding via a settlement agreement. *Id.*

Entergy, the Louisiana Commission, FERC Staff, and other parties filed briefs on exceptions to the ALJ Order. Some parties sought a finding that capacity costs could not continue to be allocated to interruptible load, while Entergy and the local regulators from New Orleans, Mississippi, and Arkansas ("State Regulators") opposed the grant of refunds. The Louisiana Commission argued that the FERC had not decided Entergy's sulfur dioxide amendment issues. *See* "Brief on Exceptions of the Louisiana Public Service Commission" at 31-37, JA 261-268.

C. Initial Order

1. FERC Rulings Addressing Interruptible Loads and Refunds

Reversing the ALJ Order in part, the FERC directed Entergy to end its historic practice of including interruptible load when calculating each company's peak load responsibility ratio under the System Agreement, if the system was actually serving interruptible load at the time of the system peak. Initial Order, 106 FERC 61,228 at PP 67-77, JA 308-313. The FERC also reversed the Presiding Judge's order of refunds. *Id.* at P 88, JA 317. As to refunds, the FERC explained that the Presiding Judge had wrongly relied on cases that involved refunds of rates that "were excessive," while the underlying case involved "a reallocation of costs" among Entergy's operating companies and thus falls within the purview of FPA § 206(c), 16 U.S.C. § 824e(c). Initial Order at P 84, JA 315-316.[2] The FERC also ruled that it could not make the requisite finding under FPA § 206(c), that there would not be a reduction in revenues, because the operating companies could not be assured recovery of the monies that would be refunded as a result of the reallocation of costs among the companies. *Id.*

[2] In support, the FERC cited both the legislative history of FPA § 206(c) and FERC orders implementing FPA § 206(c). *See* S. Comm. on Energy and Natural Resources, Regulatory Fairness Act, S. Rep. No. 100-491 at 6-7 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2684, 2687-88; *CL&P*, 45 FERC at 62,163-64; *Southern Company Services, Inc.*, 46 FERC ¶ 61,381 at 62,191 and n.19 (1989); *Blue Ridge Power Agency v. Appalachian Power Co.*, 57 FERC ¶ 61,100 at 61,375 (1991), *reh'g denied*, 58 FERC ¶ 61,193 (1992).

In this respect, the FERC disapproved of the Presiding Judge's ruling that the Louisiana Commission's argument that Entergy could recover its costs was "uncontroverted." *Id.* at P 86, JA 316. Rather, as the FERC observed, several parties challenged the Louisiana Commission's conclusion that refunds were "appropriate in this proceeding." *Id.*

2. Sulfur Dioxide Ruling

The FERC affirmed the Presiding Judge's ruling that the sulfur dioxide ratemaking issue had been removed by settlement to another System Agreement ("rough equalization") complaint proceeding. *Id.* at P 96, JA 320. The FERC also concluded that such removal did not "deprive the Louisiana Commission of a forum to litigate this issue." *Id.* at P 99, JA 321.

3. Rehearing and Clarification Requests

On rehearing of the Initial Order, the Louisiana Commission argued that the FERC erred by denying refunds. It asserted that the FERC erred by denying refunds because "the rule against retroactive ratemaking cannot preclude recovery of FERC-ordered refunds" and that its witness had provided an evidentiary basis for a "'finding' and the legal analysis that should support the 'finding.'" JA 639, 646. The Louisiana Commission also argued that the FERC should reconsider its decision not to consider in this proceeding, and to defer to another proceeding, the issue of ratemaking treatment of sulfur dioxide emission allowances. *Id.* at 14-15,

JA 647-648.

Entergy also sought rehearing, but it did not challenge the FERC's ruling that it must modify the System Agreement prospectively effective April 1, 2004, to exclude interruptible load from the calculation of peak load responsibility. JA 323. Rather, Entergy asserted that the Initial Order "requires a fundamental change in the manner" in which it will determine each operating company's cost responsibility under the System Agreement. *Id.* at 4, JA 325. Entergy also asked the FERC for guidance on several questions regarding the implementation of the changes to the intra-system billing process. *Id.* at 5-12, JA 326-333.

D. Rehearing Order

The FERC denied rehearing. Specifically, it held that the Louisiana Commission's refund arguments ignored the fact that refunds are "discretionary" and that the statutory language of FPA § 206(c) limits the FERC's "authority to order refunds" where, as here, it could not make the "findings required by the statute." Rehearing Order, 111 FERC ¶ 61,080 at P 21, JA 368. The FERC also emphasized that it would exceed its authority to prescribe directly retail rates for the interruptible customers. *Id.* at P 22, JA 369.

Likewise, the FERC rejected the Louisiana Commission's sulfur dioxide arguments. *Id.* at P 26, JA 370. The FERC determined that the Louisiana Commission had not timely raised its concerns regarding inclusion of this issue in

the matters addressed in the other (rough equalization) proceeding. *Id.* The FERC, therefore, directed the Louisiana Commission to renew its argument "in the next case Entergy files regarding the System Agreement" or to "file a complaint raising this issue." *Id.* Finally, the FERC, at Entergy's request, provided guidance in implementing its findings, and directed Entergy to make a compliance filing in thirty days. *Id.* at PP 30-34, JA 371-372.

The petition for review followed.

SUMMARY OF ARGUMENT

I.

First, the Louisiana Commission failed to seek rehearing, in contravention of FPA § 313(b), 16 U.S.C. § 825*l*(b), of the FERC's guidance on prospective implementation sought by Entergy. Moreover, on this issue, the Louisiana Commission does not claim injury from the Initial and Rehearing Orders now on review, but rather from the FERC's later order addressing Entergy's later filing in compliance with the Rehearing Order and addressing the "phase-in" of relief. In any event, the FERC fully considered the record and reasonably rejected the Louisiana Commission's concerns in the Compliance Order that is not under review.

II.

As for retroactive relief, the FERC's decision to decline to order refunds was based on a reasonable interpretation of FPA § 206(c), 16 U.S.C. § 824e(c). The FERC examined FPA § 206(c), its legislative history, and the record, and concluded that it could not make the requisite statutory findings to assure that the Entergy operating companies that would be required to pay refunds would be able to collect increased costs from their customers. In support, the FERC found that the Louisiana Commission's witness testimony had been rebutted and was based on speculation and, thus, had no probative value. Accordingly, the FERC

reasonably exercised its remedial discretion in declining to order refunds.

III.

The FERC, agreeing with the Presiding Judge, properly deferred acting on the sulfur dioxide issue, where the parties had entered into an uncontested settlement that removed the issue to another complaint proceeding. Moreover, the FERC reasonably relied on the Presiding Judge's determination that there was no evidence in the record on which to make a sulfur dioxide ruling. As the FERC has provided the Louisiana Commission with a future opportunity to raise a sulfur dioxide challenge, the FERC's allocation of priorities and resources here was reasonable and is entitled to deference.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(c)(A); *see also, e.g.*, *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) ("*Florida Municipal*"). This standard requires the FERC to "examine the relevant data and articulate a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also, e.g.*, *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). The FERC's factual findings are conclusive if supported by substantial evidence. *See* FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Florida Municipal*, 315 F.3d at 365 (quoting *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

"In general, [this Court] defer[s] to FERC's decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the FERC with full knowledge that this judgment requires a great deal of discretion." *Koch Gateway Pipeline Co. v. FERC*, 136

F.3d 810, 816 (D.C. Cir. 1998) (internal quotation marks omitted).[3] As a result, the Court does not ordinarily interfere with FERC's exercise of its remedial discretion so long as the agency's determination has a rational basis. *Id.* *See also, e.g.*, *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044-45 (D.C. Cir. 2000) ("*Connecticut Valley*") (explaining the FERC's broad remedial discretion under the statutes it administers); *Towns of Concord, Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 72-76 (D.C. Cir. 1992) ("*Towns of Concord*") (same).

Where a court is called upon to review an agency's construction of the statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S.C. 837, 842-43 (1984). *See also, e.g., Whitman v. American Trucking Ass'n*, 531 U.S. 457, 481 (2001). If the statute is silent or ambiguous as to the question at issue, then the Court "must defer to a reasonable interpretation made by the . . . agency." *Whitman*, 531 U.S. at 481; *Chevron*, 467 U.S. at 843. *See also New York v. EPA*, Nos. 03-1380, *et al.* (D.C. Cir. March 17, 2006) (reviewing *Chevron* deference

[3] Cases interpreting FPA § 313 and Section 19 of the Natural Gas Act, 15 U.S.C. § 717r, which are substantially identical provisions, can be cited interchangeably. *See, e.g., Granholm ex rel. Michigan Dept. of Natural Res. v. FERC*, 180 F.3d 278, 280 n.2 (D.C. Cir. 1999).

principles).

II. AS FOR THE PROSPECTIVE TIMING OF RELIEF, THE LOUISIANA COMMISSION'S ARGUMENTS ARE EITHER JURISDICTIONALLY BARRED OR UNSUPPORTED ON THE MERITS.

A. The Statutory Provisions

FPA § 313(a) provides that a party must apply for rehearing within 30 days of the issuance of the aggrieving order. 16 U.S.C. § 825*l*(a). Moreover, FPA § 313(b) provides that no objection to a FERC order "shall be considered by the court" on judicial review by an "aggrieved" party "unless such objection shall have been urged before the [FERC] in the application for rehearing," absent reasonable ground for the party's failure to do so. *Id.* § 825*l*(b).

This Court has repeatedly held that these requirements are "jurisdictional prerequisite[s] to judicial review." *Moreau v. FERC*, 982 F.2d 556, 563 (D.C. Cir. 1993), quoting *Public Service Comm'n v. FPC*, 543 F.2d 757, 774 n.116 (D.C. Cir. 1974) (internal quotation marks omitted). Furthermore, "it is settled that 'the time requirements of the statute are as much a part of the jurisdictional threshold as the mandate to file for a rehearing,'" so that they "must be strictly construed . . . and may not be waived by FERC or evaded by the courts." *Moreau*, 982 F.2d at 563, quoting *Boston Gas Co. v. FERC*, 575 F.2d 975, 977 (1st Cir. 1978) (internal quotation marks and citations omitted). *See also, e.g.*, *California Dep't. of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002).

B. The Louisiana Commission Failed To Preserve Below Its Objections To The FERC's "Phase-In" Of The Removal Of Interruptible Loads From The Calculation Of Peak Load Responsibility.

The FERC did not, in the challenged orders, direct or approve the delay or "phase-in" of prospective relief. Rather, after granting the Louisiana Commission's complaint in the Initial Order, it provided in the Rehearing Order, at Entergy's request, certain guidance concerning implementation of the Initial Order. *See* Rehearing Order at PP 27-34, JA 370-372. The Louisiana Commission did not seek rehearing of any aspect of the Rehearing Order, leaving specific implementation issues – including the "phase-in" of prospective relief – to a later compliance proceeding. Accordingly, the Louisiana Commission did not, in contravention of FPA § 313(b), preserve its objections to the timing of prospective relief in a request for rehearing. *See* Br. at 2, 24-33 (Louisiana Commission's objection to delay in the implementation of prospective relief concerns the FERC's later approval of a later compliance filing).

In the Initial Order, the FERC agreed with the Louisiana Commission that Entergy must remove all interruptible load when calculating peak load responsibility ratios. Initial Order at P 77, JA 313. As for prospective implementation of that decision, the FERC stated only that "we will make the change that we order here effective from the first day of the first month following the date of this order (*i.e.*, April 1, 2004)." *Id*. at P 88, JA 317.

Entergy subsequently filed a motion that did not challenge the FERC's ruling that it must modify the Entergy System Agreement, prospectively effective April 1, 2004, to exclude interruptible load form the calculation of peak load responsibility. JA 323. Rather, Entergy sought clarification, or in the alternative rehearing, of certain unresolved issues concerning the implementation of that ruling, which required "fundamental changes in the manner in which Entergy determine[d] each [o]perating [c]ompany's cost responsibility under the System Agreement." *Id.* at 4, JA 325. As relevant here, Entergy also sought FERC guidance as to "[w]hether the [o]perating [c]ompanies' peak load responsibility should be revised beginning with the new system peak in April 2004 such that the effect of [the Initial Order] will be phased in prospectively over the ensuing twelve months." *Id.* at 5, JA 326.

Entergy proposed this "phase-in" method because the responsibility ratio "is calculated as a rolling twelve-month average that uses the hourly system peak for each of the preceding twelve months." JA 327. Entergy also maintained that its proposed implementation method would ensure that there was no retroactive adjustment to the system peaks for the eleven months prior to April 2004. *Id.* at 6-7, JA 327-328. Entergy did not "interpret [the Initial Order] to require the use of inconsistent system peaks for the months prior to April 2004." *Id.* at 7, JA 328. Consequently, Entergy requested that the FERC "confirm that [the Initial Order]

only requires Entergy to exclude interruptible load from the formula for establishing peak load responsibility beginning with the new data for April 2004." *Id.* at 8, JA 329.

The Louisiana Commission also filed for rehearing of the Initial Order. *See* JA 633-649. Unlike Entergy, however, it did not seek rehearing or clarification concerning the prospective timing of relief; rather, it focused on the availability of retroactive relief and the FERC's treatment of the sulfur dioxide emission allowance issue. [4]

In the Rehearing Order, the FERC addressed Entergy's implementation issues. As for the timing of prospective relief, the FERC confirmed that "in calculating peak load responsibility beginning April 2004, Entergy must adjust the system peaks and its rates beginning April 1, 2004, as required by [the Initial Order]." Rehearing Order at P 31, JA 372. The FERC also provided guidance on: (1) contractual limitations on customer interruptions; (2) estimation and calculation of a customer's interruptible load; and (3) operating costs for the System Operation Center under another rate schedule. *Id*. at PP 32-34, JA 372. Entergy was "directed to make a compliance filing, within 30 days of the date of issuance of [the Rehearing Order], consistent with the findings in [that] order." *Id*. at Ordering

[4] The Louisiana Commission did file on April 22, 2004, 15 days after requests for rehearing were due, an "Opposition" to Entergy's motion for clarification and rehearing. JA 348-361.

P (B), JA 373.

Neither the Louisiana Commission nor any other party sought rehearing of the FERC's guidance on implementation issues, offered for the first time, at Entergy's request, in the Rehearing Order. If the Louisiana Commission is truly aggrieved by that guidance, the appropriate response under FPA § 313 is to file for rehearing rather than proceed immediately to judicial review. *See, e.g., Town of Norwood v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990); *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1072-73 (D.C. Cir. 1989). Because the Louisiana Commission chose to accept that guidance and decided to offer objections only in response to Entergy's later compliance filing, it did not file a rehearing petition that would have alerted the FERC as to the Louisiana Commission's objections to this aspect (timing of prospective relief) of the Initial and Rehearing Orders. As a result, the FERC was not afforded the opportunity to correct or to explain further itself, and the Court, on review of the Initial and Rehearing Orders, was deprived of the agency's response to the Louisiana Commission's objections. *See, e.g.*, *Ameren Services Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) ("The very purpose of rehearing is to give the [FERC] the opportunity to review its decision before facing judicial scrutiny."); *Canadian Ass'n of Petroleum Producers v. FERC*, 308 F.3d 11, 15 (D.C. Cir. 2002) ("Simply put, the court cannot review what the [FERC] has not viewed in the first instance.").

C. The Louisiana Commission Lacks Standing To Challenge The FERC's Rejection Of Its "Phase-In" Arguments In A Compliance Order Not Before This Court.

Instead of filing a request for rehearing of the Rehearing Order asking the FERC to reconsider its implementation rulings, the Louisiana Commission waited until the later compliance stage of the proceeding to raise its concerns. *See Louisiana Public Service Comm'n v. Entergy Corp.*, 112 FERC ¶ 61,192 (2005) ("Compliance Order"). The Louisiana Commission now objects not to the Initial and Rehearing Orders on review, but rather to the later Compliance Order delaying for 12 months the complete elimination of interruptible load. *See* Br. at 2, 27.

Under FPA § 313(b), 16 U.S.C. § 825*l*(b), only a party "aggrieved" by FERC action may obtain judicial review. *See, e.g., Public Utility District No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001). To be "aggrieved," a petitioner must meet both constitutional (Article III) and prudential standing requirements. *See, e.g., DTE Energy Co. v. FERC*, 394 F.3d 954, 960 (D.C. Cir. 2005); *Louisiana Energy and Power Auth. v. FERC*, 141 F.3d 364, 366 (D.C. Cir. 1998).

As relevant here, constitutional standing focuses on three requirements: (1) there must be an "injury in fact" – an "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) "the injury has to be fairly traceable to the challenged action

of the defendant;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotations marks omitted).

The Louisiana Commission cannot establish an injury in fact from the challenged orders as to its "phase-in" arguments. The orders under review did not address the Louisiana Commission's claim, Br. at 27, that "the FERC's clarification permits the inclusion of interruptible loads for twelve months after the effective date of the new rate rule." Rather, the Louisiana Commission raised this argument in its protest to Entergy's May 18, 2005 filing in compliance with the guidance on implementation provided in the Rehearing Order. "Notice of Intervention and Protest on Behalf of the [Louisiana Commission] to May 18, 2005 Compliance Filing" at 6-7 (June 17, 2005).

In the Compliance Order, the FERC concluded that the Louisiana Commission was "mistaken in its argument that Entergy seeks to phase-in the removal of interruptible load over twelve months beginning April 1, 2004." Compliance Order at P 13. The FERC reasoned that Entergy had explained that it will eliminate its entire interruptible load on April 1, 2004, but because the "formula rate is calculated based on a twelve-month rolling average, the effect of the elimination will be phased in over the ensuing twelve months." *Id.* [5] Thus, the

[5] For example, as the FERC noted in the Compliance Order, "if Entergy eliminated

FERC conditionally accepted Entergy's compliance filing with its April 1, 2004 date for the elimination of interruptible load as complying with the requirements of the Initial Order and Rehearing Order, contingent on Entergy filing work papers and calculations detailing the elimination of the interruptible load from the calculation of peak load responsibility.

That compliance proceeding is ongoing and the Louisiana Commission is an active party therein. As such, the Louisiana Commission has not demonstrated an immediate or concrete harm from the FERC's conditional acceptance of Entergy's compliance filing in a proceeding that is ongoing and not before this Court. The Louisiana Commission's only current concern is its ability to seek a change to Entergy's allocation in the compliance filing proceeding in the future. The extent of any possible harm cannot be determined from the challenged orders but only from any future consideration of the Compliance Order implementing the remedies prescribed in the orders under review here. *See, e.g.*, *Lujan*, 504 U.S. at 564 ("some day intentions" do not establish standing); *Williams Gas Processing Co. v. FERC*, 17 F.3d 1320, 1322 (10th Cir. 1994) (petitioner's "fear that Williams will charge unreasonable rates is only speculation for now").

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500 MW of interruptible load on April 1, 2004, the formula rate would reflect only one month of the 500 MW reduction (April 2004) and eleven months at the higher load (May 2003-March 2004)." Compliance Order at P 10 n.4. *See also* "Answer of Entergy Services, Inc. on Behalf of the Entergy Operating Companies" at 5-7 (July 5, 2005).

In sum, the Louisiana Commission is not aggrieved by the challenged orders as required under FPA § 313(b), as to its "phase-in" objections concerning decisions made in a later Compliance Order. Accordingly, the Louisiana Commission's petition for review to the extent it makes its "phase-in" argument (Br. at 24-33) should be dismissed.

D. In Any Event, The FERC Properly Ruled That Entergy Was Not "Phasing-In" The Removal Of Interruptible Load From The Entergy Rate Calculation.

As the FERC explained in the Initial Order, Entergy's "System Agreement allocates capacity costs among the [o]perating [c]ompanies in proportion to the load that each [o]perating [c]ompany places on the Entergy System at the time of the [s]ystem peak." Initial Order at P 2, JA 286. Moreover, the System Agreement allocates Entergy's system costs on the basis of the ratio of an operating company's coincident peak load for the prior twelve months to the average sum of all operating companies' coincident peak loads for the period. *Id.* at P 3 n.4, JA 287. Because Entergy's formula rate is calculated based on a twelve-month rolling average, the FERC later explained that "the effect of the elimination will be phased in over the ensuing twelve months. This is the natural result of the billing lag built into the formula rate." Compliance Order at P 13.

The Louisiana Commission argues that the FERC's decision in the Compliance Order to permit Entergy to "phase-out interruptible load over the year

following the effective date of [the Initial Order] constitutes legal error." Br. at 24. The Louisiana Commission makes a companion argument that the inclusion of interruptible load for twelve months "permits Entergy to include a component in the formula that the FERC has found unjust and unreasonable." Br. at 27.

Entergy committed in its compliance filing to "eliminate its entire interruptible load on April 1, 2004." Compliance Order at P 13. *See also* Entergy Answer at 5-7. Moreover, as the FERC and Entergy point out, the System Agreement allocates Entergy System costs based on the ratio of an Operating Company's coincident peak load for the prior twelve months to the average sum of all Operating Companies' coincident peak load for that period. Initial Order at P 3 n.4, JA 287. *See also* (Arts. 2.16-2.18), JA 54-55; (Exh. No. 72 at 38, 47-48), JA 452-453; (Exh. No. 216 at 20), JA 470 (System Agreement employs a rolling twelve-month average of System coincident peak loads). [6] Therefore, Entergy determined that "the peaks of each of the [o]perating [c]ompanies for purposes of calculating peak load responsibility under the formula rate" would be "adjusted beginning with the peaks for April 2004, and for all peaks thereafter." Entergy Answer at 5.

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[6] The peak load responsibility ratio is a formula rate. As defined by the FERC, a formula rate specifies the cost components that form the basis of the rates a utility charges its customers. The formula itself is the rate, not the particular components of the formula or the fluctuations in the charges. *See Public Utilities Comm'n of California v. FERC*, 254 F.3d 250 (9th Cir. 2000). Once the FERC accepts a formula rate, it becomes the filed rate.

The Louisiana Commission nonetheless would have the operating companies adjust their loads beginning in April 2003, in order that the rolling 12-month average would fully reflect this change by April 2004. Br. at 27 and 29. Nevertheless, the FERC found that neither the Initial Order nor the Rehearing Order "required Entergy to alter the components of the formula rate" or "require[d] Entergy to adjust the system peak for months prior to April 1, 2004." Compliance Order at P 13. The cases the Louisiana Commission relies upon do not require a contrary result.

III. AS FOR RETROACTIVE RELIEF, THE FERC'S DECISION TO DECLINE TO ORDER REFUNDS WAS BASED ON A REASONABLE INTERPRETATION AND IMPLEMENTATION OF FPA § 206(c).

The Louisiana Commission contends that the FERC's decision not to order refunds conflicts with FPA § 206(c), violates the Supremacy Clause, which requires that state regulators pass through cost allocations mandated by the FERC, and ignores the Louisiana Commission's testimony on the recovery of refunds in retail rates. Br. at 33-44. The Louisiana Commission asks the Court to "direct the FERC to make refunds or [to] provide an explanation of why refunds are inappropriate." *Id.* at 44. The Louisiana Commission's arguments disregard the language of FPA § 206(c) and are contrary to the record, which indicates that the FERC appropriately exercised its remedial discretion.

A. The FERC Reasonably Determined That It Could Not Make The Requisite Findings Under The Statute To Support Refunds.

First, the Louisiana Commission couples FPA § 206(c), which purportedly "permits a subsequent adjustment for the refund-effective period to ensure that ratepayers receive timely relief after the filing of a Complaint," Br. at 33-35, 37, with the Supremacy Clause, which purportedly mandates that "a FERC-ordered cost allocation must be included in retail rates," Br. at 36-38. These authorities, according to the Louisiana Commission, override the FERC's finding that it could not make the requisite finding that a refund was required and would be recovered in retail rates.

The Louisiana Commission's arguments in this regard, ignore the language and legislative intent of FPA § 206(c). FPA § 206(c), 16 U.S.C. § 824e(c), provides, in relevant part, that:

> [I]n 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) shall not be ordered to the extent that such refunds would result from any portion of a FERC 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 FERC 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 FERC's order.

Entergy is a multi-state, integrated public utility holding company system, registered under the Public Utility Holding Company Act of 1935. Initial Order at P 2 n.1, JA 286. The Entergy system is comprised of Entergy Services, Inc. and its various public utility operating companies, *i.e.*, Entergy Arkansas, Inc.; Entergy Louisiana, Inc.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Gulf States, Inc. *See Entergy Louisiana*, 539 U.S. at 42 (describing Entergy's system). FPA § 206(c) exempts registered holding companies like Entergy from paying refunds otherwise due under FPA § 206, when such refunds would result from reallocation of cost responsibility among operating subsidiaries of such companies and would result in a reduction in overall system revenues. S. Rep. No. 100-491 at 6-7, *reprinted in* 1998 U.S.C.C.A.N. at 2688.

The legislative history of FPA § 206(c) highlights why Congress exempted the operating companies of registered holding companies, like Entergy, from paying refunds which would result from reallocation of cost responsibility. The Senate Report states that "[r]efunds in such reallocation situations may unfairly burden shareholders because of the inability of a holding company's subsidiaries to recover rate increases for past periods along with the rate decreases upon which refunds are based. This inability can result from operation of the filed rate doctrine at both the wholesale and retail jurisdictional levels and in effect create a 'trapping' of costs." S. Rep. No. 100-491 at 6-7; 1998 U.S.C.C.A.N. at 2688. "The filed rate

doctrine holds that a public utility may not charge rates higher than those filed with the relevant regulatory body. The recovery of rate increases for past periods (generally in the form of a prospective surcharge on otherwise applicable rates) is likely to be inconsistent with the doctrine." *Id.* However, the Senate Report concludes, the need for the refund exemption "is removed to the extent that the holding company is in fact kept whole with respect to revenues for past periods." *Id.* at 7; 1988 U.S.C.C.A.N. at 2689.

As the FERC explained, "[u]nlike the more typical case that involves refunds of rates that were excessive, the instant case involves a reallocation of costs among the [o]perating [c]ompanies and thus falls within the scope of [FPA §] 206(c)." Initial Order at P 84, JA 315 (citing Senate Report and FERC cases). The Louisiana Commission does not dispute that the removal of interruptible load from the calculation of the peak load responsibility calculation results in a reallocation of costs among the Entergy operating companies. Nor could it. The record indicates that the removal of interruptible load from the peak load calculation would shift revenues to Entergy Louisiana from the other operating companies. *See* (Exh. No. 72, JKS-1 at 39), JA 450 (FERC Staff estimates a cost shift of about $14 million); (Exh. No. 8, KJW-1 at 11), JA 90 (the City of New Orleans witness testified of a cost shift of "over $6.3 million").

The FERC recognized that the statutory refund bar is removed to the extent

the holding company is kept whole and is able to recoup the refunds at the local level. *See* Initial Order at P 84, JA 315. Therefore, the FERC considered whether, consistent with the inquiry under FPA § 206(c), it could find that the operating companies that would pay the refund would be able to collect it from their retail customers.

Here, the FERC concluded that, based upon the record, it could not "make the requisite findings." *Id.* Specifically, the FERC ruled that the Louisiana Commission did not meet its burden of proof to demonstrate that, "in this comparatively unusual circumstance," the Entergy operating companies, which would be required to pay the refunds, would be able to collect increased costs from their customers. Rehearing Order at P 21, JA 368. [7] To be sure, a Louisiana Commission witness testified that the prospective surcharges he proposed "would then be passed on to retail ratepayers within each retail jurisdiction in the same manner as MSS-1 payments and receipts are currently treated for ratemaking

[7] As the complainant, the Louisiana Commission had the burden, which it failed to meet, to demonstrate that the operating companies, which would pay refunds, would be able to recoup them from the ratepayers in their respective jurisdictions. FPA § 206(c), added to the statute in 1988, did not change the fact that the complainant in any FPA § 206 proceeding has the burden of proof to show that an existing utility rate, charge or provision is unlawful. *See* S. Rep. 100-491 at 5, *reprinted in* 1988 U.S.C.C.A.N. at 2687 ("[t]his provision does not change existing law. Under existing [FPA § 206], the burden of proof is controlled by section 556(d) of the Administrative Procedure Act, which imposes the burden on the 'proponent of a rule or order'"). *See also Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 949 (D.C. Cir. 1999); *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993) (burden of proof is on the complainant).

purposes." Exh. No. 48 at 125-26, JA 75-76; *See also* Initial Order at P 85, JA 316 (citing Louisiana Commission argument, based on its witness's testimony, that refund costs could be recovered in all jurisdictions). However, the FERC found that the Louisiana Commission witness offered "absolutely no basis for [his] assertion, nor did he claim to know how state commissions would treat the recovery of past costs through future surcharges." Initial Order at P 87, JA 316. Accordingly, the FERC found that this witness's testimony has "no probative value." *Id.*

The FERC also found that the Louisiana Commission testimony, in favor of refunds, was not "uncontroverted" as claimed by the Louisiana Commission, but rather was challenged by several parties. *Id.* at P 86, JA 316. In support, the FERC offered several portions of the record. *See* State Regulators Brief Opposing Exceptions at 22-23 (in Mississippi, pass-through of refund-related costs to retail customers has been prohibited), JA 272-273; Entergy's Post-Trial Brief at 60-62 (Louisiana Commission witness' proposal would be inconsistent with the filed rate doctrine and FPA § 206), JA 137-139; Entergy's Reply Brief at 33-34 (refunds are inappropriate when FERC alters an existing method of allocating costs), JA 150-151; FERC Trial Staff's Initial Brief at 77 (Section 206(c) "appears to prohibit the recovery of retroactive refunds in this proceeding"), JA 579; and Arkansas Public Service Commission's Post-Trial Brief at 34-35 (refunds are neither necessary nor

appropriate), JA 133-134. Under these circumstances, the record supports the FERC's ruling that it could not find, as it must under FPA § 206(c) to support refunds, that the Entergy operating companies that would pay refunds "as a result of a reallocation of costs among such companies" would be able to collect those refunds from their ratepayers. Initial Order at P 84, JA 316.

B. The FERC Reasonably Exercised Its Remedial Discretion.

Likewise, the Louisiana Commission's argument that the Supremacy Clause and the preemption doctrine mandate that state agencies pass through FERC-mandated cost allocations, *see* Br. at 35-39, ignores the restrictions on FERC jurisdiction. It is undisputed that the FERC's jurisdiction here is limited to jurisdiction over wholesale rates. Rehearing Order at P 22, JA 369. Moreover, the record indicates that the interruptible load at issue was a retail load. *See* Transcript at 2970, JA 103 (the Louisiana Commission "is very concerned that retail interruptible customers make some contribution to the fixed costs of the Entergy Louisiana Company . . . I think that if these industrial customers are receiving large amounts of energy - - these interruptible customers . . . they ought to be making at least some contribution . . . of the fixed capacity costs"). Thus, if the FERC had ordered the payment of refunds or surcharges because of the reallocation of cost responsibility among the Entergy operating companies, the FERC determined that it would have been directly prescribing retail rates, thereby, exceeding its

authority. Rehearing Order at P 22, JA 369. "The fact that state commissions, in setting retail rates, are not authorized to second guess [the FERC's] wholesale rate determinations" is in "no way inconsistent with the [FERC] declining to overstep its bounds by directly prescribing retail rates." *Id.*

The Louisiana Commission's additional argument that Entergy's history of correcting billing errors provides support for the FERC ordering a "surcharge to make up for an unjust cost misallocation during a period in which the assessments explicitly were made subject to refund," Br. at 41, is also misplaced. First, the FERC reasoned that although it has held that utilities may correct past billing errors in order to apply correctly the filed rate, the Louisiana Commission, through its complaint, sought to alter the filed rate (*i.e.*, the System Agreement itself). Initial Order at P 89, JA 317. [8] Moreover, the record supports the FERC's decision in this regard, where several parties refuted the Louisiana Commission's premise that Entergy's correction of past billing errors provides precedent for ordering refunds in this case. *See* Entergy Reply Brief at 33-34, JA 150-151. For example, the State Regulators argued that there is a distinction between correcting billing

[8] *See also Southwestern Public Serv. Co.*, 68 FERC ¶ 61,184 at 61,945 (1994) ("The [FERC] has previously determined that utilities do not have to apply for waiver of the [FERC's] regulations to recover through fuel clause billings any payments to correct past billing errors"); *Philadelphia Elec. Co.*, 57 FERC ¶ 61,147 at 61,566 (1991) (No waiver of FERC regulations is necessary to correctly apply the filed rate when a company is required to recompute bills).

errors and changing an existing rate. State Regulators Brief on Exceptions at 6-8, JA 255-257. The State Regulators agreed with Entergy and submitted that removing interruptible load from the calculation of peak load responsibility ratios under the System Agreement was different from correcting billing errors, because the removal was not an application of a "filed rate" but rather "a fundamental change in cost allocation and ratemaking policy**."** *Id.* at 7, JA 256. State Regulators also argued that the Louisiana Commission's proposed method "will have the effect of negating the need for the proviso [exempting refunds in the holding company context] in [FPA] Section 206." *Id.* at 8, JA 257.

Under these circumstances, the record supports the FERC's ruling that "[b]illing adjustments made to correctly charge a filed rate afford no support for ordering refunds when the [FERC] orders a public utility to change a filed rate." Initial Order at P 89, JA 317.

In sum, the Louisiana Commission's refund arguments fail to recognize that neither the FPA in general nor FPA § 206(c) in particular requires the FERC to order refunds. *See* 16 U.S.C. § 824e(c) (FERC "may" order refunds, "in whole or in part," if it makes the requisite findings). As the FERC explained here, its "authority to order refunds is discretionary." Rehearing Order at 21, JA 368. Thus, "the fact that, in a particular case, we may have *authority* to order refunds, is not the same as a determination that in that case we *should* order refunds. The

standard for refunds is not, as seems to be argued, that the [FERC] must order refunds unless it can show that none are warranted." *Id.* Indeed, the courts have repeatedly recognized that the FERC's discretion is at its zenith in determining whether, and, if so, how, to remedy a past violation and that the agency might choose not to order refunds or to provide any remedy at all in appropriate circumstances. *See Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 460-61 (D.C. Cir. 2001); *Connecticut Valley*, 208 F.3d at 1044; *Towns of Concord*, 955 F.2d at 72-73, 76 n.8.

Given the rational grounds for the FERC's decision and the considerable breadth of its discretion with regard to remedies, the FERC's exercise of its discretion, following the directives of FPA § 206(c), should be affirmed. *See Louisiana Public Service Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999) (holding that the FERC did not abuse its discretion in declining to order refunds despite the FERC finding that Entergy violated its formula tariff).

IV. THE FERC, AGREEING WITH THE PRESIDING JUDGE, PROPERLY RULED THAT THE UNDERLYING PROCEEDING WAS NOT THE PROPER FORUM TO ADJUDICATE THE SULFUR DIOXIDE RATEMAKING ISSUE.

The Louisiana Commission argues that the FERC "has avoided making a decision for over six years" on issues related to the propriety of including sulfur dioxide compliance allowances in Entergy's "actual cost tariff." Br. at 45. It further contends that the FERC "approved a settlement agreement requiring the

[sulfur dioxide] issues be decided in this docket. But [the FERC] then ruled that the issues should have been raised in another docket, in which the hearing had already occurred" and then "referred the issue to an unspecified future case or cases." *Id.* The Louisiana Commission contends, therefore, that the FERC's actions were "patently arbitrary" and that this Court should remand the sulfur dioxide issue to the FERC "for a decision." *Id.* at 49. [9]

The crux of the Louisiana Commission's sulfur dioxide arguments is that the FERC has denied it a forum to resolve the sulfur dioxide issue by "repeatedly moving the issue from one docket to the next." Br. at 50.[10] As shown, the Louisiana Commission's sulfur dioxide arguments are belied by the record.

First, rather than avoid the sulfur dioxide issue as the Louisiana Commission claims, both the Presiding Judge and the FERC examined the record to determine if they could make a determination on the sulfur dioxide issue. As the Presiding Judge observed, however, there was "no such proposal on the table," "the

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[9] The Louisiana Commission's argument, Br. at 47-48, should not concern the Court because it did not raise these issues on rehearing. In that unrelated proceeding, the FERC ruled that a proceeding involving Entergy's revisions to Service Schedule MSS-1 was "not the proper forum for the Louisiana Commission to resolve the sulfur dioxide issue" that "relate[s] to Service Schedule MSS-3." *See Entergy Services, Inc.*, 111 FERC ¶ 61,198 at P 18 (2005).

[10] The Louisiana Commission's additional arguments regarding "automatic adjustment clauses," Br. at 48-49, should be dismissed, as the Louisiana Commission did not raise these issues with specificity on rehearing before the FERC. *See supra* page 18 (explaining mandatory rehearing argument of FPA § 313).

amendment referred to was the subject of a 1999 [FERC] proceeding," and the parties had removed the issue to another ("rough equalization") complaint proceeding. ALJ Order at 65,025, JA 241-242. Moreover, the Presiding Judge pointed out that while the Louisiana Commission and others had intervened in Entergy's 1999 sulfur dioxide proceeding, none had "challenge[d] the proposed amendments as not being in accord" with FERC policy or not being just and reasonable. *Id.*

Therefore, the Presiding Judge reasoned that because the FERC had "accepted Entergy's amendment to its System Agreement and allowed them [sic] to become effective" in the 1999 order, the Louisiana Commission bore the burden, as the complainant, of showing that the amendment was not just and reasonable. *Id.* The Presiding Judge found no evidence in the record to support such a contention. *Id.*, citing Louisiana Commission Initial Br. at 68-75, JA 581-288; Louisiana Commission Reply Brief at 55-59, JA 590-594; New Orleans City Council Initial Br. at 44, JA 157; and New Orleans City Council Reply Br. at 29, JA 148.

The Presiding Judge also concluded that the parties by settlement had removed from the instant proceeding the consideration of whether the "rough equalization" of costs among the operating companies would be upset with the sulfur dioxide amendment. ALJ Order at 65,052, JA 241-242. Indeed, the record

shows that this issue was removed to the "rough equalization" complaint proceeding when the parties reached an uncontested settlement that waived from the instant interruptible complaint proceeding "all issues regarding the extent to which costs are roughly equalized under the current System Agreement." (Sections I.C and I.D), JA 176. The settlement also expressly provided that the rough equalization sulfur dioxide issue "will not be decided in this [*i.e.*, the interruptible complaint] proceeding." *Id.* at 12 (Section II), JA 177.

The FERC affirmed the Presiding Judge's finding that the sulfur dioxide issue was not appropriate for resolution in this proceeding. The FERC concluded, however, that its finding "does not deprive the Louisiana Commission of a forum in which to litigate this issue; it merely ensures that the parties will litigate the issue in the proper proceeding." Initial Order at P 99, JA 321. The FERC also concluded that, in any event, the Presiding Judge could not have ruled on the sulfur dioxide issue "because the order allowing an initial decision in this proceeding directed him to rule only on the issue before him, *i.e.*, whether Entergy should revise the System Agreement to exclude interruptible loads from the calculation of peak load responsibility ratios." *Id.* at P 98, JA 321.

Under these circumstances, the FERC agreed with the Presiding Judge that the most appropriate course of action was not to adjudicate the issue on an incomplete record, but rather to allow the Louisiana Commission to either file a

complaint on the issue or raise the issue in a future Entergy System Agreement filing. Rehearing Order at 26, JA 370. The FERC's allocation of priorities and resources, and decision here to resolve the sulfur dioxide dispute in a later proceeding, was reasonable and entitled to judicial deference. *See, e.g.*, *Mobil Oil Exploration v. United Distribution Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how to best handle related, yet discrete, issues in terms of procedures and priorities") (internal citations omitted).

The courts have long given agencies broad discretion as to the manner in which they carry out their own proceedings. *See*, *e.g.*, *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1056 (D.C. Cir. 1979) ("the agency . . . alone is cognizant of the many demands on it, its limited resources, and the most effective structuring and timing of proceedings to resolve those competing demands. An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in any proceeding. . . ."). The FERC's exercise of its discretion here, in deciding when and how to consider the sulfur dioxide issue raised by the Louisiana Commission, is reasonable and should not be disturbed.

CONCLUSION

For the reasons stated, the petition for review should be dismissed as to the Louisiana Commission's "phase-in" argument and the challenged orders upheld in all respects.

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