

119 FERC ¶ 61,019
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Entergy Services, Inc. and EWO Marketing, L.P.	Docket No. ER03-583-006
Entergy Services, Inc. and Entergy Power, Inc.	Docket No. ER03-681-004
Entergy Services, Inc. and Entergy Power, Inc.	Docket No. ER03-682-005
Entergy Services, Inc. and Entergy Louisiana, Inc.	Docket No. ER03-744-003

OPINION NO. 485-A
OPINION AND ORDER ON REHEARING
AND CLARIFICATION

(Issued April 5, 2007)

1. In response to the Commission's order in *Entergy Services, Inc. and EWO Marketing, L.P.*, Opinion No. 485, 116 FERC ¶ 61,296 (2006), requests for rehearing were filed by Entergy Services, Inc. (Entergy Services), on behalf of the Entergy operating companies: Entergy Arkansas, Inc.; Entergy Gulf States, Inc. (Entergy Gulf States); Entergy Louisiana, LLC (Entergy Louisiana); Entergy Mississippi, Inc.; and Entergy New Orleans, Inc. (Entergy New Orleans) (collectively "Entergy") and by the Louisiana Public Service Commission (Louisiana Commission). In this order, we deny these requests for rehearing. In addition, as further described below, we grant clarification that, although Entergy does not dispute that it improperly used information it obtained from bid proposals to develop certain purchased power agreements, the record does not establish that these communications constituted a violation of Entergy's code of conduct.

Background

2. This matter began when on March 31, 2003 and April 14, 2003, respectively, Entergy filed, in four separate dockets, eight power purchase agreements (PPAs or

contracts) with the Commission for approval. The PPAs consist of market-based sales of electric power and associated capacity from four Entergy affiliates¹ to two other Entergy affiliates² acquired under a request for proposals auction process conducted in the Fall of 2002 (2002 RFP), as well as affiliate power sales under an approved cost-based formula rate.

Opinion No. 485

3. In Opinion No. 485, the Commission affirmed the presiding judge's finding in his initial decision (ID)³ that the four Entergy affiliate PPAs obtained through the 2002 RFP are just and reasonable and not unduly discriminatory,⁴ however, the Commission limited the term of the Independent System Electric Union Station Unit 2 (Entergy Power ISES 2) contracts to ten years to coincide with the ten-year analysis used to justify these contracts.

4. The Commission agreed with the presiding judge that the design and implementation of Entergy's 2002 RFP process, while not without flaws, worked in this instance.⁵ In this regard, we stated that "while we expect the process used by Entergy to conduct future RFPs will be superior to the process it used in this proceeding, we find, nonetheless, that the 2002 RFP was adequate to ensure just and reasonable rates and, while not perfect, did not rise to the level of affiliate abuse."⁶

5. With respect to the four affiliate contracts secured outside of the 2002 RFP, the Commission affirmed the presiding judge's findings that: (1) the standard announced by the Commission in *Southern California Edison Company on behalf of Mountainview*

¹ EWO Marketing LP (EWO Marketing), Entergy Power, Inc. (Entergy Power), Entergy Gulf States and Entergy Arkansas, Inc. (Entergy Arkansas).

² Entergy Louisiana and Entergy New Orleans.

³ *Louisiana Public Service Commission v. Entergy Services, Inc.*, 111 FERC ¶ 63,077 (2005).

⁴ These agreements include two three-year term (term ending June 2006) contracts from EWO Marketing's RS Cogen facility sold to Entergy Louisiana and Entergy New Orleans and two life-of-unit (LOU) contracts from Entergy Power's ISES 2 facility also sold to Entergy Louisiana and Entergy New Orleans.

⁵ Opinion No. 485 at P 36.

⁶ *Id.* at P 39.

Power Company, LLC, 106 FERC ¶ 61,183 (2004) (*Mountainview*) does not apply to these contracts, and (2) Entergy improperly used information obtained through the 2002 RFP process to price two Entergy Arkansas Wholesale Base Load (Entergy Arkansas Base Load) contracts. Accordingly, in Opinion No. 485, the Commission affirmed the presiding judge's finding that the two Entergy Arkansas Base Load contracts are unjust, unreasonable, and unduly discriminatory.

6. In this regard, the Commission stated that it was extremely concerned about the treatment of confidential bid information by senior Entergy management during the RFP and affirmed the presiding judge's finding that the power sales from Entergy Arkansas to Entergy Louisiana and Entergy New Orleans (*i.e.*, the sales made under the Entergy Arkansas Base Load agreements) were made at sales prices that are unjust and unreasonable and that affiliate abuse occurred because of the improper handling of sensitive pricing information by senior Entergy management.⁷

7. The Commission also affirmed the presiding judge's remedy to remove the retained share of Grand Gulf from the resource mix of the Entergy Arkansas Base Load agreement with Entergy Louisiana.⁸ As a further remedy, the Commission ordered the removal of the retained share of Grand Gulf from the resource mix of the Entergy Arkansas Base Load agreement with Entergy New Orleans.

8. In addition, the Commission accepted the two Entergy Gulf States River Bend 30 PPAs (Entergy Gulf States River Bend 30 PPAs) as just and reasonable and not unduly discriminatory. With respect to the remaining issues raised by the parties in their exceptions to the ID, the Commission, in Opinion No. 485, summarily affirmed the presiding judge's findings in the ID for the reasons set forth therein and denied the exceptions on those remaining issues.

Requests for Rehearing

9. In response to Opinion No. 485, Entergy and the Louisiana Commission each filed a request for rehearing. Their arguments can be summarized as follows:

⁷ *Id.* at P 80.

⁸ As we explained in Opinion No. 485, the most expensive base load resources available to Entergy Arkansas to meet its resource requirements were those obtained from Grand Gulf. The presiding judge found, and we affirmed in Opinion No. 485, that Entergy used inside information it obtained from competitors' bids to determine the maximum share of resources it could retain from Grand Gulf resources and still present a winning bid.

Entergy

- Entergy objects to the Commission's finding limiting the Entergy Power ISES 2 PPAs to a ten-year term.
- Entergy seeks clarification that, despite its inappropriate use of certain information about bid proposals to develop certain contracts, the process for developing the Entergy Arkansas Base Load PPAs did not technically constitute a code of conduct violation.
- Entergy does not request rehearing of the Commission's finding excluding Grand Gulf retained shares, but objects to the Commission's finding that \$46/MWh represented a "cost-based" rate for the retained share of Grand Gulf.

Louisiana Commission

- Louisiana Commission objects to the Commission's finding that section 3.05 of the Entergy System Agreement was not triggered by Entergy's one-month capacity sales.
- Louisiana Commission objects to the Commission's affirming the judge's approval of Entergy's allocation of base load generating resources. Louisiana Commission argues that this is inconsistent with the Commission's findings in Opinion No. 480.⁹
- Louisiana Commission also objects to the Commission's finding limiting the Entergy Power ISES 2 PPAs to a ten-year term.
- Louisiana Commission argues that, while the Commission asserted jurisdiction over the sale of River Bend 30 power, states have the authority to review the prudence of capacity sales by entities subject to a state agency's jurisdiction.

10. In addition, on November 13, 2006, Louisiana Commission filed a motion for leave to file an answer to Entergy's rehearing request.

⁹ *Louisiana Public Service Commission v. Entergy Services, Inc.* (Opinion No. 480), 111 FERC ¶ 61,311, *order on reh'g*, (Opinion No. 480-A), 113 FERC ¶ 61,282 (2005).

Discussion

I. Procedural Matter

11. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we will reject Louisiana Commission's answer.

II. Whether the Entergy Power ISES 2 PPAs Should Be Limited to a Ten-Year Term?

12. In Opinion No. 485, the Commission found the ten-year period used by Entergy to evaluate the bids for the Entergy Power ISES 2 LOU contracts: (1) was too short to allow a proper evaluation of long-term proposals for the purpose of determining the “short list” in the Fall 2002 RFP; (2) skewed the results; and (3) was a questionable methodology for an LOU product.¹⁰ Based on the mismatch between the evaluation period and the LOU term of the Entergy Power ISES 2 bids, the Commission directed Entergy to modify the contract term of the Entergy Power ISES 2 PPAs to a ten-year power purchase.¹¹

13. Entergy objects to the Commission’s finding in Opinion No. 485 that the Entergy Power ISES 2 PPAs should be limited to a ten-year term and argues that the Commission erred when it made this finding. Entergy argues that the Commission made this error because it misunderstands the methodology behind the ten-year analysis. It also maintains a longer analysis would be burdensome because it requires bidders to provide unneeded, excessively detailed bid information early in the RFP initial bid process.¹² Thus, Entergy maintains that the methodology it used adequately supported its selection of the winning bids for the entire life of the Entergy Power ISES 2 unit.

14. By contrast, Louisiana Commission argues that the remedy imposed by the Commission, of reducing the term of the Entergy Power ISES 2 contracts to ten years, has the potential to harm ratepayers and benefit Entergy, if market prices exceed the contract price after ten years. Louisiana Commission argues that limiting the term of these contracts to ten years is more likely to punish Entergy’s customers than Entergy. It argues that the Commission’s remedy will penalize Entergy only if, at the end of the ten-

¹⁰ Opinion No. 485 at P 71-73.

¹¹ *Id.* at P 74.

¹² Entergy Rehearing Request at 6.

year period, market rates are lower than the cost of the remaining life of the Entergy Power ISES 2 contracts.¹³ Louisiana Commission further argues that limiting the term of these contracts to ten years is inconsistent with the remedy imposed for the Grand Gulf retained share, where the Commission was careful not to reward Entergy's bad conduct by allowing it to unilaterally escape its obligation to sell the Entergy Arkansas Base Load and other PPAs and by requiring an option to purchase the Grand Gulf retained shares at prices below the market price..

15. Louisiana Commission argues that a better remedy would be for the Commission to amend the Entergy Power ISES 2 contracts to give state regulators the option after ten years to accept or reject the remaining years of the contracts if it appears at that time that it would be beneficial to ratepayers for the contracts to continue. This would protect ratepayers from any risk of price increases and would place this risk entirely on Entergy.

Commission Determination

16. Although Entergy and Louisiana Commission both object to the Commission's ten-year limitation on the duration of the Entergy Power ISES 2 PPAs, each offers a different argument in support of its position. Entergy argues that its use of a ten-year analysis to evaluate LOU bids was reasonable and fully consistent with the goal of achieving the lowest-cost resources for its franchised ratepayers. Louisiana Commission, on the other hand, objects to the Commission's remedy of limiting the Entergy Power ISES 2 PPAs to a ten-year term because it contends that the remedy will harm ratepayers and reward Entergy if, at the end of the ten year term, available market prices for the remainder of the contract terms are higher than they would have been under the Entergy Power ISES 2 PPAs.

17. Entergy states that a ten-year analysis was used as a basis for selecting those resources that would be short-listed for consideration for the LOU contracts because Entergy determined that ten years was a sufficiently long period over which to evaluate long-term proposals for the purpose of determining which proposals should be included on the shortlist. Entergy argues that the period was long enough to reasonably ensure that any short-term anomalies did not skew the results.

18. We disagree with Entergy's argument. The initial evaluation used to generate a short list for a LOU proposal is a critical step that determines whether bids are eliminated from further consideration. The issue here is not whether the period was long enough to ensure that any short-term anomalies did not skew results, but whether all long-term (more than ten years) low cost bids were included to be considered in the very beginning.

¹³ Louisiana Commission Rehearing Request at 2.

However, under Entergy's methodology, long-term (more than ten years) low-cost bids by firms that are not affiliated with Entergy may have been permanently eliminated from the process in the beginning, which would create an opportunity to favor Entergy's affiliates.

19. Entergy states that, if older plants have lower costs (fixed and variable costs) over the first ten years, then they will necessarily have lower costs over the following ten and 20 year periods as well, because the costs of those plants will at that time be further depreciated. We disagree, because there are many factors other than depreciation that affect the plants' future fixed and variable costs, such as, for example, major planned maintenance, upgrades and repairs. We conclude, therefore, that ten years of lower costs do not guarantee lower costs for the entire lifetime of a plant. Market conditions change over time, so it is possible that a relatively low cost plant in the first ten years could become a relatively high cost plant after the ten years.

20. Entergy states that it would be difficult to assure that all bidders used common assumptions regarding future costs or the ultimate terms of the resource acquisition agreements between the parties. If Entergy finds it too difficult to evaluate contracts using bids for more than ten years, it should use a ten-year bid analysis for ten-year contracts, instead of using a ten-year bid analysis for LOU contracts. Therefore, we reaffirm the finding we made in Opinion No. 485 directing Entergy to modify the Entergy Power ISES 2 contract terms to ten-year power purchases. As the ten-year power purchase contracts expire, Entergy can solicit more bids for another ten years out, or, at its option, it can modify its methodology when the ten-year contracts expire, and choose replacements using a LOU analysis.

21. Louisiana Commission bases its objection to the Commission's ten-year term remedy for the Entergy Power ISES 2 PPAs on the concern that the market prices ten years in the future may be higher than those now available under the Entergy Power ISES 2 PPAs. Louisiana Commission asserts that under this market price scenario the Commission's remedy would harm ratepayers and reward Entergy. To address this concern, Louisiana Commission argues that the Commission should modify its remedy to allow state regulators to have the option after ten years to accept or reject the remaining years of the contracts, if it appears after ten years that the remaining years of the contracts would be beneficial to ratepayers. We find it necessary to reject the Louisiana Commission's proposed modification because it suffers from the same analytical flaw as found in Entergy's arguments

22. We agree with the Louisiana Commission that its proposal would protect ratepayers from any risk of unexpected price increases and would place the risk of the Entergy Power ISES 2 PPAs after ten years on Entergy. It would accomplish this by deferring the post ten year contract decision and then using then current information to reevaluate the Entergy Power ISES 2 PPAs after they have been in place for ten years.

However, this reevaluation does not address the Commission's concern that the cost analysis Entergy used to determine the Fall 2002 RFP "short list" only looked at costs for the first ten years of the contracts. Neither Entergy's analysis nor Louisiana Commission's proposal provides the Commission with a basis to find Entergy's choice of the Entergy Power ISES 2 PPAs, rather than the selection of other RFP bids, in the first place was reasonable for the entire life of the unit. We must make our decision based on the evidence presented and the record developed in this proceeding, rather than on speculation as to future prices. Likewise, the Louisiana Commission's proposal does not correct this flaw by postponing the decision on the appropriate contract term until the end of the ten year term analyzed in the RFP.

23. Louisiana Commission also argues that the remedy imposed here is inconsistent with the Grand Gulf retained shares remedy. While it is true that we are ordering different remedies in these two situations, this is appropriate because the remedies we are ordering in these two instances are addressing two distinct, unrelated problems. With respect to the retained share of Grand Gulf in the Entergy Arkansas Base Load PPA resource mix, the remedy there is designed to address the improper handling of confidential bid information, while the remedy here is designed to address Entergy's improper method of analyzing bids.

III. Whether the Process Used to Develop the Entergy Arkansas Base Load PPAs Constituted a Code of Conduct Violation?

24. With respect to the two Entergy Arkansas Base Load PPAs, the Commission held in Opinion No. 485 that Entergy improperly used information obtained through the 2002 RFP to price those two contracts, affirmed the Presiding Judge's remedy with respect to the Entergy Arkansas-Entergy Louisiana PPA, imposed a similar remedy with respect to the Entergy Arkansas-Entergy New Orleans PPA, and held that Entergy's Senior Vice President for System Planning had violated Entergy's code of conduct.¹⁴

25. Entergy seeks clarification that, regardless of whether Entergy's Senior Vice President for System Planning improperly used certain information obtained during the evaluation of the non-affiliate bids in the Fall 2002 RFP to develop the Entergy Arkansas Base Load PPAs, the process for developing the Entergy Arkansas Base Load PPAs (which occurred parallel with Entergy's initial RFP to acquire new system resources) did not constitute a code of conduct violation.¹⁵ Entergy argues that the applicable codes of conduct of Entergy's power marketing affiliates govern the relationship between Entergy

¹⁴ Opinion No. 485 at P 80.

¹⁵ Entergy Rehearing Request at 8-12.

Services and the Entergy operating companies, on the one hand, and Entergy's affiliated power marketers, on the other. Entergy states that the code of conduct does not govern the relationship between franchised public utilities such as Entergy Arkansas, Entergy New Orleans, and Entergy Louisiana, therefore, Entergy could not have violated the code of conduct even if it inappropriately used confidential bid information to price the Entergy Arkansas Base Load PPAs.¹⁶ .

Commission Determination

26. After reviewing Entergy's code of conduct and Entergy's arguments on this subject, we will grant the request for clarification that Entergy did not violate its code of conduct. Although we previously stated that Entergy's use of the bid information obtained from the 2002 RFP to develop the Entergy Arkansas Base Load PPAs was improper,¹⁷ based on the record developed in this proceeding, it did not constitute a violation of the code of conduct because the code of conduct does not govern the relationship between franchised public utilities, such as Entergy Arkansas, Entergy Louisiana, and Entergy New Orleans.

27. However, the conduct at issue may run afoul of the provisions prohibiting undue preferences or unduly discriminatory behavior under section 205 of the Federal Power Act (FPA).¹⁸ But, in this instance, the record was not developed to make that determination and as the contracts at issue have been reformed, we believe that this proceeding should be closed and that pursuing the matter further, under FPA section 206, would be an inefficient use of agency resources. The Commission will seriously consider, however, any future allegations of undue preference caused by improper sharing of information, and as we noted in Opinion No. 485, the Commission will consider civil penalties as a potential remedy for violations of Part II of the FPA.¹⁹

¹⁶ *Id.* at 10.

¹⁷ Opinion No. 485 at P 80.

¹⁸ With respect to any sale subject to the Commission's jurisdiction, section 205(b) of the FPA prohibits a public utility from making or granting any undue preference or advantage to any person or subjecting any person to any undue prejudice or disadvantage. 16 U.S.C. 824(d)(b).

¹⁹ 116 FERC ¶ 61,296 at P 82.

IV. Whether \$46/MWh Represented a “Cost-Based” Rate for the Retained Share of Grand Gulf?

28. Entergy objects to the finding in Opinion No. 485 that \$46/MWh represented a “cost-based” rate for the retained share of Grand Gulf. Entergy states that it does not seek rehearing of the Commission’s decision to remove the Grand Gulf retained share from the Entergy Arkansas Base Load PPAs. However, it disputes the Commission’s conclusion that “[t]he retained share of Grand Gulf can be separately contracted for at the *cost-based* price of \$46/MWh, a price that the [Louisiana Commission] had approved for [Louisiana Commission]-jurisdictional retained share of Grand Gulf.”²⁰

29. Entergy argues that the \$46/MWh is not a “cost-based price” as contemplated by the Commission. Rather, Entergy maintains that \$46/MWh is *below* cost, and compelling a below-cost rate outside the context of its litigation settlement would be neither just and reasonable nor consistent with the System Agreement. In this regard, Entergy argues that the \$46/MWh price was an “exception” to the cost-based MSS-4 pricing it was offering.

30. Entergy states that one of the reasons it was “willing to use actual costs as defined by MSS-4, with the exception of the retained share of Grand Gulf” to price the Entergy Arkansas Base Load PPAs was to minimize the areas of dispute concerning those PPAs. Entergy states that it offered the \$46/MWh price in the course of proposing alternative pricing made solely for purposes of the Entergy Arkansas Base Load contracts at issue in the PPA Proceedings. Entergy argues that the hearing evidence made clear that the \$46/MWh price is below cost, and does not represent the full cost of that resource.

31. Entergy, therefore, requests that the Commission find that, if and when the retained share of Grand Gulf is to be “separately contracted for,” the price of such a separate, stand-alone contract should be a cost-based price that complies with the requirements of Service Schedule MSS-4, consistent with all other unit power sales between the Entergy operating companies.²¹

32. Louisiana Commission objects to Entergy seeking to shed the obligation to offer the retained share of Grand Gulf at a price of \$46/MWh under stand-alone contracts.²² In its request for rehearing and clarification, Louisiana Commission states that its understanding of the offer Entergy made during the hearing process – to sell the retained share of Grand Gulf embodied within the Entergy Arkansas PPA at \$46/MWh – is that this price would apply to all of Entergy’s Grand Gulf retained share capacity sales.

²⁰ *Id.* at 13.

²¹ *Id.* at 14.

²² Louisiana Commission Rehearing Request at 1.

Commission Determination

33. As was recognized in the ID²³ and in Opinion No. 485,²⁴ Louisiana Commission permits Entergy Louisiana to recover up to \$46/MWh via retail rates, a price that Louisiana Commission approved for the Louisiana Commission-jurisdictional retained share of Grand Gulf owned by Entergy Louisiana. In Opinion No. 485, we did not intend to disturb that condition, which was the product of an earlier settlement in a separate state proceeding. However, it was also not our intent to bind Entergy to the rate of \$46/MWh for other contracts that Entergy may enter into separately.

34. The Service Schedule MSS-4 cost-based formula rate settlement that was entered into among the Entergy operating companies, the Arkansas Public Service Commission, the Mississippi Public Service Commission, Louisiana Commission, and the Council of the City of New Orleans will determine the rate at which the retained share of Grand Gulf can be separately contracted for when entering into agreements falling outside of Entergy's earlier settlement with Louisiana Commission. Therefore, we disagree with Louisiana Commission's interpretation of the offer made by Entergy in the hearing process.

V. Whether Section 3.05 of the Entergy System Agreement was Triggered by Entergy's One-Month Capacity Sales?

35. Section 3.05 of the System Agreement addresses the right of first refusal of other Entergy operating companies to acquire capacity from an Entergy operating company that has excess capacity. Louisiana Commission objects to the finding in Opinion No. 485 that section 3.05 of the Entergy System Agreement was not triggered by Entergy's one-month capacity sales. Louisiana Commission argues that Opinion No. 485 erroneously abrogates the right of first refusal contained in section 3.05 of the System Agreement by holding that the right does not apply to a sale of excess capacity on a short-term basis to a third party.

36. Louisiana Commission argues that section 3.05 of the System Agreement makes no distinction between short-term and long-term sales, and there is no other basis to justify the distinction. Louisiana Commission further argues that Entergy Arkansas's sales into the wholesale market were made to benefit shareholders, by denying the benefits of Entergy Arkansas's cheap excess base load generation to the System's ratepayers and permitting Entergy to reap the margins on the transactions. In Louisiana

²³ ID at P 142.

²⁴ Opinion No. 485 at P 102.

Commission's view, allowing Entergy Arkansas to make low cost short-term sales of capacity without first offering this capacity to the other Entergy operating companies not only violates the language of the contract, but the overall intent of the System Agreement. In this regard, Louisiana Commission argues that the Commission has ruled that Entergy may sell resources to others only if the sale benefits the System as a whole regardless of section 3.05.

37. In this regard, Louisiana Commission argues that the Commission erred by providing no substantive basis for its conclusion that the System Agreement did not require Entergy Arkansas to offer a right of first refusal to the other operating companies before it agreed to consecutive monthly short-term sales of system capacity to off system customers. Louisiana Commission further argues that the fact that it did not raise this issue prior to this docket, when it had no information to allow it to raise this issue earlier, does not alter the contractual requirements of the System Agreement.

38. In addition, Louisiana Commission contends that Opinion No. 485 bases its conclusion, not on an interpretation of the language of the System Agreement, but on Louisiana Commission's failure to raise the issue earlier and on the failure of section 3.05 to mandate a particular allocation of capacity; but, in Louisiana Commission's view, these reasons are not dispositive. In Louisiana Commission's view, Opinion No. 485 ignores the plain language of section 3.05 and improperly abrogates the right of first refusal.

Commission Determination

39. Louisiana Commission's argument is flawed. Contrary to Louisiana Commission's argument, the Commission did consider whether the one-month opportunity sales begun by Entergy Arkansas in 2002 after losing North Little Rock, Arkansas as a customer triggered a right of first refusal for the LOU Entergy Arkansas Base Load PPAs. We concluded that the presiding judge's finding in the ID that these sales did not trigger a right of first refusal under section 3.05 of the System Agreement was correct and, accordingly, we affirmed the presiding judge's finding on this issue.

40. As to Louisiana Commission's contention that section 3.05 applies equally to short-term and long-term sales, this overlooks the opening language of section 3.05, which states that,

[i]t is the long term goal of the Companies that each Company have [sic] its proportionate share of Base Generating Units available to serve its customers either by ownership or purchase.^[25]

²⁵ Section 3.05 of Entergy System Agreement (quoted in the ID at P 175).

41. As demonstrated by the language quoted immediately above, the main goal of section 3.05 of the System Agreement is to ensure that each operating company receives its proportionate share of the base-load generating units over the long-term. By contrast, section 3.05 makes no mention of being designed to ensure that each company receives a proportionate share of Base Generating Units to meet its short-term needs. Therefore, consistent with the expressed goal of section 3.05, we affirm our finding in Opinion No. 485 that Entergy Arkansas's one-month opportunity type sales did not trigger a right of first refusal.

42. Moreover, Entergy Arkansas's one-month opportunity type sales will not affect the long-term availability to each company of its proportionate share of Base Generating Units. Given that section 3.05 of the System Agreement was designed to ensure that the operating companies' long-term capacity needs were being met, we find the judge's determination that the section 3.05 right of first refusal was not triggered by one-month sales to be both a proper reading of this provision and entirely reasonable.

43. Louisiana Commission next argues that Entergy's failure to offer Entergy Gulf States and Entergy Louisiana a right of first refusal to purchase the Entergy Arkansas capacity entitles Entergy Gulf States and Entergy Louisiana to exercise these rights, retroactive to the time the capacity was sold off-system. We disagree. As we stated in Opinion No. 485,²⁶ assuming *arguendo* that we agreed with Louisiana Commission's contention that Entergy Arkansas's one-month sales triggered a section 3.05 right of first refusal, there is nothing in section 3.05 that supports Louisiana Commission's position that this would entitle Entergy Gulf States and Entergy Louisiana to exclusively exercise these rights. As noted by trial staff witness Sammon, the right of first refusal afforded each Entergy operating company under the System Agreement does not explicitly address the question of whether an operating company can offer its surplus capacity to any particular operating company, or if it must offer the capacity to all of the other operating companies.²⁷ For these reasons, we will reject Louisiana Commission's request for rehearing on this issue.

²⁶ Opinion No. 485 at P 134.

²⁷ *See* Exhibit S-5 (Prepared Direct and Answering Testimony and Exhibits of John K. Sammon) at 21.

VI. Entergy's Allocation of Base Load Generating Resources

44. Louisiana Commission objects to the Commission's finding in Opinion No. 485 affirming the presiding judge's approval of Entergy's allocation of base load generating resources. Louisiana Commission argues this is inconsistent with Opinion No. 480.²⁸

45. In Opinion No. 485, we summarized the Commission's findings in Opinion No. 480. Specifically, we stated:

As we found in Opinion No. 480, the purpose of the System Agreement, among other things, is to roughly equalize costs among the Entergy operating companies. However, because the Entergy System was found to no longer be in rough production cost equalization, as determined in that proceeding, the Commission found it appropriate to implement a remedy (*i.e.*, bandwidth) to achieve rough production cost equalization. We affirm the presiding judge's approval of Entergy's allocation of capacity because the allocation appears reasonable. Moreover, to the extent that the allocations we affirm here (with regard to the agreements) do not achieve rough production cost equalization among the operating companies, Opinion No. 480 has established a bandwidth remedy that will ensure rough production cost equalization among the Entergy operating companies. Accordingly, we also affirm his rejection of the Louisiana Commission's proposed alternative allocation of capacity. In this regard, we agree with the presiding judge that the Louisiana Commission's alternative allocation proposal "runs counter to the goal of at least roughly equalizing the production cost of the operating companies to eliminate discrimination."^[29]

46. Louisiana Commission argues that the Commission erred when it found that Entergy's allocation of Entergy Gulf States' River Bend 30 resource to Entergy Louisiana and Entergy New Orleans, to the exclusion of Entergy Gulf States, was proper because it purportedly was consistent with the goal of moving the operating companies closer to rough production cost equalization and that the Opinion No. 480 bandwidth would fix any cost disparities.³⁰

²⁸ See note 11, *supra*.

²⁹ Opinion No. 485 at P 128.

³⁰ Louisiana Commission Rehearing Request at 2-3.

47. Louisiana Commission further argues that this finding is inconsistent with the finding in Opinion No. 480 that resource allocations are the primary means available to equalize cost under the System Agreement and the bandwidth was merely an "insurance policy."³¹ Louisiana Commission argues that, contrary to the principles in Opinion No. 480, Entergy's allocation of costs among operating companies caused Entergy Arkansas' costs to move further down from the system average, while causing Entergy Gulf States' costs to go higher.³²

48. Louisiana Commission argues that Entergy allocated the new resources, not to minimize production cost differences, but to settle with the City of New Orleans in the System Agreement proceeding and achieve corporate objectives at the retail level.³³ Louisiana Commission further argues that Entergy's resource allocation approved by Opinion No. 485 does not minimize the production cost differences among the operating companies, but instead transfers costs from one company to another. Louisiana Commission argues that Entergy's failure to lessen production differences through its resource allocations cannot be surprising, because Entergy did not study the production cost implications of its allocation before adopting it. Louisiana Commission also argues that, for nearly a year, Entergy created a long range generation plan based on matching resources and company needs, not on minimizing production cost differences. Finally, Louisiana Commission argues that, only at the end of this process, when Entergy was searching for a settlement with the City of New Orleans in the System Agreement proceeding, did the company select its preferential allocation.

Commission Determination

49. Reviewing Louisiana Commission's arguments on this issue, we conclude that Louisiana Commission merely reiterates arguments that we already considered and rejected in Opinion No. 485. Therefore, we will deny the Louisiana Commission's request for rehearing on this issue. As we stated in Opinion No. 485,³⁴ to the extent that the allocations of capacity that we affirmed in Opinion No. 480 do not achieve rough production cost equalization (the overriding goal of the System Agreement), Opinion No.

³¹ *Id.* at 4.

³² *Id.*

³³ Louisiana Commission Rehearing Request at 13.

³⁴ Opinion No. 485 at P 128.

480 has established a bandwidth remedy designed to ensure that rough production cost equalization among the Entergy operating companies is actually achieved.³⁵

50. Furthermore, as the Louisiana Commission is aware, the Opinion No. 480 proceeding³⁶ took extensive evidence regarding the lack of proportionality between the Entergy operating companies and requires that all Entergy operating companies submit cost of production information annually.³⁷ In Opinion No. 485, we merely affirmed the judge's rejection of Louisiana Commission's alternative allocation methodology as being inconsistent with the overall goal of rough production cost allocation. Accordingly, we will reject the Louisiana Commission's request for rehearing of this issue.

VII. Commission's Jurisdiction over the Sale of River Bend 30 Power

51. Louisiana Commission argues that, while the Commission asserted jurisdiction over the sale of River Bend 30 power in Opinion No. 485, states have the authority to review the prudence of capacity sales by entities subject to a state agency's jurisdiction. Louisiana Commission argues that, in Opinion No. 485, the Commission incorrectly finds that the Louisiana Commission is preempted from challenging in state proceedings the prudence of Entergy Gulf States' decision to sell all the power from the River Bend 30 unit to Entergy Louisiana and Entergy New Orleans, rather than devote a portion of that capacity to Entergy Gulf States' retail customers.

52. Louisiana Commission further argues that,

states, not FERC, have jurisdiction to determine the prudence of purchases and sales of capacity by utilities subject to state jurisdiction. Opinion No. 485 holds that "a state commission may question the utility's resource *purchase* decisions," but finds that the Louisiana Commission does not have jurisdiction over the *sale* of the River Bend 30 power by [Entergy Gulf States]. Opinion No. 485 cites no law and provides no reasoned analysis to support its holding.^[38]

³⁵ *Id.*

³⁶ *See, e.g.,* Opinion No. 480 at P 7, P 28-29.

³⁷ *Id.* at P 140.

³⁸ *Id.* at 5-6.

53. Finally, Louisiana Commission argues that the Commission's decision violates longstanding legal principles, is internally inconsistent, and is not adequately explained in the Commission's decision.³⁹

Commission Determination

54. In Opinion No. 485, the Commission affirmed the judge's determination that the Commission has jurisdiction to determine that the pricing and allocation provisions of the sale of the River Bend 30 power are just and reasonable. The Commission agreed with the judge that the River Bend 30 PPAs provide for the wholesale sale of power from generating facilities, which is subject to the Commission's jurisdiction, and do not represent an asset disposal of all or part of a generating facility, which is within the jurisdiction of the states.⁴⁰ We reached this conclusion because we found that the case involved the sale of power from a jurisdictional facility, not the sale of that facility.

55. We also explained in Opinion No. 485 that Louisiana Commission's reference to *Pike County* was inapposite because, in *Pike County*, the court held that, in making determinations about retail rates, state Commissions may not question the reasonableness of FERC-approved wholesale rates.⁴¹ Under *Pike County* and subsequent case law, while the state may not question the reasonableness of the wholesale rate, it nevertheless may disallow pass-through of the rate, if the purchase was imprudent and if the purchaser had a legal choice not to purchase the power.⁴²

56. On rehearing, Louisiana Commission renews its argument that the Commission is precluded from evaluating an agreement providing for wholesale power sales by a FERC-jurisdictional public utility because this would divest Louisiana Commission of its authority to direct Entergy Gulf States to sell its River Bend 30 unit, rather than retain it and make sales from it.

57. Louisiana Commission's argument has two major flaws. First, the argument misreads the Commission's findings in Opinion No. 485. In Opinion No. 485, the

³⁹ *Id.*

⁴⁰ Opinion No. 485 at P 138.

⁴¹ See *Pike County*, 77 Pa. Cmwlth. Ct. at 273-274, 465 A.2d at 737-738; *Nantahala Power & Light Co., et al. v. Thornburg*, 476 U.S. 953 at 965-967 (1986); and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 at 369 (1988).

⁴² *Id.*

Commission did not divest Louisiana Commission of its authority over the sale of generating units. To the contrary, Opinion No. 485 was focused on actions being taken under the Commission's jurisdiction – the justness and reasonableness of the wholesale price for power from the River Bend 30 unit -- and was not intended to make any findings, one way or the other, on the extent of Louisiana Commission's authority under state law to require Entergy Gulf States to sell the River Bend 30 unit.

58. Second, in any event, Louisiana Commission has not ordered Entergy Gulf States to sell the River Bend 30 unit. Such a sale has not happened, has not been ordered, and is purely hypothetical. The hypothetical possibility that Louisiana Commission could, at some future date, require Entergy Gulf States to sell the River Bend 30 unit⁴³ is not sufficient to divest the Commission of its authority to review the real world jurisdictional agreement that was filed with it for approval covering wholesale power sales from the River Bend 30 unit. If we were to follow the Louisiana Commission's logic, the Commission would be precluded from fulfilling its statutory responsibility to ensure that wholesale power sales are made at just and reasonable rates and are not unduly discriminatory, based on the hypothetical possibility that a state Commission might, at some undefined future date, order the unit that produced that power to be sold. We find this argument untenable, contrary to prior precedent, and reject it.

The Commission orders:

As discussed in the body of this order, the Commission denies the requests for rehearing filed by Entergy and by the Louisiana Commission and grants Entergy's request for clarification.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.

⁴³ We reiterate here that the Commission takes no position, one way or the other, on Louisiana Commission's authority to order such a sale.