ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 07-1228

LOUISIANA PUBLIC SERVICE COMMISSION,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

BETH G. PACELLA
SENIOR ATTORNEY

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

March 24, 2009

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review:

1. *Louisiana Public Service Commission v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (November 17, 2006) ("Compliance Order"), JA 1-22; and

2. *Louisiana Public Service Commission v. Entergy Services, Inc.*, 119 FERC ¶ 61,095 (April 27, 2007) ("Rehearing Order"), JA 23-40.

C. Related Cases:

The orders challenged in the instant petition addressed a filing made in compliance with *Louisiana Public Service Commission v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005), *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in part, reversed in part, sub nom. Louisiana Public Service Commission v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) ("*Louisiana III*").

This appeal represents the fifth recent appeal by the Louisiana Public Service Commission of wholesale ratemaking decisions arising from disputes among the Entergy Operating Companies and their state utility commissions. *See Louisiana Pub. Serv. Comm'n v. FERC*, No. 07-1175

(D.C. Cir. Dec. 30, 2008) ("*Louisiana IV*") (addressing allocations of power-generating capacity among Entergy Operating Companies); *Louisiana III*, 522 F.3d 378 (addressing "rough equalization" of production costs among Entergy Operating Companies and selection of +/- 11 percent bandwidth remedy); *Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) ("*Louisiana II*") (addressing inclusion of interruptible load in calculation of peak load responsibility); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) ("*Louisiana I*") (same). The orders on remand from *Louisiana II* (*Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 120 FERC ¶ 61,275 (2007), *order on reh'g*, 124 FERC ¶ 61,275 (2008)) are currently pending review in *Arkansas Public Service Commission, et al. v. FERC*, D.C. Cir. No. 08-1330, *et al.*

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Beth G. Pacella
Senior Attorney

March 24, 2009

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GLOSSARY

ALJ	Administrative Law Judge
Commission	Federal Energy Regulatory Commission
Compliance Order	*Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006)
Entergy	Affiliated Entergy Operating Companies
Entergy Louisiana	Entergy Louisiana, LLC
FERC	Federal Energy Regulatory Commission
Louisiana I	*Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999)
Louisiana II	*Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007)
Louisiana III	*Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008)
Louisiana IV	*Louisiana Pub. Serv. Comm'n v. FERC*, No. 07-1175 (D.C. Cir. Dec. 30, 2008)
Louisiana PSC	Louisiana Public Service Commission
Opinion No. 468	*Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 106 FERC ¶ 61,228 (2004)
Opinion No. 468-A	*Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 111 FERC ¶ 61,080 (2005)
Opinion No. 480	*Louisiana Public Service Commission v. Entergy Corp.*, 111 FERC ¶ 61,311 (2005)

Opinion No. 480-A	*Louisiana Public Service Commission v. Entergy Corp.*, 113 FERC ¶ 61,282 (2005)
Rehearing Order	*Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 119 FERC ¶ 61,095 (2007)
Vidalia	Vidalia Hydroelectric Power Plant

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LOUISIANA PUBLIC SERVICE COMMISSION,
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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

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission or FERC") reasonably determined that the filing the Entergy Operating Companies made to comply with FERC orders reviewed by this Court in *Louisiana Public Service Commission v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), complied with the Commission's directives in those orders.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

INTRODUCTION

This is the latest in a long line of cases involving the unique arrangement under which five affiliated Entergy Operating Companies (collectively, "Entergy"), including Entergy Louisiana, LLC ("Entergy Louisiana"), operate their transmission and generation facilities as a single, highly integrated electric system under a multi-part System Agreement. Under this arrangement, the companies allocate the costs and benefits of generation resources among themselves, and by extension among ratepayers of these companies in various southern states, with the goal of roughly equalizing their production costs.

The instant proceeding concerns the April 10, 2006 filing Entergy made to comply with the Commission's orders in *Louisiana Public Service Commission v. Entergy Corp. and Entergy Services, Inc.*, 111 FERC ¶ 61,311 ("Opinion No. 480"), JA 41, *order on reh'g*, 113 FERC ¶ 61,282 (2005) ("Opinion No. 480-A"), JA 104, *aff'd in part, rev'd in part, sub nom. Louisiana Public Service Commission v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) ("*Louisiana III*"). The challenged orders approved those portions of Entergy's filing the Commission found complied with the Commission's directives in Opinion Nos. 480 and 480-A, and disapproved

those portions it found did not comply. *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006) ("Compliance Order"), *order on reh'g*, 119 FERC ¶ 61,095 (2007) ("Rehearing Order") (collectively, "Compliance Orders").

Rejecting the protest of the Louisiana Public Service Commission ("Louisiana PSC"), the Commission found that Entergy's proposals to include interruptible load in measuring total production costs (to determine whether the Operating Companies are in rough production cost equalization), and to re-price the energy associated with the Vidalia Hydroelectric Power Plant ("Vidalia") contract at Entergy Louisiana's MSS-3 rate, fully complied with the Commission's Opinion Nos. 480 and 480-A directives. Furthermore, because its decision regarding when the bandwidth remedy would be implemented was based on a refund determination in another proceeding that had since been remanded to the Commission, the Commission determined that it would defer ruling on Louisiana PSC's claim that the Commission improperly delayed implementation of the bandwidth remedy until after it acted on the refund issue in the remand proceeding.

STATEMENT OF FACTS

I. Events Leading To The Challenged Orders

A. The Entergy System

The Entergy System is highly integrated, and generation facilities are planned, constructed, and operated for the benefit of the whole system. *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) (addressing cost equalization payments among Entergy Operating Companies and overturning Louisiana PSC's decision not to reflect such payments in retail rates). This arrangement is familiar to this Court, as this appeal represents the fifth recent appeal by the Louisiana PSC of wholesale ratemaking decisions arising from disputes among the Entergy Operating Companies and their state utility commissions. *See Louisiana Pub. Serv. Comm'n v. FERC*, No. 07-1175 (D.C. Cir. Dec. 30, 2008) ("*Louisiana IV*") (addressing allocations of power-generating capacity among Entergy Operating Companies); *Louisiana III*, 522 F.3d 378 (addressing "rough equalization" of production costs among Entergy Operating Companies and selection of +/- 11 percent bandwidth remedy); *Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) ("*Louisiana II*") (addressing inclusion of interruptible load in calculation of peak load responsibility); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) ("*Louisiana I*") (same).

Entergy operates the five Operating Companies' transmission and generation facilities as a single electric system, dispatching generation on a least cost basis system-wide and without regard to ownership. Opinion 480-A P 8, JA 107. This pooling arrangement benefits the entire system by lowering energy and capacity costs to customers throughout the system. *Id.*

Transactions among the Entergy Operating Companies are governed by a multi-part System Agreement, which "acts as an interconnection and pooling agreement for the energy generated in the System," and "provides for the joint planning, construction and operation of new generating capacity in the System." *Louisiana III*, 522 F.3d at 383; *see also Miss. Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir. 1987). A system-wide operating committee coordinates the addition of new generating capacity to the Entergy System. *Louisiana III*, 522 F.3d at 383. "In adding generating capacity, the committee follows both a system-planning approach, which ensures that generation facilities are planned, constructed and operated for the benefit of the whole system, and a rotational approach, which adds new capacity on a rotating basis to the jurisdictions in the System. *Id.* (internal quotation omitted).

"Because an operating company is responsible for the costs of the generation plants in its jurisdiction, the rotation of new plants throughout the System historically had the effect of roughly evening out investment costs over time

among the operating companies . . . ." *Louisiana III*, 522 F.3d at 384 (internal citation omitted). For example, from 1985 through 1999, Entergy remained in rough production cost equalization, with total production cost deviations ranging from 7.71 to 22.2 percent. *Id.* at 385; Opinion No. 480 P 30, JA 51-52; Opinion No. 480-A P 10, JA 108.

In 2000, however, there was a spike in the price of natural gas, and total production cost deviations jumped significantly. *Louisiana III*, 522 F.3d at 385; Opinion No. 480 P 30, JA 52; Opinion No. 480-A P 10, JA 108. For the period 2000 through 2002, total deviations averaged more than 33 percent, and this pattern of deviations appeared likely to continue for years into the future. Opinion No. 480 PP 28, 30, JA 51-52; Opinion No. 480-A P 10, JA 108.

B. Opinion Nos. 480 And 480-A

On June 14, 2001, Petitioner Louisiana PSC filed a complaint asserting that the cost allocations among the Entergy Operating Companies had become unjust, unreasonable, and unduly discriminatory. Opinion No. 480 P 3, JA 42. The Commission set the complaint for hearing before an Administrative Law Judge ("ALJ"), who issued his Initial Decision, *Louisiana Public Service Commission v. Entergy Services, Inc., et al.*, 106 FERC ¶ 63,012 (2004), JA 146, on February 6, 2004.

The Commission addressed the ALJ's Initial Decision in Opinion Nos. 480 and 480-A. Based on the total deviation percentages calculated from the production cost comparison in Entergy-sponsored Exhibit ETR-26, the Commission affirmed the ALJ's finding that the Entergy System was no longer in rough production cost equalization. Opinion No. 480 PP 1, 28-31, JA 51-53.

To return Entergy to rough production cost equalization, the Commission instituted an annual bandwidth of +/- 11 percent, which allows for a maximum 22 percent spread in production costs between the operating companies.[1] Opinion No. 480 P 144, JA 88. Furthermore, based on its holding in another Entergy proceeding (*Louisiana Public Service Commission v. Entergy Corp.*, 106 FERC ¶ 61,228 (2004) ("Opinion No. 468"), *order on reh'g*, 111 FERC ¶ 61,080 (2005) ("Opinion No. 468-A"), *aff'd in part, rev'd in part, sub nom. Louisiana Public Service Commission v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) ("*Louisiana II*")) that refunds among the Operating Companies were prohibited, the Commission determined that "[a]ny reallocation of production costs among the Operating

[1] "For each Operating Company, actual production costs are compared to the level of production costs for that Operating Company were its production costs equal to its allocated share of the system average production costs." Compliance Order P 25, JA 8. This comparison "is made to determine if any Operating Company's production costs deviate from its system average production costs by more than +/- 11 percent. If such a deviation exists in any calendar year subsequent to 2005, payments and receipts will be required under the bandwidth remedy." *Id.*

Companies necessitated by [the] percentage bandwidth remedy must be implemented prospectively." Opinion No. 480 P 145, JA 89. Thus, the Commission made "the change to impose a +/- 11 percent annual bandwidth that [it] order[ed] here effective for the calendar year 2006," *id.*; *see also* Opinion No. 480-A P 53, JA 123, with "[a]ny equalization payments [to] be made in 2007," Opinion No. 480-A P 54, JA 124.

Contrary to the ALJ's determination, the Commission found that the Vidalia generating plant was not planned as a system resource for the benefit of the Entergy System. As a result, the Commission determined that the full Vidalia contract energy costs should not be included in calculating whether the Entergy Operating Companies' production costs are roughly equal. Opinion No. 480 P 146, 174, JA 89, 96; Opinion No. 480-A P 70, JA 129.

The Commission further determined that "[f]uture production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26, which accounts for Vidalia by re-pricing the energy at the annual MSS-3 rate." Opinion No. 480 P 33, JA 53.

C. Entergy's Opinion No. 480 Compliance Filing

Entergy submitted its filing to comply with Opinion Nos. 480 and 480-A on April 10, 2006. R 1, Compliance Filing, JA 262. The filing "modif[ied] Service Schedule MSS-3 of the Service Agreement to allow for the exchange of payments,

if any payments are required, to meet the Commission's Rough Production Cost Equalization standard under Opinion Nos. 480 and 480-A." *Id.* at 8, JA 269; *see also* Compliance Order P 5, JA 3 (explaining that the compliance filing "propose[d] to amend certain provisions of one of the service schedules, Service Schedule MSS-3.").

Entergy explained that, as Opinion No. 480 had directed that "[f]uture production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26," the compliance filing re-priced the energy associated with Entergy Louisiana's purchase power contract with Vidalia based on the average annual MSS-3 rate paid by Entergy Louisiana. R.1, Compliance Filing at 16, JA 277 (quoting Opinion No. 480 at P 33, JA 53). In addition, the compliance filing included interruptible loads in calculating the total production costs of each Operating Company for purposes of production cost comparisons. R. 1, Compliance Filing at n.39, JA 282.

The compliance filing also proposed that, if any payments are required to maintain rough production cost equalization in a calendar year (*i.e.*, 2006), those payments would be made in 12 equal monthly payments beginning June 1 of the following year (*i.e.*, from June 1, 2007 through May 31, 2008). R. 1, Compliance Filing at 22, JA 283. Entergy explained that it chose June 1 as the payment start date because FERC Form No. 1, which contains the data necessary to determine

whether the Entergy System is in rough equalization, is filed on April 30 of each year. *Id.* A "June 1 date allows Entergy a reasonable and brief period of time for FERC Form No. 1 data to be collected and incorporated in the MSS-3" bandwidth remedy formula. *Id.*

Furthermore, the compliance filing explained that, because any bandwidth remedy payments would "bring the Companies within the Opinion No. 480 bandwidth on a prospective basis, these payments are not interest bearing under the Commission's regulations . . . ." *Id.*

D. Louisiana PSC's Protest

Louisiana PSC (and others, *see* Compliance Order P 6, JA 3) protested Entergy's compliance filing on several bases. R. 13, JA 325.

Louisiana PSC contended that, to comply with Opinion Nos. 480 and 480-A, Entergy needed to re-price the energy associated with Entergy Louisiana's Vidalia contract based on the average annual price of the MSS-3 exchange rather than on the average annual MSS-3 price paid by Entergy Louisiana. R. 13, Louisiana PSC Protest at 21-26, JA 341-45.

Louisiana PSC also claimed that the compliance filing violated the Commission's ruling in Opinion Nos. 468 and 468-A that Entergy should "remove interruptible load when calculating peak load responsibility ratios." Louisiana PSC Protest at 26, JA 345; *see also id.* at 26-28, JA 345-47.

Additionally, noting that Opinion Nos. 480 and 480-A determined that the bandwidth remedy would be in effect beginning in 2006 and that any equalization payments for 2006 would be made in 2007, Louisiana PSC protested that the compliance filing proposal would allow some equalization payments for 2006 to be made in 2008. R. 13, Louisiana PSC Protest at 14-15, JA 334-35; *see also id.* at 14-21, JA 334-41.

Furthermore, Louisiana PSC contended that "the Commission should require that rough equalization payments be made no later than January 31 of the year succeeding the period for which the remedy applies," and that "[i]f estimates are necessary, the tariff should provide for true-ups later in each year." *Id.* at 16, JA 336. If the Commission allowed monthly payments, however, Louisiana PSC argued that "they should commence by January 31 and each payment should provide one-twelfth of the amount due for the prior year." *Id.* at 17, JA 337. Louisiana PSC also claimed that the equalization payments should include interest "from the time costs are incurred by the operating companies to the time payments are made." *Id.*

II. The Challenged Orders

The Commission found no merit to Louisiana PSC's claim that, to comply with Opinion Nos. 480 and 480-A, the energy associated with Entergy Louisiana's Vidalia contract should be priced based on the average annual price of the MSS-3

exchange rather than on the average annual MSS-3 price paid by Entergy Louisiana. Compliance Order P 59, JA 17; Rehearing Order P 47, JA 38. Opinion No. 480 directed that "[f]uture production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26," Opinion No. 480 P 33, JA 53, which re-priced "the Vidalia energy based on the annual Service Schedule MSS-3 rate paid by [Entergy Louisiana]." Compliance Order P 59, JA 17 (citing, *e.g.*, Exhibit ETR-23, Testimony of Entergy witness Bruce Louiselle in the Opinion No. 480 proceeding, at 41-42, JA 451-52); *see also* Rehearing Order P 47, JA 38 (same).

The Commission also rejected Louisiana PSC's claim that Entergy should not include interruptible loads in calculating production costs because doing so purportedly conflicted with Opinion Nos. 468 and 468-A. Compliance Order P 62, JA 18; Rehearing Order n.29, P 39, JA 35, 36. As the Commission explained, Opinion No. 480 directed that "[f]uture production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26," which includes interruptible load. Compliance Order P 62, JA 18 (quoting Opinion No. 480 P 33, JA 53); *see also* Rehearing Order Rehearing Order P 39, JA 36 (same).

Moreover, the Commission added, Opinion Nos. 468 and 468-A "held that the System Agreement was to be modified to exclude interruptible load from the calculation of peak load responsibility under Service Schedule (MSS-1) (Reserve

Equalization) and MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of All Companies). Rehearing Order n.29, JA 35; *see also* Compliance Order P 61, JA 18 (explaining that Opinion Nos. 468 and 468-A "excluded interruptible loads from the 12 CP allocator for purposes of calculating reserve equalization payments under Service Schedule MSS-1."). This compliance proceeding, by contrast, involved the calculation of total production costs under Service Schedule MSS-3. Compliance Order PP 5, 62, JA 3, 18.

In addition, because the Commission's determination as to when to implement the bandwidth remedy had been based on its since-remanded refund ruling in the Opinion No. 468 proceeding, the Commission determined that it would defer ruling on Louisiana PSC's claim that the Commission impermissibly delayed implementing a remedy for two years until after it acted on the refund issue in the Opinion No. 468 remand proceeding. Rehearing Order P 26, JA 32 (citing Opinion No. 480 P 145, JA 88-89).

SUMMARY OF ARGUMENT

The challenged Compliance Orders appropriately reviewed Entergy's filing to ensure that it complied with the Opinion Nos. 480 and 480-A, the orders directing the filing.

Any objection to any of the legal and policy judgments made in Opinion Nos. 480 and 480-A (reviewed on appeal by this Court in *Louisiana III*) is outside the scope of this narrow compliance filing. Thus, Louisiana PSC's claims that interruptible loads should not be included in determining each Operating Company's total production costs are an impermissible collateral attack on Opinion Nos. 480 and 480-A and should, therefore, be dismissed.

In any case, those claims lack merit. The ALJ did not rule that the issue whether interruptible loads should be included in calculating total production costs would be decided in the Opinion No. 468 proceeding. Even if the ALJ had made such a ruling, however, it would have been superseded by the Commission's ruling in Opinion No. 480 that future production cost comparisons follow the methodology in Exhibit ETR-26, which includes interruptible load in calculating total production costs.

In addition, contrary to Louisiana PSC's assertion, including interruptible load in calculating total production costs does not conflict with Opinion Nos. 468 and 468-A. Those orders held that interruptible load should not be included in the

calculation of peak load responsibility under Service Schedule MSS-1 or the distribution of revenues from sales made for the joint account of all companies under Service Schedule MSS-5. The instant compliance proceeding, by contrast, involved the calculation, under Service Schedule MSS-3, of each Operating Company's total production costs to determine whether the Entergy System is in rough equalization.

Louisiana also mistakenly claims that Opinion Nos. 480 and 480-A determined that the Vidalia energy would be re-priced at the annual price of the Service Schedule MSS-3 exchange, *i.e.*, the average price paid by all the Operating Companies, rather than at the annual MSS-3 price Entergy paid. Opinion No. 480 directed that future production cost comparisons should follow the methodology in Exhibit ETR-26 which, Louisiana PSC concedes, re-priced the Vidalia energy at the Entergy Louisiana's MSS-3 price.

Louisiana PSC's final contention, that the Compliance Orders improperly delayed implementing the rough equalization remedy, is not ripe for review, as the Commission has not yet ruled on that contention. Because its decision regarding when to implement the bandwidth remedy was based on a refund determination that had since been remanded in *Louisiana II*, the Commission logically determined that it would defer ruling on Louisiana PSC's improper delay claim until after it acted on the refund issue in the *Louisiana II* remand proceeding.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decision must be reasoned. *East Texas Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 753 (D.C. Cir. 2000). For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence in the record. *Id.*; FPA § 313(b), 16 U.S.C. § 825*l*(b).

The Court is "particularly deferential to the Commission's expertise in ratemaking cases, which involve complex industry analyses and difficult policy choices." *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 821 (D.C. Cir. 2007) (quoting *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1172 (D.C. Cir. 2005)). *See also Blumenthal v. FERC*, No. 07-1130, slip op. at 9 (D.C. Cir. Jan. 23, 2009) ("the statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions") (quoting *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2738 (2008)). Deference is particularly appropriate when the Commission makes an informed judgment as to a dispute arising under the complicated, multi-utility, multi-state Entergy System Agreement. *See Louisiana*

IV, slip op. at 6 (FERC's allocation of costs among Entergy's Operating Companies entitled to "great deference;" "[g]iven this lenient standard of review, we find ourselves unconvinced by the Louisiana Commission's arguments for second-guessing FERC's judgment.")

Moreover, "[i]n evaluating FERC's interpretation of its own order[s], [the Court] afford[s] the Commission substantial deference, upholding the agency's decision 'unless its interpretation is plainly erroneous or inconsistent' with the order[s]." *Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1067-68 (D.C. Cir. 2005).

II. THE COMMISSION REASONABLY ASSURED THAT ENTERGY'S FILING, MADE TO COMPLY WITH OPINION NOS. 480 AND 480-A, ACCORDED WITH THOSE ORDERS' DIRECTIVES

"The principal issue presented by this compliance filing, as by any, [is] whether the provisions included in the schedule accorded with the directions of the underlying order[s]." *City of Cleveland, Ohio v. FERC*, 773 F.2d 1368, 1374 (D.C. Cir. 1985); *see also East Texas*, 218 F.3d at 753-54 ("FERC precedent generally confines the scope of modifications in compliance filings to the Commission's particular directives"); *Pub. Serv. Co. of New Mexico v. FERC*, 857 F.2d 833, 834 n.1 (D.C. Cir. 1988) ("[c]ompliance filing is the common term for the revised cost-of-service estimates, rate schedules and tariffs which a utility submits in conformity with a Commission order.").

Thus, in reviewing Entergy's compliance filing, the Commission rejected Entergy proposals that it found did not conform to the directives in Opinion Nos. 480 and 480-A. For example, because Opinion No. 480 directed that "[f]uture production costs comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26," Opinion No. 480 P 33, JA 53, the Commission rejected Entergy's request in its compliance filing to make adjustments to the methodology in that exhibit. Compliance Order PP 63, 69, JA 18, 20; Rehearing Order P 43, JA 37.

As the Commission explained, "[t]his is a compliance filing and Entergy must comply with the requirements of Opinion Nos. 480 and 480-A." Compliance Order P 69, JA 20; Rehearing Order P 43, JA 37 (citing, *e.g.*, *Sierra Pacific Power Co.*, 80 FERC ¶ 61,376 at 62,271 (1997) ("a compliance filing is not an appropriate mechanism to challenge Commission directives. If [a party] is dissatisfied with any aspect of a Commission order, or is uncertain as to the extent of the directives the Commission is ordering, it should seek rehearing or clarification of that order, as appropriate. The sole purpose of a compliance filing is to make the revisions directed by the Commission."); *Delmarva Power & Light Co.*, 63 FERC ¶ 61,321 at 63,160 (1993) (the "sole relevant issue in reviewing [a] compliance filing is whether it complies with the direction in the [underlying order]")); *see also* Rehearing Order P 13, JA 27 (finding "beyond the scope" of

this compliance proceeding issues other than whether Entergy properly implemented the Commission's Opinion Nos. 480 and 480-A directives).

The Commission added that, if Entergy wanted to change the rough equalization methodology from that in Exhibit ETR-26, it would have to make an FPA section 205 rate filing seeking to do so. Compliance Order P 69, JA 20; Rehearing Order P 43, JA 37. "Similarly, customers may file [FPA] section 206 complaints if they seek to make a change, and the Commission may institute a section 206 proceeding on its own motion if it seeks a change." Compliance Order P 69, JA 20. Entergy followed the Commission's instruction, and made a new rate filing that proposed a cost allocation different from that approved in Opinion Nos. 480 and 480-A. Rehearing Order n.34, JA 37. Likewise, Louisiana PSC filed a new complaint on the interruptible load issue (and the Vidalia re-pricing issue) three weeks before the Rehearing Order issued. Rehearing Order nn.32 and 35, JA 36, 38.[2]

Louisiana PSC nevertheless persists in raising to this Court several challenges to the Compliance Orders. None of Louisiana PSC's claims has merit.

[2] Louisiana PSC also awaits judicial review by this Court on the Commission's decision on remand, in Louisiana PSC's favor (as to timing of remedy) in *Louisiana II*, Br. at i-ii, and awaits agency rehearing on the Commission's decision on remand, also in Louisiana PSC's favor, in *Louisiana III*, Br. at ii, 56-57.

A. The Commission Reasonably Determined That Including Interruptible Loads In Calculating Total Production Costs Complied With Its Directives In Opinions 480 And 480-A

In the Opinion No. 480 proceeding, the Commission directed that "[f]uture production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26," Opinion No. 480 P 33, JA 53, which "includes interruptible load in the measurement of total production costs of each Operating Company for purposes of production cost comparisons." Compliance Order P 62, JA 18; *see also* Rehearing Order P 39, JA 36 (same). Entergy's compliance filing "include[d] interruptible loads to measure the total production costs of each Operating Company for purposes of production cost comparisons." Compliance Order P 60, JA 17. Accordingly, the Commission found that Entergy complied with the Commission's directives in Opinion Nos. 480 and 480-A. Compliance Order P 62, JA 18; Rehearing Order P 39, JA 36.

Louisiana PSC does not dispute any of this. Instead, Louisiana PSC raises several matters which, it asserts, undermine the Commission's approval of the compliance filing. In fact, however, Louisiana PSC's interruptible load challenges are an improper collateral attack on the Commission's directives in Opinion Nos. 480 and 480-A, and, in any event, lack merit.

1. Louisiana PSC's Interruptible Load Claims Should Be Dismissed As Untimely Collateral Attacks On The Directives In Opinions 480 and 480-A

Opinion No. 480 explicitly directed that future production cost comparisons follow the methodology in Exhibit ETR-26. Opinion No. 480 P 33, JA 53. As that exhibit included interruptible load in its calculations (which Louisiana PSC does not dispute[3]), Opinion No. 480 put the parties, including Louisiana PSC, on sufficient notice that future production cost calculations would include interruptible load. *See Dominion Res., Inc. v. FERC*, 286 F.3d 586, 590 (D.C. Cir. 2002) (a reasonable party to the proceeding "'would have perceived a very substantial risk that [Opinion No. 480] meant' what the Commission now says it meant.") (quoting *ANR Pipeline Co. v. FERC*, 988 F.2d 1229, 1234 (D.C. Cir. 1993)); *see also id.* ("'the remedy for . . . ambiguity is to petition . . . for reconsideration'") (quoting *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 286 (1987)).

Louisiana PSC should have raised its interruptible load claims, if at all, therefore, in the Opinion No. 480 proceeding. *See Pacific Gas & Elec. Co. v.*

[3] In fact, in its Request for Rehearing, Louisiana PSC conceded that "the Compliance Order correctly determines that Exhibit ETR-26 did not eliminate interruptible loads from the demand data used to allocate production costs . . . ." R. 46, Louisiana PSC Rehearing Request at 2, JA 425; *see also* Rehearing Order P 39, JA 36 ("The Louisiana Commission does not argue that Entergy has failed to comply").

FERC, 533 F.3d 820, 824-27 (D.C. Cir. 2008); *Southern Co. Svcs., Inc. v. FERC*, 416 F.3d 39, 44-46 (D.C. Cir. 2005); *Dominion*, 286 F.3d at 589-90. Accordingly, the interruptible load claims should be dismissed as untimely, and thus impermissible, collateral attacks on Opinion Nos. 480 and 480-A.

2. Louisiana PSC's "Law of the Case" Claim Has No Merit

Louisiana PSC contends that, "[p]ursuant to the explicit agreement of the parties that briefed the issue, the ALJ determined that the interruptible load issue would be decided in the [Opinion No. 468] docket," that "[n]o party filed an exception to this ruling," and, therefore, that "this determination of the ALJ became the law of the case . . . ." Br. at 38-40 (citing Initial Decision P 45 and n.15, JA 166, 179); *see also* Br. at 41-43.

Contrary to the Louisiana PSC's contention, the ALJ did not "rule" that the interruptible load issue would be decided in the Opinion No. 468 proceeding. Rather, the ALJ merely noted the parties' agreement to that effect. Initial Decision n.15, JA 179 ("As all parties agree, the issue of whether interruptible loads should be included in calculating load responsibility ratios will be decided in another proceeding now on appeal before the Commission."); *see also id.* P 45, JA 166 (noting that Louisiana PSC witness Baron's analysis "excluded interruptible load from the 12-[coincident peak] (demand) responsibility ratio (Line 5), consistent

with [Louisiana PSC]'s position. However, as all parties agree, that question is being decided in another Commission proceeding.").

Even if the ALJ had "ruled" that whether interruptible loads should be included in measuring each Operating Company's total production costs for production cost comparisons would be decided in the Opinion No. 468 proceeding, such a ruling would have been superseded by the Commission's ruling in Opinion No. 480 that "[f]uture production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26 . . . ." Opinion No. 480 P 33, JA 53; *see also Louisiana III*, 522 F.3d at 395 (even when the ALJ makes a "finding," the Commission need only give that finding "attentive consideration," not afford it "any special deference"). It is undisputed that Exhibit ETR-26 "includes interruptible load in the measurement of total production costs of each Operating Company for purposes of production cost comparisons." Compliance Order P 62, JA 18; *see also* Rehearing Order P 39, JA 36 (same).

Louisiana PSC next argues that "FERC's reference in Opinion No. 480 to Exhibit ETR-26 could not reasonably be interpreted to overrule the determination on the interruptible load question" because, purportedly, the "reference to Exhibit ETR-26 was made in the context of a discussion of repricing Vidalia . . . ." Br. at 40. Louisiana PSC failed to raise this argument on rehearing in the instant compliance proceeding, R. 46, JA 424-38, and, therefore, it is jurisdictionally

barred from raising it on appeal. FPA § 313(b), 16 U.S.C. § 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.").

As this Court has explained, "[e]nforcement of this provision, which [the Court] ha[s] considered to pose a jurisdictional bar, enables the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (citations omitted); *see also California Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood v. FERC*, 906 F.2d 772, 774-75 (D.C. Cir. 1990).

Moreover, the "reasonable ground for failure" to raise an objection exception "is reserved for extraordinary situations," *Sebasticook*, 431 F.3d at 381-82 (citing *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004)), not present here. The Compliance Order explicitly relied on the very sentence Louisiana PSC now challenges as the basis for "reject[ing] the Louisiana Commission's argument that Entergy should have excluded interruptible loads in its calculation of total production costs." Compliance Order P 62, JA 18.

Louisiana PSC could have apprised the Commission of its contention that this sentence related only to re-pricing Vidalia energy, but did not do so.

In any event, Louisiana PSC's contention is mistaken. The Commission's mandate that future production cost comparisons among the Operating Companies follow the methodology in Exhibit ETR-26 did not occur in the context of a discussion of the Vidalia generating resource. Rather, it occurred in the section of the order addressing "Whether the Entergy System is Currently in Rough Production Cost Equalization." Opinion No. 480 at Heading A.1. (covering PP 15-33), JA 47-53.

In that section of the order, the Commission, based on the production cost comparison in Exhibit ETR-26, found that the Entergy System was no longer in rough production cost equalization. Opinion No. 480 PP 28-31, JA 51-53. In addition, the Commission directed that future production cost comparisons follow the very same production cost comparison methodology the Commission relied on in Opinion No. 480, *i.e.*, the methodology in Exhibit ETR-26. *Id.* P 33, JA 53 ("Future production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26"). Finally, the Commission noted and explained why that methodology "accounts for Vidalia by re-pricing the energy at the annual MSS-3 rate." *Id.* PP 32, 33, JA 53.

3. Including Interruptible Load In Comparing the Operating Companies' Production Costs Does Not Conflict With Opinion Nos. 468 And 468-A

Louisiana PSC contends that including interruptible loads in calculating each Operating Company's total production costs for production cost comparisons conflicts with the Commission's holding in Opinion Nos. 468 and 468-A (the orders addressed by this Court in *Louisiana II*). Br. at 43-46. As the Commission explained, however, Opinion Nos. 468 and 468-A "held that the System Agreement was to be modified to exclude interruptible load from the calculation of peak load responsibility under Service Schedule MSS-1 (Reserve Equalization) and MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of All Companies)." Rehearing Order n.29, JA 35; *see also* Compliance Order P 61 and n.28, JA 18 (Opinion Nos. 468 and 468-A "excluded interruptible loads from the 12 [coincident peak] allocator for purposes of calculating reserve equalization payments under Service Schedule MSS-1."); Opinion No. 468 PP 1, 3, 77, JA 209-11, 237; Opinion No. 468-A PP 8, 30, 32, JA 248, 255-56. The instant compliance proceeding, by contrast, involved the calculation of each Operating Company's total production costs (to determine whether the Entergy system is in rough

equalization) under Service Schedule MSS-3. Compliance Order PP 1, 5, 23, JA 1, 3, 7-8; Rehearing Order PP 1, 35, JA 23, 34-35.[4]

The Rehearing Order further pointed out that Louisiana PSC had filed a complaint, in Docket No. EL07-52, Rehearing Order nn.32 and 35, JA 36, 38, which asserted, among other things, that Entergy's inclusion of interruptible load in the instant compliance filing conflicted with the Commission's holding in Opinion Nos. 468 and 468-A that interruptible load should be removed when calculating peak load responsibility ratios. *See Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,212 at PP 11, 21 (2007), *reh'g pending*.

The Commission rejected that complaint, explaining that, while "Opinion Nos. 468 and 468-A held that the System Agreement was to be modified to exclude interruptible load from the calculation of *peak* load responsibility under MSS-1, Reserve Equalization, and Service Schedule MSS-5, Distribution of Revenue from Sales Made for the Joint Account of All Companies," *id.* P 24 (citing Opinion No. 468 P 63; Opinion No. 468-A PP 15-17), "[u]nder Service Schedule MSS-3, *total* production costs of each Operating Company are being

[4] *See also* R. 1, Entergy's Compliance Filing at n.39, JA 282 ("For purposes of comparing production costs among the Operating Companies (as opposed to calculating cost responsibility under Service Schedule MSS-1), the relevant cost comparison is a Company's total cost to its total load, regardless of whether that load is interruptible or not") (internal quotation marks omitted).

calculated," *id.* The Commission found that "nothing in Opinion Nos. 468 and 468-A ties the exclusion of interruptible load from Service Schedule MSS-1 and Service Schedule MSS-5 calculations to the exclusion of interruptible load from total production costs calculated for bandwidth payments under Service Schedule MSS-3." *Id.*; *see also id.* ("Opinion Nos. 468 and 468-A simply do not relate to Service Schedule MSS-3 and the related determination of bandwidth payments."). Moreover, the Commission explained, "Service Schedule MSS-3 is used to compare each Operating Company's actual fixed production costs," which "include not only reserve capacity but *all* the coal-fired base load capacity on the system." *Id.* P 25. Louisiana PSC's petition for rehearing of that decision is pending before the Commission.

Louisiana PSC also argues that FERC's decision is arbitrary and capricious because it largely reverses the benefit of the remedy ordered in Opinion Nos. 468 and 468-A. Br. at 46-47. Louisiana never raised this argument to the Commission, preventing both the Court and the parties from knowing what the Commission's views on it would have been. Moreover, Louisiana PSC's failure to raise this argument in its rehearing request, R. 46, JA 424-38, jurisdictionally prevents the Court from addressing it on appeal. FPA § 313(b), 16 U.S.C. § 825*l*(b); *Sebasticook*, 431 F.3d at 381; *California Dep't of Water Res.*, 306 F.3d at 1125; *Norwood*, 906 F.2d at 774-75.

B. The Commission Reasonably Determined That Re-Pricing The Energy Associated With The Vidalia Contract At Entergy Louisiana's MSS-3 Rate Complied With Its Directives In Opinion Nos. 480 And 480-A

Louisiana PSC claims that the Compliance Orders departed from the Vidalia energy re-pricing methodology adopted by the Commission in Opinion Nos. 480 and 480-A. Br. at 48-55. Louisiana PSC is mistaken.

"In Opinion No. 480, the Commission stated that '[f]uture production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26, which accounts for Vidalia by re-pricing the energy at the annual [Service Schedule] MSS-3 rate." Compliance Order P 59, JA 17 (quoting Opinion No. 480 P 33, JA 53); *see also* Rehearing Order P 47, JA 38. As Louisiana PSC concedes, Br. at 48, and the Commission found, "Exhibit ETR-26 includes the re-pricing of Vidalia energy based on the annual Service Schedule MSS-3 rate paid by [Entergy Louisiana]," not the overall annual price in the MSS-3 exchange, Compliance Order P 59, JA 17 (citing, *e.g.*, Opinion No. 480 proceeding Exhibit ETR-23, Testimony of Bruce Louiselle, at 41-42, JA 451-52[5]); *see also* Rehearing Order P 47, JA 38-39.

[5] Mr. Louiselle, the witness who sponsored Exhibit ETR-26, *see* Louisiana PSC Br. at 51, explained in his testimony in the Opinion No. 480 proceeding (Exhibit ETR-23) that:

Thus, the Commission reasonably found that re-pricing the Vidalia energy at Entergy Louisiana's MSS-3 rate complied with its directives in Opinion Nos. 480 and 480-A. Compliance Order P 59, JA 17; Rehearing Order P 47, JA 38-39. Louisiana PSC's argument in this compliance proceeding that the Vidalia energy should have been re-priced instead at the overall annual price in the MSS-3 exchange is "beyond the scope of this proceeding as [it is] irrelevant to whether Entergy properly implemented the Commission's directives." Rehearing Order P 47, JA 38-39.

Louisiana PSC points to several statements from the Opinion No. 480 proceeding that, it asserts, establish that Vidalia energy was to be re-priced at the average annual price of the MSS-3 exchange rather than at Entergy Louisiana's average annual MSS-3 price. Br. at 49-51. None of these statements, however, mentions the term "exchange," or otherwise supports the notion that Vidalia

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> In analyzing production costs, I present[ed] more than one analysis. The first analysis reflects Vidalia costs as actually incurred by [Entergy Louisiana]. The second re-prices the Vidalia purchases to what they would have been had the price been equal to the average cost per kWh incurred by [Entergy Louisiana] incident to its 'purchases' under the MSS-3. Had the Vidalia purchase not been made, [Entergy Louisiana] would still need the energy provided under that contract. I have used the average rate paid under MSS-3 as the cost of replacement energy.

Opinion No. 480 Proceeding's Exhibit ETR-23 at 41-42, JA 451-52.

energy was to be re-priced at the average annual price of the MSS-3 exchange rather than at Entergy Louisiana's average annual MSS-3 price. By contrast, Mr. Louiselle's testimony in the Opinion No. 480 proceeding explained that Exhibit ETR-26 re-priced the Vidalia energy at the average MSS-3 price incurred by Entergy Louisiana. Exhibit ETR-23 at 41-42, JA 451-52.

If Louisiana PSC wanted to assert that Mr. Louiselle's explanation in Exhibit ETR-23 was ambiguous, Br. at 51, and that Entergy Louisiana's average annual MSS-3 rate does not serve as a proxy for replacement energy, Br. at 49, 52-54, it needed to do so in the Opinion Nos. 480 and 480-A proceeding before the agency and before this Court in *Louisiana III*, not now in this limited compliance proceeding.[6] Rehearing Order P 47, JA 38-39 (Louisiana PSC's arguments "were

[6] Even though the Compliance Order explicitly relied on Exhibit ETR-23 in explaining that Exhibit ETR-26 reprices the Vidalia energy based on Entergy Louisiana's MSS-3 rate, Compliance Order P 59, JA 17, Louisiana PSC's request for rehearing of that order does not mention or challenge Exhibit ETR-23 in any way. As a result, Louisiana PSC's new claim that Mr. Louiselle's description in Exhibit ETR-23 of how he re-priced the Vidalia energy in Exhibit ETR-26 was ambiguous is barred on the additional basis that it failed to raise that issue on rehearing as required by FPA § 313(b), 16 U.S.C. § 825*l*(b). *See supra* pp. 23-24. Likewise, while Louisiana PSC did raise on rehearing in this compliance proceeding that Entergy Louisiana's average annual MSS-3 rate does not serve as a proxy for replacement energy, Louisiana PSC has greatly expanded on that argument in its brief before this Court. *See* Br. at 53-54. Thus, the new proxy arguments Louisiana PSC raises are similarly barred under FPA § 313(b). *See Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) (an objection "must be raised with sufficient specificity" on rehearing).

properly addressed in Opinions 480 and 480-A, and are beyond the scope of this proceeding as they are irrelevant to whether Entergy properly implemented the Commission's directives."); *see also supra* pp. 18-19. Exhibits ETR-26 and ETR-23 (which explained Exhibit ETR-26) were critical exhibits in the Opinion No. 480 proceeding. In fact, the Commission based its determination that the Entergy System was no longer in rough equalization on the calculations in Exhibit ETR-26. Opinion No. 480 PP 30-31, JA 51-53. Moreover, the Commission directed that "[f]uture production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26 . . . ." *Id.* P 33, JA 53.

C. Louisiana PSC's Improper Delay Claim Is Not Yet Ripe

Louisiana PSC, relying on *Louisiana II* and *III*,[7] argues that the Compliance Orders impermissibly delayed implementing the rough equalization remedy. Br. at 55-57. This issue is not appropriate for judicial review.

In Opinion Nos. 480 and 480-A, in reliance on Opinion Nos. 468 and 468-A (the orders addressed in *Louisiana II*), the Commission found that refunds were prohibited under FPA § 206(c), 16 U.S.C. § 824e(c), and, therefore, that the Commission's bandwidth remedy could be implemented only prospectively.

[7] *Louisiana II* was issued on April 3, 2007, shortly before the instant Rehearing Order was issued (on April 27, 2007). *Louisiana III* was issued on April 15, 2008, almost a year after the Rehearing Order issued.

Opinion No. 480 P 145, JA 89; Opinion No. 480-A P 59, JA 126. The Commission directed, therefore, that the bandwidth remedy would commence in calendar year 2006, with equalization payments based on 2006 data commencing in 2007, after a full calendar year of data was available. Opinion No. 480 P 145, JA 89; Opinion No. 480-A P 54, JA 124.

Louisiana PSC claimed, in the instant compliance proceeding, that the Commission impermissibly delayed implementing the rough equalization remedy for two years. *See* Rehearing Order P 26, JA 32. In response, the Commission explained that, while Opinion No. 480 P 145, JA 89, found that payments under the bandwidth remedy must be prospective because the Commission believed FPA section 206(c) barred it from ordering refunds, "the permissibility of refunds among Entergy's Operating Companies [was] pending on remand" from *Louisiana II*. Rehearing Order P 26, JA 32. The Commission determined, therefore, that it would address Louisiana PSC's improper delay claim after it addressed the refund issue on remand of *Louisiana II*. *Id.* (The Commission "will address the issue of refunds in a subsequent order after it has addressed the remand."); *see also id.* P 1, JA 23 ("With respect to the issue of refunds among the Operating Companies, we

defer action until a further order by the Commission.").[8] As a result, Louisiana PSC's improper delay claim is not ripe for judicial review at this time.

To determine whether an issue is ripe for judicial review, the Court considers: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Louisiana III*, 522 F.3d at 398 (quoting *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003)). "Among other things, the fitness of an issue for judicial decision depends on whether it is 'purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" *Id.* (quoting *Atl. States Legal Found., Inc. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003)).

Under these standards, Louisiana PSC's improper delay claim is not ripe for judicial review. The challenged Compliance Orders did not rule on that claim but, rather, deferred ruling on it until after the Commission addressed the underlying

[8] This Court "ha[s] long given agencies broad discretion as to the manner in which they carry out their duties, including the timing of their own proceedings. *Domtar Maine Corp., Inc. v. FERC*, 347 F.3d 304, 314 (D.C. Cir. 2003) (citing *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1056 (D.C. Cir. 1979)); *see also Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1315 (D.C. Cir. 1991) (FERC has "well-established discretion" to order its own proceedings and control its own docket). FERC properly exercised its broad discretion when it determined that it would address, on remand of *Louisiana II*, the refund issue underlying Louisiana PSC's improper delay claim before it would address the improper delay claim here.

refund issue on remand of *Louisiana II*. Rehearing Order P 26, JA 32. Thus, the Commission's action regarding the improper delay issue is not final, and consideration by the Court of that issue would benefit greatly from the more concrete setting that will exist when the Commission addresses it in light of its ruling on remand of *Louisiana II*. *See Louisiana IV*, slip op. at 8-9 ("because we think it quite clear that FERC made no final decision on any claim for relief . . ., we still have nothing to review;" "For us to have Article III jurisdiction, the Louisiana Commission must instead point to some relief that FERC either granted or failed to grant in a proceeding where such relief was actually at issue").

There is no hardship to the parties of withholding court consideration in the circumstances here. Even Louisiana PSC notes that FERC has since issued its order on remand from *Louisiana II* (*Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 120 FERC ¶ 61,275 (2007), *order on reh'g*, 124 FERC ¶ 61,275 (2008), *pet. for review pending sub nom., Arkansas Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 08-1330), and that there the Commission "corrected the delay in remedy and granted refunds," Br. at i-ii. As Louisiana PSC further notes, "[i]f FERC decides the delay issue consistently on the remand of [*Louisiana III*], the delay issue here will be moot." Br. at 56.

Accordingly, the Court should not consider Louisiana PSC's improper delay claim at this time, as it is not ripe for review.[9]

CONCLUSION

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

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Robert H. Solomon
Solicitor

Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-6048
Fax: (202) 273-0901
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[9] At the end of its improper delay claim, Louisiana PSC argues that "FERC, without providing any intelligible explanation, declared that there is no inconsistency between making a remedy 'effective' for 2006, but 'prospective' from June, 2007." Br. at 56-57 (citing Rehearing Order P 25, JA 31-32). As the Commission found, this argument "is a collateral attack on Opinions 480 and 480-A . . . ." Rehearing Order P 25, JA 32. "The Commission stated in Opinion No. 480 that the bandwidth would be implemented prospectively and would be effective for calendar year 2006, and [the Commission] clarified in Opinion No. 480-A that any equalization payments would then be made in 2007 after a full calendar of data became available." *Id.*, JA 31-32 (citing Opinion No. 480 P 145, JA 88-89; Opinion No. 480-A P 54, JA 124).

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 7,984 words, not including the tables of contents and authorities, the certificates of counsel, or the addendum.

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Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-6048
Fax: (202) 273-0901
Email: beth.pacella@ferc.gov

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