ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

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Nos. 05-1462, *et al*. (consolidated)

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**LOUISIANA PUBLIC SERVICE COMMISSION*, et al.*,
PETITIONERS,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

____

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

____

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FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

JUNE 26, 2007

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the briefs of Petitioners.

B. Rulings Under Review

1. *Louisiana Public Service Commission, et al. v. Entergy Corporation and Entergy Services, Inc.,* Opinion No. 480, 111 FERC ¶ 61,311 (2005); and

2. *Louisiana Public Service Commission, et al. v. Entergy Corporation and Entergy Services, Inc.,* Opinion No. 480-A, 113 FERC ¶ 61,282 (2005).

C. Related Cases

These consolidated cases have not previously been before this Court or any other court. The Court's recent decision in *Louisiana PSC v. FERC*, No. 05-1161, 2007 U.S. App. LEXIS 7596 (D.C. Cir. April 3, 2007), concerned refund issues that were addressed in the orders challenged here, but the issue of refunds is not yet ripe for review because that issue is still pending before the Commission on compliance filings.

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Lona T. Perry
Senior Attorney

June 26, 2007

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GLOSSARY

AEEC	Arkansas Electric Energy Consumers
ALJ	Administrative Law Judge
Arkansas PSC	Arkansas Public Service Commission
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Initial Decision	*Louisiana PSC v. Entergy Services, Inc.*, 106 FERC ¶ 63,012 (2004)
Louisiana PSC	Louisiana Public Service Commission
Mississippi PSC	Mississippi Public Service Commission
Vidalia	Vidalia Hydroelectric Power Plant

IN THE UNITED STATES COURT OF APPEALS
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Nos. 05-1462, *et al*.
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LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
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ON PETITIONS 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 set a symmetrical bandwidth to define the outer limits of permissible cost disparities on the multi-state Entergy System, after finding that the System was no longer in its historical pattern of rough production cost equalization,

and that production cost disparities now and in the near future were going to persistently disfavor one of the five affiliated Operating Companies and its customers.

STATUTES AND REGULATIONS

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

INTRODUCTION

This proceeding concerns the allocation of electric energy production costs among the affiliated Operating Companies making up the Entergy System. *See Louisiana Public Service Commission, et al. v. Entergy Corporation and Entergy Services, Inc.,* Opinion No. 480, 111 FERC ¶ 61,311, JA 256, *on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), JA 338. Entergy Corporation, a public utility holding company, provides electric service at retail through five operating companies: Entergy Arkansas, Inc.; Entergy Louisiana, Inc.; Entergy Mississippi, Inc.; Entergy Gulf States, Inc.; and Entergy New Orleans, Inc. The Entergy Operating Companies are, as relevant here, regulated by Petitioners Arkansas Public Service Commission ("Arkansas PSC"), Mississippi Public Service Commission ("Mississippi PSC"), and Louisiana Public Service Commission ("Louisiana PSC").

The Entergy System Agreement, a rate schedule, allocates costs among the Entergy Operating Companies. The Entergy System has operated under a System Agreement for over fifty years; the current System Agreement was filed in 1982.

In the challenged orders, the Commission determined that the allocation of production costs among the Operating Companies under the System Agreement was no longer just and reasonable. The System was no longer in its historical pattern of rough production cost equalization among the Operating Companies, but instead was in a persistent pattern, expected to continue for years into the future, where one Operating Company in particular, Entergy Louisiana, was subject to much higher production costs than the other Operating Companies. To remedy this situation, the Commission defined a "bandwidth" of +/- 11 percent from the System average as the acceptable range of cost disparities on the System, based on the maximum range of cost disparities experienced on the System during a 14-year period of rough equalization.

In challenging these orders, the Louisiana PSC asserts that the Commission's remedy was inadequate, and that full cost equalization is required. In contrast, the Arkansas and Mississippi PSCs, as well as Arkansas Electric Energy Consumers, maintain that no remedy was required, as the System cost disparities, when averaged over a substantial period of System history, remain in rough production

cost equalization. The Arkansas Electric Energy Consumers also claim that FERC lacks jurisdiction under the Federal Power Act ("FPA") to grant any remedy.

STATEMENT OF FACTS

I. Events Leading To The Challenged Orders

A. Entergy's System Agreement

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 PSC*, 539 U.S. 39, 42 (2003). *See also Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305, *reh'g denied*, Opinion No. 234-A, 32 FERC ¶ 61,425 (1985), *aff'd, Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987), *vacated and remanded in part, Mississippi Industries v. FERC*, 822 F.2d 1103 (D.C. Cir. 1987). As a result of constructing System generating facilities on an integrated basis, System members are able to achieve economies of scale in building new generation, reductions in reserve requirements, increased reliability and efficiencies in operation. *System Energy Resources, Inc.*, Opinion No. 292, 41 FERC ¶ 61,238 at 61,622 (1987), *on reh'g*, 42 FERC ¶ 61,091 (1988), *aff'd*, *City of New Orleans v. FERC*, 875 F.2d 843 (D.C. Cir. 1989).

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 341. 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 System Agreement. *Mississippi Industries*, 808 F.2d at 1529. Over its history, Entergy has filed three such Agreements, in 1951, 1973 and 1982. *Id.* All three System Agreements assigned the task of coordinating the planning of new generating capacity to a system-wide Operating Committee. *Id.* The Operating Committee, consisting of a representative of Entergy Corporation and of each of the Operating Companies, administers the System Agreement.

The Entergy System primarily allocates the costs and benefits of new generation resources through the Operating Committee's assignment of new resources to individual Operating Companies, on a rotating basis. Opinion No. 480-A P 7, JA 341 (citing ETR-41 at 3, JA 530 (Schnitzer)). Each Operating Company assumes the responsibility for financing and bearing the costs of its assigned new generation plant. *Id.* The fixed costs of these facilities are included in the Operating Company's retail rates, and the fuel costs are flowed through to retail customers through the fuel clause. ETR-41 at 4, JA 531. *Id.* In return for bearing these costs and associated risks, the System Agreement allows an Operating

Company and its customers to retain the benefits of the energy produced by units assigned to the Operating Company. ETR-41 at 4, JA 531.

Because Entergy operates the Operating Companies' transmission and generation facilities as a single electric system, the System Agreement also allocates the costs of imbalances in the cost of facilities used for the mutual benefit of all the Operating Companies. Opinion No. 480-A P 8, JA 341. Service Schedule MSS-1 is the only System Agreement schedule that allocates production costs. Louisiana PSC June 14, 2001 Complaint, Affidavit of Stephen J. Baron ("Baron Aff.") P 7, JA 2-3. MSS-1 equalizes the cost of imbalances of System reserves. ETR-41 at 6, JA 533. It requires that "short" companies pay "long" companies to equalize their reserve margins.[1] *Id*.

However, as Service Schedule MSS-1 equalizes only the costs of *excess* capacity on the System, the charges paid pursuant to MSS-1 are only a very small fraction of the overall production costs of the Operating Companies. Opinion No.

---

[1] If a company's share of System's generating capacity is greater than its share of the energy generated and distributed by the system as a whole, the company is deemed to be "long." *Mississippi Industries*, 808 F.2d at 1530. If the company's share of the system's generating capacity is less than its percentage of the system's energy, the company is deemed to be "short." *Id*. The terms "long" and "short" do not refer to the company's ability to provide enough energy to meet its customer's requirements, but rather compares the share of system capacity contributed by a company with the share of system energy used by that company. *Id*. n. 8.

480-A P 8, JA 341 (citing Ex. ETR-1 at 5-6, JA 464-65 (Gallaher)). For example, in 1999 the total value of MSS-1 transactions was $15.7 million. Baron Aff. P 7, JA 5-6. This compares to 1999 total Entergy System production costs of $4.49 billion, or about 0.35 percent of total costs. *Id.* Entergy Louisiana's 1999 total production costs were $1.32 billion. *Id*. P 13, JA 4.

Accordingly, the primary vehicle for equalizing total System production costs had been the rotational methodology by which individual Operating Companies acquire particular generating resources and become responsible for the costs, and receive the benefits, of those resources on a long-term basis. ETR-41 at 8-9, JA 535-36. Inequalities in production costs are inherent in this approach; indeed, there can be and will be, from time to time, significant disparities in production costs. *Id*. at 9, JA 536. This is the natural and expected result of the structure of the System Agreement and the manner in which Entergy has chosen to allocate the costs and benefits of generating resources. *Id.*

The structure of the Entergy System has significant implications for state regulation of generation facilities and retail rates. Opinion No. 234-A, 32 FERC at 61,951-52. Because capacity acquisitions are allocated to individual Operating Companies, the retail regulator of that Company approves the acquisition of the

resource, giving the retail regulator control over the costs of the new generation and related choices. ETR-41 at 27-28, JA 547-48.

B. The History of Production Cost Disparities on the Entergy System.

The Entergy System planning approach to new generating capacity inevitably results in disparities in generating capacity and costs among the Operating Companies. *Mississippi Industries*, 808 F.2d at 1529. Because the Operating Companies have always been responsible for the costs associated with the plants they build and finance, costs necessarily vary from company to company. *Id*. at 1566. Nevertheless, during the years the 1951 Agreement was in force, the System planning approach nonetheless resulted in a rough equality of costs, as a result of relatively uniform and constant costs of creating capacity, *id*. at 1530, and sufficient system growth that new units were needed on a frequent basis, so the rotation among the Operating Companies tended to even out the costs. *Middle South Energy*, 26 FERC at 65,100. Although in the 1970s, the cost of new units began to exceed that of older facilities by a substantial margin, the burden of relatively more expensive capacity was often offset by the lower fuel costs associated with the new units. *Mississippi Industries*, 808 F.2d at 1531 & n. 12.

In the 1980s, however, problems encountered in constructing nuclear generation disrupted the pattern of rough equalization. Opinion No. 480-A P 9, JA

342. In particular, the Grand Gulf and Waterford 3 nuclear projects experienced such enormous cost overruns that they were five times as costly as previous nuclear projects, with Grand Gulf alone costing in excess of $3 billion. *Mississippi Industries*, 808 F.2d at 1532. Together, the Grand Gulf and Waterford 3 units were estimated to represent over 70 percent of the Entergy System production costs, even though they produced only 13 percent of the electricity used on the system. *Id.*

As a result, total cost deviations among the Operating Companies increased dramatically. As shown in the chart *infra* at 11-12, total deviations from 1983 through 1985 averaged 31 percent. Opinion No. 480 P 30, JA 269. Because of these large deviations, the Commission fully equalized nuclear investment costs to get the Entergy System back into rough production cost equalization. *Id.* (citing *Louisiana PSC v. Entergy Services, Inc.*, 106 FERC ¶ 63,012 (2004) ("Initial Decision"), P 25, JA 182); Opinion No. 480-A P 9, JA 342. The Commission took no action with regard to non-nuclear production costs, however, because they remained in rough equalization. Opinion No. 292, 41 FERC at 61,619-20. This Court, in *Mississippi Industries*, 808 F.2d at 1565, affirmed the Commission's conclusion that the cost disparities resulting from the rotational generation assignments, absent the nuclear costs, did not constitute unlawful discrimination. At the time that FERC restored rough production cost equalization in 1986, the cost

disparity among Operating Companies was approximately 15 percent. ETR-41 at 20, JA 543 (citing Ex. ETR-25, JA 510 (Louiselle)).

For the next fourteen years, as can be seen from the chart *infra* at 11-12, Entergy once again remained in rough production cost equalization, with total production cost deviations ranging from 8 to 22 percent. Opinion No. 480 P 30, JA 269; Opinion No. 480-A P 10, JA 342. During this period, the cost disparities did not favor or disfavor any particular Operating Company. Rather, the pendulum of production cost disparities swung back and forth from negative to positive among the Operating Companies. Opinion No. 480 P 141, JA 305.

However, in 1999, total deviations jumped significantly. Opinion No. 480 P 30, JA 270; Opinion No. 480-A P 10, JA 342. For the period 2000 through 2002, total deviations averaged more than 33 percent, an even greater deviation than that which prompted the Commission's Grand Gulf decision in 1985, and this pattern of deviations appeared likely to continue for years into the future. Opinion No. 480 PP 28, 30, JA 269, 270; Opinion No. 480-A P 10, JA 342.

Further, these cost disparities were all to the particular disadvantage of Entergy Louisiana, because the Entergy rotational scheme for new generation units had been inactive for a lengthy period, and rising gas prices disproportionately adversely impacted Entergy Louisiana. Opinion No. 480 P 29, JA 269 (citing

Initial Decision, 106 FERC P 30, JA 185). Entergy Louisiana relies heavily on gas-fired production facilities, especially as compared to Entergy Arkansas's relatively large amount of cheaper coal base load capacity. Opinion No. 480 P 29, JA 269 (citing Initial Decision, 106 FERC P 30, JA 185).

Below are the total deviation percentages from the System average for the years 1983 through 2002. Opinion No. 480 P 31, JA 270. Based on these figures, the Commission agreed with the ALJ that the Entergy System is no longer in rough production cost equalization. Opinion No. 480 P 30, JA 269; Opinion No. 480-A P 10, JA 342.

Year	Total Deviation
1983	35.15.%
1984	25.32%
1985	32.90%
1986	14.85%
1987	22.20%
1988	21.58%
1989	16.18%
1990	21.34%
1991	12.13%
1992	16.70%
1993	8.53%
1994	10.48%
1995	7.71%
1996	11.55%
1997	10.76%
1998	14.00%

1999	12.39%
2000	33.26%
2001	39.79%
2002	27.60%

Furthermore, projections indicated that future production cost disparities would continue to be high. Opinion No. 480 P 43, JA 275. For the period 2003-2005, it was projected that the total disparities would be 31 percent for 2003, 27 percent for 2004 and 18 percent in 2005 (or an average of more than 25 percent for the period). *Id*. (citing ALJ-3, JA 451).

These projections, moreover, assumed the successful implementation of Entergy's Strategic Supply Resource Plan. Opinion No. 480 P 43, JA 275 (citing Initial Decision P 27, JA 184). Having determined that it was short on capacity for 2003, and there was a projected increase in base load requirements by 2007, Entergy designed the Strategic Supply Resource Plan to address these deficiencies through targeted resource acquisition to bring all of the Operating Companies closer to the System average production costs over the period from 2003-2012. Opinion No. 480-A P 20, JA 347; Opinion No. 480 P 34, JA 271. However, even if the Strategic Supply Resource Plan eventually provided improvement, there was every indication it would not in the next five years due to the persistence of high gas prices. Opinion No. 480 P 43, JA 275; Initial Decision P 38, JA 188.

C. The Louisiana PSC Complaint

On June 14, 2001, the 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 260. The Louisiana PSC sought full equalization of all production costs, or, alternatively, a closer alignment of production costs. *See id.* On February 13, 2002, the Commission set the complaint for investigation and hearing.

The Administrative Law Judge ("ALJ") found that Operating Company production costs were no longer in rough equalization. Initial Decision PP 25-41, JA 182-89. As a remedy, the ALJ imposed numerical percentage bandwidths of +/- 7.5 percent annually, and +/- 5 percent on a rolling three-year basis, to set outside bounds by which production costs may deviate from the System average. Opinion No. 480 P 12, JA 263. The ALJ also found that the costs of the Vidalia Hydroelectric Power Plant ("Vidalia") should be treated as System resource costs, rather than Entergy Louisiana costs, in calculating whether the Entergy Operating Company's production costs are roughly equal. *Id.*

Exceptions to the Initial Decision were filed by petitioners Louisiana PSC, the Arkansas and Mississippi PSCs, and the Arkansas Electric Energy Consumers.

II. The Challenged Orders

In Opinion No. 480, the Commission affirmed the ALJ's finding that the Entergy System is no longer in rough production cost equalization, and affirmed the use of a bandwidth as a remedial device. Opinion No. 480 PP 14, 93, 94, JA 264, 290, 291. However, the Commission chose a broader bandwidth (+/- 11 percent from System average) than that selected by the ALJ, as it was more in line with historical cost disparities experienced on the System during a period of rough equalization, and it would ease the severity of the cost-shifting among the Operating Companies that would be required under the ALJ's remedy. The Commission also reversed the finding that Vidalia should be treated as a System resource, finding that the Vidalia Project was not constructed for System purposes, but rather for the benefit of Louisiana concerns.

All Petitioners requested rehearing. The Arkansas Electric Energy Consumers and the Arkansas and Mississippi PSCs contended that: (1) no remedy was required as the Operating Companies' production costs remain in rough equalization; (2) Entergy's Strategic Supply Resource Plan will maintain rough production cost equalization in the future; and (3) the bandwidth remedy, if adopted, should be modified. The Arkansas Electric Energy Consumers also contended that FERC lacked jurisdiction to impose the bandwidth remedy.

For its part, the Louisiana PSC contended that: (1) full production cost equalization was required to remedy the undue discrimination among the Operating Companies; (2) Vidalia should be considered a System, not an Entergy Louisiana, resource; and (3) the effective date of any bandwidth remedy adopted in Opinion No. 480 should be clarified and/or modified.

In Opinion No. 480-A, these requests for rehearing were denied. *See* Opinion No. 480-A, JA 338. This appeal followed.

SUMMARY OF ARGUMENT

This Court and the Supreme Court have squarely held that the Commission has jurisdiction to allocate generation costs among the Entergy Operating Companies. While the allocation provisions of the Entergy System Agreement do not fix wholesale rates, their terms directly and significantly affect the wholesale rates at which the Operating Companies exchange energy, due to the highly integrated nature of the Entergy System.

While the assignment of new generation to individual Operating Companies on a rotating basis inevitably results in cost disparities, over time the Entergy System has largely achieved a rough equalization of production costs. Beginning in 2000, however, the System began experiencing larger cost disparities which persistently disfavored Entergy Louisiana. Projections indicated that these disparities would continue for years into the future. Entergy's prior experience of year-to-year variations in production costs that achieve rough equalization over time was far different than the current picture of at least five-ten years of large deviations disfavoring the same Operating Company. Under these circumstances, the Commission found it necessary to set boundaries for the "rough equalization" cost disparities that would be permitted among the Entergy Operating Companies.

Setting such boundaries required balancing the prevention of undue discrimination with limiting the disruption of the System's historical operations and the states' settled regulatory interests. The Commission set a bandwidth remedy of +/- 11 percent from System average as the outer boundaries of permitted cost disparities, based upon the largest deviation experienced by the System during a fourteen-year period (1986-1999) of rough equalization. The Commission rejected arguments that it should have adopted a bandwidth with no lower boundary or an asymmetrical bandwidth to protect the advantage enjoyed by those Operating Companies with the lowest costs. The Commission's symmetrical remedy protects against both undue discrimination from excessively high costs relative to System average, and undue preference from excessively low costs relative to System average. Either an asymmetrical remedy or one with no lower boundary could permit an Operating Company to have sufficiently lower costs than the other Companies that it would create an undue preference.

The Louisiana PSC asserts that the FPA anti-discrimination requirements mandate the elimination of all cost disparities. However, as this Court has affirmed, undue discrimination here is properly determined based on the factual setting and principles underlying the complex Entergy System agreements, rather than more general notions of when undue discrimination occurs in regulated industries. Here,

full cost equalization was unnecessary and unduly intrusive, as it would remove significant costs from the states' retail jurisdiction, and would result in enormous, unprecedented cost shifts among the Operating Companies. This Court has previously affirmed the Commission's determination that full production cost equalization on Entergy would be inconsistent with the history and purpose of the System Agreement and would dramatically disrupt the system's historical operations and the states' settled regulatory interests and expectations.

For their part, the Arkansas and Mississippi PSCs and the Arkansas Electric Energy Consumers argue that no remedy is necessary because the System is still in rough production cost equalization. The Commission, however, rejected both methodologies Petitioners employed purporting to show such equalization. First, averaging disparities dating back to 1986 does not accurately reflect the current and future situation, in which disparities that once evened themselves out over time are now consistently disfavoring one Operating Company. Second, the Commission found the "cents per kilowatt" methodology an unreliable determinant of rough equalization. Percentage comparisons are the best way to make comparisons over time, and to show the relative effects of production costs, whereas absolute differences can be misleading, since their significance changes as production costs change.

The Commission further rejected the argument that Entergy's Strategic Supply Resource Plan would assure rough equalization in the future. While the Strategic Plan may eventually narrow production cost disparities, there is no assurance it will unfold as planned, and, with persistent high gas prices, there is no guarantee that it will correct large disparities. In any event, the Commission did not reject the Strategic Plan. If it proves effective in remedying production cost disparities, the bandwidth remedy simply will not come into play.

The Commission also reasonably concluded that the Vidalia hydroelectric project should not be considered an Entergy System resource. Vidalia was not a product of Entergy's System planning, but rather was built to benefit Louisiana. While Vidalia's capacity is small, its costs are significant. The Commission reasonably found that allowing Louisiana to shift the costs of Vidalia to other states on the Entergy System was inappropriate.

The Louisiana PSC finally challenges the timing of the implementation of the Commission's bandwidth remedy, and refers the Court to its Docket No. 05-1161 for the resolution of the issue of the Commission's ability under FPA § 206(c) to order retroactive remedies. These issues concerning implementation of the Commission's bandwidth remedy are not ripe for review at this time, as they remain pending before the Commission in the Entergy compliance proceeding.

In *Louisiana PSC v. Entergy Services, Inc*., 117 FERC ¶ 61,203 (2006) ("November 2006 Compliance Order"), the Commission ordered modifications to Entergy's Order No. 480 compliance filing implementing the bandwidth remedy, and clarified the remedy's operation. The Louisiana PSC sought rehearing of the November 2006 Compliance Order, arguing the Commission's prospective remedy is being unduly delayed, and incorporating all objections raised in this proceeding, including the argument that the Commission has authority under the FPA to order retroactive remedies. On rehearing, the Commission is now considering all issues regarding the appropriate timing and implementation of the bandwidth remedy in light of this Court's recent decision in *Louisiana PSC v. FERC*, No. 05-1161, 2007 U.S. App. LEXIS 7596 (D.C. Cir. April 3, 2007). Should the Louisiana PSC be dissatisfied with the ultimate decision on implementation of the Commission's remedy, the Louisiana PSC can appeal the compliance proceeding orders.

ARGUMENT

I. STANDARD OF REVIEW

The "deferential standard" of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), applies to "an agency's interpretation of its own statutory jurisdiction." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) ("*TAPS*"), *aff'd, New York v. FERC*, 535 U.S. 1 (2002). Arkansas Electric Energy Consumers concede that *Chevron* deference applies if the Commission has previously settled a dispute or "'set out agency reasoning,'" AEEC Br. 6 (citing *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843, 1848-49 (2006)). Both conditions are met here. The Commission's jurisdiction over allocating production costs among the Entergy Operating Companies was previously established in *Mississippi Industries*, 808 F.2d at 1539-41 and summarily affirmed in *New Orleans*, 875 F.2d at 905. Here, the Commission expressly set out its reasoning, expressly relying upon the findings and analysis of *Mississippi Industries.* Opinion No. 480-A P 98, JA 375. Accordingly, *Chevron* deference should apply.

On other issues, the Commission's orders are reviewed under the arbitrary and capricious standard, under which a "court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear

error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency." *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1078 (D.C. Cir. 2002) (citations and internal quotation marks omitted). The substantial evidence standard, applicable to the agency's factual findings, FPA § 313(b), 16 U.S.C. § 825*l*(b), "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FLP Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). Under the substantial evidence standard, the relevant question is not whether record evidence supports petitioners' version of events, but whether it supports the Commission's conclusions. *Id*. at 368. The Commission's choice between "disputing expert witnesses" is entitled to deference. *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001).

"[I]n light of the technical nature of rate design, involving policy judgments at the core of the regulatory function," review of the Commission's ratemaking decisions is "highly deferential." *Entergy Services, Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003) (citing *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999)).

The Court also "defer[s] to FERC's decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the Commission with full knowledge that this judgment requires a great deal of discretion." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998). As a result, the Court does not ordinarily interfere with FERC's exercise of its discretion so long as the agency's determination has a rational basis. *Id. See also, e.g., Connecticut Valley Electric Co. v. FERC*, 208 F.3d 1037, 1044-45 (D.C. Cir. 2000) (explaining the Commission's broad remedial discretion under the statutes it administers); *Towns of Concord, Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 72-76 (D.C. Cir. 1992) (same).

II. THE COMMISSION'S JURISDICTION OVER THE ENTERGY SYSTEM AGREEMENT IS WELL SETTLED.

A. *Mississippi Industries* Settled the Question of FERC's Jurisdiction over the Entergy System Agreement.

Arkansas Electric Energy Consumers contend that Opinion No. 480 exceeds the Commission's jurisdiction by regulating generation. AEEC Br. 7-25. Arkansas Electric Energy Consumers are, however, in reality challenging this Court's decision in *Mississippi Industries*. Opinion No. 480-A P 98, JA 375. *Mississippi Industries* rejected the argument that FERC lacked jurisdiction to allocate generation costs among the Entergy Operating Companies because, while the

allocation provisions do not fix wholesale rates, their terms directly and significantly affect the wholesale rates at which the Operating Companies exchange energy, due to the highly integrated nature of the Entergy System. 808 F.2d at 1542. Accordingly, the Court found the allocation of generation costs plainly within Commission jurisdiction. *Id*.

Indeed, the Supreme Court has recognized that FERC's exclusive jurisdiction over wholesale rates applies not only to rates "but also to power allocations that affect wholesale rates." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988) (cited AEEC Br. 6). Based on *Mississippi Industries*, the Court found that FERC's jurisdiction to adjust the allocations of power in an Entergy agreement "has been established," based upon "the thorough consideration at every level of administrative and judicial review." *Id*. at 374 & n. 13 (citing Opinion Nos. 234 and 234-A and *Mississippi Industries*). Likewise, *Entergy Louisiana*, 539 U.S. 39, relied upon this FERC jurisdiction to find state action regarding Entergy cost allocations preempted. This Court summarily rejected the same jurisdictional challenges to FERC's regulation of the Entergy System Agreement in *City of New Orleans*, 875 F.2d at 905.

FPA § 201(b)(1), 16 U.S.C. § 824(b)(1), confers jurisdiction on the Commission over the transmission of electric energy in interstate commerce, and

sales of electric energy at wholesale in interstate commerce. FPA § 201(b)(1) further provides Commission jurisdiction over "all facilities for such transmission or sale of electric energy" except that it "shall not have jurisdiction, *except as specifically provided in this Part and the Part next following*, over . . . facilities used for the generation of electric energy. . . ." FPA § 201(b)(1) (emphasis added). Thus, the Commission has been awarded jurisdiction over generating facilities "to the extent provided in other sections," including jurisdiction necessary to effectuate regulation of interstate wholesale rates. Opinion No. 480-A P 101, JA 375 (citing *Mississippi Industries*, 808 F.2d at 1540-49). FPA § 201(a), 16 U.S.C. § 824(a), "makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used." *TAPS*, 225 F.3d at 696. *See also New York*, 535 U.S. at 23 (affirming *TAPS*); *National Association of Regulatory Utility Commissioners v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (cited AEEC Br. 11) (FERC does not unlawfully intrude on state jurisdiction over local distribution facilities by regulating interconnections to such facilities for the purpose of making wholesale sales).

B. *Mississippi Industries* Is Fully Applicable Here.

While Arkansas Electric Energy Consumers concede, as they must, that *Mississippi Industries* is "somewhat to the contrary" of its views, AEEC Br. 25,

they assert that *Mississippi Industries* should not be followed here because it is contrary to the FPA and Supreme Court precedent, and factually inapposite. *Id*. 14-16, 25. Neither contention has merit.

1. *Mississippi Industries* is not Contrary to the FPA or Supreme Court Precedent.

As the Commission found, in *Mississippi Industries* this Court addressed and dismissed the same arguments that Arkansas Electric Energy Consumers makes here. Opinion No. 480-A P 101, JA 375. *Mississippi Industries* found that *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986) (cited AEEC Br. 11, 14), *confirmed* the propriety of the *Mississippi Industries'* jurisdictional analysis. *Mississippi Industries*, 808 F.2d at 1542. "FERC's allocation of Grand Gulf's costs and capacity, like the setting of entitlement percentages in *Nantahala Power & Light*, does not set a sales price, but does directly affect costs, and, consequently, wholesale rates. We cannot disregard the Supreme Court's clear and timely message that FERC's jurisdiction under such circumstances is unquestionable." *Id*. The Supreme Court in *Mississippi Power & Light* likewise rejected Petitioners' interpretation of *Nantahala*, finding that, if FERC dictates that the Operating Companies obtain a particular quantity of power, the Operating Companies may not pay for less than the amount allocated to them, and the states cannot deny the Operating Companies recovery of the cost of that power.

Mississippi Power & Light, 487 U.S. at 373-74. *See also Entergy Louisiana*, 539 U.S. at 47 (following *Nantahala* and *Mississippi Power & Light* in holding that FERC-mandated cost allocations cannot be second-guessed by state regulators).[2]

Similarly, as the Commission found, *Mississippi Industries* dismissed arguments that *Connecticut Light & Power v. FPC*, 324 U.S. 515 (1945) (discussed AEEC Br. 19-20), compelled a different result. Opinion No. 480-A P 101, JA 375 (citing *Mississippi Industries*, 808 F.2d at 1544). To the contrary, the Supreme Court accepted the proposition that FERC may lawfully assert jurisdiction over matters pertaining to generation where the generation facilities are used for interstate wholesale sales. *Mississippi Industries*, 808 F.2d at 1544-45 (citing *Connecticut*, 324 U.S. at 528 n.6); Opinion No. 480-A P 101, JA 375. Thus, because the Entergy generating facilities are used for wholesale sales, *Connecticut*

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[2] Arkansas Electric Energy Consumers' citations to *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144, 188 (1992), are likewise inapposite. AEEC Br. 7-8. *Printz* and *New York* concern federal action imposing mandatory action on state officials in carrying out a federal program. *See Printz*, 521 U.S. at 904 (Congress commandeered state sheriffs to determine the lawfulness of gun sales); *New York*, 505 U.S. at 175-76 (Congress required states either to enact legislation regarding disposal of radioactive waste in accord with Congressional direction or to implement an administrative solution). Here, the Commission's orders require no action by the state or its officials. *See National Ass'n of Regulatory Utility Commissioners*, 475 F.3d at 1283 (cited AEEC Br. 11) (distinguishing *Prinz* and *New York*).

in fact *supports* the Commission's exercise of jurisdiction over allocations of generation costs. *Mississippi Industries*, 808 F.2d at 1544-45; Opinion No. 480-A P 101, JA 375.

In contrast, as *Mississippi Industries* held, the interpretation urged by Arkansas Electric Energy Consumers here would nullify FERC's authority over wholesale sales any time generation facilities are used for such sales, inconsistent with the declaration in FPA § 201(a) that federal regulation of the sales of energy at wholesale in interstate commerce is necessary in the public interest. *Mississippi Industries*, 808 F.2d at 1544. Hence, although allocating System production costs does, to some extent, result in regulation of matters relating to generation, such regulation is valid under the FPA when it is the byproduct of a legitimate exercise of FERC's power to regulate wholesale sales. *Id*. at 1543. *See also, TAPS*, 225 F.3d at 718-19 (same). Accordingly, to accept Arkansas Electric Energy Consumers' interpretation of Commission jurisdiction, the Commission would have to act inconsistently with *Mississippi Industries*, which, as the Commission found, it cannot do. Opinion No. 480-A P 100, JA 375.

Arkansas Electric Energy Consumers cite *FPC v. Conway Corp.*, 426 U.S. 271 (1976), for the proposition that FERC lacks authority to reject a contract and replace it. AEEC Br. 12-13. Conway is inapposite here. Opinion No. 480-A P

105 n. 145, JA 377. First, the Commission did not reject a contract. *Id*. Second, *Conway* dealt with a classic price squeeze situation, and explained that, while the Commission lacks authority to fix retail rates, it may take those rates into consideration when it imposes a remedy fixing a wholesale rate subject to its jurisdiction. *Id*. (citing *Conway*, 426 U.S. at 276-82). Here, the Commission examined the allocation of costs under the Entergy System Agreement, a matter that this Court in *Mississippi Industries* determined is jurisdictional to this Commission, and imposed a remedy. *Id*.

2. *Mississippi Industries* is not Factually Distinguishable.

Arkansas Electric Energy Consumers' arguments that *Mississippi Industries* is factually inapposite fare no better.

Arkansas Electric Energy Consumers argue that *Mississippi Industries* used a "nuclear plant-specific framework" that is inapplicable here, AEEC Br. 38-40, and that Grand Gulf was a "unique" Entergy generation resource. *Id.* 15. To the contrary, as the Commission stated here, Opinion Nos. 234 and 292, as affirmed by *Mississippi Industries*, 808 F.2d at 1555-57, found that the Entergy System was highly integrated and that generation facilities, including the nuclear facilities, were planned, constructed and operated for the benefit of the entire system. Opinion No. 480 P 7, JA 261 (citing Opinion No. 292, 41 FERC at 61,614). *See* Opinion No.

234, 31 FERC at 61,651-54; Opinion No. 292, 41 FERC at 61,618. The reallocation made in that proceeding was limited to nuclear costs, not because the nuclear projects were treated any differently than other generation, but because the overall production costs of generation facilities other than nuclear remained roughly comparable, so that no general reallocation of costs was required. Opinion No. 480 P 7, JA 261; Opinion No. 480-A P 9, JA 342; Opinion No. 292, 41 FERC at 61,618.

Arkansas Electric Energy Consumers also argue that *Mississippi Industries* relied on the coordinated planning of the Grand Gulf project, whereas, here, the Commission made no comparable findings that, for example, System gas-fired units were the result of integrated System planning. AEEC Br. 15. The Commission was not required to make findings specific to gas-fired units because it found that Entergy acts for the benefit of the System with respect to the planning and operating of *all* Entergy System resources. Opinion No. 480-A P 99, JA 375. Individual Operating Companies do not choose the system plants and power for which they bear cost responsibility; rather, Entergy makes the planning and operational decisions that guide cost responsibility. *Id*. The Commission found that it could not act inconsistently with *Mississippi Industries* and conclude that it no longer has jurisdiction over the allocation of costs under the Entergy System Agreement. *Id*. P 100, JA 375.

B. The Commission Reasonably Concluded that Entergy is an Integrated System.

Arkansas Electric Energy Consumers further contend that the Commission lacked substantial evidence to support its finding that the Entergy System was integrated. AEEC Br. 20-23. Arkansas Electric Energy Consumers do not, however, explain why the findings in prior Court and Commission decisions that the Entergy System is highly integrated, *see* Opinion No. 480 P 7, JA 261 (citing Opinion No. 292, 41 FERC at 61,614), were no longer applicable. Arkansas Electric Energy Consumers cite no change in circumstances; indeed, Entergy is still operating under the 1982 System Agreement which was at issue in those earlier proceedings. *Id*. *See* Opinion No. 480 P 71, JA 283 (rejecting change of circumstances argument).

There was in any event ample record evidence in this proceeding that: resource additions were planned as a part of a greater effort to acquire additional generation capacity for the benefit of the system, Initial Decision P 54, JA 193 (citing Tr. 4186-87, JA 77-78 (Gallaher)); System resources are dispatched as a single electric utility without regard to generator ownership to serve the single integrated system at the lowest reasonable cost consistent with reliability constraints, *id*. PP 137, 141, JA 222, 224 (citing ETR-3 at 9-10, JA 499-500; LC-1 at 69, 72, JA 623-24 (Baron)); and the intent of the System Agreement was to

balance production costs over time through the assignment of new resources, *id*. P 38, JA 188 (citing Tr. 5816-18, JA 121-23; Ex. ETR-41 at 6-7, JA 533-34, ETR IB at 14, JA 128).

III. THE COMMISSION ACTED REASONABLY IN SELECTING A SYMMETRICAL BANDWIDTH REMEDY TO BRING THE ENTERGY SYSTEM BACK INTO ROUGH EQUALIZATION.

A. The Commission Reasonably Concluded that the Entergy System was Out of Rough Production Cost Equalization.

The Entergy System of allocating new generation resources rotationally inevitably results in disparities in generating capacity and costs among the Operating Companies. *Mississippi Industries*, 808 F.2d at 1529, 1566; Opinion No. 480-A P 7, JA 341. Indeed, there can be and will be, from time to time, significant disparities in production costs. ETR-41 at 9, JA 536. This is the natural and expected result of the structure of the System Agreement and the manner in which Entergy has chosen to allocate the responsibility, costs and benefits of generating resources. *Id*.

Nevertheless, for a great deal of the history of the Entergy System, the net result over time was a rough equalization of capacity and production costs among the Operating Companies. *Mississippi Industries*, 808 F.2d at 1566. While the pendulum of production cost disparities swung back and forth from negative to

positive among the Operating Companies, overall the cost disparities did not favor or disfavor any particular Operating Company. Opinion No. 480 P 141, JA 305.

However, in 1999, the situation changed. Total cost disparities jumped to an average of more than 33 percent for in 2000 through 2002, which is an even greater deviation than the 31 percent deviation that prompted the Grand Gulf full allocation of nuclear costs in 1985. Opinion No. 480 PP 28, 30, JA 269, 270; Opinion No. 480-A P 10, JA 342. These disparities were, moreover, to the particular disadvantage of one company, Entergy Louisiana. Opinion No. 480 P 29, JA 269 (citing Initial Decision, 106 FERC P 30, JA 185). As the Entergy rotational scheme for new generation units had been inactive for a lengthy period, rising gas prices disproportionately adversely impacted Entergy Louisiana, which relied heavily on gas-fired production facilities. *Id.*

Projections indicated that high production cost disparities would continue in the future. Opinion No. 480 P 43, JA 275. For the period 2003-2005, it was projected that the total disparities would be 31 percent for 2003, 27 percent for 2004 and 18 percent in 2005 (or an average of more than 25 percent for the period). *Id.* (citing ALJ-3, JA 451). Even these projected disparities could not be achieved absent the timely and effective implementation of Entergy's Strategic Supply Resource Plan for the acquisition of new generation resources. Opinion No. 480 P

43, JA 275 (citing Initial Decision P 27, JA 184). Further, even if the Strategic Plan eventually provided improvement, there was every indication there would be no improvement in the next five years due to the persistence of high gas prices. Opinion No. 480 P 43, JA 275; Initial Decision P 38, JA 188.

Thus, while the System intends to balance production costs over time through the assignment of new resources, the lack of new generation construction resulted in Entergy Louisiana experiencing a persistent disparate impact from high gas prices. Initial Decision P 38, JA 188. Year-to-year variations are a far different concept than the current picture of at least five-ten years of large deviations in the same direction for an Operating Company. *Id*. P 42, JA 189. Under these circumstances, the Commission found it necessary to set boundaries for the "rough equalization" cost disparities that would be permitted among the Entergy Operating Companies.

B. The Commission Reasonably Established A Bandwidth Remedy to Set the Bounds of Rough Production Cost Equalization.

Prior to Opinion No. 480, there was no bright-line, numerical test for determining whether the Entergy System was in rough production cost equalization. Opinion No. 480-A P 39, JA 353. Resolution of this issue required balancing the prevention of undue discrimination with not dramatically disrupting the System's

historical operations and the states' settled regulatory interests and expectations.[3] *Id*. The System Agreement itself is designed to balance multiple objectives, including affording each Operating Company in each state the opportunity to own an appropriate portfolio of resources, while operating the system collectively for the overall benefit of the System. *Id*.

The ALJ found that a numerical bandwidth was necessary to define the bounds of rough production cost equalization, setting an annual limit of +/- 7.5 percent, and a rolling three-year average of +/- 5 percent. Opinion No. 480 PP 93, 94, JA 290-91. The Commission agreed that a bandwidth was an appropriate methodology, *id*. P 136, JA 303, but rejected the ALJ's specific bandwidth, which was never proposed by any party to the proceeding and was not tied to any specific evidence in the record. *Id*. P 137, JA 303. Also, the three-year rolling average limitation was overly complex, vague and unworkable, and no explanation was provided of how this three-year average would be implemented. *Id*. P 138, JA 303.

Further, the ALJ's narrow bandwidth would result in substantial cost shifting among the Operating Companies. *Id*. P 139, JA 304. Each percentage point of

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[3] Because capacity acquisitions are allocated to individual Operating Companies, the retail regulator of that Company approves the acquisition of the resource, giving the retail regulator control over the costs of the new generation and related issues. Opinion No. 234-A, 32 FERC at 61,951-52; ETR-41 at 27-28, JA 547-48.

production costs was worth approximately $11.8 million. *Id*. The difference in absolute dollars if Entergy Louisiana were at + 5 percent and Entergy Arkansas were at -5 percent would be approximately $130 million. *Id*. (citing Initial Decision P 28, JA 185). Incorporating the ALJ's remedy would result in a significant and immediate rate shock to below system average companies to the benefit of companies with costs currently above the system average. *Id*.

In selecting the specific bandwidth, the Commission considered the historical disparities occurring on the Entergy System during the period from 1986-1999 when the System was in rough equalization. Opinion No. 480 PP 139-141, JA 304-05. In five of the 14 years during that time period, the deviation percentages were greater than the annual 15 percent bandwidth proposed in the Initial Decision. Opinion No. 480-A P 42, JA 354. In three of the years, the deviations were greater than 20 percent. *Id*. The highest total deviation during this period was 22 percent. Opinion No. 480 P 141, JA 305.

Based on this historical data, the Commission concluded that a bandwidth of +/- 11 percent, allowing for a maximum of a 22 percent spread of production costs between Operating Companies on an annual basis, was just and reasonable and would help keep the Entergy System in rough production cost equalization. *Id*. P 144, JA 306. The Commission found that this bandwidth was consistent with

Commission precedent, which the courts had previously upheld, that it has never been the intent to equalize all production costs among Entergy's Operating Companies under the System Agreement. *Id*. This bandwidth also mitigates massive cost shifts among the Operating Companies. *Id*. The bandwidth only applies if the System exceeds historical cost disparities and will assist Entergy in eliminating drastic rate disparities in the future. *Id*.

On rehearing, the Commission reaffirmed its bandwidth selection based on its analysis of historical deviations. Opinion No. 480-A P 41, JA 353. The decision to broaden the bandwidth mitigated the magnitude of the cost shifts that might otherwise occur, an objective the Commission found no less critical than remedying cost inequalities, and was in line with what has been experienced historically on the Entergy System. *Id*. P 40, JA 353. Although the Commission granted rehearing on the use of the Arkansas and Mississippi PSC's statistical analysis, Louisiana PSC Br. 28, the Commission had used the analysis only as further confirmation of its primary analysis of historical deviations. Opinion No. 480-A P 40, JA 353.

Arkansas Electric Energy Consumers argue that the Commission ignored that the Commission's rough-equalization standard was never intended to eliminate all production cost disparities. AEEC Br. 26. To the contrary, the Commission's remedy is designed with this fact in mind, as the Commission's bandwidth remedy

only comes into play when relatively large disparities (+/- 11 percent) exist on the Entergy system. Opinion No. 480-A P 18, JA 345.

C. The Commission Reasonably Rejected the Louisiana PSC's Full Cost Equalization Remedy.

1. The FPA Does Not Require Full Cost Equalization Here.

The Louisiana PSC argues that the Commission's bandwidth remedy, which permits cost disparities of 22 percent, is contrary to the FPA antidiscrimination requirements, which Louisiana PSC asserts require the elimination of any discrimination. Louisiana PSC Br. 21-25. However, in Opinion No. 292, as affirmed in *New Orleans*, 875 F.2d 903, the Commission found that undue discrimination on the Entergy System is properly determined based on the factual setting and the principles underlying the complex Entergy agreements, rather than more general notions of when undue discrimination occurs in regulated industries. Opinion No. 292, 41 FERC at 61,617; Initial Decision P 21, JA 180. Whether to apply full production cost equalization or rough production cost equalization is a question that must be answered based on the facts unique to Entergy. Opinion No. 480 P 73, JA 284. This is the same for any public utility – under the FPA, the Commission must look to the facts relevant to each public utility in determining whether there is undue discrimination. Opinion No. 480-A P 44, JA 354. Here, as

in Opinion Nos. 234 and 292, the Commission considered the facts specific to the Entergy System, and Commission and court precedent, and concluded that full production cost equalization was not appropriate. Opinion No. 480-A P 44, JA 354.

Indeed, if full cost equalization were required by the FPA, it would have been imposed years ago, but it was not and the Louisiana PSC provides no new support for why it must be imposed now. Opinion No. 480 P 70, JA 283. Louisiana PSC provided no evidence to show changed circumstances that would warrant full cost equalization. *Id*. P 71, JA 283. Since 1985, the only change that has occurred in Entergy operations is the consolidation of certain administrative functions designed to make the Operating Companies more efficient. *Id*.

Louisiana PSC's argument in fact ignores the history of the Entergy System. *Id*. P 73, JA 284. The history of rate-setting on the Entergy System establishes the principle of looking at the System through its historical operation and pattern of rough equalization. Opinion No. 480-A P 43, JA 354 (citing Opinion No. 480 PP 28-30, JA 269-70). *Mississippi Industries* affirmed the Commission's refusal to impose full production cost equalization on Entergy, finding that it would be antithetical to the history and purpose of the System Agreement and would dramatically disrupt the System's historical operations and the states' settled regulatory interests and expectations. Opinion No. 480 P 70, JA 283 (citing

Mississippi Industries, 808 F.2d at 1565); Opinion No. 480-A P 44, JA 354. Thus, the Commission's bandwidth remedy is fully consistent with, rather than conflicts with, *Mississippi Industries*. *See* Louisiana PSC Br. 25.

Thus, Louisiana PSC's interpretation of the limits of undue discrimination based on other factual scenarios is irrelevant to the treatment of production costs on the Entergy System. Opinion No. 480 P 73, JA 284; Opinion No. 480-A P 44, JA 354. The cases cited by the Louisiana PSC were each decided based on their specific facts, and none purported to be applying any universal standard with regard to the permissible parameters of discrimination. Opinion No. 480-A P 44, JA 354. No such generally-applicable standard has ever been applied to Entergy by the Commission or the courts, and Louisiana PSC provided no convincing justification to do so now. Opinion No. 480 P 73, JA 284.

The Louisiana PSC also argues that "past disparities have no legitimacy for establishing the bounds of rough equalization." Louisiana PSC Br. 26-27. The Louisiana PSC analogizes this situation to redressing racial discrimination, arguing that "if 'looking to the past' could provide the basis for applying non-discrimination standards, discrimination could never be eliminated." *Id*.

Analogies to racial discrimination cases have little relevance to the economic regulation the Commission engages in pursuant to the FPA. Opinion No. 480-A P

45, JA 355. Indeed, in *NAACP v. FPC*, 425 U.S. 662 (1976), the Supreme Court held that the FPA's economic regulation did not encompass racial discrimination. Opinion No. 480-A P 44 n. 62, JA 355. The Commission must often rely on historical data in meeting its obligations under the FPA, specifically including setting rates for service. *Id.* P 44, JA 355 (citing Opinion No. 234, 31 FERC at 61,656). In virtually identical circumstances, this court upheld the Commission's use of historical data to find that the Entergy System was no longer in rough production cost equalization. *Id.* (citing *Mississippi Industries*, 808 F.2d at 1565-66). Here, the Commission reviewed historical data and concluded that the Entergy System was no longer in rough production cost equalization. *Id.*

The Louisiana PSC complains that the bandwidth remedy permits "huge" disparities in costs. Louisiana PSC Br. 24-25, 29. However, the large amount of dollars represented by percentage differences in costs militate both ways in considering a reasonable bandwidth figure. Initial Decision P 42, JA 189. A larger bandwidth permits larger cost disparities among Operating Companies, but a narrower bandwidth results in more frequent shifting of costs of substantial magnitude among the Operating Companies, inconsistent with the System's historical operations, and resulting in a significant and immediate rate shock to

below system average companies to the benefit of companies with costs currently above the system average. Opinion No. 480 P 139, JA 304.

Moreover, the bandwidth is based upon the historical disparities that occurred during a period when the Entergy System was in rough equalization. Opinion No. 480-A P 28, JA 350. It has never been the intent to fully equalize all production costs among Entergy's Operating Companies under the System Agreement. *Id.* Thus, the remedy applies only where the System exceeds historical cost disparities, for the purpose of assisting Entergy in eliminating drastic rate disparities. *Id.*

2. The Commission Reasonably Rejected Imposing Full Cost Equalization.

The ALJ determined that full production cost equalization was unnecessary and that its implementation would substantially affect the relationship between the Commission and various retail regulatory entities. Opinion No. 480 P 45, JA 275. Huge increases in costs would be put into play outside of the jurisdiction presently available to retail regulators. *Id.* Adopting full production cost equalization would also result in retail regulators having less authority over the costs of the Operating Companies within their respective jurisdictions, as production costs comprise about 72 percent of the total costs of the Operating Companies. *Id.* P 46, JA 276. In short, the Commission would assume a much greater regulatory role over the Entergy System's production resources. *Id.*

The Commission affirmed the ALJ's determination, finding that full production cost equalization was too intrusive and not a necessary remedy. *Id*. P 65, JA 281. One of the Louisiana PSC's own witnesses demonstrated that, during the 2001 test year, over $321 million in costs would be shifted to Entergy Arkansas and Entergy Mississippi from the other Operating Companies if the Louisiana PSC plan were adopted. *Id*. (citing Initial Decision P 127, JA 218, citing Exhs. LC-3, JA 625; LC-5, JA 626; and LC-8 at 50, JA 628). Here, as in Opinion No. 234, 32 FERC at 61,959, affirmed in *Mississippi Industries*, 808 F.2d at 1566, the Commission sought to eliminate drastic rate disparities in a manner that disturbs the historical operation of the System as little as possible. Opinion No. 480 P 65, JA 281. Production cost pooling and equalization is entirely contrary to the System practice of assigning individual Operating Companies cost responsibility for the plants they build and finance. *Mississippi Industries*, 808 F.2d at 1565-66.

Further, in Opinion No. 234, a significant factor in the Commission's decision was the impact of full production cost equalization on the states' interest in generation facilities. Opinion No. 480 P 67, JA 282. The Court in *Mississippi Industries* affirmed this consideration, noting that full production cost equalization would dramatically disrupt states' settled interests and expectations, as the practical effect of such equalization would be to bind local state commissions in many of

their rate base determinations. *Mississippi Industries,* 808 F.2d at 1565; Opinion No. 480 P 68, JA 282 (citing Order No. 234, 32 FERC at 61,952).

D. The Commission Reasonably Rejected Imposing No Remedy or an Asymmetrical Remedy.

1. The Commission Reasonably Rejected Arguments that the System Was Still In Rough Equalization.

a. The Commission Reasonably Rejected Assessing Rough Equalization by Averaging System Deviations In Production Costs since 1986.

Arkansas Electric Energy Consumers and the Arkansas and Mississippi PSCs contend that the bandwidth remedy is unnecessary, because Entergy production costs are still in rough equalization if they are viewed in the context of the average of the percentage deviation from System average over the period 1986-2002. AEEC Br. 28-30; Arkansas and Mississippi PSC Br. 18. However, averaging the record of disparities dating back to 1986 does not accurately reflect the current and future situation, in which production cost disparities that once evened themselves out over time are now consistently disfavoring one Operating Company and are expected to continue to do so for years into the future. Opinion No. 480-A P 19, JA 346; Opinion No. 480 P 141, JA 305; Initial Decision PP 31, 37, JA 185, 187.

While the Entergy System was in rough equalization from 1986 to 1999, Opinion No. 480-A P 10, JA 342; Opinion No. 480 P 141, JA 305, since 1999

Entergy Louisiana's production costs have risen dramatically in relation to System average, particularly as compared to Entergy Arkansas's relatively large amount of cheaper coal base load capacity. Initial Decision PP 25, 37, JA 182, 187. Such large disparities were far more than the System had experienced for the previous 14 years, and are comparable to the disparities experienced from 1983 to 1985, when the Commission found the System was not in rough production cost equalization. Opinion No. 480-A P 15, JA 344. In addition, it appeared likely that such large disparities would continue to exist in the near future. *Id.*

Thus, the Commission disagreed that it had improperly analyzed cost disparities in this proceeding. *Id.* P 18, JA 345. As the ALJ states, when looking at the history back to 1986, it is clear that prior to 2000, "there was no period when an Operating Company was hammered like [Entergy Louisiana] has been with double-digit percentage deviations above a System average for each of the past four years (2000-2003), while [Entergy Arkansas] has enjoyed greater than mirror image double-digit disparities below System average." Initial Decision P 33, JA 186. The fact that past rough equalization over a significant period of time was sufficient, when averaged, to mask the current disparity does not provide a basis for refusing to remedy what is clearly a current and ongoing significant disparity that is

not now balanced, and is not expected to be for years in the future, by any pendulum swing shifting the balance of costs among Operating Companies.

b. The Commission Reasonably Rejected Assessing Rough Equalization Based on the "Cents per Kilowatt" Methodology.

The Arkansas and Mississippi PSCs contend that, in addition to using the "percentage deviation from System average" methodology, the Commission should also have evaluated deviations in production costs on a "cents per kilowatt" basis. Br. 16-19. This methodology, they contend, also demonstrates that the Operating Companies remain in rough production cost equalization. *Id.*

The Arkansas and Mississippi PSCs spend six pages of their brief, *see* Br. 11-16, arguing that the Commission's failure to employ the "cents per kilowatt" methodology was arbitrary and capricious because the Commission had applied the methodology in prior cases, and failed to explain its deviation from it. However, on rehearing the Arkansas and Mississippi PSCs did not argue that the Commission's action was reversible because it was inconsistent with precedent. Rather, they simply argued that the "cents per kilowatt" methodology was preferable to the methodology FERC employed. *See* Arkansas and Mississippi PSC July 1, 2005 Petition for Rehearing at 3-7, JA 323-27. As Petitioners failed to argue on rehearing that the Commission was arbitrary in failing to follow or explain away

past precedent, they are barred from raising it now. FPA § 825*l*(b), 16 U.S.C. § 313(b) ("[n]o 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."). *See also City of Orrville, Ohio v. FERC*, 147 F.3d 979, 990 (D.C. Cir. 1998) (court lacks jurisdiction to hear arguments not made on rehearing); *Platte River Whooping Crane Critical Habitat Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) (same).

Petitioners also failed to raise this argument on exceptions to the Initial Decision's rejection of the "cents per kilowatt" methodology. Accordingly, under the Commission's regulations, petitioners have waived this argument. *See* 18 C.F.R. § 385.711(d).

The Commission in any event explained why it found "cents per kilowatt" an unreliable determinant of whether the system is in rough production cost equalization. Opinion No. 480-A P 16, JA 344. The Commission selected percentage comparisons for cost disparities because they are the best way to make comparisons over time, and they also show the relative effects of production costs. *Id*. (citing Initial Decision P 29, JA 185). Absolute differences, whether in dollars or per kilowatt, can be misleading, since their significance changes as overall production costs increase or decrease. Opinion No. 480-A P 16, JA 344; Initial

Decision P 29, JA 185. For example, a disparity of $10,000 from a $100,000 total is much more significant than a $10,000 disparity from a total of $1 million. Initial Decision P 29, JA 185 (citing Staff Initial Brief at 11, JA 146).

The Arkansas and Mississippi PSCs argue that sole reliance on a percentage deviation test could result in just and reasonable rates becoming unjust and unreasonable for the sole reason that costs have declined. Arkansas and Mississippi PSC Br. 17. As purported evidence of this, they point to the fact that, if the cost differential between two companies is held constant, that cost differential would become a larger percentage of system average if the system's costs should decline. *Id*. 18. The ALJ found, however, that this example illustrated why a percentage comparison is a meaningful comparison to make. Initial Decision P 29, JA 185. Percentages, unlike absolute differences in dollars or in per kilowatt, show the relative effects of production costs. *Id*.

Thus, the ALJ did not find it convincing to use cents per kilowatt differences and neither did the Commission. Opinion No. 480-A P 16, JA 344. In Opinion No. 480, the Commission affirmed the ALJ's determination that a percentage difference was the appropriate measurement in determining rough production cost equalization. *Id*. (citing Opinion No. 480 P 30, JA 269).

The Commission further was not convinced, *see* Arkansas and Mississippi PSC Br. 19, that deviations that existed under prior System Agreements support a finding that the Operating Companies have been and are still in rough production cost equalization. Opinion No. 480-A P 17, JA 345. This argument was based on Exhibit AC-53 (MSS-28), JA 426, one exhibit in a compilation of exhibits from FERC Docket No. ER82-483, which compares average cost for electricity in cents per kilowatt from the years 1965-1982. *Id.* This argument is flawed in several ways. Opinion No. 480-A P 17, JA 345. First, the exhibit is based on a "cents per kilowatt" comparison which is different from the analysis performed by the Commission in Opinion No. 480, and is not directly comparable. *Id.* Second, the Commission considered the use of a "cents per kilowatt" comparison in this case and rejected it. *Id.*

Further, upon examination of this exhibit during the hearing, the Arkansas Commission's witness did not know whether this particular exhibit in fact portrayed a comparison of production costs or whether it included retail costs. *Id.* (citing Tr. at 3695, JA 68 (Berry)). The witness attempted to brush this issue aside by asserting that the "vast majority" of costs would be production costs in any event. Arkansas and Mississippi PSC Br. 19 n. 44. However, as the Commission stated in Opinion No. 292, 41 FERC at 61,621, in rejecting reliance on the same exhibit –

MSS-28 from FERC Docket No. ER82-483 – the exhibit does not indicate the effect of a pro rata allocation on costs relevant to this case. The Commission's allocation is not designed to result in the retail rates of the Operating Companies being equal. *Id.* The Commission does not have jurisdiction to set retail rates, and retail rates among the Operating Companies will differ due to the differing treatment of rate elements by the state regulatory authorities. *Id.* Although production costs comprise some 72% of the total costs of the Operating Companies, the Commission is not currently exercising full jurisdiction over all those costs. Initial Decision P 129, JA 219. One of the reasons for rejecting the Louisiana PSC's proposed full equalization was to avoid such a significant intrusion into jurisdiction currently being exercised by the states. *Id.* P 127, JA 218.

It should be further noted that this same witness testified that, even if averaging the historical deviations, the period under consideration should start in 1986, *see* Ex. AC-1 at 20, JA 384 (Berry), whereas the period addressed by the Arkansas and Mississippi PSCs here was 1965-1982. The witness found 1986 to be an appropriate starting point for a historical analysis because the Grand Gulf and Waterford 3 units were not fully operational until the latter part of 1985, and the Commission's Grand Gulf allocations would be expected to produce rough equalization, so that the period after 1985 would be a period of rough equalization.

Id. at 21, JA 385. *See also* Arkansas and Mississippi PSCs' Brief on Exceptions at 11, JA 243 (arguing that the issue of rough equalization should be based on the historical variations in Operating Company production costs post-1986). The percentage deviations reflected in AC-53 (MSS-28) thus do not support the Arkansas and Mississippi PSCs' claim, *see* Arkansas and Mississippi PSC Br. 19, that "these are part of the pattern of rough equalization of production costs which had previously existed among the [Entergy] pool members." Opinion No. 480-A P 17, JA 345.

2. The Commission Reasonably Rejected Applying the "Life of the Contract" Standard.

Arkansas Electric Energy Consumers contends the Commission erred in failing to apply the "life of the contract" standard, citing cases that require a party to show that its contract was unreasonable over the "life of the contract" and not just when a party to a long-term contract sought to change or terminate it.[4] The "life of the contract" standard has no application here. Opinion No. 480-A P 19, JA 346. Entergy's witness Schnitzer explained that the Entergy System Agreement is not a

[4] AEEC Br. 30-35 (citing *Pontook Operating Ltd. Partnership v. Pub. Serv. Comm'n. of N.H.*, 94 FERC ¶ 61,144 at 61,552 (2001); *French Broad Elec. Membership Corp. v. Carolina Power & Light Co*., 92 FERC ¶ 61,283 (2000); *San Diego Gas & Elec. Co. v. Pub. Serv. Comm'n of N.M.*, 95 FERC ¶ 61,073 (2001)).

fixed-rate contract of the type at issue in *French Broad. Id.* (citing Tr. at 5799, JA 120). As the ALJ found, the "life of the contract" argument

> makes sense when dealing with arm's-length, independent parties, when one has reaped the benefits of its bargain and then seeks to extricate itself when the benefits have shifted. But the cases are not in point when applied to the System Agreement. The "Agreement" here is implemented by the Entergy parent company to regulate the dealings of its controlled affiliate Operating Companies. It is not the result of an open negotiation among independent parties.

Id. (quoting Initial Decision P 35, JA 186). Moreover, the System Agreement governs the FERC-jurisdictional tariff and has been relied upon by the Commission, in conjunction with other actions, to achieve rough equalization among the Operating Companies. Initial Decision P 35, JA 186. Thus, the Louisiana PSC's complaint is best viewed through the lens of the System Agreement. *Id*. The Commission agreed with the ALJ and rejected Arkansas Electric Energy Consumers' arguments on this matter. Opinion No. 480-A P 19, JA 346.

3. The Commission Reasonably Rejected Arguments that the Current Cost Disparities Were Lawful Based on the Dissimilar Circumstances of the Operating Companies.

Arkansas Electric Energy Consumers argue that the existing cost disparities between the Operating Companies were lawfully based on dissimilar circumstances, as each Operating Company is responsible for financing and constructing its own generation facilities. AEEC Br. 35-40. The Arkansas and Mississippi PSCs

contend that these dissimilar circumstances justify an asymmetrical remedy, *i.e.*, one that has either no lower boundary or a flexible lower boundary, to permit Operating Companies to retain low cost savings. Arkansas and Mississippi PSC Br. 22-26.

These arguments are contrary to the nature of the Entergy System Agreement. Opinion No. 480-A PP 46, 99, 106, JA 356, 375, 378. Entergy's System is highly integrated, and therefore Entergy's System planning and operation affects the cost disparities among the Operating Companies. Id. P 46, JA 356. As *Mississippi Industries* explained, the System Agreement "has sought to coordinate the addition of operating capacity by each individual operating company while achieving the greatest economies of scale." *Id*. P 99, JA 375 (quoting *Mississippi Industries*, 808 F.2d at 1529). Entergy acts, with respect to the planning and operation of the Entergy System's plants, for the benefit of all the Operating Companies. *Id*. Individual Operating Companies do not choose the system plants and power for which they should have cost responsibility. *Id*. Rather, in a public utility holding company system such as the Entergy System, Entergy makes the planning and operational decisions that guide cost responsibility. *Id*.

Having found that all Entergy generation has been planned to meet overall System needs and objectives, the conclusion of undue discrimination "follows

almost as a matter of course" when there are widely varying costs from Operating Company to Operating Company. *Mississippi Industries*, 808 F.2d at 1556. Given the degree of integration on the System, this Court has determined that the Commission may properly conclude that large disparities in costs among Operating Companies disrupt the historical pattern of roughly equalizing capacity costs and constitute undue discrimination under the FPA. *Id*. at 1557.

Contrary to the contentions of the Arkansas and Mississippi PSCs, Arkansas and Mississippi PSC Br. 21, the integrated nature of the Entergy System also supports the adoption of a symmetrical bandwidth. Opinion No. 480-A P 46, JA 356. Because Entergy's System planning and operation affects the cost disparities among its five Operating Companies, the Commission found it reasonable to impose a symmetrical boundary around the System average. *Id*. A symmetrical remedy ensures that the System remains roughly balanced while not instilling an undue preference or undue discrimination on any operating company. *Id*. Eliminating or rendering "flexible" the lower boundary of the bandwidth would permit one Operating Company to have drastically low costs at the expense of others, and an undue preference is no more defensible than undue discrimination. *Id*. (citing Staff Initial Br. at 37, JA 148). *See* FPA § 205(b)(1), 16 U.S.C. § 824d(b)(1) (prohibiting undue preference as well as undue prejudice); *Town of*

Norwood v. FERC, 587 F.2d 1306, 1312 (D.C. Cir. 1978) (low rates may constitute undue preference implicating the fairness concerns of FPA § 205(b)).

Arkansas Electric Energy Consumers argue further that, because Entergy Arkansas's ratepayers initially financed Entergy Arkansas's generation through retail rates, Entergy Arkansas should not have to "share" with the other Operating Companies the advantages of economical power from its Arkansas plants, AEEC Br. 16-17, and it is "unconscionable" to deprive Entergy Arkansas of the benefits of its depreciated base-load capacity. *Id*. 40-42.

This argument likewise is contrary to the integrated nature of the System Agreement. Opinion No. 480-A P 106, JA 378. An individual Operating Company under the Entergy System Agreement is not guaranteed all the benefits of its specific generation for an infinite amount of time. *Id*. Rather, by the very nature of the System Agreement and the Operating Companies' participation in that Agreement, benefits and burdens specific to each Operating Company have to be balanced with what is appropriate for the system as a whole. *Id*. *Mississippi Industries* rejected the argument of Arkansas Power & Light (now Entergy Arkansas) that it should not be required to pay more for nuclear production costs than was justified by its own ownership costs, finding no basis for that argument

given the integrated nature of the Entergy System. *Mississippi Industries*, 808 F.2d at 1559-60.

Similarly, in *Arkansas Electric Energy Consumers v. FERC*, 290 F.3d 362 (D.C. Cir. 2002), this Court rejected Arkansas Electric Energy Consumers' argument that the merger between Gulf States and Entergy Systems was unduly discriminatory because it deprived Arkansas consumers of the benefit of Entergy Arkansas' fully depreciated generating plants. *Id*. at 368. The Court affirmed the Commission's finding that "'rates for transactions among the operating company subsidiaries of a holding company are not unduly discriminatory merely because they fail to exactly reflect the benefits contributed by the various participants.'" *Id*. at 367 (quoting *Entergy Services, Inc.*, Opinion No. 385, 65 FERC ¶ 61,332 (1993), *on reh'g*, Opinion No. 385-A, 67 FERC ¶ 61,192 (1994), *aff'd*, *Arkansas Electric Energy Consumers*, 290 F.3d 362). The issue is whether the allocations among subsidiaries are fair. *Id*. at 368. In that case, Arkansas Electric Energy Consumers did not demonstrate unduly disparate treatment between Gulf States and the Entergy Operating Companies because the Arkansas Electric Energy Consumers ignored the benefits that Gulf States brought to the Entergy System power pool. *Id*. at 368-69.

Here, Arkansas consumers benefit from the participation of other Operating Companies in the System pool. By constructing the System's generating facilities

on an integrated basis, the System's members are able to achieve economies of scale in building new generation, reductions in reserve requirements, increased reliability and efficiencies in operation. Opinion No. 292, 41 FERC at 61,622. Further, Entergy operates the five Operating Companies' transmission and generation facilities as a single electric system, dispatching generation on a least cost basis system-wide without regard to ownership. Opinion 480-A P 8, JA 341. This pooling arrangement benefits the entire system by lowering energy and capacity costs to customers throughout the system. *Id.*

Further, *Mississippi Industries*, 808 F.2d at 1559-60, found that Arkansas Power & Light did not lose the benefits of its low-cost power as a result of the nuclear power costs allocation, because, under the System Agreement, Arkansas Power & Light remained entitled to first call on its own lowest cost energy. *Id.* at 1559-60. Thus, if Arkansas Power & Light's demand exceeded the production of its lowest-cost units, then Arkansas Power & Light would retain the benefits of those units. *Id.* at 1560. Likewise, here, Entergy Arkansas will continue to benefit from its depreciated base-load capacity, just not to the same degree. Opinion No. 480-A PP 99, 106, JA 375, 378. Entergy Arkansas will continue to possess priority respecting the use of its low-cost generation capacity. *See* Ex. ETR-41 at 4, JA 531.

It is only if Entergy Arkansas' costs go so low that they exceed the bandwidth that Entergy Arkansas may be liable for equalization payments.

The Arkansas and Mississippi PSCs contend that cost-sharing under the bandwidth remedy will raise System costs overall because it will dampen the incentives of both high and low-cost jurisdictions to lower their costs. Arkansas and Mississippi PSC Br. 26-29. However, because the Operating Companies are operated and centrally dispatched as one company, no individual company can have incentive, or act on it, to minimize production costs, and therefore the symmetrical bandwidth does not destroy any cost-saving incentives on the part of the individual Operating Companies. Initial Decision P 44, JA 190 (citing Staff Initial Br. at 35 n. 84, JA 147; Louisiana PSC Reply Br. at 38, JA 161). The cost-sharing provisions among the Operating Companies will have no effect on Entergy's incentive to lower costs over the entire System.

Arkansas and Mississippi PSCs follow with the argument that, under the Commission's remedy, state regulators will lack incentive to require lower costs, and will have increased incentive to "approve local, politically favored projects such as the Vidalia hydroelectric plant" rather than more cost-effective resources. Arkansas and Mississippi PSC Br. 26-28. The Vidalia project itself, however, is a perfect example of why the costs of such projects need not be imposed on non-

jurisdictional ratepayers. *See* Section IV, *infra*. Resources, such as Vidalia, acquired to advance local concerns rather than Entergy's centralized System planning, are subject to being excluded as a System resource upon the complaint of state regulators, Entergy, and/or other Operating Companies. This likely mitigates any state incentive to engage in such behavior, as the inflated costs will be borne entirely by ratepayers in the state's own jurisdiction.

Indeed, this ability to override localized concerns in assuring fairness among the Operating Companies is well recognized as one of the reasons why FERC has plenary jurisdiction over transactions among affiliated companies in a multi-state organization, including decisions to invest in generation or enter into contracts to construct and operate generation. *Mississippi Power & Light*, 487 U.S. at 376. Because generation is constructed to meet the needs of the entire system, the allocation of the cost of that generation must rest, not on the needs of an individual company or jurisdiction, but on the principles of just, reasonable, non-discriminatory and non-preferential rates. *Id*. at 364 (citing Opinion No. 234-A at 61,958). As this Court observed, when, as here, affiliated operating companies in an integrated regional system enter into agreements for wholesale power sales in interstate commerce which allocate costs, FERC is in the best position to reach the most equitable results and to act in the public interest, rather than be controlled by

the localized concerns of individual states. *Mississippi Industries*, 808 F.2d at 1549.

4. The Commission Reasonably Rejected Claims That Entergy's Strategic Supply Resource Plan Could Be Relied Upon to Maintain Rough Equalization in the Future.

Having determined that it was currently short on capacity for 2003, and there was a projected increase in base load requirements by 2007, Entergy designed a Strategic Supply Resource Plan to address these deficiencies through selective and targeted resource acquisition to bring all of the Operating Companies closer to the System average production cost over the period from 2003-2012. Opinion No. 480-A P 20, JA 347; Opinion No. 480 P 34, JA 271. Arkansas Electric Energy Consumers contend that Entergy's Strategic System Resource Plan can be relied upon to ensure rough equalization in the future. AEEC Br. 30.

The Commission affirmed the ALJ's finding that the Strategic Plan could not be relied upon to restore rough production cost equalization. Opinion No. 480 P 42, JA 274 (citing Initial Decision PP 73-79, JA 201-02). The Commission's concern was based on projections in the record that future cost disparities may be so severe that an additional remedy was warranted. Opinion No. 480-A P 25, JA 348. For example, in Exhibit ALJ-3, JA 451, for the period of 2003-2005, it was projected that the total disparities would be 31 percent in 2003, 27 percent in 2004 and 18

percent in 2005 (or an average of more than 25 percent for the period). Opinion No. 480 P 43, JA 275; Opinion No. 480-A P 25, JA 348.

While Entergy's Strategic Plan may eventually narrow production cost disparities in the future, there is simply no assurance that the Strategic Plan will unfold as planned. *Id.*; Opinion No. 480-A P 24, JA 348. As the projections assume both the timely and effective implementation of Entergy's Strategic Plan, the assumptions are therefore subject to much uncertainty. Opinion No. 480 P 43, JA 275 (citing Initial Decision P 27, JA 184); Opinion No. 480-A P 24, JA 348. With actual gas prices remaining high and no indication that this is likely to change, there was no guarantee that Entergy's Strategic Plan will correct large disparities in the future. Opinion No. 480 P 43, JA 275 (citing Initial Decision P 27, JA 184); Opinion No. 480-A P 24, JA 348. Thus, projections of future cost disparities in the record of this proceeding indicate that the Strategic Plan may not be able to maintain rough production cost equalization. Opinion No. 480-A P 25, JA 348 (citing Opinion No. 480 P 43, JA 275).

In any event, the Commission did not reject the use of the Strategic Plan as a means of mitigating cost disparities on the Entergy System. Opinion No. 480-A P 26, JA 349. Rather, the Commission found no assurance that the Strategic Plan could by itself maintain rough production cost equalization. *Id*. If the Strategic

Plan does prove to be an effective remedy for production cost deviations, then the bandwidth the Commission established as a remedy for the deviations would simply not come into play. *Id.*; Opinion No. 480 P 44, JA 275. It is only if the deviations become particularly severe (greater than +/- 11 percent), that the bandwidth remedy becomes applicable. Opinion No. 480 P 44, JA 275. In effect, the bandwidth remedy is an insurance policy in the event that Entergy's Strategic Plan fails to keep the Entergy System in rough production cost equalization. Opinion No. 480-A P 26, JA 349; Opinion No. 480 P 44, JA 275.

IV. THE COMMISSION REASONABLY DETERMINED THAT VIDALIA WAS NOT PROPERLY CONSIDERED AN ENTERGY SYSTEM RESOURCE.

The Vidalia Hydroelectric Power Plant was built forty miles below Vidalia, Louisiana. Initial Decision P 52, JA 193. Failing independently to obtain financing for constructing the plant, the Town of Vidalia entered into an agreement with Catalyst Energy Development Corporation to form the Catalyst Old River Hydroelectric Limited Partnership. *Id.* P 53, JA 193. On November 18, 1985, Entergy Louisiana (then Louisiana Power & Light) entered into a contract with the Catalyst Old River Hydroelectric Limited Partnership whereby Entergy Louisiana would purchase up to 94 percent of the output of Vidalia, with the Town of Vidalia purchasing the remaining 6 percent of the output. *Id.*

Vidalia produces a very small amount of power, relative to the needs of the Entergy System (less than one percent), Opinion No. 480 P 180, JA 317, or the needs of Entergy Louisiana (less than three percent), Ex. LC-84 at 2, JA 681. The costs of producing that power, however, are quite high. Vidalia's costs alone can increase Entergy Louisiana's production costs from the System average by approximately five percent, as compared to Entergy Louisiana purchasing energy through the MSS-3 System pool exchange. Opinion No. 480 P 180, JA 317.

Until this proceeding, Entergy Louisiana recovered Vidalia's cost from its own ratepayers through its retail rates. *Id.* Although Vidalia was included in the equalization of excess reserve capacity on the System through Service Schedule MSS-1, *see* Louisiana PSC Br. 37, that had little practical impact of any kind because: (1) Vidalia provides a negligible contribution to system capacity, Opinion No. 480-A P 75, JA 366; and (2) the MSS-1 equalization payments themselves have been a tiny fraction of Entergy production costs. *Id.* P 8, JA 341.

In this proceeding, however, there may be significant cost shifts among Operating Companies in the event that the bandwidth is exceeded. Thus, this proceeding was the first time any significant portion of the Vidalia costs might be shifted to other Operating Companies. Opinion No. 480 P 180, JA 317. Louisiana PSC contends that the actual cost of Vidalia should be included in the bandwidth

production cost calculations because Vidalia is a System resource. Louisiana PSC Br. 30. Entergy, the Arkansas and Mississippi PSCs, the City of New Orleans, the Arkansas Electric Energy Consumers, and FERC Staff all opposed treating Vidalia as a System resource. *See* Opinion No. 480 PP 151-170, JA 309-13.

The Commission reversed the ALJ's finding that Vidalia should be treated as a System resource. Opinion No. 480 P 173, JA 314. While the Louisiana PSC contends the Commission failed to afford the ALJ's findings appropriate deference, Louisiana PSC Br. 30-31, the Commission disagreed. Opinion No. 480-A P 71, JA 364. In Opinion No. 480, the Commission accepted the ALJ's determinations on numerous issues, and, when it did not, the Commission made clear its substantial reasons for taking a different course. *Id.*

Here, the Commission found that the ALJ ignored distinguishing factors that warranted Vidalia being treated as an Entergy Louisiana-only resource. Opinion No. 480 P 173, JA 314. These crucial distinguishing features were: (1) the fact that Vidalia was not built as part of Entergy's overall System planning; (2) the unusual structure of the Vidalia contract, including the Louisiana PSC's finding of prudence and the guaranteed flow-through of costs; (3) the significant cost shifts that would occur if the Vidalia contract were treated as a System resource; and (4) the fact that

significant tax benefits have been enjoyed solely by Entergy Louisiana and its retail customers. *Id.*

A. Vidalia Was Not Built As Part of Entergy's System Planning.

As the Louisiana PSC acknowledges, System resource planning is conducted by the Entergy Operating Committee. Louisiana PSC Br. 33-34. Here, the purchase of Vidalia power was initiated by the Town of Vidalia, rather than the Entergy Operating Committee. Opinion No. 480 P 180, JA 317; Opinion No. 480-A P 74, JA 365. Indeed, the Louisiana PSC conceded at hearing that the Operating Committee did not direct Entergy Louisiana to enter into the Vidalia contract and did not vote to approve the contract. Opinion No. 480 P 175, JA 315 (citing Tr. 1483, 1578, JA 52, 58). Entergy explained that the Operating Committee chose not to interfere with Entergy Louisiana's execution of the Vidalia contract in reliance on the Louisiana PSC's guarantee that all costs were to be borne by Entergy Louisiana's ratepayers for the life of the contract. *Id.* (citing Entergy's Reply Brief at 28, JA 165, referencing Tr. 4900-01 (Harlan), JA 104-05, and Ex. ETR-106 at 140, JA 621 (Saacks deposition excerpt)).

Louisiana PSC points to the Commission's statement in Opinion No. 234, and this Court's finding in *Mississippi Industries,* that all generating resources were acquired for the system as a whole. Louisiana PSC Br. 31-32 (citing *Mississippi*

Industries, 808 F.2d at 1569). At the time of Opinion No. 234, no new units had been built without a recommendation from the Operating Committee. However, Vidalia was built *after* Opinion No. 234, and was not planned in a manner similar to other resources. Opinion No. 480-A P 74, JA 365. Vidalia is the only long-term resource added to Entergy's System since 1986, the period spanning the issuance of Opinion No. 234 and the filing of this complaint case. *Id*. P 74 n. 97, JA 366. Unlike previous resource acquisitions, the Vidalia contract was negotiated, approved and executed by Entergy Louisiana alone. *Id*. Entergy neither built, owned or operated the Vidalia project. *Id*.

Further, the nuclear units at issue in Opinion Nos. 234 and 292 were part of a centralized and deliberate strategy to diversify fuel sources for the System through investment in nuclear capacity. Opinion No. 480 P 180, JA 317 (citing Opinion No. 292, 41 FERC at 61,618-19). In contrast, there is no evidence that Vidalia was part of any centralized and deliberate system plan to acquire hydroelectric capacity. *Id*.; Opinion No. 480-A P 74, JA 365. The Louisiana PSC's own witness admitted that Vidalia was not part of such a strategy. Opinion No. 480 P 180, JA 317 (citing Tr. 1488 (Kollen), JA 53). The Operating Committee did not approve the Vidalia purchase as a System purchase and the Commission found no evidence in the record showing that any studies were ever provided to the Entergy Operating Committee

evaluating either the need for or economics of the Vidalia purchase. Opinion No. 480 P 181, JA 318 (citing ETR-1 at 41, JA 473).

Instead, Vidalia cost studies were prepared and presented only to the Louisiana PSC. *Id.* The studies prepared for the Louisiana PSC showed the effects of the Vidalia purchase only on Entergy Louisiana's customers. *Id.* (citing ETR-102 at 2-3, JA 616-17 (Harlan) and Tr. 4862, JA 101 (Harlan)). This lack of evidence of System planning for Vidalia stands in stark contrast to the vast amount of evidence of the Operating Committee's planning and approval of Entergy's nuclear resources discussed in Opinion No. 234. Opinion No. 480-A P 74, JA 365.

Further, in contrast to the large share of base load capacity and energy provided by nuclear power for the benefit of the entire system, Vidalia contributes less than one percent of the system's capacity. Opinion No. 480 P 180, JA 317. It was only in terms of the cost of the capacity that Vidalia was very significant. *Id.* (citing Tr. 1885-87, JA 62-64). Such minimal capacity would hardly be of any interest to Entergy in planning for the entire system. *Id.*

In response to this point, Louisiana PSC points to an analysis performed by its employee purporting to show that Vidalia "offered the potential to save billions of dollars over its life." Louisiana PSC Br. 3. However, as discussed above and in

section (C) *infra*, Vidalia was enormously *expensive* generation capacity compared to the capacity available under the MSS-3 Service Schedule in the System pool.

The Commission also rejected the argument, Louisiana PSC Br. 33-34, that Entergy demonstrated acceptance of Vidalia as a System resource by including Vidalia's capacity in Entergy Louisiana's capacity credits under Service Schedule MSS-1. Opinion No. 480-A P 75, JA 366. This credit simply acknowledges that Vidalia provides a measurable but negligible contribution to system capacity. *Id.* It only shows that Vidalia exists and can serve load. *Id.* It does not prove why or for whom it was planned, and the fact that Entergy recognizes the existence of Vidalia and provides a capacity credit is no reason for shifting the Vidalia costs to other Operating Companies. *Id.*

Similarly, the inclusion of Vidalia in the load and capability forecast, Louisiana PSC Br. 34, does not evidence acceptance as a System resource. Entergy explained that the load and capability forecast was merely used as a tool to determine how much energy was available to the individual Operating Companies so that the Operating Committee could plan future resource acquisitions for the benefit of the System. Initial Decision P 60, JA 195 (citing Entergy Initial Brief at 54, JA 141). The inclusion of Vidalia in the load and capability forecast was

therefore not indicative of approval as a System resource, but merely that the project existed as a source of power. *Id*.

B. The Unique Character of the Vidalia Contract.

The Vidalia contract was the product of a unique accommodation between the Louisiana PSC and Entergy Louisiana meant to facilitate the local economic and political objectives of Louisiana without exposing Entergy Louisiana (or the System) to the cost risks associated with a substantial generation project. Opinion No. 480 P 175, JA 315. The evidence showed that, from the contract's inception, it was in essence a public works project designed to bring jobs, tourism and other economic development to the area, and was agreed to by Entergy Louisiana (then Louisiana Power & Light) only under a guarantee of full cost recovery from Louisiana ratepayers. Opinion No. 480 PP 151, 176, JA 309, 315.

From the beginning, Entergy Louisiana made it clear to the Louisiana PSC that it would oppose the Vidalia contract if all the costs of the Vidalia power were not flowed through to Entergy Louisiana ratepayers under a fuel adjustment clause. Opinion No. 480 P 176, JA 315 (citing AC-11 at 2, JA 401; Ex. No. ETR-23 at 47 (Louiselle), JA 509). A Louisiana PSC memorandum from 1984, discussing the application for certification of the proposed Vidalia contract, included these statements: "[Louisiana Power & Light, now Entergy Louisiana] proposes to collect

the cost of the electricity purchased from Catalyst through the fuel adjustment clause. LP&L would oppose the project if it could not flow the total cost through the fuel adjustment factor." Opinion No. 480 P 176, JA 315 (quoting Ex. AC-11 at 2, JA 401).

> Approximately 800 construction jobs will be created by this project, tax collections to the State and local bodies are estimated to be $7 million. Annual payroll is estimated to be $1 million. A major tourist attraction will be created similar to those at other hydropower sites, particularly since this is Louisiana's first major hydropower facility utilizing the world's largest bulb turbines.

Id. (quoting Ex. AC-11 at 6, JA 402).

The Louisiana PSC did in fact guarantee that all of Entergy Louisiana's purchase costs would be borne by Entergy Louisiana's customers via Entergy Louisiana's fuel adjustment clause. Opinion No. 480 P 178, JA 316. In Louisiana PSC Order No. U-16246-A, issued August 22, 1990, the Louisiana PSC made an express finding that Entergy Louisiana's purchase of Vidalia supply was prudent. Opinion No. 480 P 178, JA 316 (citing Ex. LC-83, JA 678-79). The Louisiana PSC further assured that "LP&L shall recover the total cost of energy over the entire duration of the Contract from its customers by including the total cost incurred as a fuel cost in the monthly fuel adjustment charges." *Id*.

Thus, the Louisiana PSC itself did not envision the cost of this contract being spread to the rest of Entergy's System, but found that it would remain with Entergy

Louisiana for the duration of the contract. Opinion No. 480 P 178, JA 316. Since the purchases first began, the contract costs have continually been recovered via the Entergy Louisiana fuel clause. *Id*. The Louisiana PSC's 1990 Order makes it clear that the Louisiana PSC was fully aware that, in approving Vidalia and its escalating rate path, Entergy Louisiana's customers would bear the entire costs of Vidalia. Opinion No. 480-A P 72, JA 364.

Further, no non-Louisiana retail regulator or any other Operating Company ever found, or had the opportunity to determine, that the Vidalia contract was prudent. Opinion No. 480 P 177, JA 316 (citing Ex. S-1 at 57 (Sammon), JA 817). The Louisiana PSC responds that retail regulators never review the prudence of resources built or acquired in other jurisdictions. Louisiana PSC Br. 37. However, the point here is that, unlike the other resources on the System, neither the Operating Committee nor any Operating Company other than Entergy Louisiana itself planned or approved the Vidalia contract. Opinion No. 480 P 155, JA 310. Given the unusual manner in which the Vidalia power was acquired, without Operating Committee instruction or approval, an allocation of the Vidalia costs to other state retail jurisdictions in this proceeding will almost certainly produce litigation before the Commission, as each retail jurisdiction will likely file prudence challenges in an attempt to reduce or eliminate the share of Vidalia costs that each

would be allocated. *Id*. P 177, JA 316. Entergy, the Arkansas and Mississippi PSCs, the City of New Orleans, the AEEC and Commission Staff all opposed treating Vidalia as a System resource. *See id*. PP 151-170, JA 309-13.

C. If Vidalia Is Treated as a System Resource, There Will Be Significant Cost Shifts to Other Operating Companies.

Significant costs are associated with the Vidalia contract and these costs will remain at over $100 million per year through the term of the contract, which ends in 2031. Opinion No. 480 P 179, JA 316. Between the years 2005 and 2031, the contract energy rate will range from $150 - $205 per megawatt hour. *Id*. (citing Ex. ETR-61, Appendix A, JA 568). For example, in 2005, the Vidalia contract would cost an estimated $121 million. *Id*.

Indeed, the Vidalia costs are so significant that they alone can increase Entergy Louisiana's production costs from the system average by approximately five percent, as compared to Entergy Louisiana purchasing equivalent amounts of energy through the MSS-3 exchange, where power is approximately $37 per megawatt hour. Opinion No. 480 P 180 & n. 7, JA 317. Allowing the full contract costs of Vidalia to be forced onto other Operating Companies would produce significant cost shifts among the Operating Companies and greatly impact other retail jurisdictions. *Id*.

The Louisiana PSC does not dispute the significant cost shifts, but asserts that this fact is not a valid basis for excluding a System resource. Louisiana PSC Br. 38. The Commission disagreed, finding that allowing cost shifts as a result of the Vidalia contract would be unjust, unreasonable and unduly discriminatory for all the reasons explained in the orders below. Opinion No. 480-A P 73, JA 365.

D. Significant Tax Benefits Have Accrued Solely to the Benefit of Entergy Louisiana and its Retail Ratepayers.

The Louisiana PSC opened an investigation into the Vidalia contract in 1999 which was subsequently settled in 2002. Opinion No. 480 P 183, JA 318. Pursuant to that settlement, Entergy Louisiana shares with its customers a portion of an accelerated deduction for the remaining life of the Vidalia contract, until 2031. *Id.* (citing Ex. CNO-1 at 5-6, JA 821-22 (Louisiana PSC Order No. U-20925)). Louisiana PSC Order No. U-20925 states that, during the first ten years, the ratepayers will receive a guaranteed credit of $88 to $110 million, and a potential additional $210 million, for a total of up to $320 million in credits. *Id*. The ratepayers will continue to receive credits through the fuel adjustment clause for the remaining twenty years of the contract. *Id.* The total credits to ratepayers may be $671 million over the life of the contract. *Id*.

These substantial tax benefits associated with the Vidalia project have been exclusively retained by Entergy Louisiana, with no benefit to other System

ratepayers. Opinion No. 480 P 184, JA 319. The retention of these tax benefits strongly suggests that Vidalia is an Entergy Louisiana-only resource. *Id.* Contrary to the Louisiana PSC's assertions that the tax settlement does not distinguish Vidalia from other resources, Louisiana PSC Br. 38, the Commission found that this tax settlement is for the exclusive guaranteed benefit of Entergy Louisiana and supports the Commission's finding that the Vidalia costs (along with Vidalia benefits) should stay with Entergy Louisiana. Opinion No. 480-A P 76, JA 366.

V. ISSUES CONCERNING IMPLEMENTATION OF THE COMMISSION'S BANDWIDTH REMEDY ARE NOT RIPE FOR REVIEW AS THEY ARE STILL PENDING BEFORE THE COMMISSION IN THE COMPLIANCE PROCEEDING.

Issues concerning implementation of the Commission's bandwidth remedy, Louisiana PSC Br. 39-44, are not ripe of review as these issues are still pending before the Commission in the Opinion No. 480 compliance proceeding.

In Opinion Nos. 480 and 480-A, in reliance on *Louisiana PSC v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *reh'g denied*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005), *remanded in relevant respect, Louisiana PSC v. FERC*, No. 05-1161, 2007 U.S. App. LEXIS 7596 (D.C. Cir. April 3, 2007), the Commission found that refunds were prohibited under FPA § 206(c), 16 U.S.C. § 824e(c), and that therefore the Commission's bandwidth remedy can be implemented only prospectively. Opinion No. 480 P 145, JA 306; Opinion No.

480-A P 59, JA 360. As Opinion Nos. 480 and 480-A were issued on June 1, 2005 and December 19, 2005 respectively, the Commission found that the prospective 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 306; Opinion No. 480-A P 54, JA 358. The Commission determined that the use of the first calendar year of data following the issuance of Opinion No. 480 was the most appropriate and equitable way to implement the bandwidth remedy. *Id.*

On appeal, the Louisiana PSC did not brief the issue of refunds, relying instead on the outcome of Docket No. 05-1161. Louisiana PSC Br. 44. Louisiana PSC did, however, complain that, although Opinion No. 480 issued on June 1, 2005, the first equalization payments under the bandwidth remedy would not be due until June 1, 2007. *Id.* 39-44.

On April 10, 2006, Entergy made a filing in compliance with Opinion Nos. 480 and 480-A. In *Louisiana PSC v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006) ("November 2006 Compliance Order"), the Commission ordered modifications to Entergy's compliance filing, and the Commission clarified the operation of its prospective bandwidth remedy. The Louisiana PSC, among others, sought rehearing of the November 2006 Compliance Order, arguing the

Commission's prospective remedy is being unduly delayed, and demanding interest on the bandwidth payments. *See* Louisiana PSC December 18, 2006, Request for Rehearing in FERC Docket No. EL01-88. Further, the Louisiana PSC incorporated into its request for rehearing all objections raised in this proceeding, including the argument that the Commission erred in finding it had no authority under FPA § 206 to order refunds. *Id*. To reiterate the point, in response to Entergy's December 18, 2006 revised compliance filing, the Louisiana PSC filed a protest again asserting all issues raised in this proceeding. *See* Louisiana PSC January 17, 2007, Protest filed in FERC Docket No. EL01-88.

The Louisiana PSC's request for rehearing, and its protest of Entergy's revised compliance filing, are pending before the Commission. On rehearing, and in the Louisiana PSC's protest, the issues of both retroactive refunds and the timing of FERC's prospective remedy have been raised. The Commission is now reconsidering these issues in light of this Court's decision in *Louisiana PSC v. FERC*, 2007 U.S. App. LEXIS 7596.

As a result, issues concerning implementation of the Commission's refund remedy are not ripe for review at this time. The Commission has now before it -- in the compliance proceeding where implementation is decided -- the issues of retroactive refunds and the timing of prospective relief, and the impact of this

Court's recent decision on those issues. As this Court has found, there is no injury in fact until the compliance filing is accepted. *New Mexico Attorney General v. FERC*, 466 F.3d 120, 122 (D.C. Cir. 2006); *DTE Energy Co. v. FERC*, 394 F.3d 954, 960-61 (D.C. Cir. 2005). For example, in *Amoco Production Co. v. FERC*, 271 F.3d 1119, 1123 (D.C. Cir. 2001), the Court dismissed a petition for review of a FERC order, notwithstanding the fact that the orders definitively rejected petitioners' argument, on the ground that the order was not final as the proceeding to which it related had not yet been adjudicated. Likewise, in *Northern Indiana PSC v. FERC*, 954 F.2d 736 (D.C. Cir. 1992), the Court found petitioners' challenge to FERC orders approving a utility's open-access transmission tariff premature, where the orders approved "the concept and outline of open-access" but did not give final authorization to conduct any open-access transactions. *Id*. at 740.

Similarly, here, Opinion Nos. 480 and 480-A approved the concept and outline of a remedy, but issues regarding the implementation of that remedy, and the ultimate imposition of payments on the Operating Companies, will not occur until the Commission finally resolves the issue of refunds and implementation of the bandwidth remedy in the compliance proceeding. Moreover, given the intervening issuance of this Court's opinion in *Louisiana PSC v. FERC*, the

Commission must assess the impact of that decision on these issues prior to finalization of the remedy implementation.

Should the Louisiana PSC be dissatisfied with the ultimate decision on implementation of the Commission's remedy, the Louisiana PSC can appeal the compliance proceeding orders. Accordingly, the Commission respectfully asks that the challenges to implementation of the Commission's bandwidth remedy be dismissed from this appeal as premature, pending Court review, if any, of the Commission's ultimate decision on implementation in the compliance proceeding.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), and this Court's order of November 9, 2006 specifying that Respondent's Brief is not to exceed 26,600 words, I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 17,016 words, not including the tables of contents and authorities, the glossary, the certificates of counsel and the addendum.

____
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