Nos. 13-60140 and 13-60141 (consolidated)

In the United States Court of Appeals for the Fifth Circuit

LOUISIANA PUBLIC SERVICE COMMISSION,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with Fifth Circuit Rule 28.2.4 and Federal Rule of Appellate Procedure 34(a)(1), the Federal Energy Regulatory Commission submits that oral argument would assist the Court's resolution of this case. The issues in this case concern certain aspects of the so-called "bandwidth remedy," required by the Commission and implemented through a Commission-approved tariff, which mandates an annual process of calculating and comparing the production costs of Entergy utilities operating in several states, then roughly equalizing those costs through payments and receipts among those utilities. The unique nature of and varying interests within the multistate Entergy system, and the relatively new bandwidth remedy in particular, have given rise to a number of agency and court proceedings prior to, concurrent with, and subsequent to the orders on review before this Court. Oral argument will enable counsel to answer any questions the Court may have regarding not only the particular issues presented in the orders on review but also the broader context of the bandwidth remedy implemented through Commission orders and Entergy's tariff, the unusual structure of the Entergy system, and numerous related regulatory and judicial proceedings.

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2006 Compliance Order	*La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006), *on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. July 6, 2009)
2007 Compliance Order	*La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095 (2007), *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. July 6, 2009)
ALJ	Administrative law judge
ALJ Decision	Initial Decision, *Entergy Servs., Inc.*, 128 FERC ¶ 63,015 (2009)
Arkansas or Arkansas Commission	Intervenor Arkansas Public Service Commission
Arkansas Complaint Order	Order Denying Complaint, *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 (2009), **on review in 5th Cir. No. 13-60140**
Commission or FERC	Respondent Federal Energy Regulatory Commission
Entergy	Entergy Corporation (corporate parent of the Operating Companies) or Entergy Services, Inc. (acting on behalf of Operating Companies)
[Entergy] Operating Company/ies	Individually or collectively, Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Gulf States Louisiana, L.L.C. and Entergy Texas, Inc. (which, prior to 2008, operated as a single entity, Entergy Gulf States, Inc.)

GLOSSARY

Entergy System or System	Generation and transmission facilities owned and operated by Entergy Operating Companies in Arkansas, Louisiana, Mississippi, and Texas
FERC Form 1	FERC Form No. 1, an annual report that major electric utilities must file with the Commission every April, pursuant to 18 C.F.R. § 141.1
First Bandwidth Proceeding	Agency proceeding concerning Entergy's first annual filing, in May 2007, of calculations of the Operating Companies' respective payments and receipts under the FERC-ordered bandwidth remedy for calendar year 2006
First Arkansas Rehearing Order	Order Denying Requests for Rehearing, *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 137 FERC ¶ 61,030 (2011), **on review in 5th Cir. No. 13-60140**
Fourth Bandwidth Proceeding	Agency proceeding concerning Entergy's fourth annual filing, in May 2010, of calculations of the Operating Companies' respective payments and receipts under the FERC-ordered bandwidth remedy for calendar year 2009
Fourth Bandwidth Rehearing Order	*Entergy Servs., Inc.*, 137 FERC ¶ 61,019 (2011), issued in October 2011 in the Fourth Bandwidth Proceeding
FPA	Federal Power Act
Louisiana or Louisiana Commission	Petitioner Louisiana Public Service Commission

GLOSSARY

Opinion No. 480	*La. Pub. Serv. Comm'n v. Entergy Corp.*, 111 FERC ¶ 61,311, *on reh'g*, 113 FERC ¶ 61,282 (2005), *aff'd in part and rev'd in part, La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008)
Opinion No. 480-A	*La. Pub. Serv. Comm'n v. Entergy Corp.*, 113 FERC ¶ 61,282 (2005), *aff'd in part and rev'd in part, La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008)
Opinion No. 505	*Entergy Servs., Inc.*, 130 FERC ¶ 61,023 (2010), *on reh'g*, 139 FERC ¶ 61,103 (2012), review pending in *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 12-1282 (D.C. Cir. filed July 5, 2012) (in abeyance)
Opinion No. 505-A	*Entergy Servs., Inc.*, 139 FERC ¶ 61,103 (May 7, 2012), review pending in *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 12-1282 (D.C. Cir. filed July 5, 2012) (in abeyance)
Opinion No. 514	Order Affirming in Part and Reversing in Part Initial Decision, *Entergy Servs., Inc.*, 137 FERC ¶ 61,029 (2011), *on reh'g*, 142 FERC ¶ 61,013 (2013), **on review in 5th Cir. No. 13-60141**
Opinion No. 514-A	Order Denying Rehearing, *Entergy Servs., Inc.*, 142 FERC ¶ 61,013 (2013), **on review in 5th Cir. No. 13-60141**
Opinion No. 518	*Entergy Servs., Inc.*, 139 FERC ¶ 61,105 (May 7, 2012)
Opinion No. 519	*La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107 (May 7, 2012)

GLOSSARY

Second Bandwidth Proceeding	Agency proceeding concerning Entergy's second annual filing, in May 2008, of calculations of the Operating Companies' respective payments and receipts under the FERC-ordered bandwidth remedy for calendar year 2007
Second Arkansas Rehearing Order	Order on Rehearing, *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,012 (2013), **on review in 5th Cir. No. 13-60140**
Service Schedule MSS-3	The rate schedule in the System Agreement that, as amended to comply with *Opinion Nos. 480 and 480-A*, sets forth the formula for calculating production costs and bandwidth payments and receipts
System Agreement	Tariff that acts as an interconnection and pooling agreement for the Entergy System and provides for the joint planning, construction, and operation of new generating capacity
Third Bandwidth Interlocutory Order	*Entergy Servs., Inc.*, 130 FERC ¶ 61,170 (2010), issued in March 2010 in the Third Bandwidth Proceeding
Third Bandwidth Proceeding	Agency proceeding concerning Entergy's third annual filing, in May 2009, of calculations of the Operating Companies' respective payments and receipts under the FERC-ordered bandwidth remedy for calendar year 2008
Vidalia	Vidalia Hydroelectric Power Plant, with which Entergy Louisiana has a long-term power purchase contract

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT REGARDING JURISDICTION

To the extent that Petitioner Louisiana Public Service Commission ("Louisiana" or "Louisiana Commission") attempts to relitigate matters decided in prior orders of the Federal Energy Regulatory Commission ("Commission" or "FERC") that are not on review, such efforts constitute impermissible collateral attacks that this Court lacks jurisdiction to consider. *See, e.g., Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 824-25 (D.C. Cir. 2008). *See infra* pp. 48-49

(addressing Louisiana's collateral attacks on earlier FERC orders approving revisions to Entergy's tariff).

The Commission does not take a position on the motion of the Arkansas Public Service Commission ("Arkansas Commission") to dismiss the petition for review in 5th Cir. No. 13-60140.[1] The Arkansas Commission's argument that the Louisiana Commission was not "aggrieved by" the FERC orders that dismissed the Arkansas Commission's complaint, as required for judicial review under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), is well-taken. (Louisiana does not explain what relief it hopes to obtain from reversal of those orders). As a practical matter, however, in those orders FERC explained, at some length, its treatment of retail depreciation rates for purposes of the bandwidth formula, and the appropriate avenues for challenging inputs and calculations under the bandwidth formula — issues that also are raised on review in 5th Cir. No. 13-60141. The Commission relied on that explanation in those and other FERC orders, and does so in this Brief (*see* Part II of the Argument, *infra*) — even if that discussion was only *dictum* in the particular orders concerning the Arkansas Commission's complaint.

[1] By order dated May 20, 2013, this Court directed that the motion be carried with the case.

STATEMENT OF THE ISSUES

In 2005, the Federal Energy Regulatory Commission determined that production costs across the multistate Entergy power system were not roughly equal and thus were unduly discriminatory, and imposed a remedy that would reallocate costs that deviated from an established "bandwidth" around the system average, as determined in annual proceedings. In 2006 and 2007, the Commission approved revisions to Entergy's tariff to implement the annual calculations and reallocation payments and receipts. The orders on review arise from subsequent proceedings concerning the interpretation and implementation of that tariff. The questions presented on appeal are:

(1) [In Case Nos. 13-60140 and 13-60141] Whether the Commission reasonably concluded that the depreciation variables specified in the bandwidth formula, which requires use of actual cost data, are elements of that filed rate that cannot be modified except through a rate change proceeding, and reasonably limited the scope of challenges in the annual bandwidth proceedings; and

(2) [In Case Nos. 13-60141 only] Assuming jurisdiction, whether the Commission reasonably found that language requiring certain capital cost adjustments had been properly included in the tariff with sufficient notice, given substantial record evidence that the language had a specific meaning in proceedings before the Louisiana Commission and FERC.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

These appeals concern orders that arose in two of the many proceedings that have followed from the Commission's 2005 decision to require an annual calculation of systemwide payments and receipts designed to achieve rough equalization of production costs. These five orders span much of the Commission's experience with implementing that remedy, and reflect its reasoned consideration of the Federal Power Act and the filed rate doctrine and its efforts to develop a reasonable and consistent approach to handling the multitude of disputes over bandwidth calculations.

The orders on review arise from two separate underlying FERC proceedings, but address some common issues. The orders on review in Case No. 13-60141 arise from Entergy's second annual filing (in May 2008) of bandwidth calculations. The Commission set the filing for a hearing before an administrative law judge ("ALJ"), who issued an initial decision in September 2009. *Entergy Servs., Inc.*, 128 FERC ¶ 63,015 (2009) ("ALJ Decision") (R. 364).[2] In the orders now on review, the Commission affirmed the ALJ Decision in part and reversed in part. *Entergy Servs., Inc.*, 137 FERC ¶ 61,029 (Oct. 7, 2011) ("*Opinion No. 514*")

[2] "R." refers to a record item. "P" refers to the internal paragraph number within a FERC order.

(R. 388), *reh'g denied*, 142 FERC ¶ 61,013 (Jan. 3, 2013) ("*Opinion No. 514-A*") (R. 399). As relevant here, the Commission reversed the ALJ's determination that certain actual, reported depreciation expenses for Entergy Arkansas should be adjusted for purposes of bandwidth calculations (*see* Part II of the Argument, *infra*), and affirmed the ALJ's finding that Entergy's calculations had appropriately adjusted Entergy Louisiana's capital structure in accordance with previously-approved language in the bandwidth formula (*see* Part III of the Argument, *infra*).

The orders on review in Case No. 13-60140 arise from a 2009 complaint by the Arkansas Commission that sought to remove language in Entergy's tariff that had given rise to disputes over depreciation inputs used in the first and second annual bandwidth filings. The Commission denied the complaint, *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 (July 14, 2009) ("*Arkansas Complaint Order*") (R. 16), and denied Arkansas's and Entergy's requests for rehearing of that order, 137 FERC ¶ 61,030 (Oct. 7, 2011) ("*First Arkansas Rehearing Order*") (R. 27). The Louisiana Commission then sought further rehearing, which the Commission also denied. 142 FERC ¶ 61,012 (Jan. 3, 2013) ("*Second Arkansas Rehearing Order*") (R. 30). (*See* Part II of the Argument, *infra*.)

These five orders are intertwined with a number of orders issued in other, contemporaneous proceedings that likewise addressed recurring disputes arising in

the annual calculation proceedings and related challenges to the bandwidth formula. For that reason, this Brief necessarily discusses the background and implementation of the bandwidth remedy, and places these orders in the broader context of those interrelated cases. (A timeline of bandwidth-related filings and orders is attached at the end of this Brief, and also included in the Addendum of Relevant FERC Orders.)

II. STATEMENT OF FACTS

A. Statutory And Regulatory Background

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

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

Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates are lawful. In a complaint proceeding, the complainant bears "the burden of proof to show that any rate . . . is unjust, unreasonable, unduly discriminatory, or preferential . . . ." FPA § 206(b), 16 U.S.C. § 824e(b); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (stating complainant's burden of proof). If the Commission finds that the burden has been met, it must determine and set the new just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

FERC regulations require large electric utilities to file an annual report, in a format specified by the Commission ("FERC Form 1"), each April. 18 C.F.R. § 141.1. *See also* 18 C.F.R. Part 101 (Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act).

B. The Entergy System and the System Agreement

The instant case stands against a backdrop of several decades of litigation over the allocation of costs under the Entergy System Agreement. *See infra* pp. 10-11. We begin with an overview of that unusual arrangement. (The D.C. Circuit provided a similar overview of the Entergy System in *Louisiana Public Service Commission v. FERC*, 522 F.3d 378, 383-85 (D.C. Cir. 2008) ("*Louisiana 2008*").)

The Entergy System comprises six Operating Companies selling electricity in Arkansas, Louisiana, Mississippi, and Texas.[3] *See Louisiana 2008*, 522 F.3d at 383. The Operating Companies are owned by a multistate holding company, Entergy Corporation.[4] *Id.* (What is now the Entergy System originated under Middle South Utilities, Inc., which owned most of the Operating Companies' predecessors.) Transactions among the Entergy Operating Companies are governed by the System Agreement. *Miss. Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987); *Louisiana 2008*, 522 F.3d at 383.

The Entergy System is highly integrated, with the Operating Companies' transmission and generation facilities operated as a single electric system. *See Louisiana 2008*, 522 F.3d at 383; *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 113 FERC ¶ 61,282 at P 8 (2005) ("*Opinion No. 480-A*"), *aff'd in part by*

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[3] Those Operating Companies are: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy New Orleans, Inc.; and Entergy Texas, Inc. Previously, an Operating Company named Entergy Gulf States, Inc. sold electricity in both Louisiana and Texas. In 2007, that company separated into Entergy Gulf States Louisiana, L.L.C. and Entergy Texas, Inc. *See Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007) (authorizing separation plan).

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

Louisiana 2008; *see generally Louisiana 2008*, 522 F.3d at 394 ("the operating companies are collaborators in the Entergy System functioning for their *mutual* benefit"). The Entergy System primarily allocates the costs and benefits of new generation resources through a centralized planning process that assigns new resources to individual Operating Companies, on a rotating basis. *See Louisiana 2008*, 522 F.3d at 383-84.

The System Agreement also allocates the costs of imbalances in the cost of facilities used for the mutual benefit of all the Entergy Operating Companies. *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) ("[K]eeping excess capacity available for use by all is a benefit shared by the operating companies, and the costs associated with this benefit must be allocated among them."). The System Agreement requires that production costs be roughly equal among the Operating Companies. *Louisiana 2008*, 522 F.3d at 384; *see also Miss. Indus.*, 808 F.2d at 1530 (affirming FERC orders that allocated costs of nuclear generation investments to operating companies in proportion to demand for system energy). Thus, since the first System Agreement in 1951, the System has sought to iron out inequities through "equalization payments." *Id.*

Nevertheless, over the history of the System Agreement, the Commission has twice (in 1985 and 2005) found that disparities in production costs among the Operating Companies had disrupted the rough equalization required by the System

Agreement and resulted in undue discrimination, requiring a Commission-ordered remedy. *See Louisiana 2008*, 522 F.3d at 384, 386 (describing both instances); *id.* at 391-94 (affirming Commission's 2005 finding of undue discrimination and "bandwidth" remedy for rough equalization of production costs); *Miss. Indus.*, 808 F.2d at 1553-58 (affirming Commission's 1985 finding of undue discrimination and remedy of reallocating nuclear investment costs). The orders on review in the instant case arise from the implementation of the bandwidth remedy imposed in 2005. *See infra* pp. 14-15.

Because the Entergy System spans four states and involves a number of retail regulators and other interested parties — and, in particular, because the allocation of costs and resources among the Operating Companies affects retail rates in several jurisdictions — that arrangement has given rise to many federal appeals over the past three decades. *See Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (filing of 1982 System Agreement); *Miss. Indus.*, 808 F.2d 1525 (allocation of nuclear investment costs); *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989) (same, after remand); *City of New Orleans v. FERC*, 67 F.3d 947 (D.C. Cir. 1995) (costs of future replacement capacity after spin-off of generation plants); *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999) (determination of Operating Companies' available capability for purposes of cost equalization); *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999)

(allocation of capacity costs); *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (same, after remand); *Louisiana 2008*, 522 F.3d 378 (reallocation of production costs through bandwidth remedy); *La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008) (allocation of generation resources); *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. July 6, 2009) ("*Louisiana 2009*") (methodology for bandwidth calculations); *Council of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (withdrawal of certain Operating Companies from System Agreement), *cert. denied*, 133 S. Ct. 2382 (2013). Additional cases are currently pending before the D.C. Circuit, in *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. Nos. 12-1282, *et al.* (D.C. Cir. filed July 5, 2012) (first annual bandwidth proceeding); and *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 13-1155 (D.C. Cir. filed May 2, 2013) (allocation of capacity costs, after remand). The multi-state nature of the Entergy System also has brought cost allocation disputes to the U.S. Supreme Court. *See Entergy La.*, 539 U.S. 39 (preemption of state regulatory jurisdiction as to cost allocation); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988) (same).

The consequences of the instant case will be limited somewhat by impending changes to the Entergy System. Both Entergy Arkansas and Entergy Mississippi will terminate participation in the System Agreement in the near future: Entergy Arkansas in December 2013 and Entergy Mississippi in November

2015. *See New Orleans*, 692 F.3d at 174-77 (affirming FERC's conclusion that, after eight years advance notice, System Agreement imposed no further conditions or obligations on termination, including participation in the bandwidth remedy after withdrawal).

C. The Vidalia Contract and Louisiana Commission Orders

In 1985, Entergy Louisiana's predecessor entered into a long-term contract to purchase most of the output from the Vidalia Hydroelectric Power Plant ("Vidalia") in Louisiana. The Vidalia plant was developed to benefit Louisiana, not through Entergy's centralized system planning. *See Louisiana 2008*, 522 F.3d at 396; *La. Pub. Serv. Comm'n v. Entergy Corp.*, 111 FERC ¶ 61,311 at P 174 (2005) ("*Opinion No. 480*"); *see also id.* at P 175 ("The Vidalia contract was the product of a unique accommodation between the Louisiana Commission 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."). For that contract, the Louisiana Commission approved a phased-in rate schedule that escalated the costs of the purchased energy over the years. *Louisiana 2008*, 522 F.3d at 385. The Louisiana Commission also guaranteed full recovery of the Vidalia plant costs through Louisiana ratepayers. *See id.* at 396; *Opinion No. 480* at PP 175, 178.

In 2002, the Louisiana Commission approved a retail ratemaking settlement with Entergy Louisiana under which the latter would exclusively retain Vidalia's accelerated federal tax deductions for the remaining life of the contract, and would flow those tax benefits in part to retail ratepayers in Louisiana. *See* 522 F.3d at 396; *Opinion No. 514* at P 56; *Opinion No. 480* at P 183. In its order adopting that tax settlement, the Louisiana Commission directed that Entergy Louisiana would maintain its pre-existing capital structure in any rate proceeding for a ten-year period. *See In re Entergy La.*, Docket No. U-20925, 2002 WL 31618829, at *10 (La. Pub. Serv. Comm'n 2002). Thus, in subsequent retail rate cases before the Louisiana Commission, Entergy Louisiana's capital structure was accordingly adjusted to "reverse[]" debt and equity related transactions resulting from application of the tax deduction proceeds. *Opinion No. 514* at P 74; *see also infra* pp. 53-54.

D. The FERC Proceedings and Orders

1. The Bandwidth Remedy and Related Proceedings

The orders challenged on appeal are properly understood within the context of similar orders issued in related FERC matters that proceeded simultaneously, including the first four annual bandwidth filings and several separate complaints. For that reason, the Commission provides the following overview of relevant filings and orders, and attaches a timeline in the Addendum to this Brief (and also

in the Addendum, with copies of key orders), to aid the Court's understanding of the array of overlapping proceedings and the Commission's development of its rulings on bandwidth issues.

Bandwidth Remedy Proceeding. The bandwidth remedy arose from a complaint filed by the Louisiana Commission, which asserted that the cost allocations among the Entergy Operating Companies had become unjust, unreasonable, and unduly discriminatory. The Commission set the matter for hearing before an administrative law judge, who found that the production costs of the Entergy Operating Companies were no longer in rough equalization, due to disparate fuel costs. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 106 FERC ¶ 63,012 at P 25 (2004). Accordingly, the ALJ developed numerical percentage "bandwidths" to establish the outside bounds by which production costs would be permitted to deviate from the System average, to be remedied through equalization payments among the Operating Companies. *Id.* at PP 43, 50.

The Commission affirmed the adoption of a bandwidth formula as a remedial device. *Opinion No. 480* at PP 1, 14, *on reh'g, Opinion No. 480-A* at PP 1, 4. The Commission agreed that the allocation of production costs among the Entergy Operating Companies was no longer just and reasonable. *Opinion No. 480* at PP 28-30. To remedy that situation, the Commission adopted the bandwidth remedy and set the acceptable range of cost disparities to +/– 11 percent from the

System average. *Id.* at PP 136, 144. The Commission determined that comparisons of production costs among the Operating Companies should follow the methodology that Entergy had proposed. *Id.* at P 33. The Commission also determined that the Vidalia plant was not a "System resource" for purposes of calculating Entergy Louisiana's production costs to apply the bandwidth remedy. *Id.* at PP 173-84. The Commission cited the 2002 settlement with the Louisiana Commission as evidence that Vidalia was an Entergy Louisiana-only resource, and ruled that the benefits of the Vidalia tax deduction should not flow to ratepayers throughout the Entergy System. *Id.* at P 184.

On appeal, the D.C. Circuit held that the Commission had jurisdiction to impose the bandwidth formula and that the remedy was reasonable, supported by substantial evidence, and well within the Commission's broad remedial discretion. *Louisiana 2008*, 522 F.3d at 383, 391-94. The court also affirmed the Commission's ruling as to the Vidalia plant, agreeing that substantial record evidence showed that Vidalia was "an Entergy Louisiana-only resource" and that shifting its costs to other states in the Entergy System by including it in bandwidth calculations would be inappropriate. 522 F.3d at 396-97.

Compliance Filings Implementing Bandwidth Remedy. In April 2006, as directed by the Commission in *Opinion No. 480*, Entergy proposed amendments to the System Agreement to implement the bandwidth remedy, which the

Commission accepted with modifications in November 2006; Entergy submitted a further compliance filing in December 2006, which the Commission accepted in April 2007. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006) ("*2006 Compliance Order*"), *on reh'g and compliance*, 119 FERC ¶ 61,095 (2007) ("*2007 Compliance Order*"), *aff'd*, *Louisiana 2009*, 341 F. App'x 649. In those filings, Entergy modified Service Schedule MSS-3 to the System Agreement to add new sections 30.11 through 30.14, which prescribed a formula rate methodology (based on Exhibits ETR-26 and ETR-28 that Entergy had submitted in the bandwidth remedy proceeding[5]) for comparing production costs among the Entergy Operating Companies and roughly equalizing their respective shares of the Entergy System's costs through inter-company payments and receipts. *See 2006 Compliance Order* at PP 24-27, 63; *2007 Compliance Order* at P 48. The calculations would be based on data reported in Entergy's annual FERC Form 1, filed each April (covering the previous calendar year). *See 2006 Compliance Order* at PP 46-47.

Annual Bandwidth Proceedings. In *Opinion No. 480*, the Commission ruled that the bandwidth remedy would be effective starting with the 2006 calendar

[5] Exhibit ETR-26 compared historical production costs of the Operating Companies for 1983-2002. Exhibit ETR-28 was a production cost analysis for September 2001 through August 2002 that detailed the figures supporting the data in Exhibit ETR-26. *First Arkansas Rehearing Order* at P 15 n.19.

year. *Id.* at P 145. Entergy therefore initiated the first annual proceeding to implement the bandwidth remedy in May 2007 ("First Bandwidth Proceeding"), filing its calculations of cost disparities and the Operating Companies' respective bandwidth payments or receipts based on production cost data for calendar year 2006. The Commission set the matter for hearing before an administrative law judge (*Entergy Servs., Inc.*, 120 FERC ¶ 61,094 (2007)), who issued his initial decision in September 2008. *Entergy Servs., Inc.*, 124 FERC ¶ 63,026 (2008). On exceptions to many of the ALJ's findings, the Commission affirmed on some issues and reversed on others; of relevance here, the Commission reversed the ALJ's adjustment of certain depreciation expenses in *Entergy Servs., Inc.*, 130 FERC ¶ 61,023 (2010) ("*Opinion No. 505*"), *on reh'g*, 139 FERC ¶ 61,103 (2012) ("*Opinion No. 505-A*"). The Louisiana Commission petitioned for review of those orders before the D.C. Circuit; that appeal remains pending in abeyance. *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 12-1282 (D.C. Cir. filed July 5, 2012).

Entergy initiated the second annual bandwidth proceeding in May 2008 ("Second Bandwidth Proceeding"). Following a hearing and an initial decision by the ALJ, the Commission issued two of the orders on review before this Court — *Opinion Nos. 514* and *514-A* (discussed *infra* at pp. 23-25).

The third annual bandwidth proceeding began in May 2009 ("Third Bandwidth Proceeding"). The Commission again set the matter for hearing before

an ALJ; in March 2010, the Commission denied an interlocutory appeal of a decision by the ALJ to remove depreciation issues from the hearing. *Entergy Servs., Inc.*, 130 FERC ¶ 61,170 (2010) ("*Third Bandwidth Interlocutory Order*"). Following the hearing, the Commission affirmed the ALJ's decision on various issues. *Entergy Servs., Inc.*, 139 FERC ¶ 61,105 (2012) ("*Opinion No. 518*"), *reh'g and compliance pending*.

Entergy initiated the fourth annual bandwidth proceeding in May 2010 ("Fourth Bandwidth Proceeding"). The Commission issued an order setting the matter for hearing, and subsequently ruled on the Louisiana Commission's request for rehearing regarding the scope of that proceeding, again concerning depreciation inputs. *Entergy Servs., Inc.*, 132 FERC ¶ 61,065 (2010), *on reh'g*, 137 FERC ¶ 61,019 (2011) ("*Fourth Bandwidth Rehearing Order*"), *reh'g pending*.

The fifth, sixth, and seventh annual bandwidth proceedings (filed each May in 2011, 2012, and 2013, in FERC Docket Nos. ER11-3658, ER12-1920, and ER13-1595, respectively) remain pending before the Commission.

Other Related FERC Proceedings. In addition to the various annual bandwidth proceedings, the Commission also has addressed similar issues in several proceedings on complaints (including a complaint by the Arkansas Public Service Commission, which was addressed in the orders on review in 5th Cir. No. 13-60140, discussed *infra* at pp. 20-23).

The Louisiana Commission filed three complaints related to the calculations for the bandwidth remedy. In 2008, Louisiana raised a number of issues concerning Entergy's methodology and inputs in calculating production costs; the Commission dismissed all issues "covering methodology deviation and the justness and reasonableness of cost inputs" — including, as relevant here, a challenge to the cost inputs for depreciation and decommissioning — because they were "currently before the Commission" in the First Bandwidth Proceeding. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010 at P 27 (2008).

In March 2010 (shortly after the Commission had, in *Opinion No. 505* and *Third Bandwidth Interlocutory Order*, clarified that the depreciation components of the bandwidth formula cannot be challenged in annual calculation proceedings), Louisiana filed a complaint seeking to require application of uniform accounting standards in bandwidth remedy calculations, without regard to retail depreciation rates. The Commission found that Louisiana had raised issues of material fact as to whether the depreciation inputs were just and reasonable and set the matter for hearing. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,003 (2010). Following that hearing, the Commission affirmed the administrative law judge's conclusion that Louisiana had not met its burden, as a complainant under section 206 of the Federal Power Act, of demonstrating that the depreciation expenses, inputs and/or provisions of the existing bandwidth formula were unjust,

unreasonable, or unduly discriminatory or preferential. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107 at P 24 (May 7, 2012) ("*Opinion No. 519*"), *reh'g pending*.

On the same day it issued *Opinion No. 519* on Louisiana's 2010 complaint, *Opinion No. 505-A* in the First Bandwidth Proceeding, and *Opinion No. 518* in the Third Bandwidth Proceeding, the Commission also issued an order on another Louisiana complaint concerning a different bandwidth calculation dispute. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,102 (May 7, 2012), *reh'g pending*. In a 2011 complaint, Louisiana asked the Commission to remove from bandwidth calculations certain expenses and revenues that related to the period before the bandwidth remedy took effect. The Commission left the issue of prospective relief to be addressed in another ongoing proceeding, but denied Louisiana's request for retrospective adjustments to calculations in the second and third annual bandwidth filings, because those calculations had used the inputs required by the existing bandwidth formula. *Id.* at PP 26-27.

2. Orders on Review in 5th Cir. No. 13-60140: The Arkansas Complaint Orders

a. Arkansas Complaint Order

In March 2009 (after disputes over depreciation inputs had arisen in the ALJ hearing in the First Bandwidth Proceeding and in Louisiana's 2008 complaint) the Arkansas Commission filed a complaint seeking to modify Service Schedule MSS-

3 to the System Agreement. The Arkansas Commission sought to remove certain language from the provisions concerning depreciation rates for nuclear generating units to be used in calculating production costs under the bandwidth formula; the language at issue indicated that FERC could have jurisdiction over some depreciation rates.[6]

The Commission denied the complaint, concluding that Arkansas had failed to meet its burden, under Federal Power Act § 206, to show that the existing rate was unjust and unreasonable. *Arkansas Complaint Order* at P 23. The Commission noted that most of Arkansas's arguments were directed to the ALJ decision in the First Bandwidth Proceeding, rather than to the complaint. *Id.* at

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[6] Section 30.12 (Actual Production Costs) sets forth formulas and defines the inputs to be used in calculating each Operating Company's production costs. The Arkansas complaint pointed, in particular, to two definitions relating to depreciation of nuclear units:

> •[NAD] Nuclear Accumulated Provision for Depreciation and Amortization (with certain adjustments) "as recorded in FERC Accounts 108, 111 and 115 [on FERC Form 1] (consistent with the accounting . . . approved by the retail regulator having jurisdiction over the [Operating] Company, unless the FERC determines otherwise)"
>
> •[NDE] Nuclear Depreciation and Amortization Expense "as recorded in FERC Accounts 403, 404 and 406 and Decommissioning Expense, as approved by Retail Regulators, unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the FERC under otherwise applicable law"

See Arkansas Complaint Order at P 5. Arkansas sought to remove the "unless" clauses that refer to FERC. *Id.*

P 24. The Commission also explained that, under the bandwidth remedy, the Commission could examine the inputs used in the calculation to ensure that they are just and reasonable; therefore, the tariff language was appropriate and consistent with the Commission's statutory authority. *Id.* at P 25.

b. First Arkansas Rehearing Order

The Arkansas Commission and Entergy sought rehearing of the Arkansas Complaint Order. R. 17; R. 18. On October 7, 2011 — on the same day that it issued *Opinion No. 514* and one day after it issued the *Fourth Bandwidth Rehearing Order* — the Commission denied the requests for rehearing, citing its "clarification in a number of [intervening] orders . . . of the treatment of depreciation expenses in the annual bandwidth proceedings." *First Arkansas Rehearing Order* at P 19; *see also id.* at PP 20-22 (discussing *Opinion No. 505*, *Third Bandwidth Interlocutory Order*, and *Fourth Bandwidth Rehearing Order*). The Commission further clarified that it had "not intended to suggest that the justness and reasonableness of the various inputs to the bandwidth formula was open to challenge in the bandwidth proceedings." *Id.* at P 23. Rather, the inputs "should be examined to make sure that the correct data was used in determining the bandwidth payments." *Id.*

c. Second Arkansas Rehearing Order

The Louisiana Commission requested rehearing of the *First Arkansas Rehearing Order*. R. 28. On January 3, 2013 (the same day that it issued *Opinion No. 514-A*), the Commission denied that request because it "does not allow rehearing of an order denying rehearing" where such order does not modify the original result, as "[a]ny other result would lead to never-ending litigation . . . ." *Second Arkansas Rehearing Order* at P 23. The Commission, however, noted that the *First Arkansas Rehearing Order* had clarified the treatment of depreciation inputs, and went on "to further clarify" the scope of annual bandwidth proceedings and the various avenues for challenging inputs to the bandwidth formula. *Second Arkansas Rehearing Order* at PP 25-42; *see* Argument, Part II.B, *infra*.

3. Orders On Review in 5th Cir. No. 13-60141: The Second Bandwidth Proceeding Orders

a. Opinion No. 514

As noted *supra* at pp. 4-5 and 17, the other two orders on review arise from the Second Bandwidth Proceeding. On exceptions to the ALJ Decision raised by various parties, the Commission ruled on a number of matters in *Opinion No. 514*, issued on October 7, 2011. As relevant here, Entergy and Arkansas challenged the ALJ's (pre-*Opinion No. 505*) determination that Entergy's depreciation inputs should be based on figures other than the actual, reported depreciation expenses.

See Opinion No. 514 at PP 11-31.[7] The Louisiana Commission challenged the ALJ's determination that Entergy had properly adjusted Entergy Louisiana's capital structure to account for reversal of the Vidalia transaction. *See Opinion No. 514* at PP 56-71.

As discussed more fully in Part II of the Argument, the Commission in *Opinion No. 514* reversed the ALJ's decision as to the depreciation inputs, consistent with intervening Commission precedents (*Opinion No. 505* and *Third Bandwidth Interlocutory Order*), and further explained its treatment of those inputs. *Opinion No. 514* at PP 48-53. As discussed more fully in Part III of the

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[7] In addition to the definitions quoted *supra* in note 6, Section 30.12 of Service Schedule MSS-3 also defines certain other depreciation inputs:

> •Depreciation and Amortization Expense associated with certain plant investments "as recorded in FERC Accounts 403 and 404, as approved by Retail Regulators unless the jurisdiction for determining the depreciation rate is vested in the FERC under otherwise applicable law." [DEXN]
>
> • Accumulated Provision for Depreciation and Amortization associated with certain plant investments and coal mining equipment Amortization (with certain adjustments), "as recorded in FERC Accounts 108 and 111 . . . (consistent with the accounting . . . approved by the retail regulator having jurisdiction over the [Operating] Company, unless the FERC determines otherwise)" [ADXN]

Opinion No. 514 at PP 19, 20 & n.27; *see also Opinion No. 514-A* at P 4 & n.8. These definitions "are analogous to the definitions of NAD and NDE" quoted in note 6. *First Arkansas Rehearing Order* at P 22 n.27.

Argument, the Commission affirmed the ALJ's decision in all respects as to the Vidalia adjustment. *Id.* at PP 72-78.

b. Opinion No. 514-A

The Louisiana Commission requested rehearing on both issues. R. 389. (Another party, East Texas Cooperatives, sought rehearing on issues not raised before this Court.) On January 3, 2013, the Commission denied rehearing in *Opinion No. 514-A* (issued together with the *Second Arkansas Rehearing Order*). As discussed more fully in the Argument, the Commission reaffirmed and further explained its rulings on both the depreciation and Vidalia issues.

These appeals followed.

SUMMARY OF ARGUMENT

In previous orders, the Commission established the bandwidth remedy to ensure rough equalization of production costs across the multistate Entergy System, and approved Entergy's revisions to its tariff to implement the requisite formula for calculating and comparing costs. In the orders on review here, together with numerous similar orders in other bandwidth-related proceedings, the Commission has reasonably limited the scope of challenges to annual bandwidth filings and developed a reasonable approach to bandwidth disputes that is consistent with the Federal Power Act, the provisions of the tariff, and its own precedents.

In both sets of orders on review, the Commission reasonably concluded that depreciation variables in the bandwidth calculations should be based on the actual costs reported on Entergy's books, rather than on imputed figures determined by the Commission itself. The bandwidth formula requires actual production cost data, which include reported expenses that reflect depreciation rates approved by the Operating Companies' respective retail regulators. The Commission appropriately determined that, in accepting a bandwidth formula that incorporated such retail components, it had not delegated its own regulatory authority over the formula. The Commission also reasonably interpreted references to its own

jurisdiction in the tariff definitions of depreciation components as referring to depreciation expenses charged in FERC-approved wholesale transactions.

Furthermore, the Commission appropriately held that challenges to the depreciation components defined in the tariff are challenges to the bandwidth formula itself — the existing filed rate — and that any change to that formula must be made pursuant to Federal Power Act § 205 (for a change proposed by Entergy itself, which must be found just and reasonable) or § 206 (requiring the existing rate to be proved unjust and unreasonable, then replaced by a just and reasonable alternative). Indeed, the Louisiana Commission did challenge the bandwidth formula components directly, in a complaint under FPA § 206 — and was found, by an ALJ after a full hearing and by the Commission (in an order that is not on review here), to have failed to make its case on the merits.

The Commission has, in these and other orders, repeatedly and thoroughly explained its decision to limit the scope of annual bandwidth proceedings to whether the calculations are correct and based on the data specified in the tariff, and whether particular costs were prudently incurred. The Commission's approach, which it clarified in its first ruling on any annual bandwidth filing and has consistently followed in its subsequent orders (including in the cases on review here), is properly grounded in the filed rate doctrine, in the Commission's expertise with rate design and FPA filings, and in its ever-increasing experience with

multiple bandwidth-related disputes — including the annual filings that could become a "free for all" if every party could litigate its desired adjustments to the inputs.

The Commission also reasonably concluded that the Vidalia-related adjustments to Entergy Louisiana's capital structure were appropriate. The Commission found that Louisiana's challenge to those adjustments was an impermissible collateral attack on the Commission's earlier approval of Entergy's tariff, which implemented the Commission's determination that costs related to the Vidalia plant should not be spread through the Entergy System in the bandwidth calculations. The Commission reasonably determined that the tariff language had been sufficiently noticed, and that the tariff incorporated language that had a specific meaning in the Louisiana Commission's own state regulatory proceedings — in its own issued orders, in documents and testimony received in its own proceedings, and in its own submissions to FERC — that the Louisiana Commission could not plausibly claim not to understand.

ARGUMENT

I. STANDARD OF REVIEW

Courts review FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Louisiana 2008*, 522 F.3d at 391; *Brazos Elec. Power Coop., Inc. v. FERC*, 205 F.3d 235, 240 (5th Cir. 2000). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The court "must examine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Brazos*, 205 F.3d at 240 (internal quotation marks and citation omitted). This standard of review is "highly deferential to the administrative agency whose final decision is being reviewed." *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)).

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001)

("Because issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citations omitted). *See also Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) ("In reviewing FERC's orders, we are 'particularly deferential to the Commission's expertise' with respect to ratemaking issues.") (citation omitted).

Additionally, applying the standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts afford substantial deference to the Commission's interpretation of filed tariffs even where the issue simply involves the proper construction of language. *See Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b); *see Transcont'l Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1320 (5th Cir. 1993). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Louisiana 2008*, 522 F.3d at 395

(internal quotation marks and citation omitted); *accord, U.S. Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 255 (5th Cir. 2004). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotation marks and citation omitted); *accord U.S. Cellular Corp.*, 364 F.3d at 255. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *see also La. Pub. Serv. Comm'n v. FERC*, 688 F.2d 357, 360 (5th Cir. 1982) ("in reviewing the facts relied upon by FERC in reaching its decision, this Court must only decide whether the facts relied upon by FERC are supported by substantial evidence"); *U.S. Cellular Corp.*, 364 F.3d at 256 (substantial evidence standard is "'highly deferential'") (citation omitted).

II. THE COMMISSION REASONABLY HELD THAT CHALLENGES TO DEPRECIATION INPUTS ARE CHALLENGES TO THE FORMULA ITSELF AND CANNOT BE RAISED IN ANNUAL BANDWIDTH PROCEEDINGS

In both sets of orders on review, the Commission properly interpreted the Federal Power Act, Entergy's FERC-approved tariff, and the Commission's own precedents in determining that the depreciation variables in the bandwidth formula are elements of a filed rate that requires the use of actual, not imputed, data. For that reason, the Commission appropriately concluded that challenges to those inputs in the annual bandwidth filings are limited to the correctness of the data or

the prudence of the costs, while proposals to modify the formula itself require rate change proceedings under the Federal Power Act.

A. The Commission Reasonably Declined To Substitute Modified Amounts For The Depreciation Inputs Defined In Entergy's Tariff

Louisiana challenges Entergy's use, for purposes of calculating the Operating Companies' production costs under the bandwidth formula, of the Companies' actual depreciation expenses, as determined in accordance with depreciation rates established by each of their respective state regulators. Br. 22-32. (Louisiana objects, in particular, to the treatment of certain nuclear plant costs for Entergy Arkansas, because Louisiana believes that the depreciation rates set by the Arkansas Commission for those plants were inappropriate. *See* Br. 15-16.) The Commission's rulings, however, are consistent with the tariff and the Federal Power Act.

1. The Bandwidth Formula Requires Calculations Using Actual Production Cost Data As Reported On Entergy's Books

The bandwidth formula, as set forth in FERC-approved provisions in the System Agreement, requires Entergy to calculate each Operating Company's actual production costs, using figures reported on FERC Form 1 in accordance with FERC reporting requirements. *La. Pub. Serv. Comm'n*, 139 FERC ¶ 61,102 at P 26. Indeed, section 30.12 of Service Schedule MSS-3 is titled "Actual

Production Costs." *Opinion No. 514* at PP 11, 47. That section expressly provides that, in determining each Operating Company's production costs, "[a]ll Rate Base, Revenue and Expense items shall be based on the actual balances on the Company's books" at the end of the previous calendar year. *Id.* at P 58 n.84 (quoting Service Schedule MSS-3, Sec. 30.12, Footnote 1). Accordingly, the Commission has interpreted the tariff as "mandat[ing] that Entergy use *the actual data that exists on the Operating Companies' books*" for each bandwidth year. *Opinion No. 505* at P 171; *see also Opinion No. 518* at P 26 ("the word 'actual' refers to data as reported in the FERC Form 1").

That actual data includes certain depreciation expenses, as defined in Service Schedule MSS-3. *See Opinion No. 514* at P 47 ("[S]ection 30.12 requires that depreciation expense, as well as all other expense items, be based on the actual amounts on the Company's books for the [previous calendar year] as reported in FERC Form 1."); *Second Arkansas Rehearing Order* at P 36 (quoting Schedule MSS-3 definition of "Depreciation and Amortization Expense" variable, which specifies certain FERC Accounts reported on FERC Form 1); *accord, Opinion No. 505* at P 172; *see also Opinion No. 514* at P 54 (tariff definition of depreciation variable "establishes *where* Entergy is to get the information to populate the variable" — i.e., from specified FERC Accounts reported on FERC Form 1); *id.* at P 52 n.70 (noting that Entergy had used actual depreciation expenses in developing

the methodology in Exhibit Nos. ETR-26 and ETR-28). Those inputs include "depreciation and amortization expenses approved by retail regulators." *Second Arkansas Rehearing Order* at P 37; *accord, Opinion No. 514* at P 49 (depreciation expenses reported in FERC Form 1 "reflect[], in part, state regulator approved depreciation rates").

The Commission's consistent rulings that "Actual Production Costs" under the bandwidth formula include expenses that reflect retail regulator-approved depreciation rates do not, as Louisiana contends (Br. 24-27), amount to a "subdelegation" of FERC's authority to retail regulators: "The fact that the Commission has accepted a formula that utilizes inputs that may have been determined at the state level does not constitute a delegation of our jurisdiction over depreciation expenses." *Opinion No. 519* at P 111, *cited in Opinion No. 514-A* at P 17; *accord, Opinion No. 514* at P 52 ("The fact that the Commission utilizes inputs that may have been determined at the state level does not make it a delegation of authority."). When the Commission reviewed and accepted the bandwidth provisions in Service Schedule MSS-3, it approved "[s]uch specification and incorporation of retail regulator-approved depreciation rates . . . as a just and reasonable element of the bandwidth formula methodology." *Opinion No. 514-A* at P 17 (citing *2006 Compliance Order*); *see also Opinion No. 514* at P 52 ("The Commission previously approved Entergy's compliance filings

implementing the bandwidth formula, which include the use of actual depreciation expenses as approved by the relevant state commissions, as just and reasonable.") (citing *2007 Compliance Order*); *id.* at n.70 (noting that such expenses were used in Exhibit Nos. ETR-26 and ETR-28, which introduced the methodology that the Commission explicitly endorsed in *Opinion No. 480* and approved in the *2006* and *2007 Compliance Orders*).

For that reason, the Commission has explained that each annual bandwidth proceeding is "not about what production costs would have been if different depreciation rates had been in effect in [the previous year], but simply about applying the formula using actual . . . data." *Opinion No. 505* at P 173, *cited in First Arkansas Rehearing Order* at P 20. The Commission's interpretation is not only faithful to the express terms of the tariff but also mindful of the purpose of the bandwidth remedy: to determine whether the actual production costs of the Operating Companies operating in different retail jurisdictions were roughly equal in a given year, and to reallocate those costs if they were not. "[T]he purpose of the annual bandwidth filings is to apply the specified formula using *actual* data to determine whether or not there was rough equalization, and not to determine what production costs would have been if different depreciation rates had been in effect for the relevant period." *Third Bandwidth Interlocutory Order* at P 20, *quoted in Opinion No. 514* at PP 48, 53.

2. The Commission Reasonably Interpreted References To Its Jurisdiction In The Tariff Definitions Of The Depreciation Variables

Louisiana argues that the "unless" clauses in tariff definitions of depreciation variables provide for the Commission to determine whether each depreciation input is just and reasonable. Br. 30-32; *see supra* notes 6 and 7 (quoting tariff). The Commission, however, found the references to FERC jurisdiction in those variables to be ambiguous (*Opinion No. 514* at P 54); therefore, its interpretation, if reasonable, is entitled to *Chevron* deference. *See Koch Gateway Pipeline Co.*, 136 F.3d at 814.

As explained *supra* at p. 33, the first part of each definition specifies from where, in accounts reported in FERC Form 1, Entergy must draw cost figures to populate the variable. *Opinion No. 514* at P 54. Accordingly, the Commission interpreted the references to FERC jurisdiction in the "unless" clauses to "refer to depreciation expenses charged to traditional wholesale customers that were approved by the Commission, rather than being a reference to the Commission substituting its own depreciation expenses in the bandwidth proceedings" for actual reported depreciation expenses as determined by retail regulators. *First Arkansas Rehearing Order* at P 22; *see also Opinion No. 514* at P 54 (nothing in the second half of each definition expressly provides that the Commission will mandate use of any alternative figures). Indeed, under the alternative interpretation

that Louisiana urges — that each "unless" clause refers to the Commission's exclusive jurisdiction over the bandwidth formula — that clause "would *always* apply and the remaining language of the definition would be rendered meaningless." *Opinion No. 514* at P 54 (emphasis added); *accord*, *Opinion No. 514-A* at P 16.

3. The Bandwidth Formula In Entergy's Tariff Is The Filed Rate

The Commission has further explained that modifying those actual depreciation variables — such as by substituting different depreciation rates, as Louisiana demands (*see* Br. 28-32) — would change the formula itself: "Replacing actual state approved depreciation expense inputs required for use by the bandwidth formula with reconstructed inputs would explicitly alter the depreciation component" of that formula. *Opinion No. 514* at P 51; *see also Second Arkansas Rehearing Order* at P 38 ("Allowing independent challenges to formula rate components that are essentially fixed would open the door to essentially reading out the precise terms of a contract . . . ."); *La. Pub. Serv. Comm'n*, 139 FERC ¶ 61,102 at P 26 (alteration of bandwidth inputs would improperly change the formula in effect), *cited in Second Arkansas Rehearing Order* at P 40.

Accordingly, the Commission's refusal to substitute its own figures into the annual bandwidth calculations is not only reasonable but also consistent with the

filed rate doctrine. The bandwidth formula set forth in the tariff is the filed rate, unless and until it is modified in accordance with the provisions of the Federal Power Act: "The Commission already found the formula rate . . . to be just and reasonable when it approved that formula . . . . Because the Commission has approved the formula, it is the filed rate and under the filed rate doctrine may not be changed absent a section 205 or 206 proceeding." *Opinion No. 514* at P 49; *accord Second Arkansas Rehearing Order* at P 35 (citing *2007 Compliance Order* at P 50); *Opinion No. 514-A* at P 17 (same); *see also Opinion No. 505* at P 133 ("The formula in Service Schedule MSS-3 that was previously accepted by the Commission is now the lawful rate"); *id.* at P 170 ("the bandwidth formula in Service Schedule MSS-3 that was accepted by the Commission in 2006 is the lawful rate that is effective for this [annual bandwidth] proceeding").

Absent any finding that the filed rate is no longer just and reasonable, the Commission's responsibility is to respect and enforce it. *See generally Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981) (discussing filed rate doctrine); *Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951) (same); *Pub. Utils. Comm'n*, 254 F.3d at 254 & n.3 (filed rate doctrine applies to a formula rate) (citing *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577-78 (D.C. Cir. 1990)).

B. The Commission Has Properly Defined The Scope Of Challenges In Annual Bandwidth Proceedings

Based on that interpretation of the tariff, the Commission has repeatedly clarified the types of challenges that are appropriately raised with respect to the annual bandwidth calculations, which concern errors in the data used or in the calculations:

> In determining whether Entergy has properly implemented the bandwidth formula using the required data inputs in a bandwidth filing, parties in a bandwidth implementation proceeding may challenge: (1) whether the inputs were calculated consistent with the formula and the applicable accounting rules; (2) conformance with retail regulatory approvals to the extent the formula requires use of values approved by retail regulators; and, (3) in instances where there are details omitted from the accepted Service Schedule MSS-3 formula, with the underlying details included in the methodology used in Exhibits ETR-26 and ETR-28.[]

Fourth Bandwidth Rehearing Order at P 13 (citing *Opinion No. 505* at PP 9, 51-64), *quoted in Opinion No. 514-A* at P 16 *and Second Arkansas Rehearing Order* at P 31, *and cited in First Arkansas Rehearing Order* at P 23. *Accord, Opinion No. 505-A* at P 50; *Opinion No. 518* at P 26; *see also Opinion No. 514-A* at P 16 ("[T]he Commission has thoroughly and repeatedly explained how and when parties may challenge a component of the bandwidth formula."). The Commission also has noted that parties may challenge "whether or not particular costs were prudently incurred" in annual bandwidth proceedings. *Fourth Bandwidth Rehearing Order* at P 13; *see also Opinion No. 514-A* at P 16. In the *Second*

Arkansas Rehearing Order (at P 37), for example, the Commission explained that a party could raise "a challenge to the prudence of plant costs [that are] being depreciated at the retail regulator-approved depreciation rate and included in plant balances included in ratebase."

Even if challenges to the formula itself were not confined by the filed rate doctrine, such procedural limitations on the scope of the annual bandwidth proceedings still would be the Commission's to define. It is within the Commission's purview to determine how best to allocate its resources for the most efficient resolution of matters before it. *See, e.g.*, *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities"; lower court "clearly overshot the mark" if it required the agency to resolve a particular issue in a particular proceeding) (internal citations omitted); *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) ("An agency has broad discretion to determine when and how to hear and decide the matters that come before it.") (citing cases). Here, the Commission has appropriately limited the grounds for challenging the recurring bandwidth calculation filings, while the ordinary avenues for seeking tariff changes under Federal Power Act § 205 or § 206 remain available.

The Commission has conceded that, in two orders in the early years of bandwidth litigation — before the Commission had yet grappled with the issues arising in the First Bandwidth Proceeding — its delineation of the appropriate means to challenge bandwidth inputs was not sufficiently clear:

> We acknowledge . . . that prior to Entergy's annual bandwidth filings, when neither we nor the parties had any experience with such filings, the Commission did make some general statements that could be interpreted as suggesting that parties had the opportunity in Entergy's annual bandwidth filings to challenge the reasonableness of any cost inputs in the Service Schedule MSS-3 bandwidth formula, including the depreciation rates effective for Entergy's annual bandwidth filings.[] Such statements, however, were made prior to final Commission action on the first annual bandwidth filing[] and thus did not benefit from experience in addressing these annual bandwidth filings.

Third Bandwidth Interlocutory Order at P 20; *accord*, *Fourth Bandwidth Rehearing Order* at P 11; *First Arkansas Rehearing Order* at P 21; *Opinion No. 505-A* at P 48; *Opinion No. 514* at PP 48, 53; *Second Arkansas Rehearing Order* at P 38; *Opinion No. 514-A* at P 15. *See also Third Bandwidth Interlocutory Order* at P 20 (admitting that language in the *Arkansas Complaint Order*, "in hindsight, was not as precise as it could have been and may have been unintentionally misleading"). The Commission, however, corrected that lack of clarity in its first ruling on an annual bandwidth proceeding (*Opinion No. 505*), and has consistently followed that precedent — and repeatedly explained its approach — in subsequent orders.

Louisiana (at Br. 24, 37) questions the "experience" that led the Commission to clarify its interpretation of the bandwidth formula, but the timeline of overlapping bandwidth litigation confirms the need for clarification. *See supra* pp. 16-20 and the attached timeline in the Addendum to this Brief. The Commission dismissed Louisiana's complaint in 2008, while the First Bandwidth Proceeding was still before the administrative law judge. It denied Arkansas's complaint in 2009, while the First Bandwidth Proceeding was pending on exceptions and the Second Bandwidth Proceeding was before another administrative law judge. *See Third Bandwidth Interlocutory Order* at P 20 n.29 (noting that both complaint orders predated *Opinion No. 505*).

With several annual bandwidth filings and various complaints moving forward contemporaneously, the Commission issued a number of orders that followed those early 2010 precedents: a hearing order later in 2010 defining the scope of the Fourth Bandwidth Proceeding; three orders in October 2011 on two bandwidth proceedings (including *Opinion No. 514*, on review) and the Arkansas complaint (*First Arkansas Rehearing Order*, on review); and four orders on a single day in May 2012, on two bandwidth proceedings and two Louisiana complaints. By the time the Commission issued the last two orders on review in this case, in January 2013, it already had ruled on the same or similar bandwidth formula issues in at least six orders in four annual bandwidth proceedings and three

orders in separate complaint proceedings since the start of 2010. The Commission has "thoroughly and repeatedly" (*Opinion No. 514-A* at P 16) explained the appropriate avenues for challenging various aspects of formula inputs, and Louisiana's dissatisfaction with those avenues is not a sufficient basis to reverse the Commission's reasoned determination as to the interpretation of a FERC-approved tariff or the proper ordering of its proceedings.

Nor is it enough that Louisiana disagrees with the Commission's choice to clarify its earliest orders in the face of accumulating litigation over annual bandwidth proceedings and multiple complaints. *See* Br. 19-21, 28. *Cf. Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("'An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis'") (quoting *Chevron*, 467 U.S. at 863-864). Given the complexity and long history of cost allocation disputes under the Entergy System Agreement, the Commission appropriately sought to avoid "mak[ing] Entergy's annual bandwidth filings a 'free for all' in which each party adjusts the FERC Form 1 data of the various Operating Companies to achieve what it believes should be the appropriate result." *Opinion No. 518* at P 27 (citation omitted).

C. The Commission Has Already Rejected The Merits Of Louisiana's Challenge To The Bandwidth Formula In A Separate Proceeding That Is Not Before This Court

Nevertheless, the Commission made clear that any party could litigate whether that incorporation of actual depreciation expenses remained just and reasonable — in a direct challenge to the filed rate in a Federal Power Act § 206 complaint, not as an objection to a routine annual bandwidth filing under the existing, previously-approved tariff. And, indeed, the Commission fully considered the question when Louisiana brought just such a challenge in its 2010 complaint. *See Opinion No. 519*; *see also supra* pp. 19-20. Though that matter remains pending on rehearing before the Commission and is not on review before this Court, Louisiana continues to press its failed arguments by way of collateral attack in the instant appeal.

In that case, the Commission (affirming the decision of an ALJ after a full hearing) specifically determined that Louisiana "ha[d] not demonstrated that the inclusion of retail depreciation data in the depreciation and decommissioning components of the bandwidth formula is unjust and unreasonable or unduly discriminatory or preferential." *Opinion No. 519* at P 108; *cf.* Br. 23, 28-29 (repeating such arguments here). The Commission further found that "the fact that the Operating Companies use different depreciation methods, which are reflected in the bandwidth formula, does not render the bandwidth formula unjust and

unreasonable or unduly discriminatory or preferential." *Opinion No. 519* at P 108; *see also id.* at P 42 ("To reiterate, this case is not about the use of depreciation expenses used to establish rates for traditional wholesale sales, in general. This case, rather, is about the depreciation rates used in the bandwidth formula remedy designed and implemented to enable the Operating Companies to achieve rough production cost equalization."). The Commission also explicitly rejected Louisiana's position that the Commission's treatment of depreciation expenses in wholesale transactions, as set forth in *Boston Edison Co.*, 59 FERC ¶ 63,028 (1992), is controlling (Br. 28). *Opinion No. 519* at P 112. The Commission (and the ALJ) also did not find sufficient evidence that the formula had been manipulated, as Louisiana continues to claim (Br. 15-16, 23). *Opinion No. 519* at P 108.

In sum, Louisiana had its opportunity to press all of its arguments and present its evidence before the ALJ and the Commission, and both soundly rejected, on the merits, its objections to the filed rate. *Cf. McClure v. Biesenbach*, 355 F. App'x 800, 806 (5th Cir. 2009) ("While Plaintiffs did not prevail, they had their day in court."). In effect, Louisiana asks this Court to overrule the Commission's holding in an entirely separate matter and substitute its own policy judgment on an issue of rate design. *But see Morgan Stanley*, 554 U.S. at 532 ("we afford great deference to the Commission in its rate decisions.").

In addition, Louisiana wrongly claims that the Commission has elsewhere found that state regulators' depreciation rates for certain Entergy Operating Companies were "unjust and unreasonable" and revised those rates for use in wholesale rates. Br. 8, 22 (discussing *Entergy Servs., Inc.*, 142 FERC ¶ 61,022 (2013), and *Entergy Servs., Inc.* 143 FERC ¶ 61,116 (2013)). Louisiana mischaracterizes those rulings, which did not find any existing rate "unjust and unreasonable" (the standard applicable to a complaint under FPA § 206) but, rather, considered Entergy's proposed changes to its own tariff under the "just and reasonable" standard applicable under FPA § 205. *See generally Tex. E. Transmission Corp. v. FERC*, 102 F.3d 174, 181 (5th Cir. 1996) (explaining different standards under similar provisions of Natural Gas Act). Moreover, those orders did not concern the bandwidth formula — including its reasonableness — so the Commission appropriately declined to reach beyond the scope of the proceeding before it to substitute new depreciation rates, adopted for other purposes, into that formula. *See* 142 FERC ¶ 61,022 at PP 195-98 (2013) (citing *Opinion Nos. 514* and *519*); 143 FERC ¶ 61,116, at PP 30-34 (2013) (same).

III. THE COMMISSION REASONABLY DETERMINED THAT A TARIFF PROVISION CONCERNING VIDALIA COSTS HAD BEEN INCLUDED, WITH SUFFICIENT NOTICE TO LOUISIANA, IN THE PREVIOUSLY-APPROVED COMPLIANCE FILING

Louisiana argues that the Commission improperly allowed certain adjustments to Entergy Louisiana's capital structure that changed the bandwidth

methodology. Br. 48-60. The Commission, however, reasonably concluded that those adjustments had been included in Entergy's 2006 compliance filing, as approved by the Commission in the *2006* and *2007 Compliance Orders*, and that the Louisiana Commission had sufficient notice of those adjustments.

A. The Commission Determined That Louisiana Had Sufficient Notice Of The Vidalia Adjustments In Entergy's Tariff Filing

The exclusion of costs associated with the Vidalia contract from bandwidth calculations was known to all parties from the outset of the bandwidth remedy. In *Opinion No. 480*, the Commission concluded that "the Vidalia contract was not entered into to benefit the Entergy system as a whole" and "was not part of Entergy's overall system planning," thus "its costs should not now be spread throughout Entergy's system" through the rough equalization formula. *Id.* at P 174. On rehearing, the Commission further explained that allowing cost-shifting as a result of the Vidalia contract, "whether [those costs] are large or small," would be unjust, unreasonable, and unduly discriminatory. *Opinion No. 480-A* at P 73. The Louisiana Commission unsuccessfully challenged that specific ruling in its appeal to the D.C. Circuit, which held that FERC's conclusions were reasonable and supported by the record. *Louisiana 2008*, 522 F.3d at 396-97. Therefore, the bandwidth remedy as directed by the Commission and upheld by the court unequivocally excluded Vidalia costs.

Moreover, the Commission approved the tariff language regarding the "reversal of the Vidalia capital transaction" in the first revision of the tariff to implement the newly-imposed bandwidth remedy. (Oddly, Louisiana characterizes the addition of this language as an "after-the-fact change to [the] tariff" (Br. 48), notwithstanding its inclusion in Entergy's *initial* compliance filing in 2006.) In accordance with the directives of *Opinion Nos. 480* and *480-A*, Entergy submitted tariff revisions that explicitly ensured that costs of the Vidalia transaction would not be included in production cost calculations. In its April 2006 compliance filing to add the bandwidth formula to Service Schedule MSS-3, Entergy specified various adjustments to production costs that included "reflecting the reversal of the Vidalia capital transaction."[8] That adjustment was consistent with the *Opinion No.*

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[8] Note 1 in the revised Service Schedule MSS-3 states, in full:

> All Rate Base, Revenue and Expense items shall be based on the actual amounts on the Company's books for the twelve months ended December 31 of the previous year as reported in FERC Form 1 or such other supporting data as may be appropriate for each Company; and *shall include certain retail regulatory adjustments* pursuant to the production cost methodology set forth in Exhibit [Nos.] ETR-26/ETR-28 filed in Docket No. EL01-88-001, including but not limited to: (1) the Deregulated Asset Plan adjustment for [Entergy Gulf States Louisiana], (2) the regulated portion (70%) of River Bend for [Entergy Gulf States Louisiana], (3) re[-]pricing of energy associated with the Vidalia purchase power contract for [Entergy Louisiana] based on the average annual Service Schedule MSS-3 rate paid by [Entergy Louisiana], including the exclusion of the income tax savings of the Vidalia purchase power contract from ADIT and

480 directive, as "[r]eversing the Vidalia capital transaction keeps the costs of the transaction from spreading throughout Entergy's system and keeps Louisiana from shifting costs to other states on the Entergy system." *Opinion No. 514* at P 78; *accord*, *id.* at P 75; *Opinion No. 514-A* at P 46. As such, that treatment was "within the scope of the compliance filing" that the Commission ordered in *Opinion Nos. 480* and *480-A* and did not require a separate rate filing. *Opinion No. 514-A* at P 37. Therefore, the Commission properly concluded that Louisiana Commission's attempt to relitigate Entergy's tariff filing constitutes "an impermissible collateral attack" on the *2006* and *2007 Compliance Orders*. *Opinion No. 514-A* at PP 38, 44. *See, e.g.*, *Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 824-25 (D.C. Cir. 2008) (under Federal Power Act, courts lack jurisdiction over collateral attacks on prior FERC orders).

The Commission also reasonably found that the Louisiana Commission had sufficient notice of the capital structure adjustments. Entergy highlighted that

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> *reflecting the reversal of the Vidalia capital transaction*, and the debt rate associated with the Waterford 3 Sale/Leaseback for [Entergy Louisiana], (4) exclusion of the [Entergy Arkansas] and [Entergy Mississippi] retail approved Grand Gulf Accelerated Recovery Tariff effects on purchased power on [Entergy Arkansas's] and [Entergy Mississippi's] production cost and (5) exclusion of any increased costs resulting from the amended Toledo Bend Power Sales Agreement accepted for filing in Docket No. ER07-984.

Opinion No. 514 at P 58 n.84 (emphases added).

aspect of its filing, both in a redlined version of the schedule showing the proposed amendments and in its transmittal letter (in a section titled "Description of the Amendments"), which stated that "adjustments to exclude income tax savings associated with the Vidalia purchase power contract, *and to reflect the reversal of the capital cost transaction regarding Vidalia on behalf of Entergy Louisiana* also will be made, consistent with Exhibit Nos. ETR-26 and ETR-28." *Opinion No. 514* at P 73 (emphasis added) (citing Exhibit LC-109 at 8 (R. 206)). Entergy included the same list of adjustments for calculation of Actual Production Costs again in its second compliance filing. *See Opinion No. 514-A* at P 38; ALJ Decision at P 269 (citing Exhibit No. LC-84 at 19 (R. 157)). "Given the evidence in the record, there is little support for the Louisiana Commission's contention that Entergy did not provide sufficient notice and tried to 'slip' a formula adjustment into the bandwidth compliance filing." *Opinion No. 514* at P 73.

Though Louisiana implies that the adjustments were buried in an easy-to-miss footnote (*see* Br. 9) or tucked among multiple pages of redlined changes (*see* Br. 41), Note 1 is placed prominently beneath the opening provision of section 30.12, which defines the basic formula to calculate "Actual Production Cost," for which the rest of that section specifies the underlying variables: "The actual production cost (PC) is the sum of the actual variable production cost (VPC) and the actual fixed production cost (FPC) and shall be determined for each Company.

(See Note 1)." Service Schedule MSS-3, sec. 30.12.[9] In any event, Louisiana did notice footnote 1, as it objected to the separate issue of re-pricing Vidalia energy for the purpose of calculating Entergy Louisiana's expenses (*see 2006 Compliance Order* at PP 56-57, 59), sought rehearing on that issue (*see 2007 Compliance Order* at PP 45-47), repeated its protest as to Entergy's second compliance filing (*see id.* at PP 49, 51), and challenged the Commission's ruling on appeal (*see Louisiana 2009*, 341 F. App'x at 650-51).

Accordingly, the Commission in the instant case, affirming the findings of the ALJ, reasonably rejected Louisiana's claims of insufficient notice as "not persuasive." *Opinion No. 514* at P 73. Notwithstanding such notice, Louisiana did not challenge the language concerning the Vidalia capital transaction, *id.* at P 72, even as it *did* object to other aspects of Entergy's compliance filings (and prevailed in several respects). *See 2006 Compliance Order* at PP 64, 69 (rejecting Entergy's proposal to change methodology by adjusting labor ratios and rates of return on equity, which Louisiana had opposed). Entergy accordingly revised those items in its second tariff filing. *2007 Compliance Order* at P 48. But to the extent that Louisiana now claims (*see* Br. 44) that Entergy's second compliance filing purported to eliminate *all* adjustments to the methodology that it had included in its

[9] The weighted average cost of capital, in turn, is an element of the formula to determine the actual variable production cost. *See id.*

first compliance filing, including the (unchallenged) reversal of the Vidalia transaction, that claim is not supported by the Commission's *2007 Compliance Order*. That order — which is not subject to relitigation here — specified that Entergy had conformed its filing to comply with the particular ruling in the *2006 Compliance Order* regarding labor ratios and rates of return on equity. *See 2007 Compliance Order* at PP 48, 50.[10]

B. The Commission Found That The Vidalia Language Had Specific Meaning In Louisiana's Own Regulatory Proceedings And FERC Submissions

Nor can Louisiana credibly claim that it did not understand what Entergy had filed. "Indeed, if *any* of the intervenors should have known what retail regulatory adjustment Entergy's proposed adjustment referred to, it was the Louisiana Commission." *Opinion No. 514-A* at P 39 (emphasis added). Reversal of the Vidalia capital transaction was explicitly required in a regulatory order

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[10] Referring to those items, the Commission later noted that Entergy's 2006 compliance filing had "included proposed revisions to Exhibits ETR-26 and ETR-28 *that had not been ordered* by the Commission in Opinion Nos. 480 and 480-A," and that the Commission had rejected "*non-compliant* adjustments to the methodology reflected in [those] Exhibits." *Opinion No. 505* at PP 107-08 (emphases added).

By contrast, reversal of the Vidalia capital transaction (as noted above) was consistent with *Opinion Nos. 480* and *480-A*, and was not challenged or rejected as "non-compliant" with those orders. In any event, the tariff as approved by the Commission "is now the lawful rate, and takes precedence in any conflict with the methodology found in Exhibits ETR-26 and ETR-28." *Opinion No. 505* at P 133; *accord*, *id.* at P 170.[10] *See supra* pp. 38-39 (discussing filed rate doctrine).

issued by the Louisiana Commission itself, and was referenced in various filings submitted *to* that state regulatory entity in retail rate proceedings and submitted *by* that entity as a litigant in FERC proceedings.

First, in the tax settlement approved by the Louisiana Commission in 2002 (which accepted and incorporated the settlement terms in its order), that entity directed that, "[t]o the extent that [Entergy Louisiana] uses the Proceeds [of the Vidalia tax deduction] to reduce its outstanding debt, it will also reduce equity to maintain the pre-existing capital structure." *In re Entergy La.*, 2002 WL 31618829 (La. Pub. Serv. Comm'n 2002); Exhibit ESI-24 at 14 (R. 156) (same order, in Louisiana Commission Docket No. U-20925), *cited in* ALJ Decision at P 278; *accord*, *Opinion No. 514* at P 74; *Opinion No. 514-A* at P 40. Subsequently, Entergy filed testimony in that same state regulatory docket stating that Entergy Louisiana had complied with Louisiana Commission's order "by reversing both debt and common equity related transactions identified as resulting from the application of the proceeds from the Vidalia Tax Deduction." Exhibit ESI-59 at 11 (R. 221) (testimony submitted by Entergy Louisiana in Louisiana Commission Docket No. U-20925, in June 2003), *quoted in Opinion No. 514* at P 74 *and Opinion No. 514-A* at P 40.

References to that reversal appeared again in Entergy Louisiana's retail ratemaking proceedings in 2005 and 2007, as shown by documents that the

Louisiana Commission itself attached to its submissions in FERC proceedings, including the Second Bandwidth Proceeding. *See Opinion No. 514-A* at P 40 n.72 (citing Exhibits LC-21 (R. 229) and LC-75 (R. 248)); *see also* Exhibit LC-110 at 1 (R. 207) (Schedule 1, titled "Entergy Louisiana FRP – Cost of Capital as of December 31, 2007, referring to "Reversal of Vidalia Transactions" and to "Reverse Vidalia Reductions" (adjustment to long term bond debt, lines 1-3) and "Reverse Vidalia Reductions" (adjustment to common equity, lines 12-14)), *cited in Opinion No. 514* at P 74 n.113.

Accordingly, FERC reasonably determined, based on substantial record evidence, that the Louisiana Commission was "a highly informed party" for whom that language "should have a specific meaning" from its own experience both as a regulator and as a litigant. *Opinion No. 514-A* at P 40; *see also Opinion No. 514* at P 75 ("the 'reversal of the Vidalia capital transaction' language included in footnote 1 has a specific meaning in Louisiana Commission retail ratemaking that refers to an adjustment to Entergy Louisiana's capital structure"). Indeed, the Commission found that "the record evidence all points to the conclusion that the Vidalia language in footnote 1 refers to an adjustment of Entergy Louisiana's capital structure, and there is no reason to think that the Louisiana Commission should not have been aware of or [that it] misunderstood the language." *Opinion No. 514* at P 75. *See generally Transcont'l Gas Pipe Line*, 998 F.2d at 1320

(Commission's factual findings are conclusive if supported by substantial evidence); *U.S. Cellular Corp.*, 364 F.3d at 256 (substantial evidence standard is "highly deferential"). Nor had Louisiana offered "any plausible alternative for what adjustment is required" by that language. *Opinion No. 514* at P 75. Thus, the Commission found Louisiana's claim of incomprehension "not convincing" — even "implausible." *Id.* at P 74.

CONCLUSION

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

Respectfully submitted,

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September 3, 2013

Louisiana Public Service Commission v. FERC
5th Cir. Nos. 13-60140 and 13-60141

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that I have, this 3d day of September 2013, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and 5th Cir. R. 32.3, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 12,354 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addenda.

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September 3, 2013

ADDENDUM

Statutes, Regulation, and Timeline

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

[1] See References in Text note below.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

LIMITATION ON AUTHORITY PROVIDED

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

STUDY

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

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

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

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

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, §16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

§ 131.80 FERC Form No. 556, Certification of qualifying facility (QF) status for a small power production or cogeneration facility.

(a) *Who must file.* Any person seeking to certify a facility as a qualifying facility pursuant to sections 3(17) or 3(18) of the Federal Power Act, 16 U.S.C. 796(3)(17), (3)(18), unless otherwise exempted or granted a waiver by Commission rule or order pursuant to § 292.203(d), must complete and file the Form of Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility, FERC Form No. 556. Every Form of Certification of Qualifying Status must be submitted on the FERC Form No. 556 then in effect and must be prepared in accordance with the instructions incorporated in that form.

(b) *Availability of FERC Form No. 556.* The currently effective FERC Form No. 556 shall be made available for download from the Commission's Web site.

(c) *How to file a FERC Form No. 556.* All applicants must file their FERC Forms No. 556 electronically via the Commission's eFiling Web site.

[Order 732, 75 FR 15965, Mar. 30, 2010]

PART 141—STATEMENTS AND REPORTS (SCHEDULES)

Sec.

AUTHORITY: 15 U.S.C. 79; 15 U.S.C. 717–717z; 16 U.S.C. 791a–828c, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 141.1 FERC Form No. 1, Annual report of Major electric utilities, licensees and others.

(a) *Prescription.* The Form of Annual Report for Major electric utilities, licensees and others, designated herein as FERC Form No. 1, is prescribed for the reporting year 1981 and each year thereafter.

(b) *Filing requirements*—(1) *Who must file*—(i) *Generally.* Each Major and each Nonoperating (formerly designated as Major) electric utility (as defined in part 101 of Subchapter C of this chapter) and each licensee as defined in section 3 of the Federal Power Act (16 U.S.C. 796), including any agency, authority or other legal entity or instrumentality engaged in generation, transmission, distribution, or sale of electric energy, however produced, throughout the United States and its possessions, having sales or transmission service equal to Major as defined above, must prepare and file electronically with the Commission the FERC Form 1 pursuant to the General Instructions as provided in that form.

(ii) *Exceptions.* This report form is not prescribed for any agency, authority or instrumentality of the United States, nor is it prescribed for municipalities as defined in section 3 of the Federal Power Act; (*i.e.*, a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power).

(2) *When to file and what to file.* (i) The annual report for the year ending December 31, 2004, must be filed on April 25, 2005.

(ii) The annual report for each year thereafter must be filed on April 18.

(iii) This report must be filed with the Federal Energy Regulatory Commission as prescribed in § 385.2011 of this chapter and as indicated in the General Instructions set out in this form, and must be properly completed and verified. Filing on electronic media

pursuant to §385.2011 of this chapter is required.

[Order 200, 47 FR 1280, Jan. 12, 1982, as amended by Order 390, 49 FR 32515, Aug. 14, 1984; Order 574, 60 FR 1718, Jan. 5, 1995; Order 626, 67 FR 36096, May 23, 2002; 69 FR 9043, Feb. 26, 2004; Order No. 694, 72 FR 20723, Apr. 26, 2007; 73 FR 58736, Oct. 7, 2008]

§141.2 FERC Form No. 1–F, Annual report for Nonmajor public utilities and licensees.

(a) *Prescription.* The form of Annual Report for Nonmajor Public Utilities and Licensees, designated herein as FERC Form No. 1–F, is prescribed for the year 1980 and each year thereafter.

(b) *Filing Requirements*—(1) *Who Must File*—(i) *Generally.* Each Nonmajor and each Nonoperating (formerly designated as Nonmajor) public utility and licensee as defined by the Federal Power Act, which is considered Nonmajor as defined in Part 101 of this chapter, shall prepare and file with the Commission an original and conformed copies of FERC Form No. 1–F pursuant to the General Instructions set out in that form.

(ii) *Exceptions.* FERC Form No. 1–F is not prescribed for any municipality as defined in Section 3 of the Federal Power Act, i.e., a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

(2) *When to file.* (i) The annual report for the year ending December 31, 2004, must be filed on April 25, 2005.

(ii) The annual report for each year thereafter must be filed on April 18.

[Order 101, 45 FR 60899, Sept. 15, 1980, as amended by Order 390, 49 FR 32515, Aug. 14, 1984; 50 FR 5744, Feb. 12, 1985; 69 FR 9043, Feb. 26, 2004; Order No. 694, 72 FR 20723, Apr. 26, 2007]

§141.14 Form No. 80, Licensed Hydropower Development Recreation Report.

The form of the report, Licensed Hydropower Development Recreation Report, designated as FERC Form No. 80, for use by licensees in reporting information with respect to existing and potential recreational use at developments within projects under major and minor license, is approved and prescribed for use as provided in §8.11 of this chapter.

[46 FR 50059, Oct. 9, 1981]

§141.15 Annual Conveyance Report.

If a licensee of a hydropower project is required by its license to file with the Commission an annual report of conveyances of easements or rights-of-way across, or leases of, project lands, the report must be filed only if such a conveyance or lease of project lands has occurred in the previous year.

[Order 540, 57 FR 21738, May 22, 1992]

§141.51 FERC Form No. 714, Annual Electric Balancing Authority Area and Planning Area Report.

(a) *Who must file.* (1) Any electric utility, as defined by section 3(4) of the Public Utility Regulatory Policies Act, 16 U.S.C. 2602, operating a balancing authority area, and any group of electric utilities, which by way of contractual arrangements operates as a single balancing authority area, must complete and file the applicable schedules in FERC Form No. 714 with the Federal Energy Regulatory Commission.

(2) Any electric utility, or group of electric utilities that constitutes a planning area and that has a peak load greater than 200 megawatts (MW) based on net energy for load for the reporting year, must complete applicable schedules in FERC Form No. 714.

(b) *When to file.* FERC Form No. 714 must be filed on or before each June 1 for the preceding calendar year.

(c) *What to file.* FERC Form No. 714, Annual Electric Balancing Authority Area and Planning Area Report, must be filed with the Federal Energy Regulatory Commission as prescribed in §385.2011 of this chapter and as indicated in the General Instructions set out in this form.

[58 FR 52436, Oct. 8, 1993 as amended by Order No. 20723, 72 FR 20725, Apr. 26, 2007]

EFFECTIVE DATE NOTE: At 58 FR 52436, Oct. 8, 1993, §141.51 was revised. The section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

TIMELINE OF FILINGS AND ORDERS IN BANDWIDTH AND RELATED PROCEEDINGS

Year	Month/Day	Description of Event/Order/Proceeding	Citation	In FERC Br.
2005	June	•*Opinion No. 480* (Bandwidth Remedy)	111 FERC ¶ 61,311	*passim*
	December	•*Opinion No. 480-A* (Bandwidth Remedy (rehearing))	113 FERC ¶ 61,282	*passim*
2006	April	[Entergy submits compliance filing]		
	November	•*2006 Compliance Order*	117 FERC ¶ 61,203	*passim*
	December	[Entergy submits compliance filing]		
2007	April	•*2007 Compliance Order*	119 FERC ¶ 61,095	*passim*
	May	•[Entergy files First Bandwidth Proceeding]		
2008	April	*Louisiana 2008* (affirming *Opinion Nos. 480 & 480-A*)	522 F.3d 378 (D.C. Cir.)	*passim*
	May	[Entergy files Second Bandwidth Proceeding]		
	July	•Order dismissing Louisiana's 2008 complaint	124 FERC ¶ 61,010	p. 19
	September	ALJ decision in First Bandwidth Proceeding	124 FERC ¶ 63,026	p. 17
2009	May	[Entergy files Third Bandwidth Proceeding]		
	July	•***Arkansas Complaint Order***	**128 FERC ¶ 61,020**	**On review**
	September	ALJ decision in Second Bandwidth Proceeding	**128 FERC ¶ 63,015**	pp. 4, 50, 53

TIMELINE OF FILINGS AND ORDERS IN BANDWIDTH AND RELATED PROCEEDINGS (continued)

Year	Month/Day	Description of Event/Order/Proceeding	Citation	In FERC Br.
2010	January	•*Opinion No. 505* (in First Bandwidth Proceeding)	130 FERC ¶ 61,023	*passim*
	March	•*Third Bandwidth Interlocutory Order*	130 FERC ¶ 61,170	pp. 18, 22, 24, 35, 41, 42
	May	[Entergy files Fourth Bandwidth Proceeding]		
	July	•Hearing Order in Fourth Bandwidth Proceeding	132 FERC ¶ 61,065	p. 18
2011	May	[Entergy files Fifth Bandwidth Proceeding]		
	October 6	•*Fourth Bandwidth Rehearing Order*	137 FERC ¶ 61,019	pp. 18, 22, 39, 41
	October 7	**•*Opinion No. 514* (in Second Bandwidth Proceeding)** **•*First Arkansas Rehearing Order***	**137 FERC ¶ 61,029** **137 FERC ¶ 61,030**	**On review** **On review**
2012	May 7	•Order on Louisiana's 2011 complaint •*Opinion No. 505-A* (in First Bandwidth Proceeding) •*Opinion No. 518* (in Third Bandwidth Proceeding) •*Opinion No. 519* (on Louisiana's 2010 complaint)	139 FERC ¶ 61,102 139 FERC ¶ 61,103 139 FERC ¶ 61,105 139 FERC ¶ 61,107	pp. 22, 32, 37 pp. 17, 39 pp.18,33,39,43 pp. 20, 34, 44-46
	May 31	[Entergy files Sixth Bandwidth Proceeding]		
2013	January 3	**•*Second Arkansas Rehearing Order*** **•*Opinion No. 514-A* (in Second Bandwidth Proceeding)**	**142 FERC ¶ 61,012** **142 FERC ¶ 61,013**	**On review** **On review**
	May	[Entergy files Seventh Bandwidth Proceeding]		