No. 13-60874

In the United States Court of Appeals for the Fifth Circuit

LOUISIANA PUBLIC SERVICE COMMISSION,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

FINAL BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: JULY 29, 2014

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 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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GLOSSARY

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)
ADIT	Accumulated Deferred Income Taxes
ALJ	Administrative law judge
ALJ Decision	Initial Decision, *Entergy Servs., Inc.*, 132 FERC ¶ 63,005 (2010), issued in Third Bandwidth Proceeding
Arkansas Complaint Order	Order Denying Complaint, *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 (2009), pending on review in *La. Pub. Serv. Comm'n v. FERC*, 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 Arkansas Rehearing Order	Order Denying Requests for Rehearing, *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 137 FERC ¶ 61,030 (2011), pending on review in *La. Pub. Serv. Comm'n v. FERC*, 5th Cir. No. 13-60140
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
Fourth Bandwidth Clarification Order	Order Granting Clarification and Denying Request for Rehearing, *Entergy Servs., Inc.*, 145 FERC ¶ 61,049 (2013), issued in October 2013 in the Fourth Bandwidth Proceeding
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	Order Granting, in Part, and Denying, in Part, Rehearing, *Entergy Servs., Inc.*, 137 FERC ¶ 61,019 (2011), issued in October 2011 in the Fourth Bandwidth Proceeding
FPA	Federal Power Act

GLOSSARY

Louisiana or Louisiana Commission	Petitioner Louisiana Public Service Commission
Opinion No. 505	Order Affirming in Part and Reversing in Part Initial Decision, *Entergy Servs., Inc.*, 130 FERC ¶ 61,023 (2010), *on reh'g*, 139 FERC ¶ 61,103 (2012), issued in the First Bandwidth Proceeding, pending on review in *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 12-1282
Opinion No. 505-A	Order Granting Rehearing in Part, Denying Rehearing in Part and Granting Clarification, *Entergy Servs., Inc.*, 139 FERC ¶ 61,103 (2012), issued in the First Bandwidth Proceeding, pending on review in *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 12-1282
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), issued in the Second Bandwidth Proceeding, pending on review in *La. Pub. Serv. Comm'n v. FERC*, 5th Cir. No. 13-60141
Opinion No. 514-A	Order Denying Rehearing, *Entergy Servs., Inc.*, 142 FERC ¶ 61,013 (2013), issued in the Second Bandwidth Proceeding, pending on review in *La. Pub. Serv. Comm'n v. FERC*, 5th Cir. No. 13-60141
Opinion No. 518	Order on Initial Decision, *Entergy Servs., Inc.*, 139 FERC ¶ 61,105 (2012), issued in the Third Bandwidth Proceeding, **on review in this case**
Opinion No. 519	Order on Initial Decision, *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107 (2012), issued, after an ALJ hearing, in a proceeding on Louisiana's Depreciation Complaint

GLOSSARY

Out-of-Period Complaint Order	Order on Complaint, *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,102 (2012), issued in a proceeding on Louisiana's Out-of-Period Complaint
Second Arkansas Rehearing Order	Order on Rehearing, *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,012 (2013), pending on review in *La. Pub. Serv. Comm'n v. FERC*, 5th Cir. No. 13-60140
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
Service Schedule MSS-3	The rate schedule in the System Agreement that 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	Order Denying Interlocutory Appeal, *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

GLOSSARY

Third Bandwidth Rehearing Order	Order on Rehearing and Clarification, *Entergy Servs., Inc.*, 145 FERC ¶ 61,047 (2013), issued on rehearing and clarification of *Opinion No. 518* in the Third Bandwidth Proceeding, **on review in this case**

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FINAL BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT REGARDING JURISDICTION

Many of the arguments that Petitioner Louisiana Public Service Commission ("Louisiana" or "Louisiana Commission") raises on appeal are jurisdictionally barred because Louisiana failed to raise them on rehearing before the Federal Energy Regulatory Commission ("Commission" or "FERC"). Section 313(b) of the Federal Power Act states: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the

Commission in the application for rehearing unless there is reasonable ground for failure to do so." 16 U.S.C. § 825*l*(b). Courts adhere strictly to that requirement. *See, e.g.*, *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (strictly construing jurisdictional requirement); *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (same); *see also Panhandle E. Pipe Line Co. v. FPC*, 324 U.S. 635, 645 (1945) (under identical provision of Natural Gas Act, petitioner was precluded from raising objection on judicial review that was not raised on rehearing, despite petitioner's having raised the objection earlier in the administrative proceeding); *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 430 (5th Cir. 1987) (barring argument that had not been raised on rehearing); *Pennzoil Co. v. FERC*, 671 F.2d 119, 122 n.8 (5th Cir. 1982) (same). *Cf. Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 739 (D.C. Cir. 2012) ("In this regard the jurisdictional provisions of the Federal Power Act differ fundamentally from routine judicial-review statutes") (internal quotation marks and citation omitted).

Also, to the extent that Louisiana's arguments challenge the Commission's rulings in orders that are not before this Court (including past orders in other proceedings, orders that are pending on judicial review in separate appeals, and orders in proceedings that remain pending before the Commission), those rulings are, of course, not within the scope of this appeal. *See Pac. Gas & Elec. Co. v.*

FERC, 533 F.3d 820, 824-25 (D.C. Cir. 2008) (court has no jurisdiction over collateral attacks).

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. The Commission subsequently approved revisions to Entergy's tariff to implement the annual calculations and reallocation payments and receipts. The orders on review arise from the third of seven subsequent annual proceedings under that tariff. The questions presented on appeal are:

(1) Whether the Commission reasonably determined, consistent with its holdings in numerous orders issued in all of the bandwidth implementation proceedings and several other related cases, that the definitions of the cost variables in the bandwidth formula are elements of the filed rate that cannot be modified except through a rate change proceeding, and thus reasonably limited the scope of challenges in the annual proceedings to implementation disputes; and

(2) Whether the Commission reasonably interpreted and applied the tariff provision governing treatment of certain accumulated deferred income taxes in the 2008 bandwidth calculation.

STATEMENT OF THE CASE

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

This appeal concerns orders that arose in the third of seven annual proceedings that have followed from the Commission's 2005 decision to require an annual calculation of system-wide payments and receipts designed to achieve rough equalization of production costs. The two orders on review reflect the Commission's reasoned approach, developed in several earlier orders and reinforced in contemporaneous and subsequent rulings, to implementing that remedy consistent with the Federal Power Act, the filed rate doctrine, and the Commission's discretion in managing the numerous disputes over bandwidth calculations.

To date, the first three annual bandwidth filings have progressed through administrative hearings, to rulings by the Commission, to appeals in the federal courts. The orders in the first case before the Commission ("First Bandwidth Proceeding") are pending before the D.C. Circuit (Nos. 12-1282, *et al.*), on petitions by both the Louisiana Commission and Entergy, with briefing to commence in July 2014. (*See infra* p. 16.) The orders in the second case ("Second

Bandwidth Proceeding") are pending on review in this Court (Nos. 13-60140, *et al.*), which held oral argument in March 2014. (*See infra* pp. 16-17.) The orders in the third case ("Third Bandwidth Proceeding") are challenged in the instant appeal.

Entergy submitted its third annual filing of bandwidth calculations in May 2009. The Commission set the filing for hearing before an administrative law judge ("ALJ"). After the Commission, ruling in January 2010 on a variety of issues in the First Bandwidth Proceeding, limited the scope of challenges to bandwidth calculations in the implementation proceedings (*see infra* p. 16), the ALJ in the Third Bandwidth Proceeding accordingly narrowed the issues to be litigated. Order Granting Motion to Remove Depreciation Issues, FERC Docket No. ER09-1224 (Jan. 27, 2010), R. 89, JA 1.[1] Louisiana sought an interlocutory appeal to the Commission, which denied the appeal in March 2010. *Entergy Servs., Inc.*, 130 FERC ¶ 61,170 (2010) ("*Third Bandwidth Interlocutory Order*") R. 109, JA 4. Following a hearing in April 2010, the ALJ issued his initial decision in August 2010. *Entergy Servs., Inc.*, 132 FERC ¶ 63,005 (2010) ("ALJ Decision"), R. 287, JA 14.

In the orders now on review, the Commission largely affirmed the ALJ Decision. *Entergy Servs., Inc.*, 139 FERC ¶ 61,105 (May 7, 2012) ("*Opinion No.*

[1] "R." refers to a record item. "P" refers to the internal paragraph number within a FERC order. "JA" refers to the Joint Appendix page number.

518") (R. 301, JA 135), *on reh'g and clarification*, 145 FERC ¶ 61,047 (Oct. 16, 2013) ("*Third Bandwidth Rehearing Order*") (R. 308, JA 170). As relevant here, the Commission affirmed the ALJ's determination that the tariff formula required certain reported costs to be used in the calculations (*see* Part II.C of the Argument, *infra*), and that certain deferred tax balances should be included in the rate base calculations (*see* Part III of the Argument, *infra*).

Together with the *Third Bandwidth Rehearing Order*, the Commission also issued an order on Entergy's compliance filing that partially accepted and partially rejected that filing and required a subsequent filing. *Entergy Servs., Inc.*, 145 FERC ¶ 61,048 (2013) ("*Third Bandwidth Compliance Order*"), JA 193. Louisiana requested agency rehearing of that order, raising issues related to its arguments concerning deferred taxes in this appeal; that request remains pending before the Commission.

In January 2014, this Court denied the Commission's motion to hold the instant appeal in abeyance pending the outcome of the related appeal of the orders in the Second Bandwidth Proceeding (*La. Pub. Serv. Comm'n v. FERC*, 5th Cir. Nos. 13-60140 & 13-60141) and/or completion of the underlying proceeding before the Commission.

The orders on review — together with the earlier interlocutory order and the compliance order in the same proceeding — are intertwined with a number of

orders issued in other, overlapping 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 is 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); *cf. Tex. E. Transmission Corp. v. FERC*, 102 F.3d 174, 181 (5th Cir. 1996) (explaining different standards for rate changes under similar provisions of Natural Gas Act). 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. 11-12; JA 617. 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.[2] *See Louisiana 2008*, 522 F.3d at 383. The Operating Companies are owned by a multistate holding company, Entergy Corporation.[3] *Id.* (What is now the Entergy System originated under Middle South Utilities, Inc., which owned most of the Operating Companies' predecessors.) At all times relevant to this case, transactions among the Entergy Operating Companies were 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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[2] 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.

[3] 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"). For decades, the Entergy System primarily allocated the costs and benefits of new generation resources through a centralized planning process that assigned new resources to individual Operating Companies, on a rotating basis. *See Louisiana 2008*, 522 F.3d at 383-84.

The System Agreement also allocated 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 required 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 sought to iron out inequities through "equalization payments." 808 F.2d at 1530.

Nevertheless, over the history of the System Agreement, the Commission 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. 13-15, 17.

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). 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).

Three additional cases (all captioned *La. Pub. Serv. Comm'n v. FERC*) are currently pending before the D.C. Circuit (Nos. 12-1282, *et al.* (First Bandwidth Proceeding), and No. 13-1155 (allocation of capacity costs, after remand)), and this Court (Nos. 13-60140, *et al.* (Second Bandwidth Proceeding)). Also, both courts recently denied Louisiana's petitions for writs of mandamus concerning cost allocation and bandwidth proceedings before the Commission. *See infra* p. 21.

The consequences of the instant case will be limited somewhat by recent changes to the Entergy System. Entergy Arkansas terminated its participation in

the System Agreement in December 2013 and Entergy Mississippi will do so 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 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 proceedings, and attaches a timeline in the Addendum to this Brief (and also in the separate Addendum 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.

a. The 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. Following a hearing before an ALJ, the Commission found that the allocation of production costs among the Entergy Operating Companies was no longer in rough

equalization, due to disparate fuel costs, and thus was no longer just and reasonable. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 111 FERC ¶ 61,311 at PP 28-30 (2005) ("*Opinion No. 480*"), *aff'd on reh'g, Opinion No. 480-A.* Accordingly, the Commission adopted a remedy establishing numerical percentage "bandwidths" of +/– 11 percent as 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. *Opinion No. 480* at PP 1, 14, 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.

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.

b. The Bandwidth Compliance Filings

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 26 and 28 that Entergy had submitted in the bandwidth remedy proceeding[4]) 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; JA 666-76. 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.

c. The Annual Bandwidth Proceedings

First Bandwidth Proceeding. In *Opinion No. 480*, the Commission ruled that the bandwidth remedy would be effective starting with the 2006 calendar year. *Id.* at P 145. Entergy therefore initiated First Bandwidth Proceeding in May 2007, filing its calculations of cost disparities and the Operating Companies' respective

[4] Entergy's Exhibit 26 compared historical production costs of the Operating Companies for 1983-2002. Exhibit 28 was a production cost analysis for September 2001 through August 2002 that detailed the figures supporting the data in Exhibit 26. *Opinion No. 518* at P 3.

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, who issued his initial decision in September 2008. On exceptions to many of the ALJ's findings, the Commission ruled on numerous issues; of relevance here, the Commission limited the scope of challenges in annual bandwidth proceedings and ruled on various issues concerning treatment of deferred taxes in bandwidth calculations 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. *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 12-1282 (D.C. Cir. filed July 5, 2012). Following further orders on compliance and clarification, Entergy also filed a petition for review (D.C. Cir. No. 13-1295, filed Nov. 26, 2013), which has been consolidated with Louisiana's appeal. Briefing in that case will commence in July 2014.

Second Bandwidth Proceeding. Entergy initiated the Second Bandwidth Proceeding in May 2008. Following a hearing and an initial decision by the ALJ in September 2009, the Commission again ruled on various issues, including the proper scope of bandwidth proceedings, in *Entergy Servs., Inc.*, 137 FERC ¶ 61,029 (2011) ("*Opinion No. 514*"), *reh'g denied*, 142 FERC ¶ 61,013 (2013) ("*Opinion No. 514-A*"), *on review in* 5th Cir. 13-60141 (consolidated with 5th Cir.

13-60140, *see infra* pp. 18-19). This Court heard oral argument in Louisiana's appeal on March 10, 2014.

Third Bandwidth Proceeding. The Third Bandwidth Proceeding began in May 2009. After limiting the scope of the proceeding in the *Third Bandwidth Interlocutory Order*, the Commission affirmed the ALJ Decision in relevant respects in *Opinion No. 518* and the *Third Bandwidth Rehearing Order* (discussed *infra* at pp. 22-23).

Fourth Bandwidth Proceeding. Entergy initiated the Fourth Bandwidth Proceeding in May 2010. The Commission issued an order setting the matter for hearing, and subsequently ruled on Louisiana's request for rehearing regarding the scope of that proceeding. *Entergy Servs., Inc.*, 132 FERC ¶ 61,065 (2010), *on reh'g*, 137 FERC ¶ 61,019 (2011) ("*Fourth Bandwidth Rehearing Order*"). Louisiana again sought rehearing and clarification, to which the Commission responded in October 2013 (issued together with the *Third Bandwidth Rehearing Order* and several other related orders). *Entergy Servs., Inc.*, 145 FERC ¶ 61,049 (2013) ("*Fourth Bandwidth Clarification Order*"). The proceeding remains pending before the ALJ, following an administrative hearing held in March 2014.

Later Bandwidth Proceedings. The fifth, sixth, and seventh annual bandwidth proceedings (filed each May in 2011, 2012, and 2013, respectively) remain pending before the Commission, which has held the matters in abeyance

pending resolution of the earlier bandwidth proceedings in order to prevent relitigation of similar issues. *See Entergy Servs., Inc.*, 136 FERC ¶ 61,057 at P 21 (2011); *Entergy Servs., Inc.*, 140 FERC ¶ 61,111 at P 32 (2012); *Entergy Servs., Inc.*, 144 FERC ¶ 61,167 at P 30 (2013).

d. Bandwidth-Related Complaint Proceedings

In addition to the various annual bandwidth proceedings, the Commission has addressed similar issues in several complaint proceedings related to the bandwidth remedy.

Scope Complaint (2008). In 2008, before the administrative hearing in the First Bandwidth Proceeding, Louisiana filed a complaint raising 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" 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).

Arkansas Complaint (2009). In response to disputes that had arisen in the First Bandwidth Proceeding, the Arkansas Public Service Commission filed a complaint in March 2009 seeking to modify the depreciation components of the bandwidth formula. The Commission denied the complaint, explaining that the existing tariff language was appropriate because the Commission could examine

the inputs used in bandwidth calculations to ensure that they are just and reasonable. *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 at P 25 (2009). In an October 2011 rehearing order, however, after the Commission had ruled on the First and Second Bandwidth Proceedings, the Commission noted its "clarification in a number of [intervening] orders" of the treatment of certain expenses in the annual bandwidth proceedings. *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 137 FERC ¶ 61,030 at P 19 (2011) ("*First Arkansas Rehearing Order*"); *see id.* at PP 20-22 (discussing *Opinion No. 505*, *Third Bandwidth Interlocutory Order*, and *Fourth Bandwidth Rehearing Order*). In another order issued in January 2013, the Commission further clarified the scope of annual bandwidth proceedings and the various avenues for challenging inputs to the bandwidth formula. Ark. Pub. Serv. Comm'n v. Entergy Corp., 142 FERC ¶ 61,012 at PP 25-42 (2013) ("*Second Arkansas Rehearing Order*"). Louisiana's petition for review of those orders, in 5th Cir. No. 13-60140, was consolidated with its appeal from the Second Bandwidth Proceeding (5th Cir. No. 13-60141) and remains pending before this Court.

Depreciation Complaint (2010). In March 2010 (shortly after the Commission had, in *Opinion No. 505* and *Third Bandwidth Interlocutory Order*, clarified that elements of the bandwidth formula cannot be challenged in annual calculation proceedings), Louisiana filed a complaint seeking to change the

calculation of depreciation expenses in the bandwidth formula. The Commission found that Louisiana had raised issues of material fact as to whether the formula's depreciation components 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 ALJ's conclusion that Louisiana had not met its burden, as a complainant under section 206 of the Federal Power Act, of demonstrating that the existing bandwidth formula was 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*.

Out-of-Period Complaint (2011). 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 Out-of-Period Complaint also sought to establish the timing and methodology for adjusting bandwidth calculations to account for changes to the formula.

On the same day it issued *Opinion No. 518* and several other bandwidth orders, the Commission also issued an order on the Out-of-Period Complaint. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,102 (May 7, 2012), *reh'g pending*. The Commission held the issue of prospective relief in abeyance pending the resolution of similar issues in an ongoing cost allocation dispute, 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.

e. Related Appellate Proceedings

As noted *supra*, the consolidated appeals from the First Bandwidth Proceeding are pending before the D.C. Circuit, while the appeals from the Second and Third Bandwidth Proceedings are on review in separate cases before this Court. In addition, both courts have recently denied petitions by Louisiana seeking extraordinary relief in bandwidth-related FERC proceedings.[5]

[5] In December 2013, Louisiana filed a petition for a writ of mandamus in the D.C. Circuit, asking that court to direct the Commission to issue an order on rehearing on a remaining issue concerning refunds in the original bandwidth remedy proceeding. D.C. Cir. No. 13-1307. The D.C. Circuit denied the petition, without comment, on January 30, 2014.

In January 2014, Louisiana filed another mandamus petition, asking this Court to require FERC to lift its orders holding in abeyance the fifth, sixth, and seventh annual bandwidth proceedings and two proceedings on Louisiana complaints against Entergy (the Out-of-Period Complaint and another concerning deferred taxes, interruptible load, and other bandwidth-related disputes), and to require FERC to proceed with administrative hearings in all of those matters. 5th Cir. No. 14-30073. The Court denied the petition, also without comment, on March 12, 2014.

2. Orders On Review: The Third Bandwidth Proceeding Orders

a. Background: Administrative Hearing and ALJ Decision

As noted *supra* at pp. 5, 17, Entergy filed its bandwidth calculations using 2008 data in May 2009. Following the hearing in 2010, the ALJ issued his Initial Decision, which made findings on several disputed issues. Of relevance here, the ALJ found that the bandwidth formula did not provide a basis for excluding out-of-period costs or for using partial-year accounting for acquisitions during the test year (ALJ Decision at PP 107-09, 147), and that certain deferred taxes associated with net operating losses and casualty losses should be included in the bandwidth calculation (*id.* at PP 275-77).

b. *Opinion No. 518*

On exceptions raised by various parties, the Commission largely affirmed the ALJ Decision (finding two issues, not relevant here, to be moot) in *Opinion No. 518*, issued on May 7, 2012. The Commission agreed with the ALJ's explanation of the principles underlying the implementation of the bandwidth formula (*Opinion No. 518* at PP 16-27) (*see* Part II.A of the Argument, *infra*). The Commission also affirmed the ALJ's findings that the tariff did not provide for excluding out-of-period costs (*id.* at PP 28-48) (*see* Part II.C.1) or altering the accounting of acquisitions made during that year (*id.* at PP 49-63) (*see* Part II.C.2), and that

casualty loss deferred taxes should be included in the bandwidth calculations for 2008 (*id.* at PP 64-92) (*see* Part III).

c. *Third Bandwidth Rehearing Order*

The Louisiana Commission filed a timely request for rehearing. R. 302, JA 204. As discussed more fully in the Argument, the Commission reaffirmed and further explained its rulings in an order issued October 16, 2013.

This appeal followed.

d. Ongoing Compliance Proceeding

As noted *supra* (at p 6), the Commission also issued the *Third Bandwidth Compliance Order* in October 2013, on which Louisiana's request for rehearing remains pending. In that order, the Commission accepted Entergy's inclusion of casualty loss taxes and (as in *Third Bandwidth Rehearing Order*) rejected Louisiana's argument that Entergy must calculate casualty loss taxes by the same methodology as net operating loss taxes. *Id.* at PP 17-19.

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 numerous subsequent orders, including those on review here, 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 the orders on review, the Commission reasonably interpreted the tariff as requiring that the cost variables in the bandwidth formula use actual data as recorded on Entergy's books and as stated in annual reports, rather than imputed figures adjusted by the Commission. Therefore, the Commission, consistent with its numerous orders since early 2010 in every bandwidth proceeding, appropriately determined that challenges to the justness and reasonableness of the component definitions in the tariff are challenges to the bandwidth formula itself — the existing filed rate — that properly are brought pursuant to the rate change provisions of the Federal Power Act.

The Commission also reasonably, and consistent with its precedents, exercised its broad procedural discretion to limit the scope of the annual bandwidth filings to implementation issues, such as erroneous inputs or calculations, and to require that challenges to the justness and reasonableness of the bandwidth formula itself be raised in stand-alone proceedings, rather than litigated repeatedly in the annual proceedings. The Commission has repeatedly and thoroughly explained this 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). This approach 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.

Moreover, Louisiana appears to contend that the Commission changed its approach to challenges to elements of the bandwidth formula (which the Commission has broad substantive and procedural discretion to do) in the Third Bandwidth Proceeding. This contention ignores the Commission's extensive discussions in the First, Second, and Fourth Bandwidth Proceedings as well as in several complaint proceedings. Much of Louisiana's argument in this case is not only a rehash of arguments it presented in the pending appeal of the Second Bandwidth Proceeding, but also a collateral attack on earlier orders in the First Bandwidth Proceeding.

In addition, the Commission appropriately determined, affirming the ALJ, that casualty loss deferred taxes should be included in the bandwidth calculations, based on the tariff provision governing treatment of deferred taxes. Louisiana's procedural arguments to the contrary, which are barred by Louisiana's failure to raise them before the Commission on rehearing, are inapposite because the Commission's tax rulings applied the existing tariff, rather than a new rate.

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); *see also New Orleans*, 692 F.3d at 175 (affording *Chevron* deference to FERC's interpretation of the Entergy System Agreement).[6]

[6] Deference is particularly appropriate, as Louisiana concedes (Br. 43), where the agency's expertise is required — as it surely is in the case of a FERC-approved tariff governing the calculation of production costs for the purpose of a remedial reallocation of costs imposed by the Commission itself. *Louisiana 2008*, 522 F.3d

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).

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at 393-94 (recognizing FERC's broad remedial discretion and policy choice in designing bandwidth remedy).

II. THE COMMISSION APPROPRIATELY DECLINED, IN AN ANNUAL IMPLEMENTATION PROCEEDING, TO ALTER FORMULA COMPONENTS THAT ARE DEFINED BY THE TARIFF

In the orders on review, the Commission reasonably interpreted Entergy's FERC-approved tariff to require that bandwidth calculations use cost data drawn from the Operating Companies' annual FERC Form 1 reports. For that reason, the Commission appropriately concluded that challenges to the cost inputs in the annual bandwidth filings are limited to whether the calculations used the correct data and math, while arguments that those inputs render the resulting calculations unjust and unreasonable constitute challenges to the filed rate itself that must be brought as rate change proceedings.

Louisiana argues that the Commission can — indeed, that it must — reconsider the justness and reasonableness of various components of the bandwidth formula as applied in each annual proceeding, and adjust the calculations accordingly. *See* Br. 47-56. In particular, in this appeal from the Third Bandwidth Proceeding, Louisiana challenges the Commission's decision not to alter specific components — acquisitions and out-of-period costs — in the bandwidth calculation, contrary to the formula in the tariff. The Commission, however, has reasonably and consistently declined to consider such adjustments in the annual implementation proceedings, in accordance with the filed rate doctrine, the provisions of the tariff, and the Commission's broad discretion to order its own

proceedings. Nevertheless, the Commission has repeatedly explained that parties may seek to change the tariff in a separate proceeding, in accordance with the rate change provisions of the Federal Power Act.

A. The Tariff's Specifications Of Cost Data To Be Used Are Elements Of The Filed Formula Rate

The Commission's rulings on the scope of bandwidth proceedings stem from a common set of principles underlying the annual implementation of the bandwidth remedy. For this reason, the ALJ began his analysis by describing these principles[7]; on review, the Commission likewise set forth these general principles, affirming the ALJ's understanding. *Opinion No. 518* at PP 25-27; *Third Bandwidth Rehearing Order* at PP 8-11. The first is that the bandwidth formula, as set forth in Entergy's tariff, defines the source of cost inputs as actual, end-of-year data in FERC-required annual reports; the second is that the bandwidth formula, including its definitions of source data, is subject to the filed rate doctrine.

1. The Bandwidth Formula Requires Use Of Actual Data As Recorded In Specific Accounts At The End Of Each Year

The Commission's analysis begins with the tariff itself. The bandwidth formula, as set forth in FERC-approved provisions in the System Agreement,

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[7] The ALJ in the Third Bandwidth Proceeding (unlike those in the First and Second) had the benefit of guidance from the Commission's first substantive ruling on review from an annual bandwidth proceeding — *Opinion No. 505* — as well as the subsequent *Third Bandwidth Interlocutory Order*. *See* ALJ Decision at PP 15-21 (explaining principles; citing both orders).

requires Entergy to calculate each Operating Company's actual production costs, using figures reported on FERC Form 1 in accordance with FERC reporting requirements. *See Out-of-Period Complaint Order* at P 26. Section 30.12 of Service Schedule MSS-3 sets forth the algebraic equations for calculating "Actual Production Cost"; Footnote 1 to that section provides that, in determining each Operating Company's production costs:

> All Rate Base, Revenue and Expense items shall be based on the actual amounts on the Company's books for the twelve months ending December 31 of the previous year as reported in FERC Form 1 or such other supporting data as may be appropriate for each company . . . .

Service Schedule MSS-3, Sec. 30.12, Footnote 1 JA 668, *quoted in Opinion No. 518* at PP 25, 43; *accord Opinion No. 514* at P 58 n.84. Footnote 2 to the same section (modifying the algebraic equation for "Variable Production Cost") states:

> Rate Base values shall be based on the actual balances on the Company's books as of December 31 of the previous year except for Fuel Inventory, Materials & Supplies and Prepayments which shall be based on the average of the beginning and ending actual balances on the Company's books.

Service Schedule MSS-3, Sec. 30.12, Footnote 2, JA 668; *quoted in Opinion No. 518* at P 61.[8]

[8] The tariff goes on to define each input to the equation, usually by reference to the FERC Account(s) in which the data are reported on FERC Form 1. *See* Service Schedule MSS-3, Sec. 30.12, JA 668-74.

Accordingly, the Commission has reasonably 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 as of December 31 of the test year where the formula specifies end-of-year values"); *see infra* pp. 49-52. Though Louisiana contends that the Commission introduced that interpretation in *this* case, the Third Bandwidth Proceeding (*see* Br. 43-44, 47-49), the Commission has construed the tariff's references to "actual data" on Entergy's "books" and "as reported in FERC Form 1" the same way in *every* bandwidth proceeding. *See, e.g.*, *Opinion No. 505* at P 171; *Opinion No. 514* at P 47; 132 FERC ¶ 60,065 at P 26; *see also Out-of-Period Complaint Order* at P 26.

Based on the tariff language, the Commission has consistently declined to make adjustments to the actual data in implementing the bandwidth calculations to achieve different results; each annual bandwidth proceeding is "not about what production costs would have been" if certain components were different, "but simply about applying the formula using actual . . . data." *Opinion No. 505* at P 173, *quoted in Opinion No. 518* at P 25; *First Arkansas Rehearing Order* at P 20; *Third Bandwidth Interlocutory Order* at P 20; *Opinion No. 514* at PP 48, 53. *See* Part II.C, *infra* (discussing the Commission's analysis of the specific data disputes

concerning out-of-period expenses and acquisition costs). Indeed, because the tariff requires actual data, parties' arguments that use of the specified data is unjust and unreasonable are, in fact, challenges to the tariff itself.

2. The Bandwidth Formula Is A Lawful Rate Subject To The Filed Rate Doctrine

The tariff in its current form is the existing lawful rate under the Federal Power Act. Thus, at the core of the Commission's reasoning in the orders on review — as in all of the annual bandwidth proceedings — is the filed rate doctrine. That black-letter principle of utility regulation — which dates over a century, long preceding the Federal Power Act[9] — holds that a rate that has been approved by the Commission must be respected and enforced as the lawful rate. *See, e.g.*, *Ark. La. Gas Co.*, 453 U.S. at 578 (discussing filed rate doctrine); *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951) (same).

Indeed, "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but *the Commission itself has no power to alter a rate retroactively*." *Ark. La. Gas Co.*, 453 U.S. at 578 (emphasis added).

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[9] "The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act . . . ." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (citing, *inter alia*, *Pa. R.R. Co. v. Int'l Coal Co.*, 230 U.S. 184, 196-97 (1913)).

Thus, even where the Commission finds an existing rate to be unjust and unreasonable (by its authority under Federal Power Act § 206), the replacement rate applies only prospectively: "This rule bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.'" 453 U.S. at 578 (citation omitted). (Similarly, the Commission generally cannot order refunds for the period while the existing rate remained the lawful filed rate. *See Out-of-Period Complaint Order* at PP 26-27.[10]) What Louisiana now portrays as the Commission's choice not to alter the tariff formula retroactively (*see* Br. 31, 42, 44-45, 50) is, in fact, adherence to that longstanding, and binding, doctrine.

The Commission has long held that the filed rate doctrine applies to a formula rate: "a formula rate specifies the cost components . . . 'the formula itself is the rate.'" *Pub. Utils. Comm'n*, 254 F.3d at 254 & n.3 (citing *Transw. Pipeline Co. v. FERC*, 897 F.2d 570, 577-78 (D.C. Cir. 1990); *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306 at P 34 (2008) ("*AEP*") ("in approving any formula rate, the Commission approves the formula itself, the algebraic equation used to calculate

[10] The Commission may order refunds for past periods "where a utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate." *Third Bandwidth Rehearing Order* at P 9; *accord*, *Fourth Bandwidth Clarification Order* at P 9; *Second Arkansas Rehearing Order* at P 27; *Opinion No. 519* at P 26.

the rates"), *quoted in Third Bandwidth Rehearing Order* at P 9; *accord Fourth Bandwidth Clarification Order* at P 9.

Accordingly, the Commission's refusal to substitute adjusted figures into the annual bandwidth calculations is not only reasonable but 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 [in the 2006 and 2007 Compliance Orders (*see supra* p. 15)] . . . . 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); *Fourth Bandwidth Clarification Order* at P 12; *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"); *Opinion No. 505-A* at PP 38, 53. Indeed, even errors or deficiencies in the methodology underlying the bandwidth formula would have to be corrected by modifying the tariff. *Opinion No. 505* at P 245.

Of course, a lawful rate can be changed — by the tariffing utility itself, with a tariff filing under Federal Power Act § 205 that the Commission finds just and

reasonable, or by a third party (or the Commission itself) under Federal Power Act § 206, upon a showing that the existing rate is unjust or unreasonable. *See supra* p. 8 (explaining applicability of 16 U.S.C. §§ 824d-824e). And the bandwidth formula has in fact been changed since its original acceptance. *See, e.g.*, *Opinion No. 505-A* at P 13 & n.27 (noting a tariff revision, on Entergy's § 205 filing, concerning source data for the Energy Ratio variable). The Commission has repeatedly emphasized that Louisiana and other parties can seek modifications in rate change proceedings. *See Opinion No. 505-A* at P 50 ("the Louisiana Commission may file a section 206 proceeding to change the bandwidth formula"); *Opinion No. 505* at PP 170, 172; *Third Bandwidth Rehearing Order* at P 11; *Third Bandwidth Interlocutory Order* at P 22 (quoting *2006 Compliance Order* at P 69).[11] The central question in this case — as in all of the annual bandwidth proceedings (and the other appeals therefrom) — is whether the Commission must instead reconsider the justness and reasonableness of the lawful, filed rate in each of the annual implementation proceedings.

[11] Though Louisiana objects (Br. 51) that placing the burden on a complainant is "arbitrary," that is the statutory standard in FPA § 206, 16 U.S.C. § 824e —a third party seeking to change an existing tariff always bears the burden of proof. *See, e.g.*, *Blumenthal*, 552 F.3d at 881. *Cf. Opinion No. 519* at PP 2, 121-22 (affirming ALJ's findings that Louisiana had not met burden on Depreciation Complaint).

B. The Commission Has Reasonably Limited The Scope Of Annual Bandwidth Proceedings To Challenges To Implementation Of The Formula, Not To The Merits Of The Formula Itself

Based on those general principles, the Commission has, since the First Bandwidth Proceeding, consistently held that challenges to the formula — including challenges to the tariff definitions of individual inputs — must be pursued as changes to the filed rate. *Opinion No. 505-A* at P 50 ("The bandwidth formula is the filed rate and under the filed rate doctrine may only be changed in a section 205 or 206 proceeding."); *accord*, *Opinion No. 514* at PP 48-49; *Opinion No. 518* at P 44; *Fourth Bandwidth Clarification Order* at P 12.

Correspondingly, the Commission has limited the scope of the annual implementation proceedings (including the Third Bandwidth Proceeding on appeal here) to disputes as to the correct implementation of the existing formula: "[T]he purpose is to establish the payments and receipts necessary under the bandwidth formula set forth in Service Schedule MSS-3. It is, thus, not about what production costs would have been if [certain variables were different], but simply about applying the formula using actual [annual] data." *Opinion No. 505* at P 173; *see also Opinion No. 518* at P 25; *cf. Out-of-Period Complaint Order* at P 26 (adjustment of bandwidth inputs in annual calculations would retroactively change the formula in effect).

1. The Commission Appropriately Limits The Scope Of The Annual Bandwidth Proceedings To Implementation Issues

Specifically, "[i]n determining whether Entergy has properly implemented the bandwidth formula using the required data inputs in a bandwidth filing" (*Fourth Bandwidth Rehearing Order* at P 13), parties may challenge the annual calculations for errors in implementation:

> [E]ach input in the bandwidth formula should be examined to make sure that the correct data was used in determining the bandwidth payments. Thus, if parties believe that Entergy has inputted data from the wrong parts of FERC Form No. 1 in its bandwidth formula, or that the data used was incorrectly calculated, such objections are properly raised in the bandwidth proceeding.

First Arkansas Rehearing Order at P 23; *accord, Opinion No. 514-A* at P 16; *Second Arkansas Rehearing Order* at P 31; *see also Fourth Bandwidth Clarification Order* at P 14 ("challenges . . . to the 'inputs' used in the bandwidth formula include misapplication of the formula rate (such as use of erroneous data or incorrect calculations)").

In addition to whether Entergy used the specified data and correct math, parties also may challenge the costs themselves, for conformance with retail regulatory approvals (where a formula variable specifies use of retail values, such as in depreciation rates), or for imprudence of costs incurred. *Fourth Bandwidth*

Rehearing Order at P 13; *accord*, *Opinion No. 518* at P 26; *Opinion No. 505-A* at P 50; *Opinion No. 514-A* at P 16.[12]

Also, in instances where the tariff formula omits details, parties may dispute whether Entergy's calculations comply with the underlying details in the methodology presented in Entergy Exhibits 26 and 28 (*see supra* p. 15 *and infra* p. 50), which the Commission adopted in developing the bandwidth remedy and on which Entergy based its tariff. *See Fourth Bandwidth Rehearing Order* at P 13; *accord*, *Opinion No. 518* at P 26; *Opinion No. 505-A* at P 50; *Opinion No. 514-A* at P 16. As the Commission explained in the orders on review, the tariff is not incomplete as to the particular costs at issue here, so reference to those exhibits was not warranted. *See* Part II.C, *infra*.

Contrary to Louisiana's argument (Br. 31-32), the Commission's rulings limiting the scope of bandwidth proceedings are entirely consistent with its long-

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[12] Imprudence, however, is not a vehicle for disputing whether the tariff's specification of cost data to be inputted is just and reasonable as applied; rather, prudence is a traditional ratemaking standard that merely precludes the passthrough to ratepayers of irresponsibly-incurred expenses. *See*, *e.g.*, *New England Power Co.*, 31 FERC ¶ 61,047 at p. 61,083 (1985) ("The term ['prudence'] is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown."); *see also Second Arkansas Rehearing Order* at P 37 (discussing example of prudence challenge to underlying plant costs in bandwidth calculations).

standing principle "that, under formula rates, parties have the right to challenge the inputs to or the implementation of the formula at whatever time they discover errors in the inputs to or implementation of the formula." *AEP*, 124 FERC ¶ 61,306 at P 35. *See Third Bandwidth Rehearing Order* at PP 8-11; *Fourth Bandwidth Clarification Order* at PP 9-12; *Second Arkansas Rehearing Order* at PP 26-31 (explaining consistency with *AEP* and other FERC precedents); *Out-of-Period Complaint Order* at P 27 (noting that "[t]he kinds of challenges to inputs or implementation contemplated" by *AEP* and similar precedents would include showing that the calculation used "a wrong amount (input challenge) or . . . that recovery is not allowed for these amounts under the prescribed formula (implementation challenge)").

"In sum, parties can challenge in a bandwidth proceeding erroneous inputs, implementation errors, or prudence of cost inputs." *Fourth Bandwidth Clarification Order* at P 12. But "the focus of litigation in these annual bandwidth filings is whether Entergy properly implemented the formula. The focus is not whether the formula [itself] is just and reasonable." *Third Bandwidth Interlocutory Order* at P 20; *Fourth Bandwidth Rehearing Order* at P 10 (same). That is where Louisiana's argument fails: Louisiana does not contend that Entergy populated the bandwidth formula with costs drawn from source data other than that specified by the tariff. Nor does it object to Entergy's calculations or to the prudence of the

underlying expenditures. Louisiana's contentions that certain costs should be adjusted, notwithstanding the language of the tariff, are focused *entirely* on whether the tariff itself is just and reasonable.

2. The Third Bandwidth Orders On Review Are Consistent With The Commission's Rulings In Every Bandwidth Proceeding

Louisiana continues to object (as it did in the appeal from the Second Bandwidth Proceeding, pending before this Court) to the Commission's "departure" from a few of its earliest statements concerning bandwidth disputes (preceding the Commission's substantive review of any annual proceeding). *See* Br. 30-33, 47-49. Indeed, Louisiana contends that the orders on review — issued in May 2012 and October 2013 — marked the Commission's supposed change in approach. Br. 47. Louisiana also now argues that the Commission reversed itself in the *Fourth Bandwidth Clarification Order*, issued on the same day in October 2013 as the *Third Bandwidth Rehearing Order*. *See* Br. 41, 48, 56.

Louisiana failed to present any of these arguments on rehearing before the Commission in the underlying proceeding. They are thus jurisdictionally barred. *See supra* pp. 1-2. They also are wrong.

First, the Commission has previously conceded that, in two orders in the earliest 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 . . . . 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.

The Commission, however, corrected that lack of clarity in its *first* ruling on an annual bandwidth proceeding (*Opinion No. 505*, issued in January 2010), when the ALJ's findings and the arguments presented on exceptions made clear that the dispute was whether specific components of the filed rate formula were just and reasonable — i.e., whether the filed rate should be changed. *See Opinion No. 505* at PP 172-73; *Opinion No. 505-A* at PP 50, 53. The Commission has consistently followed that precedent, and repeatedly explained its approach, in numerous subsequent orders. *See generally 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."); *Second Arkansas Rehearing Order* at PP 5-10 (discussing series of orders). Yet Louisiana inexplicably contends that *these* orders in the Third Bandwidth Proceeding, issued in May 2012 and October 2013, "reversed" or "departed from" the Commission's pre-*Opinion No. 505* statements. *See* Br. 2, 47, 48. (Louisiana similarly argued in the appeal from the Second Bandwidth Proceeding that *those* orders — including two key orders issued in October 2011 — marked the purported departure, notwithstanding the series of consistent orders since January 2010.)

Finally, the Commission did not, as Louisiana contends, "shift back" (Br. 52) to allowing parties to litigate the merits of the filed rate in a bandwidth proceeding. *See* Br. 41, 48, 52, 56. The *Fourth Bandwidth Clarification Order* discussed, yet again, the same categories of implementation challenges — wrong data, faulty math, and imprudent expenditures — *not*, as Louisiana seeks here, relitigation of the justness and reasonableness of the tariff. *See Fourth Bandwidth Clarification Order* at P 12 ("[P]arties can challenge in a bandwidth proceeding erroneous inputs, implementation errors, or prudence of cost inputs. However, challenges to the bandwidth formula itself must be raised in an FPA section 206 complaint or section 205 filing."); *id.* P 14 ("We clarify that challenges that may be raised in a bandwidth implementation proceeding to the "inputs" used in the bandwidth formula include misapplication of the formula rate (such as use of

erroneous data or incorrect calculations), which includes the prudence of a cost input."); *id.* n.37 ("challenges to the proper implementation of the formula[] includ[e] the prudence or reasonableness of expenditures booked to the applicable FERC accounts, [in contrast to] challenges to the bandwidth formula itself"). *Cf. Third Bandwidth Rehearing Order* at P 8 & n.22 (*Fourth Bandwidth Clarification Order*, issued the same day, merely "reiterates" the familiar principle that "misapplication of the formula rate," such as "erroneous data" or "incorrect calculations" or "imprudent costs," can be challenged in bandwidth proceedings).

3. The Commission Reasonably Exercised Its Broad Discretion To Order Its Proceedings

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); *Transw. Pipeline Co. v. FERC*, 820 F.2d 733, 745 (5th Cir. 1987) ("the Commission possesses broad discretion to organize its caseload and to determine which issues are to be decided"). 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 (rate filing) or § 206 (complaint) remain available.

Nor was it improper for the Commission to clarify the proper scope and focus of its proceedings in the face of accumulating litigation over annual bandwidth proceedings and multiple complaints. *See* Br. 43-44, 52. *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 863-64). Given the complexity and long history of cost allocation disputes under the Entergy System Agreement, the Commission appropriately ordered its proceedings 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).[13]

Louisiana disagrees with the Commission's exercise of its discretion, arguing that the Commission "did not explain how a 'free for all' of Section 206 complaints is preferable to a 'free for all' in annual bandwidth proceedings." Br. 52; *see also* Br. 56. Louisiana further contends that the Commission "changed the procedure" for bandwidth proceedings "retroactively," citing due process cases concerning retroactive application of administrative rules. Br. 50-51. The Court lacks jurisdiction to consider any of these arguments because Louisiana wholly failed to raise them before the Commission in the underlying proceeding. In addition to being an express statutory prerequisite for jurisdiction (*see supra* pp. 1-2), rehearing serves the important purpose of "enabl[ing] the Commission to correct its own errors, which might obviate judicial review, or to explain in its expert judgment why the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005); *see also Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir.

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[13] Louisiana misapprehends the Commission's citation of the "free for all" comment, arguing that the Commission "relied on" testimony that did not support its ruling. *See* Br. 47, 52. The Commission merely agreed with the witness's characterization of a rationale that the Commission itself had already reached in numerous orders.

2003) ("The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny."); *Ecee, Inc. v. FERC*, 611 F.2d 554, 565 (5th Cir. 1980) (requirement allows the agency to correct its errors, and provides the court the benefit of the agency's consideration and analysis of issues within its expertise).

Finally, by enforcing the filed rate doctrine and reasonably holding that proposals to alter the rate be brought as separate rate change proceedings rather than litigated in the annual implementation filings, the Commission has not "block[ed] any avenue" (Br. 45) for parties to challenge the justness and reasonableness of the bandwidth formula:

> [P]arties . . . are not deprived of the opportunity to raise any issues before this Commission. They just have to raise them in the proper forum — bandwidth filings to raise whether the required formula inputs were correctly applied in the bandwidth calculation[,] and section 206 complaints . . . to raise whether the formula is just and reasonable.

Fourth Bandwidth Rehearing Order at P 12; *accord*, *Fourth Bandwidth Clarification Order* at P 12.

C. The Commission Properly Interpreted the Tariff As To The Particular Cost Issues That Louisiana Raises

Louisiana's primary argument on appeal is, in essence, that the Commission should have modified the bandwidth formula in the annual implementation proceedings, tweaking specific variables in the equation to achieve what Louisiana

believes would be more equitable results. *See, e.g.*, Br. 7, 50-54. As discussed above, the Commission has, in all of the bandwidth proceedings, reasonably declined to impose such adjustments.

Furthermore, to the extent that Louisiana challenges the Commission's interpretation of the tariff as to specific costs at issue in the Third Bandwidth Proceeding, the Commission's interpretation was reasonable and is entitled to *Chevron*-type deference. *New Orleans*, 692 F.3d at 175; *see supra* p. 27. Louisiana argues that an agency's inconsistent interpretations receive no deference (Br. 43), but even "agency inconsistency is not a basis" for withholding *Chevron* deference. *Brand X*, 545 U.S. at 981. In any event, the Commission's interpretation in this case is, in fact, consistent with the other bandwidth orders. *See supra* Part II.B.2. *Contra Idaho Power Co. v. FERC*, 312 F.3d 454, 464 (D.C. Cir. 2002) (reversing orders that were inconsistent with numerous agency interpretations of the relevant tariff, both "prior and subsequent," without "a single case to the contrary").

1. The Commission Reasonably Concluded That The Tariff Does Not Provide For Adjusting Bandwidth Calculations To Exclude Out-of-Period Costs

In a complaint proceeding on a cost allocation dispute that predated the bandwidth remedy, the Commission required Entergy to implement certain refunds and surcharges in 2007 and 2008. *See La. Pub. Serv. Comm'n v. Entergy Corp.*,

120 FERC ¶ 61,241 (2007). Those "out-of-period" revenues and expenses were included in the actual costs properly recorded in the Operating Companies' accounts listed on FERC Form 1 for 2008. *Opinion No. 518* at P 43. For that reason, Entergy included those amounts in the calculations in the Third Bandwidth Proceeding. *Id.* Over Louisiana's objection, the ALJ found, and the Commission affirmed, that the tariff language requires that bandwidth calculations use the actual data on the Operating Companies' books at the end of the calendar year, and that the tariff "does not provide for the exclusion of out-of-period revenues and expenses." *Id.*; *see also Third Bandwidth Rehearing Order* at P 40. Moreover, the Commission found "no provision in the tariff that would allow for an adjustment to remove out-of-period amounts . . . ." *Opinion No. 518* at P 43.

Louisiana argued that excluding out-of-period costs would be more reasonable, but the Commission explained — consistent with its other rulings (*see* Part II.B.2, *supra*) — that "the bandwidth proceeding is not the proper place to argue the justness and reasonableness of the bandwidth formula provisions." *Opinion No. 518* at P 44.[14] Furthermore, reading the tariff to "allow deviations

[14] In 2011, Louisiana did file a complaint under FPA § 206 to modify the tariff. The Commission properly declined to alter the formula retroactively (for past bandwidth years), but held the complaint in abeyance as to prospective relief (pending the outcome of a hearing in a separate proceeding that involved related issues). *Out-of-Period Complaint Order* at PP 26, 28; *see supra* pp. 20-21.

from use of data in the FERC Form 1 required by the formula to be used in the bandwidth calculation in order to achieve what any particular party may think is a more reasonable result . . . would make the tariff language superfluous." *Third Bandwidth Rehearing Order* at P 41.

Louisiana argued that the Commission should apply the methodology used in Entergy's Exhibits 26 and 28 in the original bandwidth remedy proceeding (*see supra* p. 15). *See Opinion No. 518* at P 30. The Commission, however, adhered to its earlier ruling in the First Bandwidth Proceeding that the filed tariff "takes precedence in any conflict with the methodology" in those exhibits. *Opinion No. 505* at P 133, *cited in Opinion No. 518* at P 46. Though the methodology in the exhibits applies when the bandwidth formula is not clear, it is not relevant for variables where "the formula is clear that actual costs are required." *Opinion No. 518* at P 46.

2. The Commission Reasonably Concluded That The Tariff Does Not Provide For Adjusting Bandwidth Formula Variables To Substitute Partial-Year Data

During 2008, two of the Operating Companies (Entergy Gulf States Louisiana and Entergy Arkansas) purchased generation facilities. Louisiana contended that the bandwidth calculations for 2008 (specifically, as to return on rate base and associated income taxes) should account for those acquisitions on a partial-year basis. *Opinion No. 518* at P 49; *see* Br. 38-39. The ALJ, however,

found that the tariff clearly required the use of data recorded as of December 31, as reported on FERC Form 1. ALJ Decision at P 108.

The Commission affirmed the ALJ, concluding that "the bandwidth formula only allows for assets on the books at the end of the calendar-year to be reflected in the bandwidth calculation as though they had existed for a full year and that Entergy is required to use the FERC Form 1 data for the applicable accounts in performing the [bandwidth] calculations." *Opinion No. 518* at P 61. Indeed, "[t]he bandwidth formula does not provide Entergy with the discretion to do anything other than use the end-of-year rate base balances for the Operating Companies' generation plants." *Id.* To do otherwise would require modifying the tariff: "a [Federal Power Act] section 206 proceeding is the proper forum for the Louisiana Commission to make an argument for applying partial year accounting of assets held in less than 12 months of a bandwidth test year, because such a change would require a change to the bandwidth formula." *Id.* at P 62.

III. THE COMMISSION PROPERLY DETERMINED THAT CASUALTY LOSS DEFERRED TAXES SHOULD BE INCLUDED IN BANDWIDTH CALCULATIONS

Louisiana also challenges the Commission's determination as to the treatment, in the Third Bandwidth Proceeding, of the calculation of a rate base component known as Accumulated Deferred Income Taxes (referred to as "ADIT"

in FERC orders and Louisiana's brief).[15] Specifically, Louisiana objects to the Commission's procedural and substantive rulings on casualty loss taxes. Br. 2, 8-20.

Some of Louisiana's principal contentions about deferred taxes are not subject to this Court's review. In particular, Louisiana's due process argument (*see* Br. 24-26, discussing *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005), and *N. Ala. Express, Inc. v. United States*, 585 F.2d 783 (5th Cir. 1978)) was not raised on rehearing before the Commission; therefore, that argument is jurisdictionally barred by the Federal Power Act. *See supra* pp. 1-2. To the extent Louisiana's arguments are properly before the Court, they are without merit.

A. The Commission Relied On The Existing Tariff Definition Of The Deferred Taxes Component Of The Bandwidth Formula

Here again, the Commission based its determinations on the language of the tariff, which defines the deferred taxes component in the equation for calculating rate base in the bandwidth formula:

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[15] ADIT is "an accounting device required under [both general and FERC-specific accounting principles] that is used to reflect the tax effect of the differences in timing between when an expense is reflected as a tax deduction . . . and when the expense is reflected in the income statement under [those accounting principles]." Order Granting Clarification in Part and Denying Clarification in Part, *Entergy Servs., Inc.*, 145 FERC ¶ 61,045 at P 1 n.2 (2013) (in First Bandwidth Proceeding).

> ADIT = Net Accumulated Deferred Income Taxes (ADIT) recorded in FERC Accounts 190, 281 and 282 (as reduced by amounts not generally and properly includable for FERC cost of service purposes, including but not limited to, SFAS 109 ADIT amounts and ADIT amounts arising from retail ratemaking decisions) plus Accumulated Deferred Income Tax Credit – 3% portion only recorded in FERC Account 255.

Service Schedule MSS-3, Section 30.12, JA 669, *quoted in Opinion No. 505* at P 224; *see also Opinion No. 518* at P 85 (tariff requires ADIT balances reported in FERC Form 1 to be included "except amounts 'not generally and properly includable'" for cost of service).

Applying that tariff provision, the Commission affirmed the ALJ's finding that all deferred taxes recorded in the specified accounts and generally and properly includable for cost of service purposes should be included in the bandwidth calculation, including casualty loss taxes. *See Opinion No. 518* at PP 65-66, 84; *Third Bandwidth Rehearing Order* at P 17. The Commission reasonably interpreted the tariff definition of ADIT to require that all deferred tax balances reported on FERC Form 1 must be included in the variable deferred taxes component, except amounts that are not generally and properly includable for cost of service ratemaking. *Opinion No. 518* at P 85. (Similarly, the Commission had ruled in *Opinion No. 505* that exclusion of deferred tax balances that were *not* generally and properly includable for cost of service purposes was "fully consistent with the bandwidth formula." *Id.* at P 233.)

On appeal, Louisiana argues at length (Br. 9-10, 22-26) that the Commission's ruling on treatment of casualty loss deferred taxes effected a rate change that could not be imposed "retroactively" (Br. 26). But Louisiana is mistaken: the Commission only interpreted and applied the *existing* filed rate — i.e., the tariff definition of the deferred taxes component. "Because the bandwidth formula provides that this casualty loss ADIT [recorded in a specified account] is to be included in the bandwidth calculation, the Louisiana Commission's claim of retroactive ratemaking is unfounded, and, accordingly, there is no reason for Entergy to make a section 205 filing." *Third Bandwidth Rehearing Order* at P 29.[16]

The Commission had likewise refuted Louisiana's same argument in the First Bandwidth Proceeding, "reject[ing] the Louisiana Commission's assertion that a section 205 filing is required" for the exclusion of deferred tax amounts the Commission had approved in that case: "Specifically, this finding follows the as-

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[16] Nevertheless, half of Louisiana's still-pending request for rehearing of the *Third Bandwidth Compliance Order* is dedicated to continuing to urge the Commission to make the treatment of casualty loss deferred taxes prospective from the date that *Opinion No. 518* was issued, based on the same arguments about the filed rate doctrine and retroactive ratemaking that it raises here. *See* Request for Rehearing at 2, 8-14, FERC Docket No. ER09-1224 (filed Nov. 15, 2013), available at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13395612. (That rehearing request was one of the bases for the Commission's motion to hold this appeal in abeyance.)

filed definition of ADIT in Service Schedule MSS-3 that provides for the exclusion of [deferred tax] amounts not includable for a Commission cost of service." *Opinion No. 505* at P 236; *id.* at P 233 ("Service Schedule MSS-3 is the controlling methodology"). Therefore, Louisiana's extended argument regarding modification of a filed rate, retroactive ratemaking, and statutory advance notice of rate changes is wholly inapposite.

B. The Commission Reasonably Determined That Casualty Loss Deferred Taxes Meeting The Tariff Definition Should Be Included In Bandwidth Calculations

Affirming the ALJ's findings, the Commission determined that the casualty loss deferred taxes that met the requirements of the tariff definition should be included in the bandwidth calculations. *Opinion No. 518* at PP 84, 88. Louisiana accuses the Commission of irrationality because there was no "nexus" between net operating loss taxes and casualty loss taxes justifying the inclusion of both together in bandwidth calculations, and because the Commission did not require both to be calculated the same way. Br. 29-30. But the Commission did not rely on any such "nexus," and did explain the difference in calculation. The Commission based its determination on the language of the tariff — which specifies deferred taxes that are recorded in certain FERC accounts *and* that are generally and properly includable for cost of service purposes. Applying those criteria, the Commission determined that *some* net operating loss taxes attributed to storm damage losses

could be included, but that such attribution cannot be isolated; for that reason, the Commission requires net operating loss deferred taxes to be calculated using a special ratio that combines all revenues and expenses. *Third Bandwidth Rehearing Order* at PP 22-23.

By contrast, the casualty loss deferred taxes recorded in FERC Account 282 were, on the record in this case, directly attributable to storm damage expenses and was generally and properly included in cost-of-service. *See Third Bandwidth Rehearing Order* at PP 24-25; *id.* at P 24 & n.48 (citing witness testimony); ALJ Decision at P 277. *See also Third Bandwidth Rehearing Order* at P 25 (also noting that casualty loss deferred taxes should be included "*to the extent* the expenses associated with the casualty loss are [also] recorded in accounts included in the bandwidth formula") (emphasis added); *Opinion No. 518* at PP 88, 91; *Third Bandwidth Compliance Order* at P 19. Thus, for casualty loss deferred tax amounts that are included in accordance with the tariff definition, "Entergy must functionalize those amounts to production based on plant ratios, in accordance with the provisions of the bandwidth formula." *Third Bandwidth Rehearing Order* at P 22.

The Commission also reasonably concluded that, although Entergy had not included casualty loss deferred taxes in its calculations for the Third Bandwidth Proceeding (having submitted the calculations eight months before the

Commission first interpreted the ADIT provision in *Opinion No. 505*), the parties had "ample opportunity" to address the issue at the (post-*505*) hearing. *Opinion No. 518* at P 91 (noting specific questioning of witnesses and finding "little support for the Louisiana Commission's claim that the issue was not properly considered"); *cf. Opinion No. 505* at P 53 n.66 (Commission generally defers to ALJ's judgment "as to what evidence he found meaningful or worthy of weight").

Accordingly, the Commission's determination is the type of expert judgment that is entrusted to the agency's discretion, and is supported by sufficient evidence in the record. *See Transw. Pipeline Co.*, 820 F.2d at 738, 740, 744-45 (affirming Commission's decisionmaking based on expertise and record evidence); *U.S. Cellular Corp.*, 364 F.3d at 256 (substantial evidence standard is "highly deferential").

CONCLUSION

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

Respectfully submitted,

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May 19, 2014
Final Brief: July 29, 2014

Louisiana Public Service Commission v. FERC
5th Cir. No. 13-60874

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 29th day of July 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system:

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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 13,039 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addenda.

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July 29, 2014

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	pp. 14, 15
	December	•*Opinion No. 480-A* (Bandwidth Remedy (rehearing))	113 FERC ¶ 61,282	pp. 9, 14
2006	November	•*2006 Compliance Order*	117 FERC ¶ 61,203	pp. 14-15, 36
2007	April	•*2007 Compliance Order*	119 FERC ¶ 61,095	pp. 15, 35
	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	•*Scope Complaint Order*	124 FERC ¶ 61,010	p. 18
	September	ALJ decision in First Bandwidth Proceeding	124 FERC ¶ 63,026	
2009	May	[Entergy files Third Bandwidth Proceeding]		
	July	•*Arkansas Complaint Order*	128 FERC ¶ 61,020	p. 19
	September	ALJ decision in Second Bandwidth Proceeding	128 FERC ¶ 63,015	
2010	January	•*Opinion No. 505* (in First Bandwidth Proceeding)	130 FERC ¶ 61,023	*passim*
	March	•*Third Bandwidth Interlocutory Order*	130 FERC ¶ 61,170	*passim*
	May	[Entergy files Fourth Bandwidth Proceeding]		
	July	•Hearing Order in Fourth Bandwidth Proceeding	132 FERC ¶ 61,065	p. 17
	August	•ALJ Decision in Third Bandwidth Proceeding	132 FERC ¶ 63,005	*passim*

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

Year	Month/Day	Description of Event/Order/Proceeding	Citation	In FERC Br.
2011	May	[Entergy files Fifth Bandwidth Proceeding]		
	October 6	•*Fourth Bandwidth Rehearing Order*	137 FERC ¶ 61,019	*passim*
	October 7	•*Opinion No. 514* (in Second Bandwidth Proceeding) •*First Arkansas Rehearing Order*	137 FERC ¶ 61,029 137 FERC ¶ 61,030	*passim* pp.19,32,38,42
2012	May 7	•*Out-of-Period Complaint Order* •*Opinion No. 505-A* (in First Bandwidth Proceeding) •***Opinion No. 518*** **(in Third Bandwidth Proceeding)** •*Opinion No. 519* (on Louisiana's Depreciation Complaint)	139 FERC ¶ 61,102 139 FERC ¶ 61,103 **139 FERC ¶ 61,105** 139 FERC ¶ 61,107	*passim* *passim* **On review** pp. 20, 34, 36
	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	*passim* pp.16,38,39,42
	May	[Entergy files Seventh Bandwidth Proceeding]		
	October 16	•*First Bandwidth Clarification Order* •*First Bandwidth Compliance Rehearing Order* •***Third Bandwidth Rehearing Order*** •*Third Bandwidth Compliance Order* •*Fourth Bandwidth Clarification Order*	145 FERC ¶ 61,045 145 FERC ¶ 61,046 **145 FERC ¶ 61,047** 145 FERC ¶ 61,048 145 FERC ¶ 61,049	p. 52 **On review** pp.6,23,54,56 *passim*