ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 23, 2015

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 12-1282 and 13-1295 (consolidated)

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

Lona T. Perry
Deputy Solicitor

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426

December 5, 2014

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

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

B. Rulings Under Review

1. *Entergy Services, Inc*., Opinion No. 505, 130 FERC ¶ 61,023 (2010), JA 1;

2. *Entergy Services, Inc*., Opinion No. 505-A, 139 FERC ¶ 61,103 (2012), JA 89;

3. *Entergy Services, Inc*., 139 FERC ¶ 61,104 (2012), JA 125; and

4. *Entergy Services, Inc*., 145 FERC ¶ 61,046 (2013), JA 139.

C. Related Cases

In *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), this Court affirmed the imposition of a so-called "bandwidth" remedy to implement rough equalization among the operating companies on the Entergy system. This proceeding concerns the first annual proceeding to implement the bandwidth remedy. The second annual bandwidth proceeding was the subject of a recent Fifth Circuit decision affirming the Commission orders in that proceeding. *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014). The third annual bandwidth proceeding orders are also under review by the Fifth Circuit in *La. Pub. Serv. Comm'n v. FERC*, No. 13-60874 (5th Cir.) (fully briefed; oral argument scheduled for October 27, 2014).

/s/ *Lona T. Perry*
Lona T. Perry
Deputy Solicitor

December 5, 2014

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUES 1

STATUTES AND REGULATIONS 3

STATEMENT OF FACTS 3

I. THE ENTERGY SYSTEM AND SYSTEM AGREEMENT 3

II. THE BANDWIDTH REMEDY AND RELATED PROCEEDINGS 7

A. The Bandwidth Remedy Proceeding 7

B. The Formula Rate Proceeding 8

C. The Annual Bandwidth Remedy Proceedings 9

1. The First Annual Bandwidth Proceeding 9

2. The Second Annual Bandwidth Proceeding 11

3. Subsequent Annual Bandwidth Proceedings 12

SUMMARY OF ARGUMENT 13

ARGUMENT…… 17

I. STANDARD OF REVIEW 17

II. LOUISIANA'S ARGUMENTS ARE WITHOUT MERIT 19

A. As Held By The Fifth Circuit, The Bandwidth Formula Established In The Formula Rate Proceeding Is The Filed Rate, Which Cannot Be Altered In The Proceedings On The Annual Bandwidth Filings 19

TABLE OF CONTENTS

PAGE

B. As Affirmed By The Fifth Circuit, The Commission Reasonably Rejected Louisiana's Efforts To Obtain Review And Alteration Of State-Determined Nuclear Depreciation Expenses That Were Included As Part Of The Approved Formula Rate 22

1. Entergy Properly Used Actual State-Approved Depreciation Expenses As Required By The Formula 22

2. Incorporating State-Approved Depreciation Expenses Was Not An Unlawful Subdelegation Of Authority..... 26

3. The Commission's Determination Did Not Unlawfully Retroactively Change Procedure 28

4. The Commission Reasonably Determined That FERC Accounting Policy Regarding Depreciation Is Irrelevant Where The Formula Rate Requires Use Of State-Approved Rates 29

C. The Commission Reasonably Determined That The Formula Rate Energy Ratio Excluded Individual Company Opportunity Sales 31

1. The Commission Reasonably Concluded That "Non-Requirements Sales For Resale" Includes Individual Operating Company Opportunity Sales 32

2. The Commission Reasonably Found Adequate Notice Of The Tariff Provision During The Formula Rate Proceeding..... 35

TABLE OF CONTENTS

PAGE

D. Louisiana Failed To Challenge On Rehearing The Exclusion Of Waterford 3 Accumulated Deferred Income Taxes From The Bandwidth Calculation, And Therefore The Court Lacks Jurisdiction Over This Claim 40

1. Louisiana Failed To Seek Rehearing Of The Exclusion Of The Waterford 3 Accumulated Deferred Income Taxes 41

2. Louisiana Cannot Demonstrate "Reasonable Ground" For Failing To Seek Rehearing 43

III. ENTERGY'S ARGUMENTS ARE WITHOUT MERIT 48

A. The Commission Reasonably Interpreted The Union Electric Contract To Preclude Recovery Of Bandwidth Payments 48

1. The Commission Reasonably Concluded That The Bandwidth Payments Could Not Be Characterized As A Purchased Energy Expense 50

2. The Fact That Bandwidth Payments Are Recorded In Account 555 Does Not Support Entergy's Interpretation 54

3. The Commission Reasonably Concluded That Extrinsic Evidence Supported The Conclusion That The Contract Did Not Encompass Bandwidth Payments 57

4. Entergy's Policy Arguments Lack Merit 62

B. The Commission Reasonably Required Interest On The First Bandwidth Proceeding Payments In Light Of The Significant Delay In Finalizing The Payments 66

TABLE OF CONTENTS

PAGE

1. The Commission Reasonably Determined That It Was Appropriate To Award Interest Given The Significant Delay In Finalizing The Bandwidth Payments 67

2. The Commission Reasonably Concluded That Awarding Interest At This Time Was Consistent With Other Bandwidth Proceeding Orders 69

CONCLUSION 74

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Amerada Hess Pipeline Corp. v. FERC,
117 F.3d 596 (D.C. Cir. 1997)..... 58

Anadarko Petroleum Corp. v. FERC,
196 F.3d 1264 (D.C. Cir. 1999), *vacated in part*,
200 F.3d 867 (D.C. Cir. 2000)..... 70

ANR Pipeline Co. v. FERC,
771 F.2d 407 (D.C. Cir. 1985)..... 63

ANR Pipeline Co. v. FERC,
988 F.2d 1229 (D.C. Cir. 1993)..... 40

Ark. La. Gas Co. v. Hall,
453 U.S. 571 (1981)..... 29

Ass'n of Oil Pipe Lines v. FERC,
83 F.3d 1424 (D.C. Cir. 1996)..... 17

Boroughs of Ellwood City v. FERC,
731 F.2d 959 (D.C. Cir. 1984)..... 47

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962)..... 17

Cajun Elec. Power Coop., Inc. v. FERC,
924 F.2d 1132 (D.C. Cir. 1991)..... 60

**ChevronTexaco Exploration & Production Co. v. FERC*,
387 F.3d 892 (D.C. Cir. 2004)..... 21

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Cities of Bethany v. FERC,
727 F.2d 1131 (D.C. Cir. 1984)..... 63

City of New Orleans v. FERC,
875 F.2d 903 (D.C. Cir. 1989)..... 6

City of New Orleans v. FERC,
67 F.3d 947 (D.C. Cir. 1995)..... 6

Consol. Gas Transmission Corp. v. FERC,
771 F.2d 1536 (D.C. Cir. 1985)..... 51

Constellation Energy Commodities Grp., Inc. v. FERC,
457 F.3d 14 (D.C. Cir. 2006)..... 65

Council of New Orleans v. FERC,
692 F.3d 172 (D.C. Cir. 2012)..... 3, 6

Credit Card Serv. Corp. v. FTC,
495 F.2d 1004 (D.C. Cir. 1974)..... 47

Dominion Resources, Inc. v. FERC,
286 F.3d 586 (D.C. Cir. 2002)..... 39

Entergy La., Inc. v. La. Pub. Serv. Comm'n,
539 U.S. 39 (2003)..... 4, 6

Entergy Servs., Inc. v. FERC,
568 F.3d 978 (D.C. Cir. 2009)..... 64

Exxon Mobil Corp. v. FERC,
430 F.3d 1166 (D.C. Cir. 2005)..... 64

ExxonMobil Oil Corp. v. FERC,
487 F.3d 945 (D.C. Cir. 2007)..... 17

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Florida Mun. Power Agency v. FERC,
315 F.3d 362 (D.C. Cir. 2003)..... 18

FPC v. Sierra Pacific Power Co.,
350 U.S. 348 (1956)..... 63

FPL Energy Me. Hydro LLC v. FERC,
287 F.3d 1151 (D.C. Cir. 2002)..... 8

Gulf States Utils. Co. v. FPC,
518 F.2d 450 (D.C. Cir. 1975)..... 49

ICC v. Brotherhood of Locomotive Engineers,
482 U.S. 270 (1987)..... 40

Holyoke Water Power Co. v. FERC,
799 F.2d 755 (D.C. Cir. 1986)..... 60

Intermountain Mun. Gas Agency v. FERC,
326 F.3d 1281 (D.C. Cir. 2003)..... 65

Kan. Cities v. FERC,
723 F.2d 82 (D.C. Cir. 1983)..... 60

**La. Pub. Serv. Comm'n v. FERC*,
522 F.3d 378 (D.C. Cir. 2008)..... 3, 4, 5, 6, 7, 8, 67

La. Pub. Serv. Comm'n v. FERC,
482 F.3d 510 (D.C. Cir. 2007)..... 6

La. Pub. Serv. Comm'n v. FERC,
551 F.3d 1042 (D.C. Cir. 2008)..... 6

**La. Pub. Serv.Comm'n v. FERC*,
341 F. App'x 649 (D.C. Cir. July 6, 2009)..... 6, 8, 20

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

**La. Pub. Serv. Comm'n v. FERC*,
761 F.3d 540 (5th Cir. 2014) 6, 12, 19-29, 37

Me. Pub. Utils. Comm'n v. FERC,
520 F.3d 464 (D.C. Cir. 2008), *rev'd in part sub nom.*,
NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n,
558 U.S. 165 (2010)..... 18

Middle S. Energy, Inc. v. FERC,
747 F.2d 763 (D.C. Cir. 1984)..... 5

Miss. Indus. v. FERC,
808 F.2d 1525 (D.C. Cir.), *vacated and remanded in part*,
822 F.2d 1103 (D.C. Cir. 1987)..... 4, 5

Miss. Power & Light Co. v. Miss. ex rel. Moore,
487 U.S. 354 (1988)..... 6

Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1,
554 U.S. 527 (2008)..... 17

Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983)..... 17

Nat'l Fuel Gas Supply Corp. v. FERC,
811 F.2d 1563 (D.C. Cir. 1987)..... 49

New York v. FERC,
535 U.S. 1 (2002)..... 64

Niagara Mohawk Power Corp. v. FPC,
379 F.2d 153 (D.C. Cir. 1967)..... 67

NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n,
558 U.S. 165 (2010)..... 18

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Old Dominion Elec. Coop., Inc. v. FERC,
518 F.3d 43 (D.C. Cir. 2008)..... 31, 58, 63

Oldham v. Korean Air Lines Co., Ltd.,
127 F.3d 43 (D.C. Cir. 1997)..... 67

Pennzoil Co. v. FERC,
645 F.2d 360 (5th Cir. 1981) 51

Permian Basin Area Rate Cases,
390 U.S. 747 (1968)..... 17

PSEG Energy Resources & Trade LLC v. FERC,
665 F.3d 203 (D.C. Cir. 2011)..... 63

Pub. Serv. Comm'n of N.Y. v. FERC,
813 F.2d 448 (D.C. Cir. 1987)..... 18

Pub. Utils. Comm'n of Cal. v. FERC,
254 F.3d 250 (D.C. Cir. 2001)..... 20, 27

S. D. Pub. Utils. Comm'n v. FERC,
934 F.2d 346 (D.C. Cir. 1991)..... 59

Sacramento Mun. Util. Dist. v. FERC,
428 F.3d 294 (D.C. Cir. 2005)..... 39

Sithe/Independence Power Partners v. FERC,
165 F.3d 944 (D.C. Cir. 1999)..... 17

TC Ravenswood, LLC v. FERC,
741 F.3d 112 (D.C. Cir. 2013)..... 58

Transmission Access Policy Study Grp. v. FERC,
225 F.3d 667 (D.C. Cir. 2000)..... 64

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.,
350 U.S. 332 (1956)..... 63

United States Telecomm. Ass'n v. FCC,
359 F.3d 554 (D.C. Cir. 2004)..... 28

Vt. Dep't of Pub. Serv. v. FERC,
817 F.2d 127 (D.C. Cir. 1987)..... 49, 50

W. Deptford Energy, LLC v. FERC,
766 F.3d 10 (D.C. Cir. 2014) 19, 31, 36

W. Resources, Inc. v. FERC,
9 F.3d 1568 (D.C. Cir. 1993)..... 18

White Stallion Energy Ctr., LLC v. EPA,
748 F.3d 1222 (D.C. Cir. 2014)..... 29

Wis. Valley Improvement Co. v. FERC,
236 F.3d 738 (D.C. Cir. 2001)..... 58

ADMINISTRATIVE CASES:

Entergy Servs., Inc.,
124 FERC ¶ 63,026 (2008).....10, 30, 45-48, 61, 65, 66

Entergy Servs., Inc.,
Opinion No. 505, 130 FERC ¶ 61,023 (2010).....10, 11, 20-25, 39, 32-35, 37, 39, 45-47, 50-55, 57, 59, 60-63, 66

Entergy Servs., Inc.,
Opinion No. 505-A, 139 FERC ¶ 61,103 (2012).....10, 11, 20-22, 25-27, 29, 30, 34-37, 51-56, 58-64

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

Entergy Servs., Inc.,
136 FERC ¶ 61,057 (2011)..... 12

Entergy Servs., Inc.,
Opinion No. 514, 137 FERC ¶ 61,029 (2011), *reh'g denied*,
Opinion No. 514-A, 142 FERC ¶ 61,013
(2013)……..... 11, 26, 42, 45, 46, 48

Entergy Servs., Inc.,
139 FERC ¶ 61,104 (2012), *reh'g denied*,
145 FERC ¶ 61,046 (2013)..... 11, 66, 68, 70, 71, 72, 73

Entergy Servs., Inc.,
140 FERC ¶ 61,111 (2012)..... 12

Entergy Servs., Inc.,
142 FERC ¶ 61,011 (2013), *reh'g denied*,
148 FERC ¶ 61,087 (2014)..... 72

Entergy Servs., Inc.,
144 FERC ¶ 61,167 (2013)..... 12

Entergy Servs., Inc.,
148 FERC ¶ 63,015 (2014)..... 12

La. Pub. Serv. Comm'n v. Entergy Servs., Inc.,
Opinion No. 480, 111 FERC ¶ 61,311 (2005), *on reh'g*,
Opinion No. 480-A, 113 FERC ¶ 61,282 (2005) 7, 8, 9, 34, 56

La. Pub. Serv. Comm'n v. Entergy Servs., Inc.,
117 FERC ¶ 61,203 (2006), *on reh'g and compliance*,
119 FERC ¶ 61,095 (2007).....8, 9, 19, 37-39, 54-57
68-71

La. Pub. Serv. Comm'n v. Entergy Corp.,
124 FERC ¶ 61,010 (2008)..... 28

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

La. Pub. Serv. Comm'n v. Entergy Corp.,
132 FERC ¶ 61,223, *order on clarification*,
133 FERC ¶ 61,213 (2010) 71

La. Pub. Serv. Comm'n v. Entergy Corp.,
Opinion No. 519, 139 FERC ¶ 61,107 (2012) 27, 28

La. Pub. Serv. Comm'n v. Entergy Corp.,
142 FERC ¶ 61,211 (2013) 72

La. Pub. Serv. Comm'n v. Entergy Servs., Inc.
146 FERC ¶ 61,152 (2014) 72

Regulation of Electricity Sales-for-Resale and Transmission Service (Phase I),
50 Fed. Reg. 23,445 (June 4, 1985) 33

STATUTES:

Federal Power Act

Section 205, 16 U.S.C. § 824d 22, 35

Section 206, 16 U.S.C. § 824e 22

Section 313(b), 16 U.S.C. § 825*l*(b) 18, 41, 43

REGULATIONS:

18 C.F.R. § 341.2(c) 36

18 C.F.R. § 141.1 9

GLOSSARY

Commission or FERC	Respondent Federal Energy Regulatory Commission
Entergy	Petitioner Entergy Corporation (corporate parent of the 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, LLC and Entergy Texas, Inc. (which, prior to 2008, operated as a single entity, Entergy Gulf States, Inc.)
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
Formula Rate Order	Proceeding establishing the formula rate for the bandwidth remedy, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006), *on reh'g*, 119 FERC ¶ 61,095 (2007), *aff'd, La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. 2009)
Formula Rate Rehearing Order	Proceeding establishing the formula rate for the bandwidth remedy, *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. 2009)
Initial Decision	Initial Decision in the First Bandwidth Proceeding, *Entergy Servs., Inc*., 124 FERC ¶ 63,026 (2008)
Louisiana or Louisiana Commission	Petitioner Louisiana Public Service Commission

GLOSSARY

Opinion No. 480	Proceeding establishing the bandwidth remedy, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in relevant respect*, *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008)
Opinion No. 505	Proceedings on the first annual bandwidth remedy, on review here, *Entergy Servs., Inc.*, 130 FERC ¶ 61,023 (2010), *on reh'g*, 139 FERC ¶ 61,103 (2012)
Opinion No. 505-A	Order on rehearing issued in the first annual bandwidth proceeding, on review here, *Entergy Servs., Inc.*, 139 FERC ¶ 61,103 (2012)
Opinion No. 514	Proceedings on the second annual bandwidth remedy, *Entergy Servs., Inc.*, 137 FERC ¶ 61,029 (2011), *on reh'g*, 142 FERC ¶ 61,013 (2013), *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014)
Opinion No. 514-A	Order on rehearing issued in the second annual bandwidth proceeding, *Entergy Servs., Inc.*, 142 FERC ¶ 61,013 (2013), *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014)
Opinion No. 519	Order on Initial Decision issued in proceeding on Louisiana complaint concerning depreciation, *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107 (2012), *reh'g pending*
Service Schedule MSS-3	The rate schedule in the Entergy System Agreement that sets forth the formula for calculating production costs and bandwidth payments and receipts

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 12-1282 and 13-1295 (consolidated)

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In 2005, the Federal Energy Regulatory Commission determined that the production costs of the operating companies comprising the multistate Entergy power system were not roughly equal and thus were unduly discriminatory. The Commission, as affirmed by this Court, required that Entergy implement a remedy that would reallocate costs that deviated from an established "bandwidth" around the system average. Upon the Commission's approval of Entergy's formula rate implementing the remedy, again affirmed by this Court, Entergy was required to

make annual filings setting out the bandwidth remedy calculations based upon cost disparities for the preceding year. The orders on review arise from Entergy's first annual bandwidth remedy filing. The questions presented on appeal are:

(1) Whether, as the Fifth Circuit has already concluded on appeal of the second annual bandwidth proceeding, the filed formula rate required that Entergy use the actual nuclear depreciation expense recorded in the Operating Companies' books in calculating the bandwidth remedy, notwithstanding Louisiana's objection that the recorded expense included state-determined depreciation rates that were not calculated in accordance with Commission policy.

(2) Whether the Commission reasonably approved Entergy's application of the Energy Ratio as set out in the filed formula rate, notwithstanding Louisiana's objection that the filed formula rate deviated in methodology from the exhibits on which the formula rate was based.

(3) Whether the Court lacks jurisdiction to hear Louisiana's arguments regarding the exclusion of accumulated deferred income tax related to the Waterford 3 nuclear plant because Louisiana failed to seek rehearing on that issue.

(4) Whether the Commission reasonably concluded that Entergy Arkansas' 1999 contract with Union Electric did not permit Entergy to charge Union Electric for bandwidth remedy payments as a purchased energy expense.

(5) Whether, notwithstanding its earlier determination not to charge interest on bandwidth payments that would be paid within a reasonable period, the Commission reasonably ordered Entergy to pay interest on payments arising from this first annual bandwidth proceeding, due to the significant passage of time since the payments were to be effective on June 1, 2007.

STATUTES AND REGULATIONS

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

STATEMENT OF FACTS

I. THE ENTERGY SYSTEM AND SYSTEM AGREEMENT

Entergy Corporation[1] is a public utility holding company that sells electricity, both wholesale and retail, in Arkansas, Louisiana, Mississippi, and Texas, through six Operating Companies.[2] *See La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 383 (D.C. Cir. 2008) (describing the Entergy system). At all times

[1] 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.

[2] Those Operating Companies are: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Gulf States Louisiana, LLC; Entergy Louisiana, LLC; Entergy New Orleans, Inc.; and Entergy Texas, Inc. Entergy Arkansas terminated its participation in the System Agreement in December 2013 and Entergy Mississippi will do so in November 2015. *See Council of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (affirming FERC's conclusion that the System Agreement required no participation in the bandwidth remedy after withdrawal).

relevant to this case, transactions among the Operating Companies were governed by the Entergy System Agreement. *Id*.

The Entergy System is highly integrated, operating the Operating Companies' transmission and generation facilities as a single electric system. *Id*. "The Entergy System Agreement acts as an interconnection and pooling agreement for the energy generated in the System and provides for the joint planning, construction and operation of new generating capacity in the System." *Id*. 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. *Id*. 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. *La. Pub. Serv. Comm'n*, 522 F.3d at 384; *see also Miss. Indus. v. FERC*, 808 F.2d 1525, 1530 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987) (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 La. Pub. Serv. Comm'n*, 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.

Because the Entergy System spans four states and involves a number of retail regulators and other interested parties -- and 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); *La. Pub. Serv. Comm'n*, 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) (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); *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014) (second annual bandwidth proceeding). The Supreme Court also has considered Entergy System cost allocation disputes. *Entergy La.*, 539 U.S. at 42 (preemption of state jurisdiction as to cost allocation); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988) (same).

In addition to this proceeding, two other cases are currently pending before this Court (*La. Pub. Serv. Comm'n v. FERC*, No. 13-1155 (allocation of capacity

costs, after remand, oral argument heard Sept. 18, 2014) and *La. Pub. Serv. Comm'n v. FERC*, No. 14-1063 (refunds and the timing of the bandwidth remedy, in abeyance)), and one before the Fifth Circuit, *La. Pub. Serv. Comm'n v. FERC*, No. 13-60874 (orders on the third annual bandwidth proceeding, briefing completed and oral argument scheduled for October 27, 2014)).

II. THE BANDWIDTH REMEDY AND RELATED PROCEEDINGS

A. The Bandwidth Remedy Proceeding

The bandwidth remedy arose from a 2001 complaint filed by the Louisiana Commission, which asserted that the cost allocations among the Entergy Operating Companies had become unjust, unreasonable, and unduly discriminatory. *La. Pub. Serv. Comm'n*, 522 F.3d at 385. Specifically, in 2000, there was a spike in the cost of natural gas, which disproportionately affected Entergy Louisiana's relatively large amount of gas-fired generation, as compared to Entergy Arkansas' relatively large amount of cheaper coal base load capacity. *Id*.

In the Opinion No. 480 proceeding, 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 Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 PP 28-30, JA 338, *on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005). Accordingly, the Commission adopted a remedy

establishing a numerical percentage "bandwidth" of +/– 11 percent as the outside bound of the amount by which production costs would be permitted to deviate from the System average, to be implemented through equalization payments among the Operating Companies. Opinion No. 480 PP 1, 14, 136, 144, JA 328, 333, 372, 375. The Commission determined that comparisons of production costs among the Operating Companies should follow the methodology that Entergy had proposed in its Exhibit 26 in that proceeding. *Id.* P 33, JA 340.

On appeal, the D.C. Circuit held that the Commission had jurisdiction to impose the bandwidth remedy and that the remedy was reasonable, supported by substantial evidence, and well within the Commission's broad remedial discretion. *La. Pub. Serv. Comm'n*, 522 F.3d at 383, 391-94.

B. The Formula Rate Proceeding

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) ("Formula Rate Order"), JA 707, *on reh'g and compliance*, 119 FERC ¶ 61,095 (2007) ("Formula Rate Rehearing Order"), JA 729, *aff'd*, *La. Pub. Serv. Comm'n*, 341 F. App'x 649.

In those filings, Entergy modified Service Schedule MSS-3 of the System Agreement to add new sections 30.11 through 30.14. Those sections established a formula rate methodology (based on Exhibits 26 and 28 that Entergy had submitted in the Opinion No. 480 bandwidth remedy proceeding[3]) 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* Formula Rate Order PP 24-27, 63, JA 714-15, 724; Formula Rate Rehearing Order P 48, JA 745. The calculations would be based on data reported in Entergy's annual FERC Form 1,[4] filed each April (covering the previous calendar year). *See* Formula Rate Order PP 46-47, JA 719-20.

C. The Annual Bandwidth Remedy Proceedings

1. The First Annual Bandwidth Proceeding

In Opinion No. 480, the Commission ruled that the bandwidth remedy would be effective starting with the 2006 calendar year. Opinion No. 480 P 145, JA 376. In May 2007, Entergy made its first annual bandwidth remedy filing,

---

[3] 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.

[4] FERC regulations require large electric utilities to file an annual report, in a format specified by the Commission ("FERC Form 1"), each April. *See* 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).

setting out its calculations of each Operating Companies' respective bandwidth payments or receipts based on production cost data for calendar year 2006. The Commission set the matter for hearing before an administrative law judge, who issued his initial decision in September 2008. *Entergy Servs., Inc.*, 124 FERC ¶ 63,026 (2008) ("Initial Decision"), JA 145.

In the orders challenged in this appeal, the Commission ruled on numerous exceptions to the Initial Decision. *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010), JA 1, *on reh'g*, Opinion No. 505-A, 139 FERC ¶ 61,103 (2012), JA 89. As relevant here, the Commission rejected Louisiana's request that it review state-approved nuclear depreciation rates, where the filed tariff required use of the state-approved rate, and the filed tariff was not subject to review or alteration during the annual proceedings to implement the tariff. Opinion No. 505 PP 170-173, JA 53-56; Opinion No. 505-A PP 48-53, JA 110-15. The Commission also rejected Louisiana's request to deviate from the Energy Ratio set out in the filed tariff, notwithstanding the argument that the filed tariff methodology did not conform to Exhibits 26 and 28 from the Opinion No. 480 proceeding. Opinion No. 505 PP 133-137, JA 43-45; Opinion No. 505-A PP 12-17, JA 95-98. The Commission also affirmed the Initial Decision's approval of certain specified exclusions of accumulated deferred income taxes from the

bandwidth remedy. Opinion No. 505 P 233, JA 75. Louisiana did not seek rehearing of this determination.

The Commission rejected Entergy's interpretation of a 1999 capacity contract with Union Electric, finding it unreasonable to interpret the contract phrase "purchased energy expense recorded in Account 555" to include the total amount of Entergy Arkansas' subsequently-imposed bandwidth remedy payments. The Commission found that such payments are not for purchased energy, but rather are payments to equalize production costs, and are in any event not solely energy-related because they are the product of both variable energy costs and fixed capacity costs. *Id*. PP 100-104, JA 32-34; Opinion No. 505-A PP 30-39, JA 102-06. The Commission likewise rejected Entergy's challenge to the Commission's award of interest on the bandwidth payments in *Entergy Servs., Inc.*, 139 FERC ¶ 61,104 (2012), JA 125, *reh'g denied*, 145 FERC ¶ 61,046 (2013), JA 139, based upon the significant delay in finalizing those payments.

2. The Second Annual Bandwidth Proceeding

Entergy initiated the second annual bandwidth proceeding in May 2008. Following a hearing and an initial decision by the Administrative Law Judge in September 2009, the Commission again ruled on various issues. *Entergy Servs., Inc.*, Opinion No. 514, 137 FERC ¶ 61,029 (2011), JA 391, *reh'g denied*, Opinion No. 514-A, 142 FERC ¶ 61,013 (2013), JA 470. The Commission's orders in the

second annual bandwidth proceeding were affirmed by the Fifth Circuit in *La. Pub. Serv. Comm'n*, 761 F.3d 540. In that decision, as relevant here, the Fifth Circuit rejected the same argument that Louisiana made in the first annual bandwidth proceeding regarding the use of state-approved nuclear depreciation rates in the bandwidth calculation. *See* 761 F.3d at 550-56.

3. Subsequent Annual Bandwidth Proceedings

The third annual bandwidth proceeding began in May 2009. The Commission's orders in that proceeding are on appeal before the Fifth Circuit in *La. Pub. Serv. Comm'n v. FERC*, No. 13-60874 (fully briefed; oral argument scheduled for October 27, 2014).

Entergy initiated the fourth annual bandwidth proceeding in May 2010. An Initial Decision following a hearing before an Administrative Law Judge issued on September 19, 2014. *Entergy Servs., Inc.*, 148 FERC ¶ 63,015 (2014).

The fifth, sixth, and seventh annual bandwidth proceedings (filed each May in 2011, 2012, and 2013, respectively) have been held in abeyance before the Commission, pending resolution of the earlier bandwidth proceedings. *See Entergy Servs., Inc.*, 136 FERC ¶ 61,057 P 21 (2011); *Entergy Servs., Inc.*, 140 FERC ¶ 61,111 P 32 (2012); *Entergy Servs., Inc.*, 144 FERC ¶ 61,167 P 30 (2013). The Commission has not yet acted on the eighth annual bandwidth filing, made in May of 2014, in FERC Docket No. ER14-2085.

SUMMARY OF ARGUMENT

This is the latest in a series of related ratemaking disputes presented to this Court and the Fifth Circuit, concerning the allocation of production costs among the Entergy Operating Companies. Pursuant to the bandwidth remedy affirmed by this Court, and under the filed tariff implementing that remedy, also affirmed by this Court, Entergy makes annual filings setting out its calculations of each Operating Companies' respective bandwidth payments or receipts based on production cost data for the preceding calendar year. This proceeding concerns the first of those annual bandwidth filings, based upon production cost data for 2006.

As the Fifth Circuit already determined on appeal of the second annual bandwidth remedy proceeding, the bandwidth formula rate, established in the 2006-2007 Formula Rate Proceeding, is the filed rate. As such, it is not subject to review or alteration in the annual bandwidth remedy proceedings implementing that formula rate. The filed formula required Entergy to use actual production costs, as recorded on the Operating Companies' books, in calculating the bandwidth remedy. The actual nuclear depreciation expenses recorded on the companies' books included depreciation rates determined by state regulators that the Commission has adopted for use in the bandwidth formula. Louisiana objects to the use of state-determined depreciation rates for two Entergy Arkansas nuclear

units because the state did not equate the useful life of the units to the duration of their licenses granted by the Nuclear Regulatory Commission.

The Fifth Circuit rejected this same argument on appeal of the second annual bandwidth proceeding, finding that the filed formula rate required that Entergy use the state-determined nuclear depreciation expenses recorded on Entergy Arkansas' books. The Fifth Circuit likewise determined that use of the state-determined depreciation rate did not constitute an unlawful subdelegation of FERC's authority to the state, and that FERC did not unlawfully depart from prior precedent in declining to reconsider the approved formula in an annual bandwidth remedy proceeding. Likewise, while Louisiana argues that the state-approved expense fails to comply with FERC accounting policies, again, the formula rate requires use of the actual figures recorded on the books, so Entergy was not at liberty under the formula to use any input other than the actual production costs in this proceeding.

The filed formula rate also includes an Energy Ratio that excludes "Non-Requirements Sales for Resale." Based upon testimony adduced at hearing, and in accordance with its common usage, the Commission reasonably determined that this phrase encompassed individual Operating Company opportunity sales (i.e. sales made with surplus resources after requirements contracts have been satisfied). Louisiana contests this interpretation because such opportunity sales were included in the Energy Ratio in Entergy Exhibits 26 and 28 in the Opinion No. 480

proceeding, which formed the basis for the formula rate. Nevertheless, the filed formula rate is the controlling methodology, and therefore opportunity sales properly were excluded from the ratio. The Commission rejected Louisiana's arguments that it lacked notice of the methodology change from Exhibits 26 and 28 when the formula rate was approved, because the new tariff language provided ample notice of the change.

Louisiana also argues that Entergy improperly excluded from the bandwidth calculation accumulated deferred income taxes related to Entergy Louisiana's Waterford 3 nuclear facility. As Louisiana concededly failed to seek rehearing on this issue before the Commission, and fails on brief to demonstrate reasonable grounds for the failure to do so, the Court lacks jurisdiction to address this issue.

Entergy contests the Commission's interpretation of a 1999 Entergy Arkansas contract to sell capacity to Union Electric. In that contract, Union Electric agreed to pay a monthly fixed capacity charge as well as a monthly variable energy charge that included "Purchased Energy Expense Charged to Account 555." In Entergy's view, this language unambiguously permits Entergy Arkansas to charge Union Electric for its share of Entergy Arkansas' bandwidth remedy payments, because those payments are recorded in Account 555.

While the Commission found the language ambiguous as applied to the subsequently-imposed bandwidth remedy, it nevertheless found it unreasonable to

interpret the language to encompass Entergy Arkansas' total bandwidth payments as "purchased energy expense." The bandwidth payments are not a payment for purchased energy, but rather a payment equalizing production costs among Operating Companies. Further, the bandwidth payments are calculated by netting both fixed capacity production costs and variable energy production costs, and therefore cannot be regarded as solely energy-related expense.

In orders issued on Entergy's filings in compliance with Opinion No. 505, the Commission ordered Entergy to include interest on the bandwidth remedy payments. Entergy objected that this ruling was inconsistent with the Commission's determination in the Formula Rate Proceeding that interest would not be charged on bandwidth remedy payments. In the Formula Rate Proceeding, however, the Commission declined to require interest because the Commission anticipated that remedy payments would be made within a reasonable time period, i.e. within the next calendar year. Here, given the significant delay since the June 1, 2007 effective date of bandwidth remedy payments based upon 2006 production costs, the Commission, in an exercise of its broad remedial discretion, reasonably found it appropriate to award interest to assure full recovery.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency has "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 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 Morgan Stanley Capital Grp. Inc. 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.") (quoting *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996)).

"Ordinarily, this court is 'without authority to set aside any rate selected by the Commission which is within a zone of reasonableness.'" *W. Resources, Inc. v. FERC*, 9 F.3d 1568 (D.C. Cir. 1993) (quoting *Pub. Serv. Comm'n of N.Y. v. FERC*, 813 F.2d 448, 451 (D.C. Cir. 1987)).

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). "When the record would support more than one outcome," the court upholds the Commission's order because the relevant question "is not whether record evidence supports [the petitioner's desired outcome], but whether it supports FERC's." *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 470 (D.C. Cir. 2008) (alteration in original, citation omitted), *rev'd on other grounds sub nom., NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010).

II. LOUISIANA'S ARGUMENTS ARE WITHOUT MERIT.

A. As Held By The Fifth Circuit, The Bandwidth Formula Established In The Formula Rate Proceeding Is The Filed Rate, Which Cannot Be Altered In The Proceedings On The Annual Bandwidth Filings.

As the Fifth Circuit has already determined on appeal of the second annual bandwidth proceeding, the formula rate for calculating the bandwidth remedy payments and receipts was established in the 2006-2007 Formula Rate Proceeding, as affirmed by this Court. Accordingly, that formula is the filed rate, and it is not subject to review or alteration in these annual proceedings to implement that formula. *See W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 12 (D.C. Cir. 2014) (under the filed rate doctrine, "utilities are forbidden to charge any rate other than the one on file with the Commission").

Entergy implemented the bandwidth remedy in the 2006-2007 Formula Rate Proceeding by including a formula rate in the Service Schedule MSS-3 of the System Agreement. *La. Pub. Serv. Comm'n*, 761 F.3d at 544. Specifically, Entergy filed revisions to Service Schedule MSS-3 to add new sections 30.11 through 30.14. Formula Rate Order P 24, JA 714. Section 30.11 establishes the methodology for determining whether Operating Companies are in rough production cost equalization, by comparing each Operating Company's actual production costs, as calculated in section 30.12, to that Company's respective share of total system production costs, as calculated in section 30.13. *Id*. P 25, JA 714.

Section 30.14 sets out the billing procedures, beginning with payments based upon calendar year 2006, the payments at issue here. *Id*. P 27, JA 715. The Commission's approval of that formula rate in the Formula Rate Proceeding was affirmed by this Court in *La. Pub. Serv. Comm'n*, 341 F. App'x at 649. *La. Pub. Serv. Comm'n*, 761 F.3d at 544.

Under the filed rate doctrine, the formula rate approved in the Formula Rate Proceeding is the filed rate. *Id*. at 555. *See* Opinion No. 505 PP 133, 170, JA 43, 54; Opinion No. 505-A PP 38, 53, JA 106, 114. "[U]nder the filed rate doctrine, '[w]hen the Commission accepts a formula rate as a filed rate, it grants waiver of the filing and notice requirements" of the Federal Power Act, and "[t]he utility's rates then can change repeatedly, without notice to the Commission, *provided* those changes are consistent with the formula.'" *La. Pub. Serv. Comm'n*, 761 F.3d at 555 (quoting *Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001)). "'The formula itself is the filed rate that provides sufficient notice to ratepayers for purposes of the doctrine.'" *Id*. (quoting *Pub. Utils. Comm'n*, 254 F.3d at 254 n.3).

Annual bandwidth proceedings, such as the proceeding at issue here, "are reserved for challenges to whether Entergy Corporation has properly implemented the formula rate." *Id*. at 550. *See* Opinion No. 505-A P 50, JA 112 (the issue in the

annual bandwidth proceeding is "whether Entergy has properly implemented the bandwidth formula using the required data inputs in a bandwidth filing").

As this Court has recognized, in approving a rate rule to be followed later by annual calculations according to that rule, the Commission "effectively bifurcate[s] its inquiry into the reasonableness of the resulting rates." *ChevronTexaco Exploration & Production Co. v. FERC*, 387 F.3d 892, 896 (D.C. Cir. 2004). When the Commission initially approves the rate rule, the Commission determines that it will produce just and reasonable results. *Id*. Thereafter, the Commission properly reviews the annual filings "only for compliance with the rate rule in its tariff." *Id*. Accordingly, when the annual filing is calculated in accordance with the rate rule in the tariff, the Commission must accept the filing "despite any perceived flaws in the rate rule." *Id*. at 896-97 (affirming Commission orders accepting an annual rate filing notwithstanding the Commission's determination that the underlying tariff rate rule was not producing just and reasonable results).

Accordingly, "an attack on the formula itself is not valid in an annual bandwidth proceeding." *La. Pub. Serv. Comm'n*, 761 F.3d at 555. A challenge to the formula in these annual compliance proceedings would constitute a collateral attack on the Formula Rate Proceeding orders, as affirmed by this Court. *Id*. at 550, 560. *See* Opinion No. 505 P 136, JA 44; Opinion No. 505-A P 17, JA 98. Changes to the formula rate may be made only in Entergy filings under section

205, or complaints under section 206, of the Federal Power Act, 16 U.S.C. §§ 824d-e. *La. Pub. Serv. Comm'n*, 761 F.3d at 548, 552. *See* Opinion No. 505 P 173, JA 55; Opinion No. 505-A P 50, JA 112 (any changes to the bandwidth formula require a section 205 or 206 filing).

B. As Affirmed By The Fifth Circuit, The Commission Reasonably Rejected Louisiana's Efforts To Obtain Review And Alteration Of State-Determined Nuclear Depreciation Expenses That Were Included As Part Of The Approved Formula Rate.

Under the filed formula rate, Service Schedule MSS-3, Entergy was required to use actual production costs, as recorded on the Operating Companies' books, in calculating the bandwidth remedy. Louisiana objected to use of the actual nuclear depreciation expenses recorded on the companies' books that included depreciation rates determined by state regulators, because they did not conform to Commission policy. As affirmed by the Fifth Circuit on appeal of orders issued in the second annual bandwidth proceeding, the Commission reasonably determined that, in this annual proceeding, Entergy must comply and did comply with the filed formula rate.

1. Entergy Properly Used Actual State-Approved Depreciation Expenses As Required By The Formula.

As the Fifth Circuit determined on appeal of the second bandwidth proceeding, the filed formula rate, Service Schedule MSS-3, requires that Entergy use actual production costs, including depreciation expense determined by retail

regulators that the Commission had approved for use in the bandwidth formula, as recorded on the Operating Companies' books in calculating the bandwidth remedy. *La. Pub. Serv. Comm'n*, 761 F.3d at 544, 551 (citing MSS-3 Section 30.12 n.1 (Exhibit ESI-4, R. 316, at 48C, JA 1280)) ("All Rate Base, Revenue and Expense items shall be based on the actual amounts on the Company's Books for the twelve months ended December 31 of the previous year as reported in FERC Form 1.") *See* Opinion No. 505 P 171, JA 54 (same).

Specifically, section 30.12 contains two provisions that address nuclear depreciation expense: nuclear depreciation and amortization expense,[5] and nuclear accumulated provision for depreciation and amortization.[6] Both provisions require that Entergy use depreciation expenses recorded on the Operating Companies'

[5] Nuclear depreciation and amortization expense is defined as "Nuclear Depreciation and Amortization Expense associated with [Nuclear Production Plant in Service] as recorded in Accounts 403 and 404 and Decommissioning Expense, as approved by Retail Regulators, unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the FERC under otherwise applicable law." Opinion No. 505 P 172 n.202, JA 54 (quoting Section 30.12, Exhibit ESI-4, R. 316 at 48F, JA 1283).

[6] Nuclear accumulated provision for depreciation and amortization is defined as "Nuclear Accumulated Provision for Depreciation and Amortization excluding [Asset Retirement Obligations] associated with [Nuclear Production Plant in Service] above, as recorded in FERC Account 108 and 111 (consistent with the accounting related to Statement of Financial Accounting Standards (SFAS) 143 approved by the retail regulator having jurisdiction over the Company, unless FERC determines otherwise)." Opinion No. 505 P 172 n.203, JA 55 (quoting Section 30.12, Exhibit ESI-4, R. 316 at 48C-48D, JA 1280-81).

books, which includes depreciation rates determined by state regulators that the Commission has approved for use in the bandwidth formula. Opinion No. 505 P 172, JA 54 (citing Section 30.12 n.1, Exhibit ESI-4, R. 316 at 48C, JA 1280); *La. Pub. Serv. Comm'n*, 761 F.3d at 551. Accordingly, "the System Agreement incorporates state regulatory agencies' depreciation rates into the bandwidth formula." *La. Pub. Serv. Comm'n*, 761 F.3d at 550. Entergy properly used the FERC Form 1 data that contained these expenses, as recorded and recovered in rates in calendar year 2006, in the bandwidth formula. Opinion No. 505 P 172, JA 54-55.

Entergy Arkansas has two nuclear generating units (ANO-1 and ANO-2) that were granted 20-year license extensions by the Nuclear Regulatory Commission in 2001 and 2005 respectively, extending their 40-year useful lives to 60 years. Opinion No. 505 P 139, JA 45. The Arkansas Commission, which regulates the state-jurisdictional rates for these units, continued to base the depreciation rate on the 40-year useful life. *Id*. Entergy used the state-approved depreciation rate in calculating the bandwidth remedy. *Id*.

Louisiana argues that the Commission, in this annual bandwidth proceeding, should have reviewed the justness and reasonableness of the state-approved depreciation rate as a cost input into the formula rate. Louisiana Br. 35-37. The Fifth Circuit rejected this same argument on appeal of the second bandwidth

proceeding, finding that '[t]he System Agreement reflects a decision to incorporate actual costs reflected on FERC Form 1 into the formula," which included depreciation expense determined by retail regulators that the Commission has approved for use in the bandwidth formula. *La. Pub. Serv. Comm'n*, 761 F.3d at 555. *See* Opinion No. 505 P 170, JA 54; Opinion No. 505-A PP 48, 50, JA 110, 112 (the issue is compliance with the formula rate, which mandates that Entergy use the actual depreciation rates recorded in the Operating Companies' books for 2006).

Far from "refus[ing] to examine the reasonableness of the inputs," Louisiana Br. 32, "FERC reviewed the reasonableness of incorporating the state agencies' rates when it accepted the bandwidth formula." *La. Pub. Serv. Comm'n*, 761 F.3d at 552. *See* Opinion No. 505-A P 50, JA 112 ("The Commission already found the bandwidth formula rate contained in Service Schedule MSS-3 to be just and reasonable when it approved the formula as being in compliance with Opinion No. 480."). "'[I]f FERC were to supplant retail regulators' actual depreciation rates with its own reconstructed rates, FERC would change the formula set forth in Section 30.12." *La. Pub. Serv. Comm'n*, 761 F.3d at 555. As "[a]n attack on the formula itself is not valid in an annual bandwidth proceeding," the Fifth Circuit affirmed the Commission's determination that Entergy properly used actual nuclear depreciation expenses in calculating the bandwidth remedy. *Id*. *See*

Opinion No. 505-A P 50, JA 112 (in this annual bandwidth proceeding, Entergy was required to use the state regulator-approved depreciation expenses as filed in FERC Form 1; the formula rate could only be changed in a Federal Power Act section 205 or 206 rate proceeding).

2. Incorporating State-Approved Depreciation Expenses Was Not An Unlawful Subdelegation of Authority.

The Fifth Circuit also rejected Louisiana's argument that the incorporation of the state-approved depreciation rate into the bandwidth formula constituted an unlawful subdelegation of authority. *See* Louisiana Br. 31. "We conclude that there is no unlawful subdelegation in this case because FERC exercised its role when it initially reviewed and accepted the bandwidth formula incorporating the state agencies' depreciation rates: 'Such specification and incorporation of retail regulator-approved depreciation rates has been reviewed and accepted by the Commission as a just and reasonable element of the bandwidth formula methodology.'" *La. Pub. Serv. Comm'n*, 761 F.3d at 552 (quoting Opinion No. 514-A, 142 FERC ¶ 61,013 P 17, JA 479). *See* Opinion No. 505-A P 50, JA 112 (citing Opinion No. 514, 137 FERC ¶ 61,029 P 52, JA 410) ("The fact that the Commission utilizes inputs that may have been determined at the state level does not make it a delegation of authority. The Commission previously approved Entergy's compliance filings implementing the bandwidth formula, which include

the use of actual depreciation expenses as approved by the relevant state commission, as just and reasonable.")

"Moreover, FERC has clarified that it will continue to exercise oversight of the state rates in a Section 206 complaint proceeding." *La. Pub. Serv. Comm'n*, 761 F.3d at 552. Therefore, FERC did not interpret the System Agreement to preclude review of the reasonableness of depreciation inputs, Louisiana Br. 32, but rather FERC reviewed the reasonableness of incorporating the state agencies' rates when it accepted the bandwidth formula and continues to review them in Section 206 complaint filings. *La. Pub. Serv. Comm'n*, 761 F.3d at 552 (quoting *Pub. Utils. Comm'n*, 254 F.3d at 257) ("'In approving formula rates, the Commission has relied on § 206 as a mechanism to ensure that the rates are just and reasonable, and its reliance on § 206 has survived judicial scrutiny.'")

Indeed, Louisiana may file a section 206 complaint to change the bandwidth formula, and it has done so "challenging the very inputs it contends FERC has shielded from review." *La. Pub. Serv. Comm'n*, 761 F.3d at 552; Opinion No. 505-A P 50 & n.92, JA 112 (citing *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 519, 139 FERC ¶ 61,107 (2012), JA 498, *reh'g pending* (order rejecting Louisiana's complaint challenging the depreciation variables in the existing bandwidth formula). "Importantly, the Louisiana Commission did not 'demonstrate [] that the inclusion of retail depreciation data in the depreciation and

decommissioning components of the bandwidth formula is unjust and unreasonable or unduly discriminatory or preferential.'" *La. Pub. Serv. Comm'n*, 761 F.3d at 552 (quoting Opinion No. 519 P 2, JA 499).

"FERC's continuing review in Section 206 proceedings distinguishes it from the unease expressed in [*United States Telecomm. Ass'n v. FCC*, 359 F.3d 554, 567 (D.C. Cir. 2004)], of agencies' "'vague or inadequate assertions of final reviewing authority.'" *La. Pub. Serv. Comm'n*, 761 F.3d at 552 (quoting *United States Telecomm.*, 359 F.3d at 567) (discussed Louisiana Br. 33). "Accordingly, FERC has not unlawfully subdelegated to state regulators and continues to exercise its authority consistent with the [Federal Power Act]." *Id*.

3. The Commission's Determination Did Not Unlawfully Retroactively Change Procedure.

The Fifth Circuit also rejected the argument, Louisiana Br. 40-41, that the Commission retroactively and unlawfully changed its procedures regarding what issues can be addressed in the annual bandwidth proceedings. *La. Pub. Serv. Comm'n*, 761 F.3d at 555-56. While, "in the early stages of implementing the bandwidth formula," the Commission held that parties could challenge formula inputs in the annual bandwidth proceedings, *id*. at 548 (citing *La. Pub. Serv. Comm'n*, 124 FERC ¶ 61,010 P 27 (2008)), the Commission "in a variety of orders," including this proceeding, "changed course and explained that bandwidth proceedings were not the proper venue to challenge the formula." *Id*. (quoting

Opinion No. 505 PP 172, 173, JA 54, 55). "FERC changed its interpretation in light of its gained experience conducting annual bandwidth proceedings, explained its new interpretation of the System Agreement, and consistently has interpreted the System Agreement after the change." *Id*. at 556. Because "'[FERC] offered a reasoned explanation for its approach; no more is required.'" *Id*. (quoting *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1245 (D.C. Cir. 2014)).

While Louisiana asserts that this precludes Louisiana from obtaining retroactive relief, Louisiana Br. 38-39, "the absence of retroactive relief is a function of the filed-rate doctrine. The Louisiana Commission's proposed changes are to the bandwidth formula itself – substituting new depreciation rates for the state regulatory rates incorporated into the formula." *La. Pub. Serv. Comm'n*, 761 F.3d at 556. Under the filed rate doctrine, neither the Court nor the Commission possess the authority to impose retroactively a different rate than the filed rate. *Id*. (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)).

4. The Commission Reasonably Determined That FERC Accounting Policy Regarding Depreciation Is Irrelevant Where The Formula Rate Requires Use Of State-Approved Rates.

Louisiana argues that the Commission permits inquiry in the bandwidth proceedings regarding whether cost inputs conform to "the applicable accounting rules." Louisiana Br. 42 (citing Opinion No. 505-A P 50, JA 112). Because under FERC policy nuclear depreciation must be measured consistently with the

remaining useful life under the Nuclear Regulatory Commission license, *id*. (citing Initial Decision PP 447-48, JA 234), Louisiana concludes that FERC was "irrational" in failing to address the state-approved depreciation rate. *Id*.

Louisiana only quotes a snippet from the Commission's explanation of the factors that can be challenged in the bandwidth proceedings. The full quote from Opinion No. 505-A provides as follows:

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

Opinion No. 505-A P 50, JA 112. Here, consistent with the filed formula rate, Entergy was required by MSS-3 Section 30.12 to use the actual depreciation figures currently recorded on the Operating Companies' FERC Form 1 that have been approved for use by state regulators. *Id*. PP 50, 53, JA 112, 114. Thus, pursuant to point 2, as already discussed, the formula rate, Service Schedule MSS-3, requires the use of values approved by retail regulators. *Id*. P 53, JA 114. The Commission's policy regarding accounting for depreciation is irrelevant to this issue. *Id*.

Accordingly, "Entergy did not have the option under Service Schedule MSS-3 of considering whether other depreciation figures would have been more consistent with the Commission's accounting regulations." *Id.* The Commission previously accepted the bandwidth formula and the use of depreciation expenses determined by state regulators as a component of the just and reasonable rate. *Id.* The bandwidth formula can only be changed through a section 206 complaint or a section 205 rate filing. *Id*.

C. The Commission Reasonably Determined That The Formula Rate Energy Ratio Excluded Individual Company Opportunity Sales.

The Service Schedule MSS-3 formula rate contains an Energy Ratio that incorporates an undefined phrase "Non-Requirements Sales for Resale." Based upon testimony adduced at hearing regarding the proper interpretation of this phrase, and in accordance with its common usage, the Commission reasonably determined that it included individual Operating Company opportunity sales (i.e. sales made with surplus resources left after requirements contracts have been satisfied). The Court's "review of the Commission's interpretation of filed tariffs is '*Chevron*-like in nature,' which means that [the Court] give[s] 'substantial deference' to the Commission's interpretation unless 'the tariff language is unambiguous.'" *W. Deptford*, 766 F.3d at 17 (quoting *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008)). While Louisiana objects that such opportunity sales were included in the Energy Ratio in Entergy Exhibits 26

and 28 in the Opinion No. 480 proceeding, which formed the basis for the formula rate, the Commission reasonably concluded that Service Schedule MSS-3, as the filed rate, is the controlling methodology.

1. The Commission Reasonably Concluded That "Non-Requirements Sales For Resale" Includes Individual Operating Company Opportunity Sales.

The Energy Ratio used in the bandwidth formula in Service Schedule MSS-3 is each Operating Company's annual energy usage as a percentage of the total system's annual energy usage. Opinion No. 505 P 110, JA 36. Service Schedule MSS-3, Section 30.13, defines the Energy Ratio as "Each Company's Annual Energy (Net Area Requirements less Non-Requirements Sales for Resale) Divided by the Sum of all Companies Annual Energy (Energy Ratio)." Opinion No. 505 P 135, JA 44 (citing Section 30.13, Exhibit ESI-4, R. 316, at 48J, JA 1287).

The Commission, relying on testimony from the hearing before the Administrative Law Judge, reasonably interpreted the term "Non-Requirements Sales for Resale" to include individual Operating Company off-system opportunity sales. *See Id*. P 111, JA 37 (citing Louiselle Direct Testimony, Revised Exhibit ESI-6, R. 213, at 38-39, JA 1352-53). Mr. Louiselle explained that Operating Companies have an obligation to meet the energy needs of their retail customers and the energy needs of wholesale customers who have an obligation to serve their

own customers. Revised Exhibit ESI-6, R. 213, at 38, JA 1352. These sales are referred to as requirements sales. *Id*.

Conversely, when Operating Companies have resources available in addition to those needed to meet their own needs and the needs of their customers, they may offer that surplus energy in the wholesale market. *Id*. Because these wholesale sales are made on an as-available basis, they are referred to as non-requirements sales. Because they are only made when a Company or System has the opportunity to make them, they are also referred to as opportunity sales. *Id*. *See* Opinion No. 505 P 111, JA 36 (requirements sales are sales to retail customers and to wholesale customers to meet their own obligation to serve, and non-requirements or "opportunity" sales occur when an Operating Company has surplus energy in addition to that needed to meet the needs of its requirements customers).

This is in accord with the standard meaning of such terms. *See, e.g.*, *Regulation of Electricity Sales-for-Resale and Transmission Service (Phase I)*, 50 Fed. Reg. 23,445, 23,446 (June 4, 1985) (FERC Notice Of Inquiry) (Under requirements contracts, the seller undertakes a long-term obligation to supply firm power to meet the buyer's load, which is relatively open-ended, in that the seller must plan its system to meet its commitment to serve that demand. In contrast, non-requirements services generally are voluntary arrangements for specific

quantities of power that allow buyers and sellers to realize efficiency gains and reduce costs to their customers by trading temporarily excess capacity).

Louisiana contends that excluding Operating Company opportunity sales from the Energy Ratio is a change to "the formula rate approved by FERC in Opinion No. 480" because individual company opportunity sales were included in the Energy Ratio in Exhibits 26 and 28 of the Opinion No. 480 proceeding. Louisiana Br. 43-44. Entergy Exhibit 26 (Exhibit ESI-9 in this proceeding) and Entergy Exhibit 28 (Exhibit ESI-10 in this proceeding) (both included in the record at R. 71, JA 1376, 1383), were exhibits Entergy filed in the Opinion No. 480 proceeding to compute and compare the historical production costs of the Operating Companies. Opinion No. 505 P 106, JA 35. The Commission determined in Opinion No. 480 that future production cost comparisons among the Operating Companies should follow the methodology in those exhibits. *Id*. (citing Opinion No. 480 P 33, JA 340).

Entergy's tariff filing in compliance with Opinion No. 480 converted the methodology and calculations of Exhibits 26 and 28 into a stated formula rate in Service Schedule MSS-3. *Id*. P 107, JA 35. That formula rate is the controlling methodology to determine the Energy Ratio. *Id*. P 135, JA 44. In instances where the MSS-3 formula rate omits details, the Commission has held that parties may look to the methodology presented in Exhibits 26 and 28. Opinion No. 505-A

P 50, JA 112; Opinion No. 505 P 134, JA 43. However, Service Schedule MSS-3 is the filed rate, and it therefore takes precedence in any conflict with the methodology found in Exhibits 26 and 28. Opinion No. 505-A P 12, JA 95; Opinion No. 505 PP 133, 170, JA 43, 54. Accordingly, while "[a]dmittedly, the proper venue for Entergy to make the change to the Energy Ratio variable should have been through a separate 205 filing," the change was accepted in the Formula Rate Proceeding Orders and it is now the filed lawful rate. Opinion No. 505-A P 13, JA 95.

2. The Commission Reasonably Found Adequate Notice Of The Tariff Provision During The Formula Rate Proceeding.

Louisiana contends that, in the earlier Formula Rate Proceeding, Entergy failed to give sufficient notice under section 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d), that Entergy was changing the Exhibit 26/28 Energy Ratio methodology in Service Schedule MSS-3. Louisiana Br. 44-48. The Commission reasonably determined that Entergy's tariff filing in the Formula Rate Proceeding offered ample notice of the change. Opinion No. 505-A PP 13, 16, JA 95, 97; Opinion No. 505 P 136, JA 44. The Energy Ratio variable was defined in the Service Schedule MSS-3 bandwidth formula, filed by Entergy in its April 2006 tariff filing. Opinion No. 505-A P 13, JA 95. The sections relating to the bandwidth formula, including section 30.13, were completely new to the tariff, and were marked in redline. *Id*. PP 13, 16, JA 95, 97. Interested parties, including

Louisiana, intervened and filed protests to various aspects of the filing. *Id*. The Energy Ratio definition proposed in Entergy's April 2006 tariff filing was revised in Entergy's December 2006 tariff filing, providing interested parties with a second opportunity to comment on the definition. *Id*. P 7 & n.12, JA 93. Thus, the Energy Ratio was set out in the tariff, in contrast to *W. Deptford*, 766 F.3d at 18, where the Court found inadequate notice of an effective date that was not specified in the tariff.

The definition of the Energy Ratio was also included in Entergy's April 10, 2006 transmittal letter. *See* April 10, 2006 Entergy Compliance Filing in FERC Docket No. ER06-841 at 20-21 (available on FERC's website at accession number 20060414-0314). Entergy did not specifically mention in the transmittal letter that the Energy Ratio methodology differed from that in Exhibits 26/28, but a tariff change not fully described in the transmittal letter does not void a change to the tariff. Opinion No. 505-A P 13, JA 95. The tariff filing itself provides notice of the change. *Id*. PP 13, 16, JA 95, 97. Louisiana asserts that Entergy's transmittal letter failed to comply with 18 C.F.R. § 341.2(c), Louisiana Br. 44, but that regulation applies to filings by oil pipelines under the Interstate Commerce Act, and does not apply here.

Louisiana protested a number of issues with respect to the bandwidth formula concerning both the April and December 2006 filings, and the

Commission found no evidence that Louisiana could not have raised its concerns regarding the Energy Ratio at the time the compliance filings were made. Opinion No. 505-A P 7, JA 92; Opinion No. 505 P 136, JA 44. Louisiana's protests included other alleged deviations from the Exhibit 26/28 methodology. Formula Rate Order, 117 FERC ¶ 61,203 PP 59, 64-68, JA 723, 724-25. Thus, "the Commission and all parties were made aware – or should have been aware – of the changes being made to Entergy's tariff because the changes were made explicit by the definition of the bandwidth formula in Service Schedule MSS-3." Opinion No. 505-A P 16, JA 97. "The Louisiana Commission's arguments, therefore, are merely collateral attacks on the Commission's orders accepting the compliance filings, and do not support the Louisiana Commission's argument that the tariff revisions were not explicitly recognized by the Commission and are therefore unlawful." *Id*. P 17, JA 98.

On appeal of the second annual bandwidth remedy proceeding, the Fifth Circuit found very similar arguments regarding the so-called Vidalia transaction to be an impermissible collateral attack on the Formula Rate Orders. *La. Pub. Serv. Comm'n*, 761 F.3d at 558-60. The Fifth Circuit similarly found that Entergy's tariff filings put Louisiana on notice of the change in methodology, particularly noting that the relevant tariff language was red-lined, and the language was included in both the April and December 2006 tariff filings, so that Louisiana had

two opportunities to protest the adjustment. *Id*. at 558. The Court also observed that Louisiana objected to many other aspects of Entergy's tariff filings, but did not protest the Vidalia transaction adjustment. *Id*. at 558-59. Further, the notice provided by the tariff language itself belied Louisiana's assertions that Entergy's transmittal letter "deceived it into believing no change was being made." *Id*. at 559-60.

Thus, "[t]he Louisiana Commission's alleged harm arises from Entergy Corporation's 2006 and 2007 compliance filings and not from the orders before us." *Id*. at 558. "To rule in favor of the Louisiana Commission we would have to unravel FERC's [Formula Rate Orders] that approved the tariff language sanctioning the reversal of the Vidalia transaction." *Id*. However, "[w]e cannot undo the [Tariff Orders] in this petition for review." *Id*. at 560. "Accordingly, we dismiss the Louisiana Commission's petition for lack of jurisdiction." *Id*.

Louisiana points to testimony that individual company opportunity sales were included in "requirements" under certain parts of the System Agreement. Louisiana Br. 45-46 (citing, *inter alia*, Entergy witness Louiselle, R. 504, Transcript at 1082-83, JA 1716-17). Mr. Louiselle testified on redirect (R. 507, Transcript at 1222, JA 1723), that the term "requirements," as used in various sections of the System Agreement, is distinct from the term "Requirements Sales" used in the definition of the Energy Ratio. The term "requirements" in the System

Agreement identifies an Operating Company's responsibility for the costs the System incurs as a result of that Operating Company's load (including opportunity sales) during peak load conditions. As discussed above, the Commission specifically relied upon Mr. Louiselle's direct testimony regarding the meaning of non-requirements sales as including opportunity sales, which is consistent with the common understanding of those terms. Opinion No. 505 P 111, JA 36 (citing Revised Exhibit ESI-6, R. 213 at 38-39, JA 1352-53).

Fundamentally, Louisiana fails to explain how it reasonably could have concluded in the Formula Rate Proceeding, beyond any need for further inquiry, that opportunity sales are not "Non-Requirements Sales for Resale" under the tariff, particularly when Louisiana admits that it never agreed with what it asserts is Entergy's interpretation of "requirements." Louisiana Br. 46. *See Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 298-99 (D.C. Cir. 2005) (dismissing as an untimely collateral attack a challenge to a previously-approved tariff, finding that the time for judicial review of the orders approving the tariff had long passed and "the orders did not fail to place the parties on notice of what would be required.") "Mere ambiguity" is not enough to excuse Louisiana's failure to seek clarification of the Formula Rate Orders with the Commission, even if Louisiana's interpretation were reasonable. *See Dominion Resources, Inc. v. FERC*, 286 F.3d 586, 590 (D.C. Cir. 2002).

Rather, the question is whether the Commission's interpretation was "so obscure" that the order did not provide notice. *Id*. *See ANR Pipeline Co. v. FERC*, 988 F.2d 1229, 1234 (D.C. Cir. 1993) (uncertainty as to potential interpretations, even if justifiable, do not excuse failing to ask for rehearing or clarification). Certainly, here, "a reader schooled in [electric] regulation" would have "perceived a very substantial risk" that opportunity sales would be considered non-requirements, as opposed to requirements, sales. *Id*. The remedy for ambiguity "is to petition the Commission for reconsideration within the [statutory time] period, enabling judicial review to be pursued (if Commission resolution of the ambiguity is adverse) after disposition of that petition." *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 286 (1987). Otherwise, the statutory time limit for seeking review "would be held hostage to everpresent ambiguities." *Id*.

D. Louisiana Failed To Challenge On Rehearing The Exclusion Of Waterford 3 Accumulated Deferred Income Taxes From The Bandwidth Calculation, And Therefore The Court Lacks Jurisdiction Over This Claim.

Louisiana argues that Entergy improperly excluded from the bandwidth calculation accumulated deferred income taxes related to Entergy Louisiana's 1989 sale/leaseback of the Waterford 3 nuclear facility. *See* Louisiana Br. 48-50. As Louisiana concedes, Louisiana failed to seek rehearing on this issue before the Commission, Louisiana Br. 27, and Louisiana fails to demonstrate reasonable grounds for failing to do so. Accordingly, the Court lacks jurisdiction to address

this issue. *See* Federal Power Act section 313(b), 16 U.S.C. §825*l*(b) ("[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so").

1. Louisiana Failed To Seek Rehearing Of The Exclusion Of The Waterford 3 Accumulated Deferred Income Taxes.

Section 30.12 of Service Schedule MSS-3 defines net accumulated deferred income taxes as follows:

> 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.

Opinion No. 505 P 224 & n.267, JA 71 (citing Service Schedule MSS-3, Section 30.12 (Exhibit ESI-4, R. 316 at 48D, JA 1281)). Following this tariff language, Entergy excluded from the bandwidth calculation accumulated deferred income tax amounts recorded in certain Operating Companies' Account 190 that were not includable for FERC cost of service purposes. *Id*. P 224, JA 72. Before the Commission, Louisiana argued generally that these amounts were improperly excluded because removal did not comply with the methodology used in Opinion No. 480 Entergy exhibits 26 and 28. *Id*.

The Commission affirmed the Administrative Law Judge's determination that Service Schedule MSS-3, section 30.12, is the controlling methodology, and therefore Entergy's exclusion of accumulated deferred income tax amounts was consistent with the bandwidth formula. *Id*. P 233, JA 75. The Commission further observed that Louisiana had not attempted to rebut Entergy's detailed testimony regarding any of the specific exclusions of accumulated deferred income tax amounts. *Id*. Louisiana did not challenge these determinations on rehearing. (*See* Request for Rehearing or Clarification on behalf of the Louisiana Public Service Commission, R. 652, JA 285).

In the second annual bandwidth proceeding, Louisiana attempted to argue that the Waterford 3 accumulated deferred income taxes were improperly excluded under Service Schedule MSS-3 section 30.12 as "[accumulated deferred income tax] amounts arising from retail ratemaking decisions." Louisiana Br. 48-49; Opinion No. 514 P 91, JA 427. The Commission in the second annual bandwidth remedy proceeding reasonably concluded that the propriety of the Waterford 3 exclusion was decided in this first annual bandwidth proceeding, and therefore Louisiana was precluded by the parties' stipulation from re-litigating the issue. Opinion No. 514 P 117, JA 437.[7] Louisiana did not appeal this determination in

[7] The parties to the second annual bandwidth proceeding entered into a Joint Stipulation agreeing not to litigate issues that were the subject of other bandwidth proceedings. Opinion No. 514 P 117, JA 437. One of the "Stipulated Issues" that

the second annual bandwidth proceeding (and, accordingly, the Fifth Circuit did not address this issue).

Having been rebuffed in the second annual bandwidth proceeding, Louisiana now seeks to raise its challenges to the Waterford 3 exclusion on appeal here. However, having failed to raise this issue to the agency on rehearing, and having failed to preserve it for judicial review, the Court lacks jurisdiction to hear Louisiana's claims.

2. Louisiana Cannot Demonstrate "Reasonable Ground" For Failing To Seek Rehearing.

Louisiana contends that it had a "reasonable ground" for failing to seek rehearing in this proceeding because "FERC gave no indication in this case that it decided the issue." Louisiana Br. 27 (quoting 16 U.S.C. § 825*l*(b)). To the contrary, the record amply demonstrates that – as a result of Louisiana's own protest – the propriety of the Waterford 3 exclusion was expressly litigated in the hearing before the Administrative Law Judge, whose determination (that the exclusion conformed to the filed tariff) was affirmed by the Commission.

---

would not be re-litigated was: "Exclusion of the categories of accumulated deferred income tax (ADIT) that Entergy excluded for the 2006 test year from Account No. 190 in the bandwidth calculation." *Id*. (citing Ex. ESI-58, R. 363, at 1, Stipulated Issue 2(iii)). Under this stipulation, the Commission concluded that Louisiana was precluded from re-litigating the Waterford 3 exclusion because that issue was litigated in the first annual bandwidth proceeding. *Id*.

In this proceeding, Entergy submitted workpapers detailing the bandwidth calculations. Louisiana collected workpapers related to the exclusions for accumulated deferred income taxes, and marked them as Exhibit LC-235, R. 515, JA 1642-52. *See* Tr. 1187-90, R. 507, JA 1719-22. Among the accumulated deferred income tax entries for Entergy Louisiana were two entries for "Sale/Leaseback," Account Nos. 190307 and 190308, totaling some $88.6 million. *See* Exhibit LC-235, at page 4.3.1, JA 1647. No other Operating Company had "Sale/Leaseback" entries.

On July 18, 2007, Louisiana filed a Supplemental Protest and Supporting Affidavit, R. 18, JA 1095-1114, in which Louisiana challenged the "sale/leaseback" exclusion. *See* Supplemental Protest at 7, JA 1101 ("Examples of Entergy's unilateral and improper exclusions with a significant dollar amount for the various Operating Companies include the ADIT amounts in account 190: . . . sale/leaseback."). *See also* Supporting Affidavit P 18, JA 1113 (same).

As the Commission noted in Opinion No. 505, Entergy provided a data response explaining each accumulated deferred income tax exclusion. Opinion No. 505 P 224 & n.268, JA 72 (citing Exhibits MC-4, R. 412, JA 1661 and MC-5, R. 413, JA 1664). In Exhibit MC-5, Entergy specifically responds to a Staff data request (request (d) on page SMF7, JA 1666), relating to the Waterford 3 accumulated deferred income taxes. The response is on page SFM10, JA 1669.

At hearing, '[t]he Presiding Judge was asked to determine the amounts of accumulated deferred income taxes that should have been included for the 2006 bandwidth calculation." Opinion No. 505 P 224, JA 72. The Administrative Law Judge concluded "that Entergy properly excluded [accumulated deferred income tax] amounts recorded in Account 190 from the bandwidth calculation" based upon the testimony provided by Entergy witnesses Louiselle and Bunting, and Mississippi Commission witness Larkin. *Id*. P 225 & n.269, JA 72. Those witnesses, *inter alia*, addressed specific accumulated deferred income tax amounts, including the accumulated deferred income taxes related to the Waterford 3 sale/leaseback. Initial Decision PP 590, 595, JA 259, 260 (citing Exhibit Nos. ESI-6 (Louiselle Direct Testimony) R. 213, at 56-59, JA 1370-73) ; ESI-50 (Louiselle Rebuttal Testimony), R. 213, at 41-47, JA 1566-72); MC-1 (Larkin Direct Testimony), R. 409, at 14-18, JA 1656-60).

As the Commission observed in Opinion No. 514 (the second annual bandwidth proceeding), Mr. Louiselle's testimony in this proceeding described and supported the accumulated deferred income tax exclusion Entergy made in the bandwidth calculations, including the exclusion associated with the Waterford 3 sale/leaseback. Opinion No. 514 P 118, JA 438 (quoting Exhibit No. ESI-6, R. 213 at 58, JA 1372). This testimony further was in specific response to Louisiana's Supplemental Protest and Supporting Affidavit, R.18 at 7, JA 1101

and Affidavit P 18, JA 1113, challenging the exclusion of Entergy Louisiana's "sale/leaseback" accumulated deferred income taxes. *See* Exhibit No. ESI-6, R. 213 at 57, JA 1371.

Likewise, Mr. Larkin directly addressed the exclusion of the Waterford 3 sale/leaseback and supported Mr. Louiselle's testimony, making specific reference to the Waterford 3 Accounts 190307 and 190308, and the $88.6 million total amount of the exclusion. Opinion No. 514 P 119, JA 439 (quoting Exhibit MC-1, R. 409 at 15, JA 1657).

After citing this testimony supporting Entergy's accumulated deferred income tax exclusions, including the exclusion related to Waterford 3, the Administrative Law Judge concluded: "Based on all the evidence, the undersigned finds Entergy properly excluded the aforementioned [accumulated deferred income taxes] from the bandwidth calculation." *Id*. P 119, JA 440 (quoting Initial Decision P 596, JA 260). The "aforementioned [accumulated deferred income tax]" exclusions include all of the accumulated deferred income tax exclusions Entergy made from the bandwidth calculation, including those associated with Waterford 3. *Id*. P 119 n.199, JA 440. The Commission affirmed the Administrative Law Judge's determination, except with regard to net operating loss carry forwards associated with storm damage losses not at issue here. Opinion No. 505 PP 233-34, JA 75.

Accordingly, the Initial Decision upheld Entergy's exclusion of accumulated deferred income taxes, including those associated with Waterford 3, and Opinion No. 505 affirmed that determination. While the Commission did not specifically reference Waterford 3 in its orders, Louisiana Br. 48, the Commission did reference Entergy's data response "explaining each [accumulated deferred income tax] exclusion," Opinion No. 505 P 224 & n.268, JA 72 , and the testimony detailing the exclusions. *Id*. P 225 & n.269, JA 72. No discussion of the individual exclusions was required because no party, not even Louisiana, objected to any specific exclusion. *Id*. P 233, JA 75. Where the Commission adopts an Administrative Law Judge's initial decision, it need not repeat the Administrative Law Judge's findings and reasoning. *Credit Card Serv. Corp. v. FTC*, 495 F.2d 1004, 1009-10 (D.C. Cir. 1974). *See also, e.g*., *Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 967-68 (D.C. Cir. 1984) ("The Commission is not required to recapitulate the reasoning of the [Administrative Law Judge] if it is satisfied that the initial decision and the reasoning underlying it are sound.").

As Louisiana never sought rehearing of that determination in Opinion No. 505, the Court lacks jurisdiction to review it now. Indeed, Louisiana raised no issues regarding any of the specific accumulated deferred income tax exclusions. Opinion No. 505 P 233, JA 75 ("the Louisiana Commission has not attempted to rebut the detailed testimony provided by Entergy in this proceeding with any

specific determinations regarding the exclusion of accumulated deferred income tax amounts"). That Louisiana now believes there was an error regarding the Waterford 3 exclusion, Louisiana Br. 49-50, does not change the fact that Louisiana could have, but did not, raise any challenges to that determination on exceptions to the Initial Decision and on rehearing before the Commission in the first annual bandwidth proceeding. Opinion No. 514-A P 25, JA 482. As the Commission found in rejecting Louisiana's arguments in the second annual bandwidth proceeding, Louisiana's objections to the Waterford 3 exclusion "were available during the [first annual bandwidth proceeding] and could have been raised by the Louisiana Commission at that time." Opinion No. 514 P 120, JA 440. Having failed in this proceeding to seek rehearing on this issue before the Commission (and indeed having failed to raise any challenges to the Waterford 3 exclusion at all), Louisiana's challenges to the Commission's findings on this issue are barred.

III. ENTERGY'S ARGUMENTS ARE WITHOUT MERIT.

A. The Commission Reasonably Interpreted The Union Electric Contract To Preclude Recovery Of Bandwidth Payments.

In 1999 – years before implementation of the bandwidth remedy – Entergy Arkansas entered into a contract to sell capacity to Union Electric Company, doing business as Ameren UE. In that contract, Union Electric agreed to pay a monthly fixed capacity charge as well as a monthly variable charge that included

"Purchased Energy Expense Charged to Account 555." The Commission found this contract language ambiguous as applied to the subsequently-imposed bandwidth remedy. Nevertheless, the Commission concluded that it was unreasonable to interpret the language to permit Entergy Arkansas to include its bandwidth payments as "purchased energy expense" under the 1999 contract. The Commission found that the bandwidth remedy payments could not be characterized as purchased energy expenses as they are instead payments to roughly equalize production costs among the Operating Companies. Further, the payments cannot be classified as solely energy expense because they are based upon both fixed capacity production costs and variable energy production costs of the Operating Companies, for both purchased energy and capacity and the Operating Companies' owned generation.

Entergy challenges the Commission's interpretation. However, "[i]t is the settled law of this circuit that substantial deference is accorded to the Commission's interpretation of utility contracts," *Vt. Dep't of Pub. Serv. v. FERC*, 817 F.2d 127, 134 (D.C. Cir. 1987), particularly "where the question of interpretation is a technical one." *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1570 (D.C. Cir. 1987) (citing *Gulf States Utils. Co. v. FPC*, 518 F.2d 450, 457 (D.C. Cir. 1975)). Accordingly, to succeed in its challenge, Entergy must show not only that its interpretation of the contract is reasonable, but also that "the

Commission's conclusion to the contrary is implausible." *Vt. Dep't*, 817 F.2d at 136. Entergy can make neither showing here.

1. The Commission Reasonably Concluded That The Bandwidth Payments Could Not Be Characterized As A Purchased Energy Expense.

In 1999, Entergy Arkansas entered into a contract to sell 165 megawatts of capacity to Union Electric. Opinion No. 505 P 72, JA 25. *See* Exhibit No. AMN-2, R. 436, at JA 1201-09 (the Union Electric contract). The contract includes a fixed monthly rate for capacity of $11.25 per kilowatt-month. Opinion No. 505 P 101, JA 33. The contract also includes a variable monthly energy rate based primarily on expenses for fuel (for Entergy Arkansas' owned generation) and purchased energy. *See* the Union Electric Contract, Exhibit No. AMN-2, R. 436 at 3, JA 1203 and Appendix A, JA 1209.

The formula rate for the variable energy charge, set out in Appendix A to the contract, includes a variable "FE" for "Fuel Expense (Accounts 501, 518, and 547)" and a variable "PE" for "Purchased Energy Expense Charged to Account 555." *See* Entergy Br. 25; Exhibit No. AMN-2, R. 436 at Appendix A, JA 1209. Entergy sought to allocate a share of Entergy Arkansas' 2006 annual bandwidth payments to Union Electric through the PE (purchased energy) variable. Opinion No. 505 P 73, JA 25.

In ruling on Union Electric's protest to this charge, the Commission found the contract ambiguous as applied to the subsequently-imposed bandwidth remedy. Opinion No. 505 P 100, JA 33. "'Ambiguity easily arises when the contract is applied to its subject matter in changed circumstances.'" *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1545 (D.C. Cir. 1985) (quoting *Pennzoil Co. v. FERC*, 645 F.2d 360, 388 (5th Cir. 1981)).

Nevertheless, the PE variable only provides for recovery of purchased energy expenses. Opinion No. 505 P 104, JA 34. The Commission concluded that it was "unreasonable to interpret the 1999 Agreement to allow Energy Arkansas to include its total bandwidth payments as purchased energy expenses." *Id*. PP 100, 104, JA 32, 34. "The 1999 Agreement pre-dates the bandwidth remedy by several years, and its purchased energy terms cannot legitimately be characterized as including bandwidth payments." Opinion No. 505-A P 37, JA 105.

"[T]he character of the bandwidth payments demonstrates that these payments are not solely purchased energy expenses." Opinion No. 505 P 103, JA 33. Bandwidth payments do not represent "an actual wholesale sale and purchase of power," but rather reallocate costs among Operating Companies. Opinion No. 505-A PP 30, 33, JA 102, 103. "[A] bandwidth payment is nothing more than a payment made by an Operating Company with low production costs to an Operating Company with high production costs, and, accordingly, is not a payment

for energy" as envisioned in the Union Electric contract. *Id*. P 36, JA 105. *See also* Opinion No. 505 PP 101, 104, JA 33, 34.

Further, bandwidth payments are not solely for the sale and purchase of energy; rather, they are "based on total production costs, including capacity and energy costs associated with purchases and each Operating Company's owned generation." Opinion No. 505 P 103, JA 33. The production costs compared in the bandwidth formula are broken down into fixed and variable cost components. *Id*. P 102, JA 33; Opinion No. 505-A P 31, JA 103. Fixed production costs include the costs of both owned and purchased capacity and are allocated to each Operating Company based on a demand ratio. Opinion No. 505 P 102, JA 33; Opinion No. 505-A P 31, JA 103. Variable costs include the costs of both self-generated and purchased energy and are allocated based on an energy ratio. *Id*. *See* Service Schedule MSS-2, Section 30.12, Exhibit No. ESI-4, at 48E-48F, JA 1282-83 (Variable Production Expense (VPX) includes, *inter alia*, fuel expense recorded in FERC Accounts 501, 518 and 547 (FE), related to an Operating Companies' owned generation, and purchased power expense recorded in FERC Account 555 (PURP), related to transactions with others).

Thus, the bandwidth payments are determined based on the net effect of demand-related and energy-related imbalances. Opinion No. 505 P 102, JA 33; Opinion No. 505-A P 31, JA 103. The bandwidth payments cannot be attributed

solely to energy-related expense (they include capacity expense), nor can they be attributed solely to purchased energy expense (they include, *inter alia*, fuel expense for the Operating Companies' owned generation). Opinion No. 505 P 102, JA 33. Thus, the bandwidth payments are a combination of both demand and energy costs for all production resources, not just purchases. *Id*. *See also id*. P 103, JA 33 (bandwidth payments "are based on total production costs, including capacity and energy costs associated with purchases and each Operating Company's owned generation").

Entergy contends that, as a factual matter, Entergy Arkansas' 2006 bandwidth payment was entirely energy-related because its capacity costs exceeded the System average, so Entergy Arkansas' net bandwidth payment for 2006 was based upon Entergy Arkansas' lower than average energy costs. Entergy Br. 23 (citing the testimony of Entergy witness Schnitzer, Exhibit ESI-41, R. 347 at 28-33, JA 1484-89).

However, as Mr. Schnitzer also testified, "the [bandwidth] payment would have been higher absent the opposite (but smaller) imbalance in demand-related costs." Exhibit ESI-41, R. 347 at 30, JA 1486. Thus, the Commission rejected the argument that Entergy Arkansas' bandwidth payments "were entirely attributable to the disparity in energy costs." Opinion No. 505-A P 35, JA 104. Rather, bandwidth payments are determined based on the net effect of demand-related and

energy-related imbalances. Opinion No. 505 P 102, JA 33; Opinion No. 505-A P 31, JA 103. "Regardless of whether Entergy Arkansas' bandwidth payments are attributable to energy costs, the bandwidth payments are not payments for just energy. They are based on a calculation of total production costs, and that calculation includes both capacity and energy costs associated with purchases and each Operating Company's owned generation." Opinion No. 505-A P 35, JA 104 (citing Opinion No. 505 P 103, JA 33). In any event, even if Entergy could establish that the bandwidth payment was totally energy-related, the payment still is not reasonably considered to be a "purchased energy expense" within the meaning of the PE variable. Opinion No. 505 P 104, JA 34.

2. The Fact That Bandwidth Payments Are Recorded In Account 555 Does Not Support Entergy's Interpretation.

Entergy argues that, because the Formula Rate Order permitted bandwidth expenses to be recorded in Account 555 (Purchased Power), the contract unambiguously permits Entergy to charge Union Electric for bandwidth payments. Entergy Br. 14-16 (citing Formula Rate Order PP 21, 31-32, JA 713, 716). Entergy asserts that "FERC's notion that expenses that indisputably qualify as 'purchased power' should not be considered 'purchased energy' is arbitrary." Entergy Br. 20.

However, Entergy itself has recognized that "purchased power" in Account 555 is not the same thing as "purchased energy." *See* November 12, 2008 Brief

Opposing Exceptions of Entergy Services, Inc., R. 639 at 83, JA 1146 ("The mere fact that the Bandwidth Payments are considered payments for purchased power does not mean that they are payments for purchased energy, however. Payments for purchased power can consist of either payments for capacity or payments for energy.").

Further, while the Formula Rate Order did permit Entergy to record bandwidth payments in Account 555, that order did not find that bandwidth payments are purchased energy expenses, or that they should be treated as such, simply because these payments are recorded in Account 555. Opinion No. 505 P 104, JA 34; Opinion No. 505-A P 34, JA 104. Account 555 "Purchased Power" includes not only the costs of electricity purchased for resale, but also a number of other items, including net settlements involving capacity transactions. *See* Entergy Br. at A-6 setting out relevant portion of 18 C.F.R. Part 101. Entergy asked to place bandwidth payments in Account 555 because this account "'includes net settlements for the exchange of energy and capacity reserves, among other things, and for transactions under pooling agreements.'" Opinion No. 505 P 104, JA 34 (quoting Formula Rate Order P 27, JA 715). In accepting Entergy's request, the Commission noted that Account 555 provides for net settlements for transactions "'under pooling or interconnection agreements wherein there is a balancing of

debits and credits for energy, capacity, etc.'" *Id*. *See* Formula Rate Order P 27 n.18, JA 715.

When the Commission allowed the recording of bandwidth payments in Account 555, the Commission specifically distinguished between the pricing of energy exchanged among the Operating Companies (the original purpose of Service Schedule MSS-3)[8] and the calculation of bandwidth payments. Opinion No. 505-A P 34 n.56, JA 104 (quoting Formula Rate Order P 31, JA 716 ("'Service Schedule MSS-3 will now be used both for pricing energy exchanged among the Operating Companies *and* also to calculate and provide for any rough production cost equalization payments")).

Indeed, several parties to the Formula Rate Proceeding objected to including the bandwidth remedy in Service Schedule MSS-3, which had previously only concerned the pricing of energy exchanges, because the bandwidth remedy included fixed production costs as well as energy costs. *Id*. PP 28-30. To address these concerns, the Commission required that Entergy separate billing for the two separate functions of Service Schedule MSS-3, *i.e*. the pricing of exchange energy

[8] In this original function, Service Schedule MSS-3 allocates energy each hour among the Operating Companies on an after-the-fact basis. Opinion No. 480 P 6, JA 330. Each Operating Company that generates power in excess of its needs is deemed to sell energy into the system exchange for the use of the other Operating Companies. *Id*. It is presumed that the selling company places its most expensive energy into the exchange and keeps its cheapest energy to meet its own base load requirements. *Id*.

and the bandwidth remedy. Formula Rate Order P 32, JA 716 ("[t]o alleviate the concerns of the protestors that combining the two functions of Service Schedule MSS-3 will be confusing, we direct Entergy to make transparent and separate in its billing the amounts applicable to each of the two functions of Service Schedule MSS-3."); Formula Rate Rehearing P 35, JA 740 (same). Therefore, "[u]nder no reasonable interpretation of the [Formula Rate Order] can it be argued that the Commission found that bandwidth payments are in fact purchased energy expenses." Opinion No. 505 P 104, JA 34.

3. The Commission Reasonably Concluded That Extrinsic Evidence Supported The Conclusion That The Contract Did Not Encompass Bandwidth Payments.

Entergy complains that the Commission "brushed aside" Entergy's "key evidence" regarding Entergy's contracting intent that it "be able to recover all energy-related costs that it incurred." Entergy Br. 24 (citing the testimony of Entergy's Vice-President John Hurstell, Exhibit ESI-23, R. 130 at 50, JA 1451). Mr. Hurstell testified that:

> While I cannot address [Union Electric's] intent with respect to contract negotiations, I can unambiguously state that [Entergy Arkansas] did not intend this contract to protect [Union Electric] against fluctuations in the cost of natural gas, or any other source of energy used to supply energy under this agreement. It was [Entergy Arkansas'] intent that the 1999 Agreement allow [Entergy Arkansas] to pass through an allocated share of 100% of its energy costs to [Union Electric] through the variable fuel and energy rate.

Exhibit ESI-23, R. 130 at 50, JA 1451.

The Commission found that Mr. Hurstell's testimony -- that "Entergy Arkansas' intent in negotiating the 1999 Agreement was to make Union Electric subject to fluctuations in fuel prices" -- does not support Entergy's current claims of contractual intent that Union Electric be subject to all energy-related charges, including the subsequently-imposed bandwidth remedy. Opinion No. 505-A P 36, JA 105. "Rather, Union Electric negotiated an energy rate that, although it could fluctuate, was specific enough to capture only certain energy charges." *Id*.

The Commission reasonably concluded that Entergy's evidence regarding its own subjective contractual intent did not outweigh the considerable record evidence that the objective interpretation of the contract language at issue did not encompass all energy-related charges. *Id*. "It is reasonable for the Commission to discount extrinsic evidence of one party's 'personal understanding of the contractual terms rather than its objective meaning.'" *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 53 (D.C. Cir. 2008) (quoting *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 606 (D.C. Cir. 1997)). "[W]here the Commission weighs competing record evidence," the Court defers to its reasonable choice. *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 119 (D.C. Cir. 2013). *See also Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001) (the Commission's choice between "disputing expert witnesses" is entitled to deference).

Union Electric witness Schukar testified that the purchased energy variable in the 1999 Agreement limits the costs that may be included in the purchased energy variable to a specific category of costs. Opinion No. 505-A P 36, JA 105 (citing Ex. AMN-11, R. 444 at 6, JA 1211). Mr. Schukar found that production cost equalization payments are not within the purchased energy variable PE, which is "limited to a very specific category of costs under Account 555, i.e. 'purchased energy expense.' Production cost equalization payments are not a cost incurred or expense for the purchase of energy." Exhibit AMN-11, R. 444 at 6, JA 1211. *See also* Opinion No. 505-A P 36, JA 105 (citing FERC staff witness Sammon, July 1, 2008 Transcript of Hearing, R. 545, at 2287-88, JA 1725-26 (Union Electric contract permits recovery of only purchased energy expenses)). Accordingly, the Commission reasonably concluded that "the purchased energy variable in the 1999 Agreement does not explicitly provide for the recovery of all energy-related expenses, but rather only purchased energy expenses charged to Account 555." Opinion No. 505 P 104, JA 34.

As this Court has recognized, in construing a contract in the context of unanticipated subsequent events, the issue becomes not the "historical intent" of the parties, but rather "how to fill a contract gap -- how to address a circumstance that the contract plainly omitted." *S. D. Pub. Utils. Comm'n v. FERC*, 934 F.2d 346, 350, 352 (D.C. Cir. 1991). Where "the parties never meant squarely to

address the issue raised by this dispute," the Commission "is entitled to place its own construction on the resultant ambiguity -- so long as it is reasonable." *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1137 (D.C. Cir. 1991). "[T]he difficulty of the task of divining the parties' intent under changed circumstances is all the more reason for this court to defer 'to the judgment of the expert agency that deals with agreements of this sort on a daily basis.'" *Holyoke Water Power Co. v. FERC*, 799 F.2d 755, 759 n.7 (D.C. Cir. 1986) (quoting *Kan. Cities v. FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983)).

Entergy points out that Messrs. Sammon and Schukar were not involved in the contract negotiations, and therefore they have no personal knowledge of the parties' intent. Entergy Br. 28. This evidence was offered, however, not as proof of the subjective intent of the parties during negotiations, but rather as evidence of the objective interpretation of the contract language in the industry. *See* Opinion No. 505-A P 36, JA 105; Opinion No. 505 P 103 & n.125, JA 33.

Entergy questions Mr. Sammon's qualifications to provide "an expert opinion on contract interpretation," Entergy Br. 29, but Mr. Sammon has over 30 years of experience as an analyst with the Commission, analyzing and testifying on electric rate issues, including energy contracts. *See* Opinion No. 505 P 93, JA 30 (citing Exhibit S-1, R. 414 at 2, JA 1671). Accordingly, the Commission found that "Mr. Sammon's testimony was given as a ratemaking expert on the issue of

whether the bandwidth payments are purchased energy expense as defined by the Commission's rules and regulations. This subject matter is certainly within his qualifications." Opinion No. 505 P 103 n.125, JA 34. Likewise, Mr. Schukar has been employed in the electric industry for over 20 years and, in the course of those years, has negotiated and interpreted numerous contracts for the purchase and sale of electric energy and capacity like the 1999 Agreement. *See* Exhibit No. AMN-1, R. 435 at 2-3, JA 1198-99; Initial Decision P 215, JA 191.

Entergy asserts that, prior to the bandwidth remedy, Entergy Arkansas recovered all amounts recorded in Account 555 except for capacity costs, and posits that this course of dealing suggests that bandwidth remedy payments are also recoverable. Entergy Br. 26. This argument likewise does not aid Entergy. Prior to this first annual bandwidth proceeding, the only expenses charged in Service Schedule MSS-3 and recorded in Account No. 555 were expenses for energy exchanged among Operating Companies. *See* Opinion No. 505-A P 34, JA 104 (distinguishing MSS-3's prior function of pricing energy exchanged between Operating Companies from the additional, new function of calculating bandwidth payments). Therefore, historically, the allocation of energy expenses to Entergy Arkansas under Entergy Service Schedule MSS-3 constituted purchased energy expenses, recoverable under the contract. *See* Initial Decision P 407, JA 227. This historical practice of charging expenses for purchasing exchange energy says

nothing, however, about whether the bandwidth remedy expenses, which post-dated the contract by several years, are properly included in the purchased energy expense PE variable. Rather, the Commission rejected the argument that bandwidth remedy payments were purchased energy expenses simply because they were recorded in Account 555. Opinion No. 505 P 104, JA 34.

4. Entergy's Policy Arguments Lack Merit.

Entergy contends that, having found the contract ambiguous, the Commission was required to interpret it in accordance with the policy goal of making wholesale customers responsible for bandwidth payments. Entergy Br. 16-18. The Commission agreed that the wholesale customers of Entergy's Operating Companies should be responsible for any bandwidth payments made by an Operating Company. *See* Opinion No. 505-A P 37, JA 105; Opinion No. 505 P 100, JA 32.

However, while the Commission found the contract ambiguous, the Commission also found it unreasonable to interpret the 1999 Agreement to include Entergy Arkansas' total bandwidth payments as purchased energy expenses. Opinion No. 505 P 104, JA 34. The 1999 Agreement pre-dates the bandwidth remedy by several years, and its purchased energy terms cannot legitimately be characterized as including bandwidth payments. Opinion No. 505-A P 37, JA 105; Opinion No. 505 P 101, JA 33. It does not, therefore, follow that Union Electric

may be allocated bandwidth payments through a purchased energy variable in a contract that does not provide for the pass-through of charges associated with bandwidth payments. Opinion No. 505-A P 37, JA 105. The Commission reasonably chose not to revise the Union Electric contract to fulfill particular policy goals.[9] *See, e.g.*, *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 519 (D.C. Cir. 1985) ("The Commission is not justified "in cavalierly disregarding private contracts."); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984) ("Because the preservation of private contracts within the context of a rate-setting statutory scheme promotes economic stability, the Supreme Court held, in the *Mobile* and *Sierra* cases, that statutory provisions governing public utilities' rates should be construed, when possible, as compatible with private rate agreements.") (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)). Further, the Commission noted that Entergy could have modified the contract (which expired in 2009). Opinion No. 505-A P 37, JA 105.

[9] Entergy cites *PSEG Energy Resources & Trade LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011), and *Old Dominion Elec. Coop.*, 518 F.3d at 48-49, for the proposition that the Commission may consider policy in interpreting ambiguous contract language. *See* Entergy Br. 17-18. Neither case stands for the proposition, however, that the Commission may adopt an unreasonable interpretation of ambiguous language to further policy goals.

The Commission also disagreed that Union Electric receives an undeserved windfall compared to other Entergy Arkansas customers. Opinion No. 505-A P 37, JA 105. It is not a windfall for Union Electric to avoid a charge that is not specified or otherwise applicable under the 1999 Agreement that pre-dates the bandwidth remedy, nor is Entergy being deprived of any payment if it does not receive an amount it had not bargained for in the 1999 Agreement. *Id*. If Entergy Arkansas is unable to recover an allocated portion of its costs from Union Electric because of its failure to negotiate a contract that would allow it to do so, it is not reasonable to characterize Union Electric as receiving a "windfall." *Id*. *See, e.g*., *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1177 (D.C. Cir. 2005) ("[A] company 'is not typically entitled to be relieved of its improvident bargain.'") (quoting *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 710 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002)); *Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 985 (D.C. Cir. 2009) (FERC contract analysis "appropriately focused on the contract the parties negotiated rather than on which side struck the better balance. . . . Similarly, the question before us is not whether the *contract* was reasonable, a technical issue as to which the courts have little expertise, but rather whether FERC's *construction* of that contract was reasonable, the kind of legal dispute that this court resolves every day.").

Nor was the Commission "inconsistent" in failing to reverse the Administrative Law Judge's determination regarding an East Texas Electric Cooperative contract, permitting East Texas to receive credits for bandwidth payments that Entergy Arkansas made to Entergy Gulf States. *See* Entergy Br. 18-19 (citing Initial Decision PP 413-14, JA 228). While Entergy asserts that it raised this issue on rehearing, Entergy Br. 18-19 (citing its February 10, 2010 Request for Rehearing, R. 650 at 16-17, JA 1165-66), the cited pages nowhere mention the East Texas contract. The Commission had no obligation to distinguish the treatment of a specific contract that was not named in Entergy's rehearing request. *See, e.g.*, *Constellation Energy Commodities Grp., Inc. v. FERC*, 457 F.3d 14, 21 (D.C. Cir. 2006) (failure to even cite on rehearing the tariff provision on which petitioner now relies does not result in a cognizable argument); *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1286 n.7 (D.C. Cir. 2003) (statutory objection not adequately raised where rehearing request did not even cite the statute).

In any event, the Administrative Law Judge expressly found that "the Ameren [Union Electric] agreement with Entergy has no precedential value to the distinct contract of [East Texas], which must be defined by its own terms, and the intent of the parties." Initial Decision P 413, JA 228. Further, "both Entergy and [East Texas] agree that [East Texas] should continue to be allocated a share of

Bandwidth receipts under the agreement." *Id*. P 414, JA 228 (citing the testimony of East Texas witness Smith regarding the East Texas contract, Exhibit No. ETEC-1, R. 450, at 12, JA 1598). As Mr. Smith testified, "[u]nlike the [Union Electric] contract, the [Eastern Texas] contract expressly identifies energy charges allocated to [Entergy Gulf States] under the Entergy System Agreement and more importantly charges under Service Schedule MSS-3 as being included in the monthly fuel and purchased power adjustment charge." Exhibit No. ETEC-1, R. 450 at 12, JA 1598. Thus, the Administrative Law Judge expressly concluded that the contracts should be interpreted independently, and the interpretation of the East Texas contract was, in any event, uncontested. Consequently, there was nothing in the Administrative Law Judge's determination regarding the East Texas contract that the Commission needed to distinguish.

B. THE COMMISSION REASONABLY REQUIRED INTEREST ON THE FIRST BANDWIDTH PROCEEDING PAYMENTS IN LIGHT OF THE SIGNIFICANT DELAY IN FINALIZING THE PAYMENTS.

In orders issued on Entergy's filings in compliance with Opinion No. 505, *Entergy Servs., Inc*., 139 FERC ¶ 61,104 (2012), JA 125, *reh'g denied*, 145 FERC ¶ 61,046 (2013), JA 139, the Commission ordered Entergy to include interest in the bandwidth remedy payments. Entergy objected that this ruling was inconsistent with the Commission's determination in the Formula Rate Proceeding that interest would not be charged on bandwidth remedy payments. In the Formula Rate

Proceeding, however, the Commission declined to require interest on the payments because the Commission anticipated that the rough equalization payments would be made within a reasonable time period, i.e. in the calendar year following the year in which the costs are incurred. Here, given the significant delay since the June 1, 2007 effective date of bandwidth remedy payments based upon production cost data for 2006, the Commission, in an exercise of its broad remedial discretion, reasonably determined that the interests of just compensation argued for awarding interest. The Court "owe[s] FERC great deference in reviewing its selection of a remedy, for 'the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions.'" *La. Pub. Serv. Comm'n*, 522 F.3d at 393 (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)).

1. The Commission Reasonably Determined That It Was Appropriate To Award Interest Given The Significant Delay In Finalizing The Bandwidth Payments.

The Commission reasonably determined that it was appropriate to award interest given the significant delay in finalizing bandwidth payments. *See Oldham v. Korean Air Lines Co., Ltd.*, 127 F.3d 43, 54 (D.C. Cir. 1997) ("interest compensates for the time value of money, and thus is often necessary for full compensation") (quoting *Motion Picture Ass'n of America, Inc. v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992)).

In the Formula Rate Proceeding, the Commission accepted Entergy's proposal to begin payments in June of every year to implement the preceding year's bandwidth payment. Formula Rate Order P 46, JA 719. Accordingly, when Entergy made its first annual bandwidth filing in this proceeding in 2007, based upon 2006 production costs, the Commission accepted the proposed rates for filing, to become effective June 1, 2007, subject to refund, and set the rates for hearing. *Entergy Servs., Inc.*, 139 FERC ¶ 61,104 P 4, JA 126.

Those bandwidth payments have yet to be finalized. Because of the significant delay in finalizing the bandwidth remedy payments and receipts for calendar year 2006, the Commission required that Entergy pay interest on the first annual bandwidth remedy payments from June 1, 2007 until the date of the Intra-System bill that will reflect the bandwidth recalculation amounts for calendar year 2006. *Id*. P 13, JA 129. The Commission ordered the interest to be paid "due to the length of time elapsed since June 1, 2007 from the original billings for calendar year 2006 payment/receipt amounts," *id*., to ensure full compensation. *Entergy Servs.*, 145 FERC ¶ 61,046 P 8, JA 141.

2. The Commission Reasonably Concluded That Awarding Interest At This Time Was Consistent With Other Bandwidth Proceeding Orders.

Entergy contends that the interest requirement is inconsistent with the Commission's orders establishing the bandwidth remedy. Entergy Br. 30 (citing Formula Rate Order P 51, JA 721). In the Formula Rate Order, the Commission denied Louisiana's request to incorporate interest into the bandwidth remedy throughout the rate effective period until payments are actually received. *See* Formula Rate Order P 50, JA 720. The Commission found that the bandwidth remedy payments bring the Operating Companies within the bandwidth on a prospective basis. *Id*. P 51, JA 721. *See also* Formula Rate Rehearing Order P 32, JA 740. The Commission exercised its remedial discretion not to order interest on those payments because "there is a necessary delay owing to the need to perform the calculations, and, once the calculations are completed, the Commission is requiring settlements to be made in a reasonable time period, i.e. before the end of the calendar year." Formula Rate Order P 51, JA 721. *See also* Formula Rate Rehearing Order P 32, JA 740 ("In our discretion, we are requiring settlements to be made in a reasonable time period once the calculations are completed and, accordingly, there is no need to require that interest be applied to the payments.") Because the Commission was not ordering refunds for past overcharges, but rather was implementing a prospective remedy that would be paid within the following

calendar year, the Commission declined to apply its general policy, recognized in *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999), *vacated in part on other grounds*, 200 F.3d 867 (D.C. Cir. 2000), of requiring interest on overcharges. Formula Rate Rehearing Order PP 32, 41, JA 740, 743. *See* Entergy Br. 30 (pointing to the Commission's statement that bandwidth remedy payments are not refunds).

In this first annual bandwidth remedy proceeding, however, settlements have not been paid within a reasonable time after the period at issue, as contemplated in the Formula Rate Orders. *Entergy Servs*., 145 FERC ¶ 61,046 P 8, JA 141. Due to the substantial length of time that has passed, the Commission found it appropriate to allow interest to be paid to ensure full recovery. *Id*. "[I]nterest is simply a way of ensuring full compensation. This is why the delay between the time of the customers' injury and the granting of relief is a reason for awarding interest, not denying it. . . ." *Id*. (quoting *Anadarko*, 196 F.3d at 1268). Thus, given that, in this instance, settlements have not occurred within a reasonable time, the Commission was well within its remedial discretion in ordering interest, and fully explained why it reached a different conclusion here than its determination in the Formula Rate Orders, as a general matter, not to incorporate interest payments into the bandwidth remedy. *See* Entergy Br. 31 (arguing that the Commission failed to explain its departure from the Formula Rate Orders).

Entergy contends that, because the bandwidth remedy is a prospective remedy, the passage of time is not a relevant consideration. Entergy Br. 32. However, in the Formula Rate Orders, the Commission declined to order interest because the bandwidth remedy was a prospective remedy that would be paid within a reasonable amount of time. Formula Rate Order P 51, JA 721; Formula Rate Rehearing Order P 32, JA 740. Here, the element of timely payment is lacking, and provides ample justification for the Commission's award of interest. *Entergy Servs.*, 139 FERC ¶ 61,104 P 13, JA 129; *Entergy Servs.*, 145 FERC ¶ 61,046 P 8, JA 141. Nothing about the fact that the remedy is prospective, rather than a refund of past overcharges, precludes the Commission from awarding interest where the payment of the remedy is significantly delayed.

Entergy contends that the Commission's determination is inconsistent with the fact that the Commission did not require interest on delayed interruptible load payments in *La. Pub. Serv. Comm'n v. Entergy Corp*., 132 FERC ¶ 61,223 PP 14, 18, *order on clarification*, 133 FERC ¶ 61,213 P 4 (2010). As the Commission explained, however, in that case, unlike here, Louisiana failed to make a timely request for interest payments. *Entergy Servs*., 145 FERC ¶ 61,046 P 9, JA 142. Accordingly, the Commission denied Louisiana's untimely request without making any determination regarding the propriety of paying interest. *Id*. Further, the Commission ultimately reversed its decision ordering refunds in that proceeding,

so any issue of interest on refunds became moot. *Id*. P 9 n.16, JA 142 (citing *La. Pub. Serv. Comm'n v. Entergy Corp*., 142 FERC ¶ 61,211 P 76 (2013)).

In contrast, where the Commission has addressed the issue of interest on bandwidth payments in similar circumstances, the Commission has reached a decision consistent with its decision here. *Id*. (citing *Entergy Servs., Inc.*, 142 FERC ¶ 61,011 P 21 (2013), *reh'g denied*, 148 FERC ¶ 61,087 (2014) (requiring interest on bandwidth payments in the second annual bandwidth proceeding due to the passage of time)). *See also La. Pub. Serv. Comm'n*, 146 FERC ¶ 61,152 P 42 (2014) (awarding interest on the bandwidth remedy payment/receipt amounts for a seven-month period in 2005). While Entergy dismisses the Commission's reliance on the second annual bandwidth proceeding interest orders as "circular," *see* Entergy Br. 34 n.5, to the contrary, it demonstrates the very consistency that Entergy asserts is lacking.

Entergy argues at length that the general policy considerations set forth in *Anadarko* in support of interest awards are inapplicable to bandwidth payments. Entergy Br. 34-36. While Entergy faults the Commission for failing to address these arguments, *id*. at 36, Entergy made no such argument in its request for rehearing, and therefore the Commission had no opportunity to respond to that argument, nor does the Court have jurisdiction to consider it. (Entergy's June 6, 2012 request for rehearing of *Entergy Servs*., 139 FERC ¶ 61,104, R. 669, is at JA

1186-93). In any event, as the Commission found, the first policy justification, just compensation, is fully applicable here where the bandwidth remedy payments have not been made within a reasonable time (i.e. the next calendar year) after the costs at issue were incurred, as contemplated in the Formula Rate Orders. *Entergy Servs.*, 139 FERC ¶ 61,104 P 13, JA 129; *Entergy Servs.*, 145 FERC ¶ 61,046 P 8, JA 141.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied and the orders on review should be upheld in all respects.

Respectfully submitted,

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

/s/ *Lona T. Perry*
Lona T. Perry
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, D.C. 20426
TEL: (202) 502-6600
FAX: (202) 273-0901
lona.perry@ferc.gov

December 5, 2014

Louisiana Pub. Serv. Comm'n v. FERC,
Nos. 12-1282, *et al*. (consolidated)

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and this Court's order of April 18, 2014, setting a word limit for Respondent's brief of 17,500 words, I hereby certify that this brief contains 16,721 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

/s/ *Lona T. Perry*
Lona T. Perry
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6600
FAX: (202) 273-0901
lona.perry@ferc.gov

December 5, 2014

ADDENDUM

STATUTES

TABLE OF CONTENTS

PAGE

Federal Power Act

Section 205, 16 U.S.C. § 824d A-1

Section 206, 16 U.S.C. § 824e..... A-3

Section 313(b), 16 U.S.C. § 825*l*(b)..... A-5

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,

(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 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.''

[1] See References in Text note below.

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

Louisiana Public Service Comm'n v. FERC **Docket No. ER07-956**
D.C. Cir. Nos. 12-1282 and 13-1295

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 5th day of December 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

Daniel Barnowski — Email
Jennifer A. Morrissey
Clinton A. Vince
SNR Denton US LLP
1301 K St., NW
Suite 600 East Tower
Washington, DC 20005-3364

Mary W. Cochran — Email
Paul Hightower
Arkansas Public Service Commission
P.O. Box 400
Little Rock, AR 72203-0000

Michael R. Fontham — Email
Noel J. Darce
Stone Pigman Walther Wittmann LLC
546 Carondelet Street
New Orleans, LA 70130

Matthew W. S. Estes — Email
John S. Moot
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., NW
Washington, DC 20005

Dennis Lane Adrienne Clair Stinson Leonard Street LLP 1775 Pennsylvania Ave., NW, Suite 800 Washington, DC 20006	Email
Glen Ortman Stinson Leonard Street LLP 1775 Pennsylvania Ave., NW, Suite 800 Washington, DC 20006	US Mail
Chad J. Reynolds Mississippi Public Utilities Staff Suite 301B P.O. Box 1174 Jackson, MS 39215-1174	Email
Michael J. Thompson Wendy Warren Wright & Talisman, PC 1200 G St., NW, Suite 600 Washington, DC 20005-1200	Email
Alan J. Statman Wright & Talisman, PC 1200 G St., NW, Suite 600 Washington, DC 20005-1200	US Mail
Andrea J. Weinstein Gregory Camet Entergy Services, Inc. 101 Constitution Ave., NW, Suite 200E Washington, DC 20001-0000	Email
Paul L. Zimmering Stone Pigman Walther Wittmann LLC 546 Carondelet Street New Orleans, LA 70130	US Mail

Deborah Shelton
Sheppard Mullin Richter & Hampton LLP
1300 I Street, NW
Suite 1100 East
Washington, DC 20005

US Mail

/s/ Lona Perry
Lona Perry
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-8334
Fax: (202) 273-0901
Email: lona.perry@ferc.gov