ORAL ARGUMENT NOT YET SCHEDULED

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

No. 16-1014

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: August 18, 2016

CIRCUIT RULE 28(A)(1) CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner.

B. Rulings Under Review

1. Order on Initial Decision, *Louisiana Public Service Commission v. Entergy Corporation*, Opinion No. 519, FERC Docket No. EL10-55, 139 FERC ¶ 61,107 (May 7, 2012), R. 394, JA 1;
2. Order Denying Rehearing, *Louisiana Public Service Commission v. Entergy Corporation*, Opinion No. 519-A, FERC Docket No. EL10-55, 153 FERC ¶ 61,188 (Nov. 19, 2015), R. 582, JA 192;
3. Order Affirming Initial Decision, *Entergy Services, Inc.*, Opinion No. 523, FERC Docket No. ER10-2001, 142 FERC ¶ 61,022 (Jan. 8, 2013), R. 575, JA 69; and
4. Order Denying Rehearing, *Entergy Services, Inc.*, Opinion No. 523-A, FERC Docket No. ER10-2001, 153 FERC ¶ 61,184 (Nov. 19, 2015), R. 581, JA 161.

C. Related Cases

This case has not previously been before this Court or any other court. Similar issues concerning the bandwidth remedy under the Entergy System Agreement were before this Court in *Louisiana Public Service Commission v. FERC*, 606 F. App'x 1 (D.C. Cir. 2015), and before the Fifth Circuit in *Louisiana Public Service Commission v. FERC*, 761 F.3d 540 (5th Cir. 2014), and *Louisiana Public Service Commission v. FERC*, 771 F.3d 903 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015). Another case concerning bandwidth remedy issues (on remand from an earlier case) is pending before this Court; briefing has been completed. *Louisiana Public Service Commission v. FERC*, Case No. 14-1063.

/s/ *Carol J. Banta*
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2006/2007 Compliance Orders	*La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006), *on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd, La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. 2009)
ALJ	Administrative law judge
ALJ Decision	Initial Decision, *Entergy Servs., Inc.*, 128 FERC ¶ 63,015 (2009) (in the Depreciation Complaint Proceeding)
Arkansas or Arkansas Commission	Intervenor Arkansas Public Service Commission
Bandwidth Remedy Proceeding	Proceeding on Louisiana's 2001 complaint, under FPA section 206, challenging cost allocations in the Entergy System, resulting in the Commission's requirement of a remedy to roughly equalize production costs
Commission or FERC	Respondent Federal Energy Regulatory Commission
Depreciation Complaint Proceeding	Proceeding on Louisiana's complaint, under FPA section 206, to change the depreciation variables in the bandwidth formula (FERC Docket No. EL10-55)
Entergy	Entergy Corporation (corporate parent of the Operating Companies) or Entergy Services, Inc. (acting on behalf of Operating Companies)

GLOSSARY

[Entergy] Operating Company/ies	Individually or collectively, Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Gulf States Louisiana, L.L.C. and Entergy Texas, Inc. (which, prior to 2008, operated as a single entity, Entergy Gulf States, Inc.)
Entergy System or System	Generation and transmission facilities owned and operated by Entergy Operating Companies in Arkansas, Louisiana, Mississippi, and Texas
FERC Form 1	FERC Form No. 1, an annual report that major electric utilities must file with the Commission every April, pursuant to 18 C.F.R. § 141.1
First Bandwidth Proceeding	Agency proceeding concerning Entergy's first annual filing, in May 2007, of calculations of the Operating Companies' respective payments and receipts under the FERC-ordered bandwidth remedy for calendar year 2006
Fourth Bandwidth Proceeding	Agency proceeding concerning Entergy's fourth annual filing, in May 2010, of calculations under the bandwidth remedy for calendar year 2009
FPA	Federal Power Act
Louisiana or Louisiana Commission	Petitioner Louisiana Public Service Commission
Louisiana 2008	*La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (upholding *Opinion Nos. 480* and *480-A* in the Bandwidth Remedy Proceeding)

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Louisiana 2014-I	*La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014) (upholding *Opinion Nos. 514* and *514-A* in the Second Bandwidth Proceeding, together with orders on a related Arkansas complaint)
Louisiana 2014-II	*La. Pub. Serv. Comm'n v. FERC*, 771 F.3d 903 (5th Cir. 2014) (upholding *Opinion No. 518* and the rehearing order in the Third Bandwidth Proceeding)
Louisiana 2015	*La. Pub. Serv. Comm'n v. FERC*, 606 F. App'x 1 (D.C. Cir. 2015) (upholding *Opinion Nos. 505* and *505-A* in the First Bandwidth Proceeding)
Opinion No. 480/480-A	*La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 480, 111 FERC ¶ 61,311, *on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005) (in the Bandwidth Remedy Proceeding), *aff'd in part and rev'd in part in Louisiana 2008*
Opinion No. 505/505-A	*Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010), *on reh'g*, Opinion No. 505-A, 139 FERC ¶ 61,103 (2012) (in the First Bandwidth Proceeding), *aff'd in Louisiana 2015*
Opinion No. 514/514-A	*Entergy Servs., Inc.*, Opinion No. 514, 137 FERC ¶ 61,029 (2011), *on reh'g*, Opinion No. 514-A,142 FERC ¶ 61,013 (2013) (in the Second Bandwidth Proceeding), *aff'd in Louisiana 2014-I*
Opinion No. 518	*Entergy Servs., Inc.*, Opinion No. 518, 139 FERC ¶ 61,105 (2012), *on reh'g and clarification*, 145 FERC ¶ 61,047 (2013) (in the Third Bandwidth Proceeding), *aff'd in Louisiana 2014-II*

GLOSSARY

Opinion No. 519/519-A	*La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 519, 139 FERC ¶ 61,107 (2012), *on reh'g*, Opinion No. 519-A, 153 FERC ¶ 61,188 (2015) (in the Depreciation Complaint Proceeding), on review in this appeal
Opinion No. 523/523-A	*Entergy Corp.*, Opinion No. 523, 142 FERC ¶ 61,022 (2013), *on reh'g*, Opinion No. 523, 153 FERC ¶ 61,184 (2015) (in the Wholesale Rates Proceeding), on review in this appeal
Schedule MSS-3	Rate schedule in the System Agreement that sets forth the bandwidth formula for calculating production costs and bandwidth payments and receipts
Schedule MSS-4	Rate schedule in the System Agreement that sets forth the formula to calculate rates for unit power sales and purchases between Operating Companies
Second Bandwidth Proceeding	Agency proceeding concerning Entergy's second annual filing, in May 2008, of calculations under the bandwidth remedy for calendar year 2007
System Agreement	Tariff that acts as an interconnection and pooling agreement for the Entergy System and provides for the joint planning, construction, and operation of new generating capacity
Third Bandwidth Proceeding	Agency proceeding concerning Entergy's third annual filing, in May 2009, of calculations under the bandwidth remedy for calendar year 2008
Wholesale Rates Proceeding	Proceeding on Entergy's filing, under FPA section 205, to use revised depreciation rates for Entergy Arkansas's FERC-jurisdictional formulas (FERC Docket No. ER10-2001)

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT REGARDING JURISDICTION

As Petitioner Louisiana Public Service Commission ("Louisiana" or "Louisiana Commission") appears to concede, its fourth specified issue on appeal, concerning denial of retroactive relief, is not justiciable in this case. *See* Br. 4-5, 32, 61. In the orders on review, Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") determined that Louisiana had failed to meet its burden, under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to show that the bandwidth formula in the Entergy System Agreement was unjust,

unreasonable, or unduly discriminatory or preferential. *See* Argument, Part II, *infra*. For that reason, the Commission declined to rule on whether the formula could be changed retroactively. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 153 FERC ¶ 61,188 at P 50 (2015), JA 214 ("[B]ecause we find that the bandwidth formula is not unjust or unreasonable, the issue as to whether a change to the formula could be applied retroactively is moot."). In a related case, the Fifth Circuit noted that Louisiana's claim for retroactive relief was "premature": Louisiana "has not yet met its Section 206 burden for *prospective* relief let alone retroactive relief." *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 556 (5th Cir. 2014) ("*Louisiana 2014-I*"), *cert. denied*, 135 S. Ct. 2072 (2015). Here, Louisiana states that it raises the issue of retroactive relief only "to ensure that it is preserved" in the event that Louisiana were ultimately to prevail on its complaint Br. 32; *accord* Br. 61.

Also, to the extent that Louisiana's arguments challenge the Commission's rulings in orders that are not before this Court (including past orders in other proceedings and/or appeals), those rulings are, of course, not within the scope of this appeal. *See Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 824-25 (D.C. Cir. 2008) (court has no jurisdiction over collateral attacks); *accord*, *Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 320 (D.C. Cir. 2015).

STATEMENT OF THE ISSUES

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

The issues presented for review are:

(1) Whether the Commission reasonably determined that Louisiana had not met its burden, under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to demonstrate that the existing bandwidth formula is "unjust, unreasonable, unduly discriminatory or preferential," where the Commission concluded that cost variables in the bandwidth formula, which require use of actual cost data that reflect depreciation rates approved by retail regulators:

(a) should be evaluated in the context of the formula's purpose of roughly equalizing production costs among affiliates operating in several states;

(b) are not inappropriate simply because depreciation rates approved by state regulators for retail costs are not uniform across different retail jurisdictions and do not conform to the Commission's policies for wholesale power sales;

(2) Whether the Commission exercised, rather than subdelegated, its statutory authority over wholesale rate-setting by approving a bandwidth formula that incorporated retail components in its variables, and by continuing to oversee the bandwidth formula through complaint proceedings under section 206 of the Federal Power Act, 16 U.S.C. § 824e; and

(3) Assuming jurisdiction, whether the Commission appropriately declined to order retroactive relief.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum. (A timeline of bandwidth-related filings and orders is attached at the end of this Brief, and a separate Addendum of Relevant FERC Orders contains orders issued in related proceedings that are cited frequently in this Brief.)

INTRODUCTION

The orders on review arise from two separate underlying FERC proceedings, but address some common issues regarding the bandwidth remedy designed to achieve rough equalization of production costs. These orders reflect the

Commission's reasoned consideration of the Federal Power Act, the filed rate doctrine, and its own precedents developed through the numerous disputes over bandwidth calculations.

One set of orders (in FERC Docket No. EL10-55) arises from a 2010 complaint by the Louisiana Commission, under section 206 of the Federal Power Act, 16 U.S.C. § 824e, asserting that the depreciation inputs in the bandwidth formula should be changed to require depreciation costs to be calculated in accordance with the Commission's policies for wholesale rates, regardless of retail depreciation rates. The Commission set the complaint for an evidentiary hearing before an administrative law judge ("ALJ"), who issued an initial decision in February 2011. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 134 FERC ¶ 63,016 (2011) ("ALJ Decision"), R. 345, JA 278. In the orders now on review, the Commission affirmed the ALJ's determination that Louisiana had failed to show that the existing bandwidth formula was unjust and unreasonable, or unduly discriminatory or preferential. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107 (2012) ("*Opinion No. 519*"), R. 394, JA 1, *reh'g denied*, 153 FERC ¶ 61,188 (2015) ("*Opinion No. 519-A*"), R. 582, JA 192.

The second set of orders (in FERC Docket No. ER10-2001) arises from Entergy's filing, under section 205 of the Federal Power Act, 16 U.S.C. § 824d, for approval of proposed depreciation rates for use in all of its wholesale formula

rates. The Commission set the filing for hearing, after which an ALJ issued an initial decision that approved the proposed rates. *Entergy Servs., Inc.*, 136 FERC ¶ 63,015 (2011), R. 558, JA 363. In the orders on review, the Commission affirmed the ALJ's determinations and approved the rates for wholesale sales of electricity, but declined to apply its holdings to rough production cost allocation under the bandwidth formula. *Entergy Servs., Inc.*, 142 FERC ¶ 61,022 (2013) ("*Opinion No. 523*"), R. 575, JA 69, *reh'g denied*, 153 FERC ¶ 61,184 (2015) ("*Opinion No. 523-A*"), R. 581, JA 161.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

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

Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates

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

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

B. The Entergy System and the System Agreement

The instant case stands against a backdrop of several decades of litigation over the allocation of costs under the Entergy System Agreement.[1] We begin with

[1] *See Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (filing of 1982 System Agreement); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987) (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 v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (reallocation of production costs through bandwidth remedy); *La. Pub. Serv.*

an overview of that unusual arrangement. (This Court provided a similar overview of the Entergy System in *Louisiana Public Service Commission v. FERC*, 522 F.3d 378, 383-85 (D.C. Cir. 2008) ("*Louisiana 2008*").)

The Entergy System comprises six Operating Companies selling electricity in Arkansas, Louisiana, Mississippi, and Texas.[2] *See Louisiana 2008*, 522 F.3d at 383. The Operating Companies are owned by a multistate holding company, Entergy Corporation.[3] *Id.* (What is now the Entergy System originated under

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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. 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) ("*Louisiana 2014-I*") (second annual bandwidth proceeding); *La. Pub. Serv. Comm'n v. FERC*, 771 F.3d 903 (5th Cir. 2014) ("*Louisiana 2014-II*") (third annual bandwidth proceeding), *cert. denied*, 135 S. Ct. 2072 (2015); *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014) (refunds related to allocation of capacity costs, after remand); *La. Pub. Serv. Comm'n v. FERC*, 606 F. App'x 1 (D.C. Cir. 2015) (first annual bandwidth proceeding) ("*Louisiana 2015*"); *La. Pub. Serv. Comm'n v. FERC*, No. 14-1063 (D.C. Cir. filed Apr. 22, 2014) (refunds and timing of implementing bandwidth remedy, after remand), *pending*. *See also Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) (preemption of state regulatory jurisdiction as to cost allocation); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988) (same).

[2] For the time period relevant to this appeal, those Operating Companies were: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy New Orleans, Inc.; and Entergy Texas, Inc.

[3] For purposes of this Brief, "Entergy" refers either to Entergy Corporation, the corporate parent of the Entergy Operating Companies and their affiliates, or to

Middle South Utilities, Inc., which owned most of the Operating Companies' predecessors.) At all times relevant to this case, transactions among the Entergy Operating Companies were governed by the System Agreement. *Miss. Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987); *Louisiana 2008*, 522 F.3d at 383.

The Entergy System is highly integrated, with the Operating Companies' transmission and generation facilities operated as a single electric system. *See Louisiana 2008*, 522 F.3d at 383; *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 113 FERC ¶ 61,282 at P 8 (2005) ("*Opinion No. 480-A*"), *aff'd in part by Louisiana 2008*; *see generally Louisiana 2008*, 522 F.3d at 394 ("the operating companies are collaborators in the Entergy System functioning for their *mutual* benefit"). For decades, the Entergy System primarily allocated the costs and benefits of new generation resources through a centralized planning process that assigned new resources to individual Operating Companies, on a rotating basis. *See Louisiana 2008*, 522 F.3d at 383-84.

The System Agreement also allocated the costs of imbalances in the cost of facilities used for the mutual benefit of all the Entergy Operating Companies. *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) ("[K]eeping

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Entergy Services, Inc., a service affiliate that has acted on behalf of the Operating Companies in various FERC proceedings.

excess capacity available for use by all is a benefit shared by the operating companies, and the costs associated with this benefit must be allocated among them."). The System Agreement required that production costs be roughly equal among the Operating Companies. *Louisiana 2008*, 522 F.3d at 384; *see also Miss. Indus.*, 808 F.2d at 1530 (affirming FERC orders that allocated costs of nuclear generation investments to operating companies in proportion to demand for system energy). Thus, since the first System Agreement in 1951, the System sought to iron out inequities through "equalization payments." 808 F.2d at 1530.

Nevertheless, over the history of the System Agreement, the Commission twice (in 1985 and 2005) found that disparities in production costs among the Operating Companies had disrupted the rough equalization required by the System Agreement and resulted in undue discrimination, requiring a Commission-ordered remedy. *See Louisiana 2008*, 522 F.3d at 384, 386 (describing both instances); *id.* at 391-94 (affirming Commission's 2005 finding of undue discrimination and "bandwidth" remedy for rough equalization of production costs); *Miss. Indus.*, 808 F.2d at 1553-58 (affirming Commission's 1985 finding of undue discrimination and remedy of reallocating nuclear investment costs).

The bandwidth remedy imposed in 2005 is set forth in the System Agreement at Service Schedule MSS-3. The formula requires Entergy to calculate each Operating Company's production costs, using figures reported on FERC

Form 1 in accordance with FERC reporting requirements, to compare those costs. *See* Schedule MSS-3, JA 497-512. Section 30.12 of Schedule MSS-3 sets forth the algebraic equations for calculating "Actual Production Cost"; Footnote 1 to that section provides that, in determining each Operating Company's production costs:

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

Service Schedule MSS-3, Sec. 30.12, n.1, JA 504, *cited in Opinion No. 519* at P 48 n.108, JA 28. The tariff goes on to define each input to the equation, usually by reference to the FERC Account(s) in which the data are reported on FERC Form 1. *See* Schedule MSS-3, Sec. 30.12, JA 504-10.[4]

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[4] With regard to depreciation expenses, Section 30.12 contains six pertinent definitions for variables used in the formula:

> • Three of the variables specify the cost data to be taken "as recorded in [certain] FERC Accounts . . . [on FERC Form 1] (consistent with the accounting . . . approved by the retail regulator having jurisdiction over the [Operating] Company, unless the FERC determines otherwise)." *See* Nuclear Accumulated Provision for Depreciation and Amortization (NAD), JA 505; Accumulated Provision for Depreciation and Amortization (ADXN), JA 508; General Plant Accumulated Provision for Depreciation (GAD), JA 508.
>
> • Two variables specify the cost data to be taken "as recorded in [certain] FERC Accounts . . . [on FERC Form 1], as approved by Retail Regulators, unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the FERC under otherwise applicable

Entergy Arkansas terminated its participation in the System Agreement in December 2013 and Entergy Mississippi did so in November 2015. *See Council of New Orleans v. FERC*, 692 F.3d 172, 174-77 (D.C. Cir. 2012) (affirming FERC's conclusion that, after eight years advance notice, System Agreement imposed no further conditions or obligations on termination, including participation in the bandwidth remedy after withdrawal). The System Agreement and all of its service schedules will terminate on August 31, 2016. *See Entergy Arkansas, Inc.*, 153 FERC ¶ 61,347 (2015) (approving settlement agreement to terminate System Agreement).

C. The Bandwidth Remedy and Related Proceedings

The orders challenged on appeal are intertwined with a number of orders issued in related, contemporaneous proceedings that likewise addressed recurrent

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law." *See* Nuclear Depreciation and Amortization Expense (NDE), JA 507; Depreciation and Amortization Expense (DEXN), JA 510.

• One variable does not contain language incorporating retail rates. *See* General Plant Depreciation Expense (GDX), JA 510.

Retail regulators include both state and local authorities in the Entergy system. In Louisiana, jurisdiction over retail electric service is divided between the Louisiana Commission and home-rule cities, such as New Orleans, that regulate utilities within their borders. *See generally New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 460 n.19 (5th Cir. 1984); *State ex rel. Guste v. Council of City of New Orleans*, 309 So. 2d 290, 292-93 (La. 1975). For purposes of this Brief, any references to "state" regulators also include other retail regulators.

disputes arising under the bandwidth formula. For that reason, this Brief necessarily discusses the background and implementation of the bandwidth remedy, and places these orders in the broader context of those interrelated cases. (A timeline of bandwidth-related filings and orders is attached at the end of this Brief and also in the separate Addendum of Relevant FERC Orders, to aid the Court's understanding of the array of overlapping proceedings and the Commission's development of its rulings on bandwidth issues.)

1. The Bandwidth Remedy Proceeding

The bandwidth remedy arose from a complaint filed by the Louisiana Commission, which asserted that the cost allocations among the Entergy Operating Companies had become unjust, unreasonable, and unduly discriminatory. Following a hearing before an administrative law judge, the Commission found that the allocation of production costs among the Entergy Operating Companies was no longer in rough equalization, due to disparate fuel costs, and thus was no longer just and reasonable. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 111 FERC ¶ 61,311 at PP 28-30 (2005) ("*Opinion No. 480*"), *aff'd on reh'g, La. Pub. Serv. Comm'n v. FERC*, 113 FERC ¶ 61,282 (2005) ("*Opinion No. 480-A*"). Accordingly, the Commission adopted a remedy establishing numerical percentage "bandwidths" of +/– 11 percent as the outside bounds by which production costs would be permitted to deviate from the System average, to be remedied through

equalization payments among the Operating Companies. *Opinion No. 480* at PP 1, 14, 136, 144. The Commission determined that comparisons of production costs among the Operating Companies should follow the methodology that Entergy had proposed. *Id.* at P 33.

On appeal, this Court held that the Commission had jurisdiction to impose the bandwidth formula and that the remedy was reasonable, supported by substantial evidence, and well within the Commission's broad remedial discretion. *Louisiana 2008*, 522 F.3d at 383, 391-94. (The Court, however, remanded to the Commission on other issues, concerning refunds and timing of implementing the bandwidth remedy (*id.* at 399-400); an appeal from the orders on remand, concerning issues not relevant here, is pending before this Court. *La. Pub. Serv. Comm'n v. FERC*, Case No. 14-1063 (D.C. Cir. filed Apr. 22, 2014) (briefing completed).)

2. The Bandwidth Compliance Filings

In April 2006, as directed by the Commission in *Opinion No. 480*, Entergy proposed amendments to the System Agreement to implement the bandwidth remedy, which the Commission accepted with modifications in November 2006. Entergy submitted a further compliance filing in December 2006, which the Commission accepted in April 2007. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006) ("*2006 Compliance Order*"), *on reh'g and*

compliance, 119 FERC ¶ 61,095 (2007) ("*2007 Compliance Order*"), *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. July 6, 2009). In those filings, Entergy modified Service Schedule MSS-3 to the System Agreement to add new sections 30.11 through 30.14 (*see* JA 502-12), which prescribe a formula rate methodology (based on Exhibits 26 and 28 that Entergy had submitted in the bandwidth remedy proceeding[5]). That methodology compares production costs among the Entergy Operating Companies and roughly equalizes their respective shares of the Entergy System's costs through inter-company payments and receipts. *See 2006 Compliance Order* at PP 24-27, 63; *2007 Compliance Order* at P 48. The calculations would be based on data reported in Entergy's annual FERC Form 1, filed each April (covering the previous calendar year). *See 2006 Compliance Order* at PP 46-47.

3. The Annual Bandwidth Proceedings

First Bandwidth Proceeding. In *La. Pub. Serv. Comm'n v. Entergy Corp.*, 111 FERC ¶ 61,311 (2005) ("*Opinion No. 480*"), the Commission ruled that the bandwidth remedy would be effective starting with the 2006 calendar year. *Id.* at P 145. Entergy therefore initiated the First Bandwidth Proceeding in May 2007,

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[5] 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. *See Entergy Servs., Inc.*, 137 FERC ¶ 61,029 at P 15 n.19 (2011).

filing its calculations of cost disparities and the Operating Companies' respective bandwidth payments or receipts based on production cost data for calendar year 2006. Following a hearing and an initial decision by an ALJ, the Commission ruled on numerous issues; of relevance here, the Commission limited the scope of challenges in annual bandwidth proceedings and reversed the ALJ's adjustment of certain depreciation expenses, in *Entergy Servs., Inc.*, 130 FERC ¶ 61,023 (2010) ("*Opinion No. 505*"), *on reh'g*, 139 FERC ¶ 61,103 (2012) ("*Opinion No. 505-A*"). The Louisiana Commission petitioned for review of those orders before this Court, which dismissed the petition in part and denied it in part. *La. Pub. Serv. Comm'n v. FERC*, 606 F. App'x 1 (D.C. Cir. 2015) ("*Louisiana 2015*"), discussed *infra*.

Second Bandwidth Proceeding. Entergy initiated the Second Bandwidth Proceeding in May 2008. Following a hearing and an initial decision by an ALJ, the Commission again ruled on various issues, including the scope of bandwidth proceedings and the interpretation of depreciation expense variables in the bandwidth formula, in *Entergy Servs., Inc.*, 137 FERC ¶ 61,029 (2011) ("*Opinion No. 514*"), *reh'g denied*, 142 FERC ¶ 61,013 (2013) ("*Opinion No. 514-A*"). Louisiana petitioned for review in the Fifth Circuit, which affirmed the orders in *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014) ("*Louisiana 2014-I*"), discussed *infra*.

Third Bandwidth Proceeding. The Third Bandwidth Proceeding began in May 2009. The Commission again set the matter for hearing before an ALJ; in March 2010, the Commission ruled, on an interlocutory appeal, that the hearing would not include depreciation issues. *Entergy Servs., Inc.*, 130 FERC ¶ 61,170 (2010). Following the hearing, the Commission affirmed the ALJ's decision on various issues. *Entergy Servs., Inc.*, 139 FERC ¶ 61,105 (2012) ("*Opinion No. 518*"), *on reh'g*, 145 FERC ¶ 61,047 (2013). Louisiana again petitioned for review in the Fifth Circuit, which affirmed the orders in *Louisiana Public Service Commission v. FERC*, 771 F.3d 903 (5th Cir. 2014) ("*Louisiana 2014-II*"), discussed *infra*.

Fourth Bandwidth Proceeding. Entergy initiated the Fourth Bandwidth Proceeding in May 2010. The Commission issued an order setting the matter for hearing, and subsequently ruled on Louisiana's request for rehearing regarding the scope of that proceeding, again concerning depreciation inputs. *Entergy Servs., Inc.*, 132 FERC ¶ 61,065 (2010), *on reh'g*, 137 FERC ¶ 61,019 (2011), *on reh'g and clarification*, 145 FERC ¶ 61,049 (2013). Following a hearing and initial decision by the ALJ in September 2014, the Commission ruled on various issues in December 2015. *Entergy Servs., Inc.*, Opinion No. 545, 153 FERC ¶ 61,303 (2015), *reh'g pending*.

Later Bandwidth Proceedings. The fifth, sixth, seventh, and eighth annual bandwidth proceedings (filed each May in 2011, 2012, 2013, and 2014, respectively) remain pending before the Commission, which (after holding several proceedings in abeyance pending resolution of the earlier bandwidth proceedings, to prevent relitigation of similar issues) consolidated all four proceedings and set them for hearing and settlement procedures. *See Entergy Servs., Inc.*, 149 FERC ¶ 61,244 at PP 1, 35-36 (2014). The ninth bandwidth proceeding, filed in May 2015, has been resolved by an uncontested settlement, pending Commission approval. *See Entergy Servs., Inc.*, 155 FERC ¶ 63,012 (Apr. 29, 2016) (ALJ's certification of uncontested settlement). Entergy submitted its tenth bandwidth filing on May 29, 2016. *See* FERC Docket No. ER16-1806.

Complaints. In addition to the various annual bandwidth proceedings, the Commission also has addressed bandwidth-related issues in several complaint proceedings under section 206 of the Federal Power Act, 16 U.S.C. § 824e. *See* note 10, *infra* (citing orders). Only two complaints, however, are relevant here: one that the Commission dismissed in 2008, and one that the Commission denied in orders on review in this appeal (*see infra* pp. 24-25). In the 2008 complaint, Louisiana raised a number of issues concerning Entergy's methodology and inputs in calculating production costs, including a challenge to the cost inputs for depreciation and decommissioning; the Commission dismissed all issues "covering

methodology deviation and the justness and reasonableness of cost inputs" because they were "currently before the Commission" in the First Bandwidth Proceeding. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010 at P 27 (2008).

D. Judicial Review of Orders in Bandwidth Proceedings

As noted *supra*, Louisiana sought judicial review of the orders in the Second and Third Bandwidth Proceedings in the Fifth Circuit. Because that court ruled on issues that Louisiana raises again in the instant appeal, as well as issues that are closely related to this case, we provide a brief overview of those Fifth Circuit opinions.

On review of *Opinion Nos. 514* and *514-A* in the Second Bandwidth Proceeding (together with orders on a bandwidth-related complaint brought by the Arkansas Public Service Commission ("Arkansas Commission")), the court in *Louisiana 2014-I* affirmed the Commission's decision to limit the scope of the annual bandwidth proceedings to the annual calculations, excluding challenges to provisions of the formula itself. The court also upheld the Commission's interpretation of the depreciation variables in the bandwidth formula, answering Louisiana's challenges to that interpretation, its "subdelegation" argument, and its claims for retroactive relief.

The court found "no unlawful subdelegation" to retail regulators because the Commission had exercised its authority "when it initially reviewed and accepted

[in the *2006* and *2007 Compliance Orders*] the bandwidth formula incorporating the state agencies' depreciation rates . . . ." 761 F.3d at 552. Moreover, the Commission had explained that it would continue to exercise oversight through complaints under section 206 of the Federal Power Act, 16 U.S.C. § 824e. 761 F.3d at 552. Thus, "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." *Id.* (citing *Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 257 (D.C. Cir. 2001)). The court noted that Louisiana had brought just such a complaint, in the Depreciation Complaint Proceeding on review here. *See id.* (citing *Opinion No. 519*). The Commission's "continuing review in Section 206 proceedings distinguishes it from the unease expressed in [*U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 567 (D.C. Cir. 2004)], of agencies' 'vague or inadequate assertions of final reviewing authority.'" 761 F.3d at 552. "Accordingly, FERC has not unlawfully subdelegated to state regulators and continues to exercise its authority consistent with the [Federal Power Act]." *Id.*

The court further upheld the Commission's interpretation of the bandwidth formula as requiring Entergy to input each Operating Company's actual depreciation costs, using depreciation rates set by the respective retail regulators: "The System Agreement reflects a decision to incorporate actual costs reflected on FERC Form 1 into the formula." *Id.* at 555; *see also id.* at 551 ("Actual

depreciation expenses reported on a company's Form 1 include state-regulator approved depreciation expenses"). Moreover, "FERC's interpretation is also consistent with the filed-rate doctrine." *Id.* at 555. The court also found the Commission's interpretation of the depreciation variables (*see* note 4, *supra*) to be a reasonable interpretation of ambiguous language. *Id.* at 554-55.

The court upheld the Commission's decision, beginning in January 2010 with *Opinion No. 505* in the First Bandwidth Proceeding (and carrying forward through the orders in the Second Bandwidth Proceeding, *Opinion Nos. 514* and *514-A*, that were before the court), to limit the scope of issues in the annual bandwidth proceedings to exclude challenges to the bandwidth formula itself, including the definitions of depreciation variables: "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 . . . ." 761 F.3d at 556. Answering Louisiana's argument that the change precluded it from challenging the bandwidth calculations for years prior to 2010, the court explained that "the absence of retroactive relief is a function of the filed-rate doctrine." *Id.* (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)). The court went on to note that "any prejudice to the Louisiana Commission is mitigated by *Opinion No. 519*, in which FERC resolved the Louisiana Commission's arguments on the

merits" — Louisiana "has not yet met its Section 206 burden for *prospective* relief let alone retroactive relief." 761 F.3d at 556.

In November 2014, in *Louisiana 2014-II*, a different panel of the Fifth Circuit similarly affirmed the Commission's orders in the Third Bandwidth Proceeding. *La. Pub. Serv. Comm'n v. FERC*, 771 F.3d 903 (5th Cir. 2014). Though that appeal involved other formula variables, not depreciation expenses, the court again affirmed the Commission's interpretation of the bandwidth formula as "requir[ing] inputs based on actual FERC [Form] 1 data" (*id.* at 912) and its decision to limit the scope of challenges in bandwidth proceedings (*id.* at 913-14), and echoed the conclusion that the filed-rate doctrine precluded retroactive relief (*id.* at 912).

Louisiana petitioned the Supreme Court for a writ of certiorari as to both Fifth Circuit decisions, arguing that the Commission had subdelegated or abdicated its regulatory authority to retail regulators and that the Commission had misapplied the filed rate doctrine and improperly limited the scope of bandwidth proceedings. Petition for a Writ of Certiorari at 7-28, *La. Pub. Serv. Comm'n v. FERC*, No. 14-757 (filed Dec. 26, 2014). (Louisiana also claimed, regarding subdelegation, that *Louisiana 2014-I* was in conflict with this Court's decision in *U.S. Telecom*. Petition at 29-30.) The Supreme Court denied the petition in May 2015. 135 S. Ct. 2072.

In March 2015, this Court affirmed *Opinion Nos. 505* and *505-A* in the First Bandwidth proceeding. *La. Pub. Serv. Comm'n v. FERC*, 606 F. App'x 1 (D.C. Cir. 2015) ("*Louisiana 2015*"). As to depreciation costs and the scope of bandwidth proceedings, the Court agreed that the bandwidth formula is the filed rate and cannot be challenged in an annual bandwidth proceeding. *Id.* at 4 (citing *Louisiana 2014-I* and *2014-II*). The Court noted that Louisiana's depreciation complaint remained pending before the Commission: "That is the appropriate forum" to challenge the depreciation variables in the formula. *Id.* The Court also rejected Louisiana's challenge to another definition in the formula because Louisiana had failed to raise its claim in the initial (2006-2007) compliance proceedings. *Id.* at 5 ("Louisiana should have raised its claim . . . before the formula became the filed rate.").

II. THE COMMISSION PROCEEDINGS AND ORDERS NOW ON REVIEW

A. Background: Depreciation Rates for Arkansas Nuclear Facilities

Underlying both sets of orders on review, as well as recurring disputes in the annual bandwidth proceedings, are depreciation rates set by the Arkansas Commission for two nuclear plants owned by Entergy Arkansas. The Arkansas Nuclear One Facility is a two-unit pressurized water reactor nuclear power plant in Russellville, Arkansas. Unit 1 came online in May 1974 and is now licensed to operate until May 2034. Unit 2 came online in September 1978 and is now

licensed to operate until July 2038. *See Opinion No. 523* at PP 17-18, JA 76-77. In 2001 and 2005, respectively, the Nuclear Regulatory Commission extended their 40-year licenses to 60 years. *See Opinion No. 505-A* at P 40 n.64. The Arkansas Commission, however, did not adopt new depreciation rates for those units, using the 60-year service life, until 2010. *See Opinion No. 519* at PP 115-16, JA 64-65.

B. The Depreciation Complaint Proceeding

1. Administrative Hearing and ALJ Decision

In March 2010 (shortly after the Commission had, in *Opinion No. 505*, clarified that the depreciation components of the bandwidth formula cannot be challenged in annual calculation proceedings), Louisiana filed a complaint seeking to require application of uniform accounting standards in bandwidth remedy calculations, without regard to retail depreciation rates. R. 1, JA 217. The Commission found that Louisiana had raised issues of material fact as to whether the depreciation inputs were just and reasonable and set the matter for hearing. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,003 (2010), JA 242. After an evidentiary hearing, the ALJ concluded that Louisiana had not met its burden, as a complainant under section 206 of the Federal Power Act, of demonstrating that the depreciation expenses, inputs and/or provisions of the existing bandwidth

formula were unjust, unreasonable, unduly discriminatory, or preferential. *See* ALJ Decision at PP 23-33, JA 298-309.

2. *Opinion Nos. 519* and *519-A*

The Commission issued *Opinion No. 519* on May 7, 2012, together with *Opinion No. 505-A* in the First Bandwidth Proceeding (upheld in *Louisiana 2015*) and *Opinion No. 518* in the Third Bandwidth Proceeding (upheld in *Louisiana 2014-II*). The Commission affirmed the ALJ's findings and, as discussed more fully in the Argument, *infra*, further explained its treatment of depreciation cost inputs under the bandwidth formula. Louisiana filed a timely request for rehearing. R. 413, JA 318. In November 2015, the Commission denied rehearing in *Opinion No. 519-A.*

C. The Wholesale Rates Proceeding

1. Administrative Hearing and ALJ Decision

On July 27, 2010, Entergy filed under section 205 of the Federal Power Act, 16 U.S.C. § 824d, proposing to use, for all of Entergy Arkansas's wholesale rates under its FERC-jurisdictional formulas, depreciation rates that the Arkansas Commission had approved for Entergy Arkansas's production units for retail purposes. R. 21, JA 256. Following an evidentiary hearing, an ALJ found that Entergy had met its burden to show that its proposed depreciation rates were just and reasonable. 136 FERC ¶ 63,015 at P 165, JA 422. The ALJ addressed issues concerning certain production facilities, including the Arkansas Nuclear One units.

See id. at PP 141-55, JA 413-18. The ALJ modified certain costs for Arkansas Nuclear One Unit 1, finding (for technical reasons not relevant here) that certain equipment replacements should not be included in the calculation. *Id*.

2. *Opinion Nos. 523* and *523-A*

On review, the Commission affirmed the ALJ's determinations. *See Opinion No. 523* at P 36, JA 84.[6] Because the modification as to Arkansas Nuclear One Unit 1 created a disparity between the retail depreciation rate and the FERC-approved depreciation rate, the parties disagreed on the depreciation rate to be used for the bandwidth formula. *See id.* at PP 181-86, JA 147-50. The Commission affirmed the ALJ's decision not to consider Louisiana's objection to using depreciation costs in bandwidth calculations that would reflect both "state-established depreciation rates for retail transactions and Commission-established rates for wholesale transactions," because the Commission had considered the issue in *Opinion No. 519*. *Opinion No. 523* at P 197, JA 154-55. Accordingly, the Commission limited its findings in *Opinion No. 523* to depreciation rates to be used in two other service schedules: Schedule MSS-1, which governs reserve equalization, with payments among Operating Companies for allocated generation

[6] The Commission issued *Opinion No. 523* on January 8, 2013, together with *Opinion No. 514-A* in the Second Bandwidth Proceeding and a rehearing order on the related Arkansas complaint (*see supra* p. 19).

reserves based on a cost of service formula; and Schedule MSS-4, which uses a cost of service formula to set rates for unit power sales and purchases between Operating Companies. *See id.* at PP 5-8, 198, JA 72-73, 155.

Louisiana filed a timely request for rehearing. R. 576, JA 426. In November 2015, the Commission denied rehearing in *Opinion No. 523-A*, issued together with *Opinion No. 519-A*. The Commission further explained its rationale for not requiring that retail costs in bandwidth calculations be modified to conform to FERC's wholesale ratemaking policies. *See Opinion No. 523-A* at PP 19-23, 32-37, JA 169-72, 176-79.

This appeal followed.

SUMMARY OF ARGUMENT

This case presents one more in a continuing series of disputes over the rough equalization of production costs across the multistate Entergy System. In previous orders — all upheld on appeal — the Commission established the bandwidth remedy and approved Entergy's revisions to its tariff to implement the requisite formula for calculating and comparing costs. The Commission interpreted that formula to require that calculations reflect actual production costs, including depreciation rates approved by the Operating Companies' respective retail regulators. The Commission also limited the scope of challenges to annual bandwidth filings. In the orders on review here, the Commission considered the

merits of Louisiana's challenges to the depreciation components of the bandwidth formula, and reasonably concluded that Louisiana had failed to meet its burden to show that the existing formula is unjust, unreasonable, unduly discriminatory, or preferential.

Focusing on the depreciation components, Louisiana contends that depreciation expenses cannot be reasonable unless they are uniform for all Operating Companies across the multistate Entergy system, and conform to the Commission's depreciation policies for wholesale rates. The Commission rejected both premises. In so doing, the Commission appropriately considered Louisiana's arguments in the context of the bandwidth remedy's history, purpose, and design: The remedy represents a policy choice — previously ratified by this Court — by which the Commission sought to balance the need to avoid undue discrimination, through rough equalization of production costs, while accounting for the Entergy system's historical operations and the interests of different retail jurisdictions.

In that context, the Commission concluded that the bandwidth formula, from the outset, had incorporated retail depreciation rates that were not uniform and that Louisiana had not shown that the formula failed to achieve rough production cost equalization. The Commission further determined that retail depreciation rates need not be adjusted to conform to the Commission's policies for wholesale rates. Because the purpose of the bandwidth formula is to compare the Operating

Companies' actual production costs, rather than to set cost-of-service rates for wholesale sales of electricity, the Commission declined to override the policy choices of state regulators.

In addition, the Commission determined that, following the logic of its interpretation of the bandwidth formula — upheld on judicial review in *Louisiana 2014-I* — that the actual retail depreciation rates are incorporated in the formula, those rates constitute the lawful FERC-jurisdictional rate for bandwidth purposes. For that reason, the Commission's policies concerning depreciation rate changes and depreciation accounting do not apply.

Furthermore, the Commission did not subdelegate its statutory authority to retail regulators by approving a tariff formula that incorporated retail depreciation rates. Indeed, the Fifth Circuit decisively rejected that claim, finding that the Commission exercised its authority when it approved the bandwidth formula and continues to do so in complaint proceedings such as this. This Court should not allow Louisiana to relitigate its failed argument.

Finally, as discussed *supra* at pp. 1-2, Louisiana's claim for retroactive relief is not justiciable. Even assuming jurisdiction, the existing formula, as interpreted by the Commission in prior orders, has been the filed rate since its approval in the 2006-2007 compliance proceeding, and the Commission's various procedural determinations in other orders are not before this Court.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Louisiana 2008*, 522 F.3d at 391. The "scope of review under [that] standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citation omitted). The relevant inquiry is whether 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 U.S., 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)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decisionmaking where Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice").

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) ("Because issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission,

our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citations omitted). *See also Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) ("In reviewing FERC's orders, we are 'particularly deferential to the Commission's expertise' with respect to ratemaking issues.") (citation omitted).

The Commission's policy assessments also are afforded "great deference." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000). *See also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) ("the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge") (internal quotation marks and citations omitted); *New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014) (court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions") (internal quotation marks and citation omitted); *Louisiana 2008*, 522 F.3d at 393-94 (recognizing FERC's broad remedial discretion and policy choice in designing bandwidth remedy). This Court also "defer[s] to the Commission's interpretations

of its own precedents." *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007); *accord Mo. Pub. Serv. Comm'n*, 783 F.3d at 316.

II. THE COMMISSION REASONABLY CONCLUDED THAT LOUISIANA HAD NOT MET ITS BURDEN TO SHOW THAT THE EXISTING BANDWIDTH FORMULA MUST BE CHANGED

In the Second Bandwidth Proceeding, the Commission interpreted the bandwidth formula — specifically, the variables for depreciation expense inputs — as requiring Entergy to use depreciation rates approved by retail regulators. *See Opinion No. 519* at PP 13-14, 26, JA 7-9, 16-17 (discussing *Opinion No. 514*). That interpretation, having been upheld on judicial review in *Louisiana 2014-I*, is not open to collateral attack here. *See supra* pp. 2, 20-21. For Louisiana to prevail on its Depreciation Complaint to change the existing formula, Louisiana bore the burden to show that the bandwidth formula was unjust, unreasonable, unduly discriminatory, or preferential. *See Opinion No. 519* at P 2, JA 2. To that end, Louisiana largely based its challenge on assertions of policy: that the depreciation inputs must be uniform across all jurisdictions; and that retail depreciation rates incorporated in the formula must conform to FERC's wholesale ratemaking policies. *See*, *e.g.*, *id.* at PP 18-19, JA 10-12. Indeed, much of Louisiana's presentation, including opinion testimony that it holds up as "unrefuted" evidence (*see* Br. 19), went to those policy claims.

In the orders on review, the Commission (affirming the ALJ) reasonably rejected those arguments. First, the Commission appropriately considered the purpose and function of the bandwidth formula to achieve rough equalization of production costs across the multistate Entergy system, and evaluated Louisiana's challenges in that framework. *See* Part A, *infra*. With that context, the Commission found that incorporating different retail depreciation rates for the Operating Companies does not render the formula unjust, unreasonable, unduly discriminatory, or preferential. *See* Part B, *infra*. The Commission also explained its rationale for not applying its wholesale depreciation policies to retail depreciation expenses in the bandwidth formula. *See* Part C, *infra*.

A. The Commission Appropriately Grounded Its Analysis In The Context Of Rough Production Cost Equalization

Before the Commission, Louisiana focused its challenge largely on the bandwidth formula's depreciation cost variables, contending that the depreciation rates must be unjust, unreasonable, and unduly discriminatory because they were not the same for all of the Operating Companies and because they did not adhere to the Commission's depreciation policies for wholesale ratemaking. *See* ALJ Decision at P 15, JA 290-91; *Opinion No. 519* at P 21, JA 13. The Commission, however, appropriately chose not to evaluate those variables in isolation, considering instead the particular context of the bandwidth formula. *See Opinion No. 519* at P 40, JA 25 ("[T]o evaluate the Louisiana Commission's complaint

properly, it is essential to consider the function of the bandwidth formula."); *see also id.* at P 41, JA 26 (evaluation of depreciation components must "tak[e] into account the reason" for the remedy); *Opinion No. 519-A* at P 16, JA 200 (considering "the context of the purpose of the bandwidth formula").

Since the inception of the bandwidth remedy, the Commission understood that determining rough equalization of production costs is a "balancing act of preventing undue discrimination and not dramatically disrupting the system's historical operations and the states' settled interests and expectations." *Opinion No. 480-A* at P 39, *quoted in Opinion No. 519-A* at P 54, JA 215; *cf. Miss. Indus.*, 808 F.2d at 1565 (upholding policy choice that would avoid "a dramatic disruption of the [Entergy] System's historical operations and of the states' settled interests and expectations"). On appeal in *Louisiana 2008*, this Court gave "great deference" to the balance that the Commission had chosen, and agreed that the remedy could take those settled interests and expectations into account. 522 F.3d at 393-94, *cited in Opinion No. 519-A* at P 54, JA 215.

Moreover, the Commission developed the remedy to achieve rough equalization of production costs, as required by the System Agreement. *See Louisiana 2008*, 522 F.3d at 384. At the outset, this Court rejected Louisiana's arguments for *full* equalization of costs. *See id.* at 393 ("FERC could have done more to eliminate cost disparities within the System, but it need not have done

more to eliminate *undue* disparities"); *see also Opinion No. 519-A* at P 54, JA 215 (*Louisiana 2008* "affirmed that the elimination of all cost disparities was not necessary to prevent undue discrimination").

Consistent with those policy judgments, the Commission concluded that Louisiana's burden under section 206 of the Federal Power Act was not merely to challenge the propriety of certain retail depreciation rates but "to show that the use of depreciation rates from various regulators in the different jurisdictions produces an unjust, unreasonable, unduly discriminatory or preferential allocation of rough production costs among the Operating Companies . . . ." *Opinion No. 519* at P 122, JA 67; *see also Opinion No. 519-A* at P 18, JA 201 (Louisiana "has not demonstrated that the bandwidth formula produces 'unreasonable rates,' i.e., an unreasonable allocation of production costs due to the use of depreciation rates set by retail jurisdictions"). That conclusion is not only faithful to the express terms of the tariff but also mindful of the purpose of the bandwidth remedy: to determine whether the actual production costs of the Operating Companies, operating in different retail jurisdictions, were roughly equal in a given year and to reallocate those costs if they were not.

B. The Commission Appropriately Determined That Louisiana Failed To Show That Differences In Retail Depreciation Rates Prevented Rough Production Cost Equalization

Louisiana contends that the bandwidth formula cannot be reasonable if the retail depreciation rates across the Entergy system are not the same. *See* Br. 34-43. The Commission, however, considered "the context of the purpose of the bandwidth formula . . . as a basis to roughly equalize production costs" across the multistate system and found the incorporation of state depreciation determinations was "a reasonable way to implement that purpose." *Opinion No. 519-A* at P 16, JA 200; *see also Opinion No. 523-A* at P 37, JA 178 (bandwidth formula is "a means of ensuring rough equalization of *total* production costs, both costs of serving retail customers and costs of traditional wholesale sales, among the Entergy Operating Companies").

From the outset, the bandwidth formula incorporated retail depreciation rates. Indeed, the formula was based on a methodology that included retail data: Entergy's Exhibits 26 and 28 in the bandwidth remedy proceeding, on which the Commission directed Entergy to base the bandwidth formula in the compliance filing (*see supra* pp. 14-15), used retail depreciation figures to compare production costs. *See Opinion No. 514* at P 52 n.70. (Those exhibits, reflecting data for 2002, used depreciation studies for the different Operating Companies that varied from several years to several decades old. *See* ALJ Decision at P 29, JA 304.)

Accordingly, the formula tariff that Entergy proposed on compliance also incorporated retail data. No party challenged the depreciation variables in the proposed tariff. *See Opinion No. 519-A* at P 15, JA 199.

In overseeing the implementation of the bandwidth formula in the annual proceedings, the Commission consistently held that the formula required Entergy to use actual retail depreciation data. *See, e.g., Opinion No. 514* at P 49 (in the Second Bandwidth Proceeding); *Opinion No. 505-A* at P 48 n.84 (in the First Bandwidth Proceeding); *Entergy Servs.*, 145 FERC ¶ 61,049 at P 16 (in the Fourth Bandwidth Proceeding). The Fifth Circuit found that interpretation reasonable, in part because it avoided "a yearly reconstruction of each company's costs." 761 F.3d at 555; 771 F.3d at 912.

Moreover, the Commission did not require uniformity across states in all facets of the bandwidth formula. Aside from the retail depreciation components, the Commission also accepted formula provisions that used retail rates of return on common equity. *See Opinion No. 519* at P 112 n.316, JA 63 (citing *2006 Compliance Order* at P 64). *See also id.* at P 112, JA 63 (quoting *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 106 FERC ¶ 63,012 at P 89 (2004), in which the ALJ in the original Bandwidth Remedy Proceeding determined that costs rejected by a state commission should not be included "in the context of comparing production costs among the [Operating Companies]"); ALJ Decision at P 25,

JA 299 (earlier ALJ "found that use of 'artificial' costs not reflected in the Operating Companies' accounting records would be bad policy in application of the Bandwidth Formula calculation").

Against that background, the ALJ and the Commission appropriately framed Louisiana's burden under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to require more than just a collateral attack on the filed rate accepted in the 2006-2007 compliance proceeding. *See Opinion No. 519* at P 120, JA 67; *cf. Louisiana 2015*, 606 F. App'x at 5 (rejecting collateral attack on formula definition not challenged in the compliance proceeding). Rather, Louisiana would have to show that the use of retail depreciation rates — and differences in those rates — for the bandwidth comparison caused the formula to fail its purpose of roughly equalizing production costs. *See Opinion No. 519-A* at P 55, JA 215-16. On the record in the Depreciation Complaint Proceeding, the Commission agreed with the ALJ that Louisiana, having focused on what it believed the depreciation rates should be, had not made its case for the failure of the formula. *See id.* at PP 18, 52, 54-55, JA 201, 214-16; *Opinion No. 519* at PP 120-22, JA 66-68.[7]

[7] Though Louisiana continues to maintain that the Arkansas Commission manipulated its depreciation rates to shift costs to other jurisdictions (*see* Br. 37-38), the ALJ found, after a hearing and based on the evidence in the record, that Louisiana had not shown that retail regulators had manipulated depreciation rates to shift bandwidth cost allocations to other states, or that there was a potential for manipulation that justified changing the bandwidth formula. ALJ Decision at P 31,

C. The Commission Reasonably Concluded That Retail Depreciation Costs Used In The Bandwidth Formula Need Not Conform To FERC's Depreciation Policies For Wholesale Rates

Louisiana also bases its challenge to the depreciation variables on the fact that certain retail rates — the Arkansas Commission's rates for Arkansas Nuclear One (before 2010) — did not conform to FERC's own depreciation policies. *See* Br. 43-49. The Commission, however, concluded that, in the context of rough equalization of production costs, state-determined depreciation rates that might differ from FERC policies did not render the bandwidth formula unjust, unreasonable, unduly discriminatory, or preferential. *See Opinion No. 519-A* at P 55, JA 216 (Louisiana "sought to prove that the depreciation rates used by the Arkansas Commission are different than they would have been if calculated under Commission policies for wholesale power sales. While this may be true, it does not, standing alone, demonstrate that the bandwidth formula fails to produce rough production cost equalization.").

1. The Commission Explained Its Policy Rationale For Distinguishing Between Wholesale Power Sales And Rough Production Cost Equalization

In the Wholesale Rates Proceeding, the Commission set the depreciation figures that Entergy Arkansas must use to calculate rates for wholesale power

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JA 306-07. The Commission affirmed that finding. *Opinion No. 519* at PP 115-18, JA 64-66; *Opinion No. 519-A* at PP 36-42, JA 208-09.

sales, but did not require Entergy Arkansas to use those depreciation rates instead of retail rates in its bandwidth formula calculations. *See Opinion No. 523-A* at P 22, JA 171-72. The Commission explained its rationale in both sets of orders, concluding that the different purposes of Entergy's tariff formulas for bandwidth equalization and wholesale sales warrant different approaches. *See Opinion No. 519-A* at P 28, JA 205 ("the circumstances surrounding the bandwidth formula are quite different from a standard calculation of wholesale rates"); *Opinion No. 523-A* at P 36, JA 178 (language in each schedule in System Agreement "must be interpreted in the context of that particular schedule").

First, the purpose of Service Schedule MSS-4 (Unit Power Purchase) "'is to provide the basis for making a unit power purchase'" from a specific generating unit, "based on a cost of service that identifies the investment and expenses in accounts related to that particular [unit] . . . ." *Opinion No. 523-A* at P 36, JA 178 (citation omitted). In other words, that formula "sets rates only for traditional wholesale sales." *Id.* at P 37, JA 178-79.

By contrast, the bandwidth formula "is a means to achieve rough equalization," among the affiliated Operating Companies, of "total production costs . . . for service to [both] retail customers and wholesale customers . . . ." *Opinion No. 523-A* at P 36, JA 178; *accord*, *id.* at P 37, JA 178. Thus, "[t]he purpose of the bandwidth formula is not to set a cost-of-service rate for the sale of

wholesale power,[] but to provide a basis to compare each Entergy Operating Company's production costs with those of the other Entergy Operating Companies in order to allocate such costs to achieve a rough equalization." *Opinion No. 519-A* at P 28, JA 205 (footnote omitted). For that purpose, the use of retail rate methodologies that may differ from the Commission's wholesale rate methodologies "does not by itself render the bandwidth formula unjust or unreasonable." *Id.*; *see also id.* at P 55, JA 216 (even if state depreciation rates are different than they would be if calculated under FERC's wholesale rate policies, "this . . . does not, standing alone, demonstrate that the bandwidth formula fails to produce rough production cost equalization"); *Opinion No. 523-A* at P 35, JA 177 (while the bandwidth formula and the wholesale sales formula are FERC-jurisdictional and use FERC Form 1 data, "that alone does not mean that different depreciation accounting methods may not be used in each Service Schedule"). That distinction is a rational policy choice. *See generally Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (deferring to FERC's policy judgment on a technical ratemaking matter); *South Carolina*, 762 F.3d at 55 (court affords "great deference" to FERC's policy judgments).

2. The Commission Appropriately Chose Not To Supplant Retail Regulators' Depreciation Policies With Its Own

Louisiana correctly points out that the Commission's policy is to base depreciation costs for a nuclear plant on the license life. *See* Br. 43; *Boston Edison*

Co., 52 FERC ¶ 61,010, at p. 61,078, n.57 (1990). It does not follow, however, that the service lives used by state regulators to set retail depreciation rates are incorrect simply because they differ from FERC policies for wholesale ratemaking. *See Opinion No. 519-A* at P 29, JA 205; *see also id.* at P 32, JA 206 ("Service lives of generating units are estimates," and FERC's wholesale ratemaking policies "do not stand for the proposition that all other methodologies for determining service lives for different purposes necessarily produce unjust and unreasonable results."). Indeed, the Commission "does not impose one single method" — even for wholesale purposes; rather, it considers a utility's depreciation accounting on a case-by-case basis, and requires depreciation methods that allocate cost over useful service life "in a systematic and rational manner." *Id.* at P 29, JA 205 (internal quotation marks and citation omitted); *see also Opinion No. 519* at P 112, JA 62 (FERC's Uniform System of Accounts does not require that service life assumption for a nuclear plant must match the plant's Nuclear Regulatory Commission operating license); *cf.* ALJ Decision at P 29, JA 304-05 (noting that no party alleged that any service life assumptions were incorrect when the challenged depreciation rates were originally adopted).[8]

[8] Service life is the time between the date the plant is placed into service and the estimated date of its retirement. *Opinion No. 523* at P 31, JA 82. Louisiana's challenges to the Arkansas Commission's depreciation rates center on the fact that the Arkansas Commission did not promptly update its depreciation rates after the

Louisiana nevertheless argues that the Commission is "obliged" to apply its own wholesale ratemaking policies. Br. 48 (citing *Ky. Utils. Co. v. FERC*, 760 F.2d 1321 (D.C. Cir. 1985)). But *Kentucky Utilities* does not support Louisiana's position. In that case, which concerned wholesale rates for power sales, the Court rejected an argument that the Commission must explain why it did not follow the approach adopted by several state commissions. *See* 760 F.2d at 1325. Nothing in *Kentucky Utilities* precluded the Commission from approving (in the *2006* and *2007 Compliance Orders*) a cost equalization formula that incorporated state methodologies. Nor does *Kentucky Utilities* conflict with the Commission's judgment in this case that, given the particular context of rough production cost equalization and the express incorporation of actual retail expense data in the tariff formula, the Commission's wholesale ratemaking policies need not supplant the retail depreciation inputs. *Cf. Opinion No. 519* at P 112, JA 62-63.

Therefore, the Commission chose not to apply its own ratemaking policy to substitute alternative cost figures for the actual retail costs specified in the tariff. *See id.* at P 121, JA 67 (rejecting argument that FERC depreciation policy should override state retail depreciation policy for bandwidth purposes); *cf. Louisiana 2014-I*, 761 F.3d at 555 ("The System Agreement reflects a decision to incorporate

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Nuclear Regulatory Commission extended the licenses for the Arkansas Nuclear One units.

actual costs reflected on FERC Form 1 into the formula. Unlike FERC's interpretation, the Louisiana Commission's interpretation undercuts that remedial scheme in favor of a yearly reconstruction of each company's costs in the bandwidth proceedings."); *accord*, *Louisiana 2014-II*, 771 F.3d at 912; *see also Opinion No. 514* at P 51 ("Replacing actual state approved depreciation expense inputs required for use by the bandwidth formula with reconstructed inputs would explicitly alter the depreciation component [of that formula]."). By incorporating retail depreciation inputs, the bandwidth formula reflects actual production costs for the year and respects states' regulatory interests — a balance that the Commission continued to find a reasonable policy choice. *See supra* Part A. *See generally Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (deferring to policy judgment that FERC addressed "seriously and carefully").

3. The Commission's Holding On Changes In Retail Depreciation Rates Followed From Its Interpretation Of The Bandwidth Formula

Louisiana claims (Br. 46-47) that the Commission departed without explanation from its policy on filing changes to depreciation rates. But the Commission, in fact, determined that the policy in question does not apply to the bandwidth formula.

The Commission generally requires, for formula rates that set prices for FERC-jurisdictional service, that utilities must file changes in depreciation rates

for approval (under section 205 of the Federal Power Act, 16 U.S.C. § 824d) to reflect those changes in prices. *See Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104, at n.25 (2000). In its very first order on review of an annual bandwidth proceeding, the Commission noted that Entergy would have to file any revised retail depreciation rates for use in the bandwidth calculations. *Opinion No. 505* at P 172 n.205. On review in the Second Bandwidth Proceeding, however, the Commission clarified its interpretation of the bandwidth formula as incorporating depreciation rates set by the Operating Companies' respective retail regulators in the cost variables. *See Opinion No. 514* at P 49; *Opinion No. 514-A* at P 17; *Louisiana 2014-I*, 761 F.3d at 551-52, 555. Accordingly, because the bandwidth formula requires Entergy to calculate actual production costs using the actual retail depreciation rates for a given year, any state-revised retail rates in effect for that year are already reflected in the formula. *See Opinion No. 519-A* at P 49, JA 213.

In keeping with that interpretation, the Commission subsequently clarified in *Opinion No. 519* that it was "unnecessary" for Entergy to seek approval, under Federal Power Act section 205, to include revised depreciation rates adopted by retail regulators in bandwidth calculations — "i.e., the Commission's policy on changes in depreciation in formula rates established in Order No. 618 does not apply to the bandwidth formula." *Opinion No. 519* at P 26, JA 17; *accord*,

Opinion No. 519-A at P 49, JA 212-13; *Opinion No. 523* at P 196, JA 154; *Opinion No. 523-A* at P 34, JA 177; *see also Opinion No. 505-A* at P 48 n.84. Thus, what Louisiana derides as "conclusory" (Br. 44) is a policy judgment that follows the logic of the Commission's interpretation in *Opinion No. 514* (as affirmed in *Louisiana 2014-I*). *Cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (deference appropriate where rate issue "involves both technical understanding and policy judgment").

4. The Commission's Application Of Its Accounting Policy Likewise Followed From Its Interpretation Of The Bandwidth Formula

Similarly, contrary to Louisiana's claim (Br. 48-49), the Commission explained why it found no conflict with its accounting policies. In *Ohio Edison Co.*, 84 FERC ¶ 61,157 (1998), the Commission stated that amounts booked to FERC depreciation accounts should reflect FERC-approved depreciation rates, and differences between FERC-approved rates and state-approved rates should be recorded as regulatory assets and liabilities. *Id.* at p. 61,862. Here, where the bandwidth formula explicitly requires actual cost data from FERC Form 1 and the Commission has interpreted the depreciation variables as incorporating retail depreciation rates, the Commission reasonably concluded that "those depreciation rates *are* the Commission-approved depreciation rate for bandwidth formula purposes." *Opinion No. 519* at P 113, JA 64; *accord*, *Opinion No. 519-A* at P 31,

JA 206 (in accepting the bandwidth formula that incorporated retail depreciation rates, "the Commission effectively adopted those depreciation rates approved by retail regulators as the Commission-approved depreciation rates for purposes of the bandwidth formula, and, as such, those depreciation rates . . . are appropriately booked to the FERC depreciation accounts").

Here, again, that accounting determination follows the Commission's interpretation in *Opinion No. 514* (affirmed in *Louisiana 2014-I*) that the bandwidth formula requires Entergy to use actual retail depreciation cost data in the bandwidth calculations. Just as the Commission has repeatedly declined to alter retail bandwidth cost inputs (*see* pp. 37, 43-44, *supra*), it correspondingly declined to alter the retail data to be reported for bandwidth purposes in FERC Form 1. In short, the Commission would not impose reconstructed data through a back door (using accounting requirements to alter Form 1 data) after declining to do so through the front door (modifying the bandwidth formula components).

III. AS THE FIFTH CIRCUIT FOUND, THE COMMISSION HAS NOT SUBDELEGATED ITS AUTHORITY

Louisiana seeks to relitigate the subdelegation argument that the Fifth Circuit soundly rejected. *See* Br. 49-59. Even if this Court independently were to reach this issue, Louisiana's rehashed arguments are without merit.

In consistently ruling that "Actual Production Costs" under the bandwidth formula include depreciation costs that reflect retail regulator-approved rates, the

Commission has not, as Louisiana contends (Br. 49-59), "subdelegated" its authority to retail regulators. Rather, the Commission has at all times maintained its authority over the formula. "[T]he Commission first exercised its jurisdiction over the bandwidth formula when it reviewed and accepted the formula" in the *2006* and *2007 Compliance Orders*. *Opinion No. 519-A* at P 12, JA 198. The Commission approved, as just and reasonable, a formula that specified and incorporated depreciation rates set by retail regulators. *See Louisiana 2014-I*, 761 F.3d at 552 (citing *Opinion No. 514-A* at P 17); *accord Opinion No. 519* at P 111, JA 62. (Notably, in that 2006-2007 compliance proceeding, no party protested the depreciation components, on subdelegation or any other grounds. *See Opinion No. 519-A* at PP 12, 15, JA 198, 199.)

Moreover, as discussed *supra* in Part II.A, given the purpose of the bandwidth formula to compare and roughly equalize actual production costs among the companies operating in different retail jurisdictions, "the Commission was justified in exercising its discretion to adopt state depreciation determinations as a reasonable way to implement that purpose." *Opinion No. 519-A* at P 16, JA 200; *see Louisiana 2008*, 522 F.3d at 393-94 (court was "especially deferential" to FERC's adoption of bandwidth remedy "because it was the product of a difficult policy choice"); *cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("It is not our job to render that judgment, on which reasonable minds can differ.").

Further, the Commission has repeatedly exercised its authority over the bandwidth formula and its components, both by reviewing implementation of the formula in the annual proceedings[9] and by considering challenges to the justness and reasonableness of the formula itself in complaint proceedings[10] under Federal Power Act section 206, 16 U.S.C. § 824e — including a full evidentiary hearing and extensive findings by the ALJ and the Commission on Louisiana's depreciation complaint. *See Opinion No. 519-A* at PP 12-14, JA 198-99; *cf. Opinion No. 523-A* at P 21 & n.41, JA 170-71 (citing cases). The Commission's decisions in multiple proceedings over the course of a decade demonstrate that "the Commission asserted jurisdiction over the workings of the bandwidth formula and exercised its authority to find that the components of the bandwidth formula, including their requirement to use depreciation data from retail regulators, produce

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9 *See* cases cited at pp. 15-18, *supra*.

10 *See, e.g., La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,102 (2012), *reh'g denied*, 149 FERC ¶ 61,246 (2014), *reh'g denied*, 154 FERC ¶ 61,013 (2016); *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,070 (2011), *reh'g denied*, 153 FERC ¶ 61,019 (2015); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,253 (2010), *reh'g denied*, 139 FERC ¶ 61,101 (2012); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,104 (2010), *reh'g denied*, 149 FERC ¶ 61,245 (2014), *reh'g denied*, 153 FERC ¶ 61,304 (2015); *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 (2009), *reh'g denied*, 137 FERC ¶ 61,030 (2011), *reh'g denied*, 142 FERC ¶ 61,012 (2013), *affirmed in Louisiana 2014-I*; *La. Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,212 (2007), *on reh'g*, 139 FERC ¶ 61,100 (2012).

just and reasonable results for purposes of allocating production costs." *Opinion No. 519-A* at P 14, JA 199.

For those reasons, the Fifth Circuit rejected Louisiana's argument that the Commission had abdicated or delegated its authority. *Louisiana 2014-I*, 761 F.3d at 552 ("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. . . . Accordingly, FERC has not unlawfully subdelegated to state regulators and continues to exercise its authority consistent with the [Federal Power Act]."); *see Opinion No. 519-A* at P 17 JA 200 ("The Louisiana Commission made the same allegation of unlawful delegation . . . [in *Louisiana 2014-I*, and] the Fifth Circuit firmly rejected that argument.").

Louisiana contends (Br. 55) that *Louisiana 2014-I* is inconsistent with this Court's decision in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). In that case, the Federal Communications Commission had given state regulators authority to make specific determinations under federal law regarding unbundling of FCC-jurisdictional network elements. *See id.* at 564-65. Here, by contrast, FERC did not delegate any wholesale ratemaking or other decisional authority; rather, it approved a FERC-jurisdictional rate formula that, solely for purposes of comparing the Operating Companies' actual production costs, included their respective retail depreciation costs that had been determined by state

regulators for retail ratemaking purposes. *See supra* pp. 37, 43-44. Moreover, the Fifth Circuit further found that the Commission's "continuing review [of the bandwidth formula] in Section 206 proceedings" — including in the Depreciation Complaint Proceeding on review here — "distinguishes it from the unease expressed in *United States Telecom*, of agencies' 'vague or inadequate assertions of final reviewing authority.'" 761 F.3d at 552.

Louisiana strains to distinguish *Louisiana 2014-I*, claiming that the Commission, in the orders on review here, "went much further than it had" in the orders upheld by the Fifth Circuit. Br. 55. Specifically, Louisiana points to the Commission's clarification in *Opinion No. 519* that, because it had found in *Opinion No. 514* that the bandwidth formula expressly incorporated retail depreciation expenses, Entergy need not submit for FERC approval changes made by state regulators to their own retail depreciation rates. *See supra* Part II.C.3; *see also Opinion No. 519* at PP 13, 26, JA 8, 17; *Opinion No. 514* at PP 47, 49). But the Fifth Circuit did not rely, in its subdelegation analysis, on FERC's approval under section 205 of the retail depreciation rates — rather, the court noted FERC's clarification "that it will continue to exercise oversight of the state rates in a Section 206 complaint proceeding." *Louisiana 2014-I*, 761 F.3d at 552. Furthermore, the Fifth Circuit carefully considered the impact of *Opinion No. 519* itself, *see* 761 F.3d at 556, and affirmed orders issued after that decision. *See id.* at

546-47 (upholding *Opinion No. 514-A* and a related order, both issued in January 2013, nearly eight months after *Opinion No. 519*); *Opinion No. 514-A* at P 17; *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,012 at PP 10, 39 (2013).

IV. ASSUMING JURISDICTION, THE FILED RATE DOCTRINE WOULD PRECLUDE RETROACTIVE RELIEF

Finally, Louisiana contends that, if it were to prevail on the merits of its complaint, it should be able to obtain retroactive relief because the Commission dismissed its 2008 complaint, which challenged numerous aspects of the bandwidth formula and calculations, including the depreciation methodology. *See* Br. 4-5, 60-61.[11] As discussed *supra* at pp. 1-2, this argument is not properly before this Court.

In any event, the bandwidth formula, with cost variables that incorporate retail depreciation rates, has been the lawful filed rate since the Commission approved it in the *2006* and *2007 Compliance Orders*. *See Louisiana 2015*, 606 F. App'x at 4 ("That formula is the filed rate.") (citing *Louisiana 2014-I* and

[11] Because the Arkansas Commission changed its depreciation rates in 2010 to reflect the extended license lives of the Arkansas Nuclear One units (*see supra* pp. 23-24), the Commission noted that "the bandwidth implementation proceedings from 2011 going forward will reflect this changed service life assumption underlying ANO 1 and ANO 2, [so] this issue has been effectively resolved." *Opinion No. 519* at P 118, JA 66. For that reason, it is not clear that *any* change could result from this appeal, as retroactive relief is barred and prospective relief is moot.

2014-II); *Opinion No. 519* at P 26, JA 17; *Opinion No. 519-A* at P 50, JA 213-14. For that reason, the formula cannot be changed retroactively. *See*, *e.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) ("Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively."); *see also Louisiana 2014-I*, 761 F.3d at 556 ("the absence of retroactive relief is a function of the filed-rate doctrine").

Furthermore, the Commission's procedural determinations were appropriate. Louisiana did not seek rehearing or judicial review of the order dismissing its 2008 complaint. After the Commission determined, in every ruling on the annual bandwidth proceedings, that it would not revisit the justness and reasonableness of the formula components in those proceedings, the Fifth Circuit upheld that judgment. *Louisiana 2014-I*, 761 F.3d at 556 (Commission had reasonably "changed its interpretation in light of its gained experience conducting annual bandwidth proceedings" and remained consistent in every proceeding); *accord*, *Louisiana 2014-II*, 771 F.3d at 913; *see also Opinion No. 519-A* at P 48, JA 211-12 (Commission's procedural approach has been reasonable, fully explained, and consistent). *See generally Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (upholding agency discretion in determining procedures and priorities).

CONCLUSION

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

Respectfully submitted,

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July 15, 2016
Final Brief: August 18, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 12,328 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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August 18, 2016

ADDENDUM
STATUTES AND REGULATION

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under

any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

[1] See References in Text note below.

§ 825j. Investigations relating to electric energy; reports to Congress

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, § 1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 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 sec-tion of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Docu-ments.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 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 amend-ed (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 Proce-dure.

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 chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or

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

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

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

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

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

PART 141—STATEMENTS AND REPORTS (SCHEDULES)

Sec.

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

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

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

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

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

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

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

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

pursuant to §385.2011 of this chapter is required.

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

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

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

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

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

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

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

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

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

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

[46 FR 50059, Oct. 9, 1981]

§141.15 Annual Conveyance Report.

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

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

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

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

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

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

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

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

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

Louisiana PSC v. FERC
D.C. Cir. No. 16-1014

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 18th day of August 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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TIMELINE AND INDEX OF FILINGS AND ORDERS IN BANDWIDTH AND RELATED PROCEEDINGS

Year	Month/Day	Description of Event/Order/Proceeding	Citation	Addendum/JA
2005	June	*Opinion No. 480* in Bandwidth Remedy Proceeding	111 FERC ¶ 61,311	F-2
	December	*Opinion No. 480-A* in Bandwidth Remedy Proceeding	113 FERC ¶ 61,282	F-69
2006	November	*2006 Compliance Order*	117 FERC ¶ 61,203	F-112
2007	April	*2007 Compliance Order*	119 FERC ¶ 61,095	F-135
	May	[Entergy files First Bandwidth Proceeding]		
2008	April	*Louisiana 2008* (affirming *Opinion Nos. 480 & 480-A*)	522 F.3d 378 (D.C. Cir.)	
	May	[Entergy files Second Bandwidth Proceeding]		
	July	Order on Louisiana's complaint on scope of proceedings	124 FERC ¶ 61,010	F-154
2009	May	[Entergy files Third Bandwidth Proceeding]		
	July	*La. Pub. Serv. Comm'n v. FERC* (affirming 2006/2007 Compliance Orders)	341 F. App'x 649 (D.C. Cir.)	
2010	January	*Opinion No. 505* in First Bandwidth Proceeding	130 FERC ¶ 61,023	F-166
	March	Interlocutory Order in Third Bandwidth Proceeding [Louisiana files Depreciation Complaint[	130 FERC ¶ 61,170	
	May	[Entergy files Fourth Bandwidth Proceeding]		
	July	[Entergy files revised depreciation rates in Wholesale Rates Proceeding]		

TIMELINE AND INDEX OF FILINGS AND ORDERS IN BANDWIDTH AND RELATED PROCEEDINGS

Year	Month/Day	Description of Event/Order/Proceeding	Citation	Addendum/JA
2011	February	ALJ Decision in Depreciation Complaint Proceeding	134 FERC ¶ 63,016	JA 278
	May	[Entergy files Fifth Bandwidth Proceeding]		
	September	ALJ's initial decision in Wholesale Rates Proceeding	136 FERC ¶ 63,015	JA 363
	October	*Opinion No. 514* in Second Bandwidth Proceeding	137 FERC ¶ 61,029	F-254
2012	May	*Opinion No. 505-A* in First Bandwidth Proceeding *Opinion No. 518* in Third Bandwidth Proceeding *Opinion No. 519* in Depreciation Complaint Proceeding [Entergy files Sixth Bandwidth Proceeding]	139 FERC ¶ 61,103 139 FERC ¶ 61,105 139 FERC ¶ 61,107	F-333 F-369 JA 1
2013	January	*Opinion No. 514-A* in Second Bandwidth Proceeding *Opinion No. 523* in Wholesale Rates Proceeding	142 FERC ¶ 61,013 142 FERC ¶ 61,022	F-405 JA 69
	May	[Entergy files Seventh Bandwidth Proceeding]		
	October	[Various orders: First, Third, Fourth Bandwidth Proceedings]		
2014	May	[Entergy files Eighth Bandwidth Proceeding]		
	August	*Louisiana 2014-I* (affirming *Opinion Nos. 514* & *514-A*)	761 F.3d 540 (5th Cir.)	
	November	*Louisiana 2014-II* (affirming *Opinion No. 518* & reh'g order)	771 F.3d 903 (5th Cir.)	
2015	March	*Louisiana 2015* (affirming *Opinion Nos. 505* & *505-A*)	606 F.App'x 1 (D.C. Cir.)	
	May	[Entergy files Ninth Bandwidth Proceeding]		
	November	*Opinion No. 519-A* in Depreciation Complaint Proceeding *Opinion 523-A* in Wholesale Rates Proceeding	153 FERC ¶ 61,188 153 FERC ¶ 61,184	JA 192 JA 161