

137 FERC ¶ 61,070  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Louisiana Public Service Commission

Docket No. EL09-50-000

v.

Entergy Services, Inc.

OPINION NO. 515

ORDER AFFIRMING INITIAL DECISION

(Issued October 20, 2011)

1. This case is before the Commission on exceptions to an Initial Decision issued on April 30, 2010.<sup>1</sup> The Louisiana Public Service Commission (Louisiana Commission) filed a complaint against Entergy Services, Inc. (Entergy) in which it sought to modify the bandwidth formula in Service Schedule MSS-3 of the Entergy System Agreement so that it would no longer functionalize Accumulated Deferred Income Tax (ADIT) in Account 190 associated with a partial sale-leaseback of Entergy's Waterford 3 nuclear power plant (Waterford 3 Sale-Leaseback Account 190 ADIT) to production using a plant allocator, and instead would directly assign the Waterford 3 Sale-Leaseback Account 190 ADIT to production. In this order, we will affirm the Administrative Law Judge's (Presiding Judge) determination to reject the Louisiana Commission's arguments that: (1) Service Schedule MSS-3 is unjust, unreasonable, unduly discriminatory or preferential in functionalizing Waterford 3 Sale-Leaseback Account 190 ADIT to production using plant ratios; and (2) Service Schedule MSS-3 should be revised to directly assign the Waterford 3 Sale-Leaseback Account 190 ADIT to production, for the reasons discussed.

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<sup>1</sup> *Louisiana Public Service Commission v. Entergy Services, Inc.*, 131 FERC ¶ 63,009 (2010) (Initial Decision).

## **I. Background and Procedural History**

### **A. The Bandwidth Formula**

2. The Entergy system has operated for over fifty years under a System Agreement that acts as an interconnection and pooling agreement, providing for the joint planning, construction and operation of the six operating companies' facilities.<sup>2</sup> In Opinion No. 480, the Commission found that "rough production cost equalization on the Entergy system had been disrupted."<sup>3</sup> The Commission imposed a "bandwidth remedy" to help keep the Entergy system in rough production cost equalization.<sup>4</sup> The Commission also required that annual bandwidth filings be made to determine any necessary payments among the Operating Companies. The bandwidth formula is included in Service Schedule MSS-3 of the System Agreement.

3. Before 1989, Waterford 3 was 100 percent owned by Entergy Louisiana. In 1989, Entergy Louisiana entered into a sale-leaseback transaction involving a 9.3 percent interest in Waterford 3,<sup>5</sup> which was intended to help Entergy Louisiana reduce its debt costs associated with the plant. The transaction involved a simultaneous sale of 9.3 percent interest in Waterford 3 from Entergy Louisiana to an owner-trustee for \$353.6 million, and a lease of that same interest back to Entergy Louisiana. For tax purposes, Entergy Louisiana used accelerated (tax) depreciation for Waterford 3 prior to the Sale-Leaseback.<sup>6</sup> As a consequence, the tax basis of the 9.3 percent interest subject to the Sale-Leaseback transaction was lower than its \$353.6 million sales price.<sup>7</sup> This

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<sup>2</sup> The six operating companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States Louisiana), Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc. (collectively, Operating Companies).

<sup>3</sup> *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 136, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in part and remanded in part, sub. nom. Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008). A detailed history of Entergy's rough production cost equalization under the System Agreement can be found in Opinion No. 480.

<sup>4</sup> Opinion No. 480, 111 FERC ¶ 61,311 at P 44.

<sup>5</sup> *See* Ex. LC-3 at 2.

<sup>6</sup> The Sale-Leaseback had no operational effect on Waterford 3 because Entergy Louisiana continued to operate the plant. Initial Decision, 131 FERC ¶ 63,009 at P 4.

<sup>7</sup> Ex. LC-1 at 5.

produced a taxable gain to Entergy Louisiana approximating \$240 million.<sup>8</sup> For accounting purposes, the Sale-Leaseback transaction was not treated as a sale and subsequent leaseback, but instead treated as a financing transaction similar to traditional debt financing.<sup>9</sup> As a result, the 9.3 percent interest that was subject to the Sale-Leaseback transaction continued to be recorded as part of Entergy Louisiana's production facilities as a capital lease.<sup>10</sup> Because no sale was deemed to have occurred for accounting purposes, the 9.3 percent interest was recorded at its pre-Sale-Leaseback book value of \$220 million. The difference between the \$353.6 million selling price and the \$220 million book value was not treated as a book gain. Instead, the entire \$353.6 million selling price was recorded as long-term debt in Account 224 (Other Long-Term Debt).<sup>11</sup>

4. ADIT reflects timing differences between when a tax liability is actually incurred and when the tax expense associated with the liability is recorded on the company books. In the case of the Waterford 3 Sale-Leaseback, Entergy Louisiana incurred a tax liability in 1989 associated with its \$240 million taxable gain. However, because the transaction was not treated as a sale for accounting purposes, the tax liability was not recorded on Entergy Louisiana's books at that time as a tax liability, but instead it was recorded as a tax asset in Account 190 as ADIT.<sup>12</sup> The bandwidth formula in Service Schedule MSS-3 functionalizes a portion of the ADIT recorded in each Operating Company's books to the production function using plant ratios.

#### **B. Louisiana Commission Complaint and Initial Decision**

5. The Louisiana Commission filed its complaint on May 1, 2009 in Docket No. EL09-50-000. The complaint included what the Louisiana Commission described as one "Complaint Issue" seeking to amend the bandwidth formula and four "Implementation Issues."<sup>13</sup> Specifically, with respect to the "Complaint Issue," the

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<sup>8</sup> Ex. LC-24 at 5.

<sup>9</sup> Ex. LC-3 at 2.

<sup>10</sup> *Id.*

<sup>11</sup> Ex. LC-21 at 12.

<sup>12</sup> Tr. at 81-82.

<sup>13</sup> The four "Implementation Issues" raised by the Louisiana Commission are: (1) Entergy deviated from the methodology used in Exhibits ETR-26 and ETR-28 by using a hypothetical capital structure for Entergy Louisiana instead of the actual capital structure that it maintains the tariff requires; (2) Entergy improperly excluded from the

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Louisiana Commission maintained that, under the current Service Schedule MSS-3, “only a portion of the Waterford 3 sale-leaseback ADIT cost would be included in production costs with the remainder of the ADIT costs being functionalized to transmission or distribution. But, it assert[ed], the sale-leaseback ADIT is 100 percent production related and should be directly assigned to the production function.”<sup>14</sup> On September 4, 2009, the Commission set the Louisiana Commission’s complaint for hearing, and limited the proceeding to the “Complaint Issue,” stating that the hearing should address “whether Service Schedule MSS-3 should be amended to include a direct assignment of the sale-leaseback ADIT, along with other costs of the sale-leaseback.”<sup>15</sup>

6. The Presiding Judge issued his Initial Decision on April 30, 2010.<sup>16</sup> The Presiding Judge specified that the issue before him was “[w]hether the Waterford 3 Sale-Leaseback ADIT should be directly assigned to production in the MSS-3 bandwidth formula or whether a production plant ratio should be used to allocate the Waterford 3 Sale-Leaseback ADIT to the production function in the MSS-3 bandwidth formula.”<sup>17</sup> The

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bandwidth calculations the \$89.435 million Account 190 ADIT related to the Waterford 3 sale-leaseback contrary to a prior Commission order on the matter; (3) Entergy failed to include in the bandwidth calculation the benefits of a settlement between Entergy Arkansas and Union Pacific concerning a coal contract (Union Pacific Settlement); and (4) Entergy should not have included in the bandwidth calculations the portion of 2007 Entergy Texas production costs that are not recovered from retail ratepayers in Texas due to a state-imposed regulatory scheme that has effectively disallowed base rate costs that exceed 1999 levels (Texas Rate Freeze Disallowance).

<sup>14</sup> *Louisiana Public Service Commission v. Entergy Services, Inc.*, 128 FERC ¶ 61,225, at P 9 (2009) (Hearing Order).

<sup>15</sup> *Id.* P 17. The Commission accepted the Louisiana Commission’s offer to amend its complaint to remove paragraphs 32 through 51 of its complaint relating to the Union Pacific Settlement and Texas Rate Freeze Disallowance (two of the four “Implementation Issues”) subject to a final Commission order approving an uncontested partial settlement agreement. The Commission denied the Louisiana Commission’s complaint with respect to the two remaining “Implementation Issues,” finding that that these implementation issues are properly before the Commission in Docket No. ER08-1056-000. *Id.* P 16.

<sup>16</sup> Initial Decision, 131 FERC ¶ 63,009.

<sup>17</sup> *Id.* P 18. While the instant proceeding was ongoing, the Commission issued Opinion No. 506, which changed the way that General and Intangible Plant costs were functionalized. In Opinion No. 506, the Commission directed Entergy to submit a compliance filing to revise Service Schedule MSS-3 to reflect that ADIT costs associated  
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Presiding Judge found that the Louisiana Commission had not met its burden to prove that the current Service Schedule MSS-3 is unjust, unreasonable, unduly discriminatory or preferential and thus rejected the Louisiana Commission's proposal to revise Service Schedule MSS-3 to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to the production function.<sup>18</sup>

7. The Louisiana Commission filed a Brief on Exceptions to the Initial Decision on June 1, 2010. The Louisiana Commission argues that: (1) a party that brings a section 206 complaint regarding a component of a formula rate has the burden of proof with respect to that component, not the entire formula; (2) the Louisiana Commission carried its burden of proof with respect to the issue set for hearing, namely whether the allocation of the Waterford 3 Sale-Leaseback Account 190 ADIT is unjust and unreasonable; (3) the finding that other ADIT costs could be directly assigned is not a basis to reject the Louisiana Commission's proposal because the other items would not offset the impact of directly assigning the sale-leaseback of ADIT, but would add to that impact; (4) the Initial Decision did not find that any identified directly assignable subaccount would offset the direct assignment of Waterford 3 Sale-Leaseback Account 190 ADIT, and the evidence establishes that none would constitute an offset; and (5) a direct assignment of liberalized depreciation ADIT in Account 282<sup>19</sup> for only two of six companies (Entergy Louisiana and Entergy Gulf States Louisiana) that have this ADIT would be inappropriate because the other four Operating Companies do not maintain

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with General and Intangible Plant should be functionalized using the same labor ratios that are used to functionalize General and Intangible Plant investment costs. *Entergy Services, Inc.*, Opinion No. 506, 130 FERC ¶ 61,026, at P 108 (2010). Therefore, Entergy subsequently submitted a compliance filing that proposed to revise Service Schedule MSS-3 so that General and Intangible Plant ADIT costs are functionalized using the same labor ratios used to functionalize General and Intangible Plant investment costs. The Commission accepted Entergy's proposal. *See Entergy Services, Inc.*, 131 FERC ¶ 61,216 (2010). Because the issue in this case is whether Waterford 3 Account 190 ADIT should be directly assigned instead of functionalized, the finding in Opinion No. 506 that General and Intangible Plant ADIT costs must be functionalized in the same manner that General and Intangible Plant investment costs are functionalized does not change our findings in this proceeding.

<sup>18</sup> Initial Decision, 131 FERC ¶ 63,009 at P 53, 59.

<sup>19</sup> *Id.* P 7-8 (explaining that there are four categories of ADIT recognized in the Uniform System of Accounts, and only three of these categories of ADIT are used in the bandwidth formula, and only two of the three categories, those reflected in Account 190 and Account 282, materially affect the bandwidth calculation).

separate production plant Account 282 subaccounts for ADIT arising from liberalized depreciation.<sup>20</sup>

8. Briefs Opposing Exceptions were filed on June 21, 2010 by Entergy, the Arkansas Public Service Commission (Arkansas Commission) and Commission Trial Staff (Staff). These parties take issue with each of the exceptions filed by the Louisiana Commission and request that the Commission affirm the Initial Decision.

## **II. Discussion**

9. As the Presiding Judge explained, the issue of “whether Waterford 3 Sale-Leaseback ADIT is ‘generally and properly includable [in the [b]andwidth [c]alculation] for FERC cost of service purposes’” is at issue in Docket No. ER08-1056-000, a case involving Entergy’s second annual filing required under Opinion Nos. 480 and 480-A.<sup>21</sup> In its Opinion in Docket No. ER08-1056-000, the Commission reversed the Presiding Judge, and found that the issue of ADIT as it relates to the Waterford 3 Sale-Leaseback should not have been relitigated in the proceeding in Docket No. ER08-1056-000 because the Commission had previously determined that Waterford 3 Sale-Leaseback Account 190 ADIT is not included in the bandwidth calculation for Commission cost-of-service purposes.<sup>22</sup> Because Waterford 3 Sale-Leaseback Account 190 ADIT is not included in the bandwidth calculation for Commission cost-of-service purposes, we find that the issue presented in this proceeding, namely, whether the Louisiana Commission’s proposal to revise Service Schedule MSS-3 to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to the production function is just and reasonable, is moot. Nonetheless, for the reasons discussed below, even if the issue raised by the Louisiana Commission was not rendered moot by the Commission’s determination in Docket No. ER08-1056-000 and the Waterford 3 Sale-Leaseback Account 190 ADIT were included in the bandwidth calculation for Commission cost-of-service purposes, we deny the exceptions raised by the Louisiana Commission and deny the complaint. Moreover,

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<sup>20</sup> Louisiana Commission’s Brief on Exceptions at 40-42.

<sup>21</sup> Initial Decision, 131 FERC ¶ 63,009 at P 40. The ADIT variable in the bandwidth formula excludes amounts not generally and properly includable for Commission cost of service purposes, including, but not limited to, Statement of Financial Accounting Standards (SFAS 109) ADIT amounts and ADIT amounts arising from retail ratemaking decisions. *Id.* P 12 (citing Ex. ESI-4 at 10).

<sup>22</sup> *Entergy Services, Inc.*, 137 FERC ¶ 61,029, at P 119-21 (2011) (citing *Entergy Services, Inc.*, 124 FERC ¶ 63,026, at P 590, 596 (2008)); *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at P 233 (2010).

to the extent not specifically addressed below, we summarily affirm the Presiding Judge's findings.

10. Section 206(b) of the Federal Power Act (FPA) requires a complainant to establish that the current rate is unjust and unreasonable.<sup>23</sup> In this regard, as the complainant in this case, the Louisiana Commission bears the burden of proof to establish that it is unjust and unreasonable, unduly discriminatory or preferential for Service Schedule MSS-3 to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT based on the plant ratio.<sup>24</sup> For the reasons discussed below, we affirm the Presiding Judge's determination that the Louisiana Commission failed to demonstrate that it is unjust and unreasonable, unduly discriminatory or preferential for Service Schedule MSS-3 to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT based on the plant ratio. We also affirm the Presiding Judge's determination that the Louisiana Commission's proposal to revise Service Schedule MSS-3 to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to production was not just and reasonable.

**A. The Louisiana Commission Did Not Meet its Burden to Demonstrate That it is Unjust, Unreasonable, Unduly Discriminatory or Preferential for Service Schedule MSS-3 to Functionalize Waterford 3 Sale-Leaseback Account 190 ADIT.**

**1. Initial Decision**

11. The Presiding Judge stated that, as the complainant, the Louisiana Commission must establish that current Service Schedule MSS-3 is unjust, unreasonable, unduly discriminatory or preferential, and specifically it must establish that it is unjust, unreasonable, unduly discriminatory or preferential for Service Schedule MSS-3 to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT based on the ratio of production plant to total plant (plant ratio). The Presiding Judge concluded that the Louisiana Commission had failed to satisfy this requirement.<sup>25</sup>

12. The Presiding Judge found that the Louisiana Commission presented no evidence concerning Service Schedule MSS-3's overall unjustness or unreasonableness as a rough production cost implementation mechanism for the Entergy System, but instead focused on a single cost element within the complex bandwidth formula, and avoided the material issue of how the overall bandwidth formula in Service Schedule MSS-3 might be unjust,

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<sup>23</sup> 16 U.S.C. § 824e (2006).

<sup>24</sup> Initial Decision, 131 FERC ¶ 63,009 at P 41.

<sup>25</sup> *Id.*

unreasonable, unduly discriminatory or preferential. The Presiding Judge found this narrow focus to be fatal to the Louisiana Commission's complaint.<sup>26</sup> Specifically, he found that the issue in this case is whether the bandwidth formula reflected in Service Schedule MSS-3 is unjust, unreasonable, unduly discriminatory or preferential, and not whether a discrete component (or input) to the formula might be unjust, unreasonable, unduly discriminatory or preferential when considered on a stand-alone basis. The Presiding Judge found that the circumstance that a filed rate could be "improved" in some way or, in this case, potentially made more precise, does not in itself render the existing rate unjust, unreasonable, unduly discriminatory or preferential.<sup>27</sup>

13. The Presiding Judge stated that the burden of proof under FPA section 206(b) is an acknowledgment of the presumption that a filed rate at some point has been approved as just, reasonable, not unduly discriminatory or preferential, and enjoys a continuing (rebuttable) presumption that it remains so. He found that it follows that the Louisiana Commission must prove it is unjust, unreasonable, unduly discriminatory or preferential for Service Schedule MSS-3 to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT based on the plant ratio, and that it must make this showing without reference to some allegedly superior methodology. The Presiding Judge found that the Louisiana Commission had impermissibly grounded its functionalization critique on evidence and arguments that should have been confined to supporting its alternative direct assignment proposal.<sup>28</sup> The Presiding Judge found that even assuming that the Louisiana Commission's conclusion that directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT to production in the bandwidth calculation would achieve more precise production cost allocation among the Operating Companies, it does not follow that current Service Schedule MSS-3 is unjust, unreasonable, unduly discriminatory or preferential because it could, but does not, do so. He found that the fact that a more precise alternate rate structure could be substituted for the current one does not render the current structure unjust, unreasonable, unduly discriminatory or preferential. The Presiding Judge concluded that there must be something about the existing formula rate that is demonstrably unjust, unreasonable, unduly discriminatory or preferential without reference to an alternative rate, and stated that that something cannot be that the bandwidth formula would be more accurate/precise if it directly assigned Waterford 3 Sale-Leaseback Account 190 ADIT to production.<sup>29</sup>

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<sup>26</sup> *Id.* P 42.

<sup>27</sup> *Id.* P 44 (citing *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 531, 534, 544 (2008) (*Morgan Stanley*)).

<sup>28</sup> *Id.* P 44-45.

<sup>29</sup> *Id.* P 46.

14. The Presiding Judge noted that the Louisiana Commission alleges that using the plant ratio to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT results in an under-allocation to the production function, and stated that “[t]his is a legitimate basis on which to challenge Service Schedule MSS-3...[b]ut because [the Louisiana Commission] focuses exclusively on a single input to Service Schedule MSS-3 instead of the schedule as a comprehensive formula rate, it is compelled to support its under-allocation claim purely by inference from a direct assignment alternative.”<sup>30</sup> The Presiding Judge found that the Louisiana Commission cannot provide any proof for the claim of under-allocation without reference to direct assignment, and that “[r]eference to anything other than how Service Schedule MSS-3 functionalizes Waterford 3 Sale-Leaseback Account 190 ADIT, however, is impermissible for threshold burden of proof purposes.”<sup>31</sup>

## 2. Louisiana Commission’s Exceptions

15. The Louisiana Commission contends that the Initial Decision applied a standard of proof for revising a formula rate that conflicts with the Commission’s decisions and judicial precedent because it found that a party cannot succeed in changing an unjust and unreasonable component in a formula unless the party proves that the entire rate is unjust and unreasonable.<sup>32</sup> The Louisiana Commission argues that by finding first, that the existence of other, less consequential flaws in the tariff prevents the correction of the misallocation alleged in the complaint, second, that Entergy’s tariff would be modified only if each directly assignable subaccount of ADIT were directly assigned and third, that this process of directly assigning each directly assignable subaccount is not feasible, the Presiding Judge erected an insurmountable barrier to correcting the largest ADIT misallocation in the tariff.<sup>33</sup> The Louisiana Commission therefore argues that the Initial Decision improperly rejected its complaint based on an incorrect and impractical standard of proof for revising a formula rate that conflicts with the Commission’s decisions and judicial precedent. The Louisiana Commission argues that by applying the incorrect standard of proof, the Initial Decision may impede the Commission from carrying out its duties under FPA section 206.

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<sup>30</sup> *Id.* P 47 (citing Ex. LC-9 at 39-40).

<sup>31</sup> *Id.*

<sup>32</sup> Louisiana Commission’s Brief on Exceptions at 1 (citing Initial Decision, 131 FERC ¶ 63,009 at P 44).

<sup>33</sup> *Id.* at 17-18 (citing Initial Decision, 131 FERC ¶ 63,009 at P 54). The Louisiana Commission appears to be referring to Service Schedule MSS-3 when using the term “tariff.” *See id.* at 2.

16. The Louisiana Commission argues that the Commission cannot refuse to correct a material deficiency in a tariff on the ground that the overall tariff was not shown to be unjust and unreasonable,<sup>34</sup> and that a complainant in a section 206 case need only show that a component of the tariff is unjust and unreasonable and that the proposed replacement corrects the deficiency.<sup>35</sup> The Louisiana Commission also argues that the burdens imposed on parties relate to the specific provisions in a formula that they seek to change.<sup>36</sup>

17. The Louisiana Commission asserts that it carried its burden of proof to establish that the allocation of the Waterford 3 Sale-Leaseback Account 190 ADIT is unjust and unreasonable, and contends that it established that Service Schedule MSS-3 currently allocates only 57 percent of the \$89.5 million of Waterford 3 Sale-Leaseback Account 190 ADIT to production, even though it is all production-related. The Louisiana Commission therefore argues that \$38.5 million in production rate base is excluded from the bandwidth calculation, and that this exclusion is unjust and unreasonable, and discriminates against Entergy Louisiana.<sup>37</sup>

18. The Louisiana Commission also contends that the Initial Decision does not articulate what would be required to prove the “overall (un)justness or (un)reasonableness as a rough production cost implementation mechanism for the Entergy System,” as a prerequisite to correcting the misallocation of the Waterford 3 Sale-Leaseback Account 190 ADIT,<sup>38</sup> and that the Initial Decision therefore erred in denying the Louisiana Commission’s requested relief.<sup>39</sup> In addition, the Louisiana

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<sup>34</sup> *Id.* at 18 (citing *Louisiana Public Service Commission v. FERC*, 184 F.3d 892, 898-99 (D.C. Cir. 1999) (*Louisiana Commission v. FERC*)).

<sup>35</sup> *Id.* at 19-20, 23 (citing *Entergy Services, Inc.*, 128 FERC ¶ 61,275 (2009) (*Entergy*); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986) (*Sea Robin*); *Georgia Power Co. v. FPA*, 373 F.2d 485, 487-88 (5th Cir. 1967) (*Georgia Power*); *Michigan Electric Transmission Co.*, 116 FERC ¶ 61,164, at P 12 (2006) (*Michigan Electric*); *Missouri River Energy Services*, 130 FERC ¶ 63,014, at P 68 (2010) (*Missouri River Energy*)).

<sup>36</sup> *Id.* at 21 (citing *ANR Pipeline Co.*, 771 F.2d 507, 514 (D.C. Cir. 1985) (*ANR Pipeline*)).

<sup>37</sup> *Id.* at 28.

<sup>38</sup> *Id.* at 23 (citing Initial Decision, 131 FERC ¶ 63,009 at P 42).

<sup>39</sup> *Id.* at 24 (citing *Louisiana Commission v. FERC*, 184 F.3d at 899).

Commission argues that the Hearing Order set the Waterford 3 Sale-Leaseback Account 190 ADIT issue for hearing, not the justness and reasonableness of the overall Service Schedule MSS-3 tariff.<sup>40</sup>

**3. Briefs Opposing Exceptions (Entergy, Arkansas Commission, and Staff)**

19. All of the parties filing briefs opposing exceptions argue that the Presiding Judge properly found that Louisiana Commission failed to satisfy its burden to prove that it is unjust, unreasonable, unduly discriminatory or preferential for Service Schedule MSS-3 to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT based on the plant ratio. Entergy argues that the Louisiana Commission's exceptions depend on a series of incorrect assertions about the legal and factual holdings in the Initial Decision. Entergy opposes all of the Louisiana Commission's exceptions, arguing that they misstate the evidence presented at the hearing, the holding in the Initial Decision, and the applicable law regarding the standard of proof applicable to the Louisiana Commission's complaint, and thus should be denied.<sup>41</sup> Entergy also disagrees with the Louisiana Commission's argument that the Initial Decision warrants full Commission review because it applied an incorrect standard of proof.<sup>42</sup>

20. Entergy asserts that, only if the application of the plant ratio to all ADIT leads to an unreasonable overall result, could the use of those ratios be unjust and unreasonable. For this same reason, Entergy argues that it was not enough for the Louisiana Commission to demonstrate that the Waterford-3 Sale-Leaseback Account 190 ADIT is production related and could be directly assigned. According to Entergy, in order for the Louisiana Commission to demonstrate that the Service Schedule MSS-3 functionalization approach results in an under-allocation of production costs, the Louisiana Commission was also obligated to show that the overall results of the functionalization methodology to all ADIT leads to an under-allocation of the total amount of ADIT to the production function. Entergy argues that the Louisiana Commission presented no evidence whatsoever regarding the overall results of applying the functionalization methodology to the total amount of ADIT, and thus failed to make the required showing. Thus, Entergy argues that it is simply not possible to conclude that the current allocation excludes \$38.5 million of production rate base from the bandwidth calculation.<sup>43</sup>

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<sup>40</sup> *Id.* at 2-3 (citing Hearing Order, 128 FERC ¶ 61,225 at P 17).

<sup>41</sup> Entergy's Brief Opposing Exceptions at 4.

<sup>42</sup> *Id.* at 4-5.

<sup>43</sup> *Id.* at 8-9.

21. Entergy contends that, contrary to the Louisiana Commission's assertion, the Initial Decision did not require the Louisiana Commission to prove that the entire rate is unjust and unreasonable, and that the Initial Decision's analysis focused on the single rate component at issue here, which is the functionalization mechanism for allocating ADIT to the production function.<sup>44</sup> Entergy argues that requiring the Louisiana Commission to demonstrate that the functionalization component of the bandwidth formula leads to an under-allocation of ADIT to production is not an incorrect burden of proof standard, but rather is exactly what the Louisiana Commission should be required to prove. Entergy argues that, contrary to the Louisiana Commission's argument that the Initial Decision does not articulate what would be required to prove the overall (un)justness or (un)reasonableness as a rough production cost implementation mechanism for the Entergy system, the Initial Decision stated that a showing that the functionalization methodology resulted in an under-allocation of ADIT to the production function would represent a "legitimate basis on which to challenge Service Schedule MSS-3," and that this represents a clear articulation of what the Louisiana Commission was required to prove.<sup>45</sup>

22. Entergy contends that, to the extent the Commission finds the language in the Initial Decision criticizing the Louisiana Commission for focusing "on a single cost element within the complex Bandwidth Formula, completely avoiding the genuine material issue of how Service Schedule MSS-3 might be unjust, unreasonable, unduly discriminatory or preferential as the *formula rate* it is"<sup>46</sup> to be ambiguous, the Commission should clarify that it has not required the Louisiana Commission to demonstrate that the entire rate is unjust and unreasonable in its overall effect as a result of its failure to directly assign the Waterford 3 Sale-Leaseback Account 190 ADIT.

23. According to Entergy, the cases cited by the Louisiana Commission as support for its argument are inapplicable. Entergy asserts that because the analysis in the Initial Decision focused on the functionalization component of the bandwidth formula, and did not require the Louisiana Commission to prove that the bandwidth formula as a whole is unjust and unreasonable, the cases cited by the Louisiana Commission to support its attack are easily distinguishable, and do not support its contention that the Initial Decision applied an incorrect standard of review. Entergy argues that none of the cases cited by the Louisiana Commission had a bearing on the analysis performed by the Initial

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<sup>44</sup> *Id.* at 11 (citing Initial Decision, 131 FERC ¶ 63,009 at P 47).

<sup>45</sup> *Id.* at 13 (quoting Initial Decision, 131 FERC ¶ 63,009 at P 47).

<sup>46</sup> *Id.* at 19 (quoting Initial Decision, 131 FERC ¶ 63,009 at P 42) (emphasis in original).

Decision, other than to confirm that the Initial Decision correctly placed the burden of proof on the Louisiana Commission.

24. Entergy also argues that the Initial Decision, contrary to the Louisiana Commission's argument, did not find that the Louisiana Commission proved the elements of the complaint set for hearing. Entergy contends that the Louisiana Commission's assertion is based on the findings in the Initial Decision that: (1) the Waterford 3 Sale-Leaseback Account 190 ADIT is 100 percent production related; and (2) it is possible for the bandwidth calculation to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to the production function. However, Entergy argues that those facts were not disputed by Entergy in responding to the Louisiana Commission's complaint, and their validity was not set for hearing by the Commission. Rather, Entergy argues that the factual issue set for hearing was "whether Service Schedule MSS-3 should be amended to include a direct assignment of the sale-leaseback ADIT, along with other costs of the sale-leaseback,"<sup>47</sup> and that the two facts alleged by the Louisiana Commission were not adequate to demonstrate the need to amend Service Schedule MSS-3.

25. The Arkansas Commission argues that the Initial Decision correctly applied the FPA section 206 burden of proof to reject the Louisiana Commission's complaint. The Arkansas Commission asserts that the Initial Decision properly found that the Louisiana Commission failed to prove that the functionalization of Waterford 3 ADIT based on the plant ratio results in an unjust and unreasonable under-allocation of costs under the bandwidth formula.<sup>48</sup>

26. The Arkansas Commission also argues that the Louisiana Commission is incorrect in asserting that its complaint should be granted because the Initial Decision did not specify precisely how the Louisiana Commission could sustain its burden of proof. The Arkansas Commission asserts that there is no such requirement that the deficiencies in a complainant's case be rectified by the Presiding Judge. The Arkansas Commission also states that the Initial Decision addresses the Louisiana Commission's argument that its proposal may be a more precise allocation method than functionalization on the basis of the plant ratio, but that does not by itself establish that the existing functionalization method is unjust and unreasonable. In addition, the Arkansas Commission argues that the Initial Decision properly recognized that the Louisiana Commission's assertion that

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<sup>47</sup> *Id.* at 5-6 (quoting Hearing Order, 128 FERC ¶ 61,225 at P 17).

<sup>48</sup> Arkansas Commission's Brief Opposing Exceptions at 6 (citing Initial Decision, 131 FERC ¶ 63,009 at P 44, 47).

Service Schedule MSS-3 is unreasonable because the Louisiana Commission's alternative is better, is fatal to its case.<sup>49</sup>

27. Staff asserts that, contrary to the Louisiana Commission's assertions, the Presiding Judge did not require the Louisiana Commission to prove that "all aspects of the formula" are unjust and unreasonable, nor did the Presiding Judge require the Louisiana Commission to address "the reasonableness of the overall tariff."<sup>50</sup> Rather, Staff argues that the Presiding Judge merely recognized that the justness and reasonableness of any given component of the MSS-3 bandwidth formula cannot be assessed outside of the context and purpose of the overall formula.

28. Staff argues that the Louisiana Commission's argument that it is necessary to examine one component while ignoring the overall operation of the bandwidth formula is fundamentally at odds with the Commission's conception of what a formula rate is: "[w]ith formula rates, the formula itself is the rate, not the particular components of the formula . . . ."<sup>51</sup> Staff agrees with the Presiding Judge that the Louisiana Commission's attempt to focus only on one component of the bandwidth formula and its application to a single Operating Company "is fatal to [the Louisiana Commission's] complaint."<sup>52</sup> Staff agrees with the Presiding Judge's finding that the "[Louisiana Commission's] threshold burden here is to prove Service Schedule MSS-3 as filed is unjust, unreasonable, unduly discriminatory or preferential either (i) in *functionalizing* Waterford 3 Sale-Leaseback Account 190 ADIT or (ii) in *the way it functionalizes* Waterford 3 Sale-Leaseback Account 190 ADIT,"<sup>53</sup> and that "the circumstance that a filed rate could be 'improved' in some way—in this case, potentially made more precise—does not in itself render the existing rate unjust, unreasonable, unduly discriminatory or preferential."<sup>54</sup>

29. Staff states that section 30.12 of Service Schedule MSS-3 requires ADIT for each Operating Company to be functionalized pursuant to the same methodology. Staff argues

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<sup>49</sup> *Id.* at 8.

<sup>50</sup> Staff's Brief Opposing Exceptions at 5 (quoting Louisiana Commission Brief on Exceptions at 16, 18).

<sup>51</sup> *Id.* at 7 (citing *Ocean State Power*, 69 FERC ¶ 61,146, at 61,544 (1994); *Doswell Limited Partnership*, 62 FERC ¶ 61,149, at 62,069 (1993)).

<sup>52</sup> *Id.* (citing Initial Decision, 131 FERC ¶ 63,009 at 42).

<sup>53</sup> *Id.* at 6, 16-17 (citing Initial Decision, 131 FERC ¶ 63,009 at P 47).

<sup>54</sup> *Id.* at 17 (citing Initial Decision, 131 FERC ¶ 63,009 at P 44).

that had the Louisiana Commission shown that only Operating Companies serving Louisiana ratepayers were required to functionalize Account 190 ADIT using one methodology, while Operating Companies serving other jurisdictions were required to directly assign Account 190 ADIT or functionalize using a different methodology to the detriment of Louisiana ratepayers, the Louisiana Commission might have been able to demonstrate that the functionalization component of the bandwidth formula is not just and reasonable. Staff concludes that the Presiding Judge correctly ruled that the Louisiana Commission failed to demonstrate that functionalization of Waterford 3 Account 190 ADIT using the plant ratio is unjust, unreasonable, unduly discriminatory or preferential.

30. Staff states that the Louisiana Commission excepts to the Presiding Judge's determination by repeatedly insisting that it has "proved the allegations of the complaint that were set for hearing," and that this entitles it to judgment in its favor.<sup>55</sup> Staff asserts that proving the factual allegations of a complaint is not the standard for prevailing in a section 206 proceeding because the Louisiana Commission's contention that it has proven factual allegations in its complaint is relevant if and only if the Presiding Judge finds that those facts establish that the functionalization of Waterford 3 Account 190 ADIT in Service Schedule MSS-3 is unjust, unreasonable, unduly discriminatory or otherwise preferential. Staff also asserts that the Louisiana Commission misinterprets a number of Commission and court cases to support its argument that it met its burden of proof.<sup>56</sup>

#### **4. Commission Determination**

31. We agree with the Louisiana Commission's argument that it is *not* required to demonstrate that the entire bandwidth formula rate is unjust and unreasonable as a result of the failure to directly assign the Waterford 3 Sale-Leaseback Account 190 ADIT. While we acknowledge that there is general language in the Initial Decision that criticizes the Louisiana Commission for focusing "on a single cost element within the complex Bandwidth Formula, completely avoiding the genuine material issue of how Service Schedule MSS-3 might be unjust, unreasonable, unduly discriminatory or preferential as

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<sup>55</sup> *Id.* (citing Louisiana Commission's Initial Brief at 3, 4, 11, 17, 29).

<sup>56</sup> *Id.* at 8-15 (citing *Louisiana Commission v. FERC*, 184 F.3d at 894-95; *Louisiana Public Service Commission v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228, at P 81 (2004); *Entergy*, 128 FERC ¶ 61,275 at P 19, 28-31; *Kern River Gas Transmission Co.*, Opinion No. 486-A, 123 FERC ¶ 61,056, at n.128 (2008) (*Kern River*); *Sea Robin*, 795 F.2d at 186-87; *ANR Pipeline*, 771 F.2d at 514; *Michigan Electric*, 116 FERC at P 12; *Georgia Power*, 373 F.3d at 486-87).

the *formula rate* it is,”<sup>57</sup> we nevertheless find that the Louisiana Commission was *not* required by the Presiding Judge to demonstrate that the entire rate is unjust and unreasonable as a result of its failure to directly assign the Waterford 3 Sale-Leaseback Account 190 ADIT. Rather, as explained by the Presiding Judge, the Louisiana Commission is required to establish that it is unjust and unreasonable, unduly discriminatory or preferential for Service Schedule MSS-3 to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT based on the plant ratio. In any event, the language in the Initial Decision suggesting that the Louisiana Commission was required to prove that the entire bandwidth formula is unjust and unreasonable is irrelevant to the Presiding Judge’s ultimate determination because he found that the Louisiana Commission is required only to establish that it is unjust and unreasonable, unduly discriminatory or preferential for Service Schedule MSS-3 to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT based on plant ratios.<sup>58</sup>

32. We affirm the Presiding Judge’s finding that the Louisiana Commission has not demonstrated that the functionalization methodology for Waterford 3 Sale-Leaseback Account 190 ADIT is unjust, unreasonable, unduly discriminatory or preferential. In this regard, we agree with the Presiding Judge that a showing that the functionalization methodology for Waterford 3 Sale-Leaseback Account 190 ADIT results in an under-allocation of ADIT to the production function would represent a “legitimate basis on which to challenge Service Schedule MSS-3.”<sup>59</sup> However, as the Presiding Judge explains, the Louisiana Commission has failed to make such a showing. In attempting to demonstrate an under-allocation of ADIT to the production function, the Louisiana Commission solely references an allegedly superior methodology. But, as the Presiding Judge explains, even if it is assumed that directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT would result in a more precise production cost allocation among the Operating Companies, it does not follow that Service Schedule MSS-3 as filed is unjust, unreasonable, unduly discriminatory or preferential in functionalizing Waterford 3 Sale-Leaseback Account 190 ADIT, or that it results in an incorrect over-allocation or under-allocation of ADIT to the production function.<sup>60</sup> Significantly, the Presiding Judge

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<sup>57</sup> Initial Decision, 131 FERC ¶ 63,009 at P 42 (emphasis in original).

<sup>58</sup> *Id.* P 41, 47. Because we agree with the Louisiana Commission that it is *not* required to demonstrate that the entire rate is unjust and unreasonable in its overall effect as a result of its failure to directly assign the Waterford 3 Sale-Leaseback Account 190 ADIT, we find that it is unnecessary to address the cases cited by the Louisiana Commission in support of this argument.

<sup>59</sup> *Id.* P 47.

<sup>60</sup> *Id.* P 46.

concluded, and we agree, there must be something about the existing ADIT functionalization that is demonstrably unjust, unreasonable, unduly discriminatory or preferential without reference to an alternative rate that might possibly be more accurate or precise. Indeed, as the Presiding Judge found, the Louisiana Commission has provided no proof for its claim of under-allocation without reference to direct assignment.<sup>61</sup>

33. In asserting that Waterford 3 Sale-Leaseback Account 190 ADIT should be directly assigned to the production function while all other ADIT<sup>62</sup> is functionalized using the plant ratio, the Louisiana Commission is seeking to cherry-pick this component of ADIT in order to increase the bandwidth payments made to Entergy Louisiana. However, we find that analyzing only how directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT would affect the bandwidth payments received by Entergy Louisiana is not adequate to show that functionalizing Waterford 3 ADIT results in an incorrect over-allocation or under-allocation of ADIT to the production function that is unjust, unreasonable, unduly discriminatory or preferential. In order to make such a showing, the Louisiana Commission would need to analyze how directly assigning all of the approximately 600 ADIT sub-accounts would impact the ADIT component of the bandwidth formula. As explained by the Presiding Judge, the record in this proceeding establishes that many other ADIT sub-accounts relating exclusively to production (as well as sub-accounts relating exclusively to distribution or transmission) are currently functionalized under Service Schedule MSS-3.<sup>63</sup> Because Service Schedule MSS-3 functionalizes ADIT in the aggregate and the functionalization process applies to all eligible ADIT amounts whether related to production, transmission or distribution functions, it is not appropriate to create an inconsistency by treating one ADIT amount differently from all others by directly assigning it to production. Rather, such a component of the ADIT should be functionalized in the same manner as all other ADIT amounts.<sup>64</sup>

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<sup>61</sup> *Id.* P 45.

<sup>62</sup> ADIT = Net Accumulated Deferred Income Taxes (ADIT) recorded in FERC Accounts 190, 281 and 282 (as reduced by amounts not generally and properly includable for FERC cost of service purposes, including, but not limited to, SFAS 109 ADIT amounts and ADIT amounts arising from retail ratemaking decisions) plus Accumulated Deferred Income Tax Credit -3% portion only recorded in FERC Account 255. Ex. LC-8 at 12.

<sup>63</sup> Ex. S-1 at 19-20; Ex. S-3; Ex. AC-1 at 9-10; Ex. ESI-1 at 32.

<sup>64</sup> *See* Ex. ESI-1 at 32.

34. We further disagree with the Louisiana Commission's argument that the Initial Decision does not articulate what would be required to prove the overall unjustness or unreasonableness of a rough production cost implementation mechanism for the Entergy system. As discussed above, the Initial Decision explicitly stated that a showing that the functionalization methodology resulted in an under-allocation of ADIT to the production function would represent a "legitimate basis on which to challenge Service Schedule MSS-3."<sup>65</sup>

35. Our determination to affirm the Presiding Judge's finding that the Louisiana Commission did not meet its burden of proof to demonstrate that it is unjust and unreasonable, unduly discriminatory or preferential for Service Schedule MSS-3 to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT based on the plant ratio renders it unnecessary to address the Louisiana Commission's proposal that Service Schedule MSS-3 directly assign Waterford 3 Sale-Leaseback Account 190 ADIT. Nonetheless, as discussed below, we affirm the Presiding Judge's finding that the Louisiana Commission's proposal to revise Service Schedule MSS-3 to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT was unjust, unreasonable, unduly discriminatory or preferential.

**B. The Louisiana Commission's Proposal to Directly Assign Waterford 3 Sale-Leaseback Account 190 ADIT To Production Is Unjust, Unreasonable, Unduly Discriminatory or Preferential.**

**1. Initial Decision**

36. The Presiding Judge explained that the Louisiana Commission proposed to revise Service Schedule MSS-3 to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to the production function without making any other changes to the schedule, because: (1) Waterford 3 Sale-Leaseback Account 190 ADIT is 100 percent production-related and, as a consequence, should be directly assigned to the production function; (2) Waterford 3 Sale-Leaseback Account 190 ADIT is unique, and this uniqueness distinguishes it from other currently functionalized ADIT; (3) Commission policy

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<sup>65</sup> Initial Decision, 131 FERC ¶ 63,009 at P 47; Entergy's Brief Opposing Exceptions at 13; Arkansas Commission's Brief Opposing Exceptions at 7; *see also* Staff's Brief Opposing Exceptions at n.13 (stating "[t]he Presiding Judge's clear and concise statement of the burden of proof also clearly disproves the [Louisiana Commission's] claim that the Presiding Judge failed to articulate how the [Louisiana Commission] might meet its burden). We also note, as argued by the Arkansas Commission, that there is no requirement that the deficiencies in a complainant's case be rectified by the Presiding Judge, or that the Initial Decision provide the complainant with a road map to meet its burden of proof.

requires direct cost assignment where feasible; (4) in contrast to Waterford 3 Sale-Leaseback Account 190 ADIT, it is not feasible to directly assign Account 282 ADIT to the production function; (5) Entergy reviews and directly assigns other ADIT out of the bandwidth calculation; and (6) Entergy directly assigns other ADIT to production under its Open Access Transmission Tariff (OATT).<sup>66</sup>

37. The Presiding Judge stated that no party in this proceeding disputes that Waterford 3 Sale-Leaseback Account 190 ADIT is 100 percent production-related, and that no participant disputes it is possible to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to the production function in the bandwidth calculation. He also states that no participant disputes that Commission policy generally favors direct cost assignment where feasible. However, the Presiding Judge found that these concessions do not support a conclusion that it would be just, reasonable, not unduly discriminatory or preferential to revise Service Schedule MSS-3 to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to production without making any other changes to the schedule.<sup>67</sup> The Presiding Judge stated that “it is *not sufficient* for the Louisiana Commission to limit its direct assignment alternative to Waterford 3 Sale-Leaseback Account 190 ADIT alone if the *limitation itself* renders revised Service Schedule MSS-3 unjust, unreasonable, unduly discriminatory or preferential.”<sup>68</sup>

38. The Presiding Judge also found unpersuasive the Louisiana Commission’s argument that direct assignment of the Waterford 3 Sale-Leaseback Account 190 ADIT was mandated by the general Commission policy favoring direct cost assignment where feasible. The Presiding Judge found that “the Louisiana Commission’s reliance on the general Commission policy favoring direct assignment [where feasible] also ignores the fact that the policy applies to direct costs.”<sup>69</sup> He stated, however, that the Waterford 3 Sale-Leaseback Account 190 ADIT is an indirect cost, and Commission policy favors allocating such costs by formula.<sup>70</sup> The Presiding Judge stated that the direct assignment test articulated in *Kern River* is whether the method is applied consistently. He found that the method the Louisiana Commission proposes – directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT – is inconsistent with the functionalization of many similar ADIT sub-accounts under Service Schedule MSS-3. The Presiding Judge stated

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<sup>66</sup> Initial Decision, 131 FERC ¶ 63,009 at P 49.

<sup>67</sup> *Id.* P 51.

<sup>68</sup> *Id.* P 52 (emphasis in original).

<sup>69</sup> *Id.* P 57.

<sup>70</sup> *Id.* (citing *Kern River*, Opinion No. 486, 117 FERC ¶ 61,077, at P 290 (2006)).

that the record in this proceeding establishes that many other ADIT sub-accounts relating exclusively to production (as well as sub-accounts relating exclusively to distribution or transmission) are currently functionalized under Service Schedule MSS-3. He observed that these sub-accounts are identifiable and indistinguishable from Waterford 3 Sale-Leaseback Account 190 ADIT insofar as their 100 percent identification with a specific function is concerned. The Presiding Judge concluded that, consistent with Opinion No. 506 and *American Electric Power Corp.*, it would be arbitrary, unduly discriminatory and preferential to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT without also directly assigning these other sub-accounts.<sup>71</sup> Because the Louisiana Commission's proposed revision to Service Schedule MSS-3 is strictly limited to Waterford 3 Sale-Leaseback Account 190 ADIT, the Presiding Judge concluded that it would be beyond the scope of this proceeding to directly assign the other sub-accounts. Thus, he found that the Louisiana Commission's proposed revision must be rejected.<sup>72</sup>

39. The Presiding Judge also found that although the record confirms it is feasible to directly assign only the Waterford 3 Sale-Leaseback Account 190 ADIT, the record also confirms it would not be feasible to directly assign every ADIT sub-account that would have to be directly assigned to avoid making an unjust, unreasonable, unduly discriminatory or preferential revision to Service Schedule MSS-3. In this regard, the Presiding Judge stated that there are approximately 600 ADIT sub-accounts, and that approximately 182 of these are subsumed in the variable ADIT category for bandwidth calculation purposes. The Presiding Judge concluded that analyzing and attempting to directly assign each such cost on an annual basis would undermine the bandwidth remedy's fundamental purpose of making the rough production cost equalization process reasonably implementable, and would significantly complicate every subsequent bandwidth implementation proceeding by encouraging item-by-item challenges to the bandwidth formula.

40. The Presiding Judge also rejected the Louisiana Commission's contention that it would not be feasible to directly assign Account 282 ADIT to the production function. He found that it would be unjust, unreasonable, unduly discriminatory or preferential to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT while continuing to functionalize Waterford 3 Account 282 ADIT using the plant ratio. The Presiding Judge explained that "Account 190 ADIT increases Entergy Louisiana's rate base—hence increasing its [b]andwidth payments from the other Entergy Operating Companies. Account 282 ADIT decreases Entergy Louisiana's rate base—hence decreasing its

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<sup>71</sup> *Id.* P 54 (citing Opinion No. 506, 130 FERC ¶ 61,026; *American Electric Power Corp.*, 88 FERC ¶ 61,141, at 61,446 (1999) (*AEP*)).

<sup>72</sup> *Id.*

[b]andwidth payments from the other Entergy Operating Companies.”<sup>73</sup> The Presiding Judge concluded that directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT while continuing to functionalize Account 282 ADIT would skew Account 282’s offsetting effect on Account 190 and “would to some degree change the [b]andwidth remedy payment/receipt dynamic among the Entergy Operating Companies in a manner inconsistent with the bandwidth formula.”<sup>74</sup> The Presiding Judge found that “[i]t follows that if it is not feasible to directly assign Waterford 3 Account 282 ADIT to production, it is not *reasonable* to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to production either.”<sup>75</sup> He also found the contention that it is not feasible to directly assign Account 282 ADIT to production to be inconsistent with the record. He explained that Account 282 ADIT is generated by the same assets as Account 190 ADIT, and the record indicates that Account 282 ADIT is as easily quantifiable as Waterford 3 Sale-Leaseback Account 190 ADIT. The Presiding Judge also noted that the Louisiana Commission’s contention that it is not feasible to directly assign Account 282 ADIT to production appears to be premised on mistaken inferences drawn from Entergy work papers produced during discovery, which appear to support just the opposite inference.<sup>76</sup>

41. The Presiding Judge rejected the Louisiana Commission’s assertions that Entergy either reviews and directly assigns other ADIT out of the bandwidth calculation or directly assigns other ADIT to production under its OATT. He explained that the record establishes that the (variable cost) ADIT definition reflected in Service Schedule MSS-3 expressly requires Entergy to exclude from the bandwidth calculation any “amounts not generally and properly includable for FERC cost of service purposes.”<sup>77</sup> The Presiding Judge stated that because these exclusions are made without regard to function, it is therefore inaccurate to characterize this process as either elective on Entergy’s part, or as direct cost assignment out of the bandwidth calculation. The Presiding Judge found that any assertion that Entergy directly assigns other ADIT to production under its OATT is inaccurate for essentially the same reasons.<sup>78</sup>

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<sup>73</sup> *Id.* P 58. As discussed further below, changes to Account 190 and Account 282 ADIT change the amount of Entergy Louisiana’s production costs, which may change its bandwidth payments or receipts.

<sup>74</sup> *Id.* (citing Ex. AC-1 at 5).

<sup>75</sup> *Id.* (emphasis in original).

<sup>76</sup> *Id.* P 58 (citing Ex. LC-19 at 1-2; Ex. LC-22 at 2-4).

<sup>77</sup> *Id.* P 50 (quoting Ex. ESI-4 at 10; citing Ex. ESI-1 at 7 Tr. 87-90, 96, 215-16).

<sup>78</sup> *Id.*

42. The Presiding Judge also concluded that Waterford 3 Sale-Leaseback Account 190 ADIT was not unique in any meaningful respect. He noted that the Waterford 3 Sale-Leaseback Account 190 ADIT is not the only bandwidth formula ADIT sub-account that is 100 percent identifiable with a specific function. The Presiding Judge observed that identification of Waterford 3 Sale-Leaseback Account 190 ADIT with production and its resulting suitability for direct assignment are the predominant bases on which the Louisiana Commission characterizes it as unique. The Presiding Judge found that while the underlying Waterford 3 Sale-Leaseback transaction may be unique to Entergy Louisiana among the Entergy Operating Companies, the Account 190 ADIT associated with that transaction is no more unique for bandwidth formula purposes than ADIT reflected in any other discrete sub-account(s).<sup>79</sup>

## 2. Louisiana Commission's Exceptions

43. The Louisiana Commission contends that the Presiding Judge “effectively ruled that under-allocation of the [Waterford 3 Sale-Leaseback Account 190] ADIT cannot be corrected, because he ruled that it ‘would not be feasible’ to directly assign those ADIT components that can be identified with a single function.”<sup>80</sup> The Louisiana Commission argues that this ruling conflicts with the Presiding Judge’s findings that: (1) the Service Schedule MSS-3 formula already requires that Entergy review each component of ADIT to determine whether it is includable for Commission cost of service purposes; and (2) the other ADIT subaccounts that exclusively relate to particular functions are “‘clearly identifiable.’”<sup>81</sup> The Louisiana Commission contends that if direct assignment of each directly assignable subaccount were necessary, it could easily be accomplished, and that the Initial Decision found it undisputed that “‘Waterford 3 Sale-Leaseback Account 190 ADIT is 100 [percent] production-related’” and that “‘it is possible to directly assign Waterford 3 Sale-Leaseback ADIT to the production function in the Bandwidth Calculation.’”<sup>82</sup>

44. The Louisiana Commission argues that Opinion No. 506 does not support the Initial Decision because, in that case, Entergy proposed to change the functionalization ratios for allocating General and Intangible Plant costs and Administrative and General expenses to the production function. The Louisiana Commission argues that Entergy’s

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<sup>79</sup> *Id.* P 55.

<sup>80</sup> Louisiana Commission’s Brief on Exceptions at 3 (quoting Initial Decision, 131 FERC ¶ 63,009 at P 56).

<sup>81</sup> *Id.* at 3-4 (citing Initial Decision, 131 FERC ¶ 63,009 at P 50, 54).

<sup>82</sup> *Id.* at 1, 28 (quoting Initial Decision, 131 FERC ¶ 63,009 at P 51).

proposal did not address the issue of direct assignment, and the Commission assumed that direct assignment is the appropriate approach when that action is feasible.<sup>83</sup> According to the Louisiana Commission, Opinion No. 506 supports its proposal for a direct assignment in this case because it confirms that the Commission prefers direct assignment and employs allocation ratios only when a direct assignment is not feasible.<sup>84</sup> The Louisiana Commission argues that “[u]nlike the 4.6 million line items in [Opinion No. 506], here there are only 592 ADIT subaccounts.”<sup>85</sup> The Louisiana Commission contends that Entergy reviews all of these ADIT balances each year to determine whether they are includable for Commission cost of service purposes, and argues that the directly assignable ADIT subaccounts are “clearly identifiable.”<sup>86</sup> The Louisiana Commission asserts that the Waterford 3 Sale-Leaseback Account 190 ADIT sub-accounts have been identified and shown to be 100 percent production related, and therefore should be directly assigned.

45. The Louisiana Commission argues that *AEP* does not support the Initial Decision because it involved a proposal to exclude entirely certain production-related ADIT from a transmission tariff, and was not a request for a direct assignment in lieu of functionalization of a transmission related item. The Louisiana Commission also argues that *AEP* is inapplicable to this case because it was decided prior to the D.C. Circuit’s ruling in *Louisiana Commission v. FERC*, where the D.C. Circuit “effectively overruled” the Commission’s reliance on the failure of the party seeking the adjustment to propose an alternative overall methodology.<sup>87</sup> The Louisiana Commission also argues that the Commission approved an amendment to remove Waterford 3 Sale-Leaseback Account 190 ADIT from the plant ratio used to allocate ADIT to the production function in the bandwidth formula.<sup>88</sup>

46. The Louisiana Commission asserts that the Initial Decision’s finding that other ADIT costs could be directly assigned is not a basis to reject its proposal because the

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<sup>83</sup> *Id.* at 25 (citing Opinion No. 506, 130 FERC ¶ 61,026 at P 91, 92, 97, n.156).

<sup>84</sup> *Id.* at 26 (citing Opinion No. 506, 130 FERC ¶ 61,026; *Kern River*, Opinion No. 486, 117 FERC ¶ 61,077).

<sup>85</sup> *Id.* (citing Ex. LC-9 at 36).

<sup>86</sup> *Id.* (quoting Initial Decision, 131 FERC ¶ 63,009 at P 54).

<sup>87</sup> *Id.* at 27.

<sup>88</sup> *Id.* at 30 (citing *Louisiana Commission v. Entergy Corp.*, 124 FERC ¶ 61,010, at P 28 (2008)).

other items would not offset the impact of directly assigning the Waterford 3 Sale-Leaseback Account 190 ADIT, but rather would *add to* that impact.<sup>89</sup> The Louisiana Commission contends that the Initial Decision erred in finding that it would be “arbitrary, unduly discriminatory and preferential to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT without also directly assigning their other subaccounts” because the undifferentiated identification of other deficiencies in Service Schedule MSS-3 is not a basis to reject a just and reasonable correction.<sup>90</sup> According to the Louisiana Commission, the other items may provide a basis for rejecting the proposal only if they offset its impact. The Louisiana Commission contends that the Initial Decision did not find that any identified directly assignable subaccount would offset the direct assignment of Waterford 3 Sale-Leaseback Account 190 ADIT, and that it could not do so because the evidence establishes that none would constitute an offset because directly assigning the identified subaccounts in each case would benefit Entergy Louisiana. According to the Louisiana Commission, the Commission can consider offsetting factors in determining whether and how to change a formula rate, and the complainant does not bear the burden of negating potential offsets.<sup>91</sup> The Louisiana Commission contends that no party in this case provided any offsetting effect, and the Initial Decision did not identify an offset. The Louisiana Commission also argues that a direct assignment of the other ADIT components that exclusively relate to a single function would increase, not offset, the benefit to Entergy Louisiana from a direct assignment of the Waterford 3 Sale-Leaseback Account 190 ADIT in the bandwidth calculation, and that the other potential changes would have a small impact compared to the Waterford 3 Sale-Leaseback Account 190 ADIT.

47. The Louisiana Commission states that the Waterford 3 Sale-Leaseback Account 190 ADIT amounts to a total of \$89.5 million, and Entergy Louisiana’s nuclear production and fixed production rate base functionalization ratios allocate only about 57 percent of this ADIT to production, even though it is 100 percent production-related.<sup>92</sup> Thus, the Louisiana Commission asserts that the ratio excludes approximately \$38.5 million of production asset cost from Entergy Louisiana’s production rate base, and that the ratio excludes \$4.7 million of production return requirement from Entergy Louisiana’s costs annually.<sup>93</sup>

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<sup>89</sup> *Id.* at 31 (emphasis in original).

<sup>90</sup> *Id.* (citing Initial Decision, 131 FERC ¶ 63,009 at P 54).

<sup>91</sup> *Id.* at 3 (citing *Louisiana Commission v. FERC*, 184 F.3d at 899).

<sup>92</sup> *Id.* at 31 (citing Ex. LC-9 at 40).

<sup>93</sup> *Id.* at 32.

48. According to the Louisiana Commission, Service Schedule MSS-3 provides for the inclusion of three ADIT accounts in production costs: (1) Account 190; (2) Account 281; and (3) Account 282. The Louisiana Commission states that Entergy divides these subaccounts into those included for ratemaking in Service Schedule MSS-3 and those excluded, and that it excludes hundreds of subaccount balances on the ground that they are “not generally and properly includable for FERC cost of service purposes.”<sup>94</sup> The Louisiana Commission argues that Staff witness Sammon identified a number of subaccounts that are included for ratemaking in Service Schedule MSS-3 that he asserted could be directly assigned to a particular function, and that Arkansas Commission witness Helsby identified many of the same items based on an Entergy data response.<sup>95</sup> The Louisiana Commission contends that the Initial Decision cited this testimony, but did not assert that any of the identified ADIT components would constitute offsets in the bandwidth calculation if directly assigned, and that no party offered a valid basis to find that these items could constitute offsets.

49. The Louisiana Commission contends for the first time in this proceeding in its brief on exceptions that several subaccounts that are included for ratemaking in Service Schedule MSS-3 could be directly assigned to a particular function. It argues that Staff witness “Sammon identified two ADIT [Account 282] balances related to Waterford 3, other than [Waterford 3 Sale-Leaseback Account 190] ADIT that Entergy includes in the ‘Ratemaking Balance’ in the MSS-3 bandwidth calculation.”<sup>96</sup> Specifically, the Louisiana Commission argues that “W3 Nuclear Fuel Depre-Fed” in a sub-account in Account 282 is a positive balance of \$3,116,462 that would add to Entergy Louisiana’s rate base if directly assigned, and that assignment of 100 percent rather than 57 percent of this component would increase the ADIT allocated to Entergy Louisiana’s rate base for this item by about \$1.34 million, and increase the return requirement by about \$164,000 at the overall rate of return of 12.24 percent.<sup>97</sup> The Louisiana Commission argues that a direct assignment would allocate less of a negative balance to Entergy Louisiana’s rate base, and that the Account 282 reduction to rate base would be \$13 million less with a direct assignment than it is with an allocation, therefore increasing Entergy Louisiana’s costs and increasing its receipts.<sup>98</sup>

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<sup>94</sup> *Id.* at 33 (citing Initial Decision, 131 FERC ¶ 63,009 at P 50; Ex. LC-8 at 12; Ex. LC-9 at 35-36).

<sup>95</sup> *Id.* (citing Ex. AC-1 at 7-8).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 34.

<sup>98</sup> *Id.* (citing Ex. LC-20).

50. The Louisiana Commission also argues that the direct assignment of the Waterford 3 Sale-Leaseback Account 190 ADIT would require an adjustment in the plant ratio for allocating liberalized depreciation ADIT to the fixed production rate base, because nuclear plant would be removed from the ratio given the direct assignment of nuclear ADIT, but would have only a minimal impact on the fixed rate base calculation.<sup>99</sup> The Louisiana Commission thus argues that, overall, the direct assignment of the liberalized depreciation ADIT for Waterford 3 would increase Entergy Louisiana's rate base by \$9.5 million, and that no party refuted this evidence. The Louisiana Commission also argues that the return requirement increase (at 12.24 percent) would be about \$1.16 million.<sup>100</sup> Further, the Louisiana Commission argues that staff witness Sammon identified certain ADIT subaccounts in the Account 190 "Ratemaking Balance" that could be directly assigned to other functions, including "IPP Advances" and "Contrib. in Aid of Constr." in Accounts 190.181, 190.182 and 190.192. According to the Louisiana Commission, if all these categories of ADIT were removed, the impact on the bandwidth calculation would be relatively insignificant.<sup>101</sup> The Louisiana Commission also contends that Staff witness Sammon identified Entergy Gulf States' accounts 283, 283206, 283211 and 28312, and that the first two of these balances relate to liberalized depreciation for the River Bend nuclear unit.<sup>102</sup> The Louisiana Commission also argues that a direct assignment of liberalized depreciation ADIT for only two of six companies that have this ADIT would be inappropriate. In support of this argument, the Louisiana Commission argues that the Initial Decision focused on Waterford 3 ADIT in Account 282 for liberalized depreciation in suggesting that the Waterford 3 Sale-Leaseback Account 190 ADIT could not be directly assigned because the Waterford 3 Account 282 ADIT would have to be directly assigned as well.<sup>103</sup>

**3. Briefs Opposing Exceptions (Entergy, Arkansas Commission, and Staff)**

51. Entergy argues that the Louisiana Commission's reliance on the Commission's holdings regarding direct assignment is misplaced because those holdings do not stand

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<sup>99</sup> *Id.* at 35.

<sup>100</sup> *Id.* at 35 (citing Ex. LC-20).

<sup>101</sup> *Id.* at 36-37 (citing Tr. 310).

<sup>102</sup> *Id.* at 38-39 (citing Ex. S-3 at 9).

<sup>103</sup> *Id.* (citing Initial Decision, 131 FERC ¶ 63,009 at P 58).

for the proposition that all costs must be directly assigned if possible.<sup>104</sup> Entergy contends that the Louisiana Commission's reliance on Opinion No. 506 is misplaced because in Opinion No. 506, the Commission approved the functionalization of all the costs at issue, notwithstanding that some costs at issue could have been directly assigned.<sup>105</sup>

52. Entergy argues that the Louisiana Commission failed to prove its allegation that “‘using plant ratios to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT results in an under-allocation to the production function.’”<sup>106</sup> Entergy points out that the Initial Decision found that focusing exclusively on a single input does not constitute proof that the functionalization methodology is unjust and unreasonable. Entergy argues that the Initial Decision's holding is correct because any allocation formula that is applied to a cost that potentially could be directly assigned will, by definition, fail to allocate 100 percent of that cost to the function where it could be directly assigned. Entergy argues that this result alone, however, does not mean that use of the allocation formula is inaccurate or is not just and reasonable, and that it is instead necessary to evaluate how the formula allocates all costs that are subject to the allocation, as well as the overall result of the application of the formula. Entergy asserts that the Louisiana Commission's argument ignores the overall impact of the application of the plant ratio, and in particular, ignores that the plant ratio is applied to all ADIT, not just to the variable production ADIT.<sup>107</sup>

53. Entergy asserts that the evaluation of the overall results of the functionalization methodology is complicated by the fact that there are two types of ADIT, Account 190 ADIT, which increases a company's rate base, and Account 282 ADIT, which reduces a

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<sup>104</sup> Entergy's Brief Opposing Exceptions at 17 (citing *Kern River*, Opinion No. 486, 117 FERC ¶ 61,077 at P 294).

<sup>105</sup> *Id.* at 18 (citing Opinion No. 506, 130 FERC ¶ 61,026 at P 56, 88).

<sup>106</sup> *Id.* at 6-7 (quoting Initial Decision, 131 FERC ¶ 63,009 at P 47).

<sup>107</sup> In Entergy's example, Account 190 ADIT totals \$1,000: \$500 associated with variable production costs, \$300 associated with fixed production costs, and \$200 associated with non-production costs. If the ratios of production plant to total plant used to functionalize the \$1,000 of ADIT were 50 percent variable production cost, 30 percent fixed production and 20 percent non-production, the allocation would then match the actual amount of ADIT associated with each function: \$500 to variable production, \$300 to fixed production, and \$200 to non-production. Entergy argues that the Louisiana Commission, however, focuses only on the \$500 of ADIT associated with variable production. *Id.* at 7-8.

company's rate base and thus offsets Account 190 ADIT. Entergy contends that it is necessary to evaluate the impact of the methodology on the allocation of both types of ADIT but that the Louisiana Commission "presented no evidence with respect to offsetting Account 282" and that this failure undercuts the Louisiana Commission's assertion that the evidence it presented proves "that the Bandwidth Formula therefore currently must be under-allocating ADIT to Entergy Louisiana on an overall basis."<sup>108</sup> Entergy therefore asserts that the Louisiana Commission's evidence suffers from the same deficiency that the Commission found in Opinion No. 506 regarding a claim that the functionalization formula at issue resulted in the over-allocation of costs to Entergy Arkansas' production function.<sup>109</sup>

54. Entergy argues that the Initial Decision correctly found that the Louisiana Commission's proposed amendment was not just and reasonable. Entergy asserts that the Louisiana Commission attempts "to shoehorn the Initial Decision's analysis into the confines of [*Louisiana Commission v. FERC*]" and characterizes the Initial Decision as simply relying on unrelated errors in Service Schedule MSS-3 to reject the complaint.<sup>110</sup>

55. Specifically, Entergy argues that the Louisiana Commission ignores that *Louisiana Commission v. FERC* did not address the question of whether a proposed replacement methodology is unjust, unreasonable or unduly discriminatory, but rather addressed the Commission's rejection without a hearing of a complaint brought by the Louisiana Commission. Entergy argues that in the *Louisiana Commission v. FERC* proceeding, the Commission found that the Louisiana Commission had failed to demonstrate that inclusion of interruptible load in the allocation ratio eliminated the rough equalization of costs provided for under the System Agreement, and never addressed whether the Louisiana Commission's proposal to exclude interruptible load was just and reasonable. Entergy contends that the Louisiana Commission attempts to get around the fact that the Initial Decision addressed a different issue than *Louisiana Commission v. FERC* by simply ignoring this difference, but that the fact is that *Louisiana Commission v. FERC* does not even purport to address the issue of whether a proposed replacement methodology is unduly discriminatory or preferential.<sup>111</sup> Entergy also argues that the holding in *Louisiana Commission v. FERC* did not address the type of discrimination claim that was being considered by the Initial Decision here, and that there is no

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<sup>108</sup> *Id.* at 9 (quoting Initial Decision, 131 FERC ¶ 63,009 at P 8-9).

<sup>109</sup> *Id.* at 10 (Opinion No. 506, 130 FERC ¶ 61,026 at P 99).

<sup>110</sup> *Id.* at 20 (citing Louisiana Commission's Brief on Exceptions at 31).

<sup>111</sup> *Id.* at 21.

precedent that addresses the discrimination claims that would support the Louisiana Commission's argument.<sup>112</sup>

56. Entergy asserts that the Louisiana Commission relies on its mischaracterization of *Louisiana Commission v. FERC* to attempt to avoid the effect of *AEP*, where the Commission rejected a proposed "piecemeal approach" to allocating ADIT where one item of ADIT was proposed to be directly assigned to the generation function while all other ADIT would continue to be allocated pursuant to a functionalization mechanism.<sup>113</sup> Entergy contends that *AEP* is much more on point to this proceeding than *Louisiana Commission v. FERC* because in *AEP* the Commission rejected the proposed direct assignment of a single item of ADIT for almost identical reasons relied upon by the Initial Decision.<sup>114</sup> Thus, Entergy argues that the Commission should uphold the Initial Decision's finding that the Louisiana Commission's proposal should be rejected.

57. Entergy asserts that the Louisiana Commission provides an extended discussion that purports to show that none of the other items of ADIT that could be directly assigned offset Waterford 3 Sale-Leaseback Account 190 ADIT. However, Entergy contends that the offset issue is irrelevant to the undue discrimination ruling reached in the Initial Decision. According to Entergy, none of the calculations presented by the Louisiana Commission go to the relevant inquiry in a discrimination claim, namely whether there are differences in the different items of ADIT that would justify the disparate treatment proposed by the Louisiana Commission.<sup>115</sup> Entergy contends that the Louisiana Commission's calculations do not require the Commission to reverse the Initial Decision's holding that the Louisiana Commission's proposal is unduly discriminatory and unjust and unreasonable. Entergy also argues that the Louisiana Commission's calculations are all based on data for the year ending December 31, 2008, and that the Louisiana Commission made no effort to demonstrate that the data for 2008 were similar either to ADIT amounts recorded in previous years, or for ADIT amounts expected to be recorded in future years. Thus, Entergy argues that it is not possible to determine whether calculations based on the year 2008 data are representative of the situation in

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<sup>112</sup> *Id.* at 23.

<sup>113</sup> *Id.* (citing *AEP*, 88 FERC ¶ 61,141 at 61,444-45).

<sup>114</sup> *Id.* at 24 (citing *AEP*, 88 FERC ¶ 61,141 at 61,445).

<sup>115</sup> *Id.* at 25 (citing *Washington Water Power Co. v. FERC*, 201 F.3d 497, 504 (D.C. Cir. 2000); *City of Vernon v. FERC*, 845 F.2d 1042, 1046-47 (D.C. Cir. 1988); *Consolidated Edison Co. v. FERC*, 676 F.2d 763, 773 & n.31 (D.C. Cir. 1982); *Iroquois Gas Transmission System Sys., L.P.*, 59 FERC ¶ 61,094 at 61,354 (1992)).

future years when the Louisiana Commission's proposed replacement method would go into effect.

58. Entergy further argues that the Louisiana Commission presented a distorted description of what the 2008 data shows. According to Entergy, the Initial Decision found that the Waterford 3 Account 282 ADIT reduces rate base and thus offsets the Waterford 3 Sale-Leaseback Account 190 ADIT.<sup>116</sup> Entergy argues that the record evidence shows that in 2008, the Waterford 3 Account 282 ADIT was \$356 million, which more than offsets the \$89.5 million in Waterford 3 Sale-Leaseback Account 190 ADIT.<sup>117</sup> Entergy also contends that the Louisiana Commission is wrong in asserting that the Arkansas Commission's witness agreed with its calculation of the effect of directly assigning the Waterford 3 Account 282 ADIT<sup>118</sup> because he testified that an amendment to the bandwidth formula would need to "exclude all items that you directly assigned in developing that ratio," not just the Waterford 3 Account 282 ADIT.<sup>119</sup> Entergy contends that since there was no proposal to directly assign anything more than the Waterford 3 Sale-Leaseback Account 190 ADIT, there is no evidence as to what the appropriate amendment would be or its impact on the allocation of costs to the production function for the various Entergy Operating Companies. Entergy asserts that whether or not directly assigning all possible ADIT would result in a greater or lesser allocation of costs to production for a particular Entergy Operating Company, the fact remains that it would result in different allocations, and the Louisiana Commission has provided no justification for treating similar items of ADIT in an inconsistent manner.

59. The Arkansas Commission argues that the Commission's policy for direct assignment establishes that functionalization of the Waterford 3 Sale-Leaseback Account 190 ADIT on the basis of the plant ratio is just and reasonable and not unduly discriminatory or preferential. It argues that in *Kern River*,<sup>120</sup> the Commission set forth the standard for direct assignment, stating that "the test is specifically whether the method of directly assigning the cost is consistent and the relationship is obvious and reviewable."<sup>121</sup> The Arkansas Commission states that because Service Schedule MSS-3

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<sup>116</sup> *Id.* at 26 (citing Initial Decision, 131 FERC ¶ 63,009 at 26).

<sup>117</sup> *Id.* (citing Ex. S-3 at 11, 13).

<sup>118</sup> *Id.* at 27 (citing Louisiana Commission's Brief on Exceptions at 35).

<sup>119</sup> *Id.* (citing Tr. at 255).

<sup>120</sup> Arkansas Commission's Brief Opposing Exceptions at 8-9 (citing *Kern River*, Opinion No. 486, 117 FERC ¶ 61,077 at P 290).

<sup>121</sup> *Id.*

section 30.12 currently functionalizes the bandwidth formula includable portion of each Entergy Operating Company's allowable ADIT recorded in Accounts 190, 281, and 282 to the production function using the plant ratio, the functionalization of Waterford 3 Sale-Leaseback Account 190 ADIT is consistent with the manner in which all variable ADIT is functionalized to the production function for purposes of the bandwidth formula, and is consistent with *Kern River*. The Arkansas Commission argues that the Initial Decision properly determined that Waterford 3 Sale-Leaseback Account 190 ADIT is an indirect cost, and therefore, allocation by formula as opposed to direct assignment is just and reasonable.<sup>122</sup> The Arkansas Commission also argues that it is not feasible to directly assign all ADIT amounts, and therefore, the functionalization of all ADIT for purposes of the rough production cost equalization bandwidth calculation, including the Waterford 3 Sale-Leaseback Account 190 ADIT, is just and reasonable.

60. The Arkansas Commission argues that the Louisiana Commission is wrong in asserting that the Commission's decisions in *Kern River*, *AEP*, and Opinion No. 506 support its position. Specifically, the Arkansas Commission argues that *Kern River* demonstrates that the Louisiana Commission's direct assignment claim is completely out of sync with the Commission's direct assignment policy. It argues that *AEP* does not support the Louisiana Commission's argument because in *AEP*, the Commission affirmed an Initial Decision that rejected a proposal by customers to directly assign the Sale-Leaseback ADIT in Account 190 out of the transmission rate base, because all other ADIT was functionalized based on the plant ratio. The Arkansas Commission also argues that Opinion No. 506 also demonstrates that the Louisiana Commission's piecemeal direct assignment proposal is unjust and unreasonable because in Opinion No. 506, the Commission "confirm[ed] that the Commission prefers direct assignment and employs ratios only when a direct assignment is not feasible."<sup>123</sup>

61. The Arkansas Commission argues that, having abandoned its failed assertion that the Waterford 3 Sale-Leaseback Account 190 ADIT should be cherry-picked for direct assignment because it is unique, the Louisiana Commission now for the first time contends that the fact that additional ADIT subaccounts could be directly assigned to a single function for bandwidth purposes does not matter because none of these amounts offset the Louisiana Commission's proposed remedy of directly assigning the Waterford 3 Sale-Leaseback Account 190 ADIT.<sup>124</sup> The Arkansas Commission asserts that the calculations and analysis of additional subaccounts that could be directly assigned that the Louisiana Commission has included in its brief are not in the record in this

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<sup>122</sup> *Id.* (citing Initial Decision, 131 FERC ¶ 63,009 at P 57).

<sup>123</sup> *Id.* at 15 (quoting Louisiana Commission's Brief on Exceptions at 26).

<sup>124</sup> *Id.* at 12 (citing Louisiana Commission's Brief on Exceptions at 32-40).

proceeding because they were raised for the first time in the Louisiana Commission's brief and that, as such, neither the parties nor the Initial Decision had any opportunity to challenge the Louisiana Commission's new calculations of the impact of direct assignment. The Arkansas Commission argues that, in any event, the Louisiana Commission's argument fails because: (1) the Louisiana Commission's "offsetting" theory misses the issue in this proceeding, which is "whether Service Schedule MSS-3 should be amended to include a direct assignment of the sale-leaseback ADIT, along with other costs of the sale-leaseback;" (2) the Louisiana Commission's focus on which of the Operating Companies stand to gain or lose under various scenarios based on 2008 data does nothing to demonstrate that the Louisiana Commission's cherry-picking proposal is a just and reasonable modification to the bandwidth formula because the results of the application of the bandwidth formula change from year to year; and (3) the Louisiana Commission's contention that all other ADIT subaccounts that exclusively relate to particular functions and therefore are subject to direct assignment were identified in this proceeding is unsupported and incorrect.<sup>125</sup>

62. The Arkansas Commission argues that the Louisiana Commission's new "offsetting" theory is without merit because it completely ignores and contradicts the Commission's direct assignment policy, which is that indirect costs should be functionalized rather than directly assigned, and that direct assignment is appropriate where feasible and consistent.<sup>126</sup> The Arkansas Commission contends that the Louisiana Commission's direct assignment proposal is inconsistent with the allocation method for every other ADIT category, grossly infeasible given that there are an overwhelming number of ADIT subaccounts (600) of which 182 are included in the variable ADIT for the rough production cost equalization calculation, and wrong given that ADIT is an indirect cost.

63. Staff asserts that the two methodologies discussed in this proceeding, functionalization using plant ratios and direct assignment, in general are both reasonable methodologies to allocate costs consistent with Commission precedent. However, Staff argues that with respect to the bandwidth formula, the Commission has made the determination that it is just and reasonable for the bandwidth formula to use the functional allocation methodology based on plant ratios.<sup>127</sup> Staff also agrees with the Presiding Judge's finding that the fact that Waterford 3 Sale-Leaseback Account 190 ADIT is production-related or could be directly assigned does not make it just,

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<sup>125</sup> *Id.* at 13 (citing Tr. at 261:17-267:5; Ex. S-1 at 19:2-20:17; Tr. at 221:25-225:23).

<sup>126</sup> *Id.* at 14 (citing *Kern River*, Opinion No. 486, 117 FERC ¶ 61,077).

<sup>127</sup> Staff's Brief Opposing Exceptions at 17.

reasonable, not unduly discriminatory or preferential to directly assign it to production in the context of the bandwidth formula, without affording similar treatment to other like items. Staff argues that the Presiding Judge was correct in finding that a more precise direct assignment methodology would be just and reasonable only if it applied equally to all ADIT balances and all Operating Companies.<sup>128</sup>

64. In addition, Staff argues that the Presiding Judge correctly relied on *AEP* and Opinion No. 506. Staff asserts that in Opinion No. 506, the Commission adopted a functionalization ratio that applied to all Operating Companies in a consistent manner and did not treat similarly-situated production costs and expenses differently. It also argues that in *AEP*, the Commission addressed the nearly-identical issue of whether ADIT arising from the sale and leaseback of American Electric Power Service Corporation's (AEP) Rockport 2 power plant should be singled out for direct assignment to production in AEP's transmission owner tariff or should be functionalized to transmission, and rejected outright the customers' "piecemeal" approach, stating that it "improperly focuse[d] on a change to only one component of ADIT."<sup>129</sup> Staff asserts that this case should be decided in the same manner as *AEP* because it is factually similar to *AEP*. According to Staff, the Louisiana Commission's argument that *AEP* addressed a transmission tariff, whereas the bandwidth formula deals with production costs, is a distinction without any difference because the customers' proposal still involved directly assigning the ADIT in question based on its function.

65. Staff argues that the context and purpose of Waterford 3 Sale-Leaseback Account 190 demonstrate that the current functionalization of Waterford 3 Sale-Leaseback Account 190 ADIT is just and reasonable. Staff points out that the Louisiana Commission does not dispute that a host of other ADIT balances are also functionalized using the plant ratio, including ADIT balances associated with a single production asset.<sup>130</sup> Staff asserts that the Louisiana Commission fails to establish how Waterford 3 Sale-Leaseback Account 190 ADIT is meaningfully unique from those balances such that it is unjust and unreasonable to treat Waterford 3 Sale-Leaseback Account 190 ADIT in exactly the same manner as those other, similarly-situated ADIT balances. Staff also argues that while the Louisiana Commission points out that the current formula excludes \$38.5 million of production rate base from the bandwidth calculation of Entergy Louisiana, depriving Entergy Louisiana of greater bandwidth receipts, the purpose of the bandwidth formula is to roughly equalize the production costs of all Entergy Operating

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<sup>128</sup> *Id.* at 22 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 144; Initial Decision, 131 FERC ¶ 63,009 at P 54).

<sup>129</sup> *Id.* at 23 (quoting *AEP*, 88 FERC ¶ 61,141 at 61,446).

<sup>130</sup> *Id.* at 19 (citing Ex. AC-4 at 3-4; Tr. 302; Ex. LC-9 at 41).

Companies, not to recognize greater production costs for Entergy Louisiana by giving it the necessary special dispensation to recognize costs differently than the other Operating Companies.<sup>131</sup> Staff argues that the Presiding Judge correctly held that the Louisiana Commission's allegations established only that the Louisiana Commission's proposed alternative direct assignment method might assign a greater portion of Waterford 3 Account 190 ADIT to production.<sup>132</sup>

66. Staff contends that functionalization is a Commission-approved methodology within the bandwidth methodology and that the Louisiana Commission fails to demonstrate how functionalization misallocates Waterford 3 Account 190 ADIT but does not misallocate the many other similarly-situated ADIT balances to which it is applied. Staff argues that the Louisiana Commission merely demonstrates that a direct assignment of Waterford 3 Account 190 ADIT would provide greater bandwidth receipts to Entergy Louisiana than under the current methodology. Staff argues that the Louisiana Commission errs in relying on the Hearing Order in Docket No. EL08-51-000, which approved the amendment to remove the Waterford 3 Capital Lease from the plant ratio used to allocate ADIT to the production function in the bandwidth formula, because this amendment applied equally to all Operating Companies.<sup>133</sup> Staff argues that as a result, both before and after the amendment, each Operating Company's ADIT balances were functionalized using the exact same plant ratio, and that the amendment merely corrected an error in that ratio. Staff contends that this is the exact opposite of the Louisiana Commission's proposal, which is to modify the formula so that the plant ratio applies to all Operating Companies except Entergy Louisiana, which would have special dispensation to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT.

67. Staff also argues that the Louisiana Commission's claim that the Presiding Judge could reject its proposal only if he found that other ADIT balances would "offset" its

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<sup>131</sup> *Id.* at 19-20 (citing Opinion No. 480, 111 FERC ¶ 61,311, at P 144 (2005), *affirmed*, Opinion No. 480-A, 113 FERC ¶ 61,282, at P 46 (2005), *aff'd in part and remanded in part, sub. nom. Louisiana Public Service Commission v. FERC*, 522 F.3d 378 (2008)).

<sup>132</sup> *Id.* (citing Initial Decision, 131 FERC ¶ 63,009 at P 44-48). Staff also notes that in setting the matter for hearing, the Commission noted that there were issues of material fact that the hearing needed to resolve relevant to the issue of whether Service Schedule MSS-3 should be amended to include direct assignment of the sale-leaseback ADIT, and that this necessarily suggests that the Louisiana Commission needed to prove at least some disputed facts in order to meet its burden, i.e., more than just the allegations in its complaint. *Id.* at n.54.

<sup>133</sup> *Id.* at 25 (citing *Louisiana Commission v. Entergy*, 124 FERC ¶ 61,010).

impact severely distorts the applicability of the holding in *Louisiana Commission v. FERC* to this proceeding. Staff argues that the complaint brought by the Louisiana Commission in 1996 and reviewed by the D.C. Circuit in *Louisiana Commission v. FERC* predates the establishment of the bandwidth formula in 2005.<sup>134</sup> Thus, Staff argues that if the Louisiana Commission believed that Entergy was no longer maintaining rough production cost equalization on its system, the only procedural avenue that the Louisiana Commission would have to remedy this situation would be to file a section 206 complaint against the rate structure of the Entergy System Agreement. Staff asserts that this was exactly the type of complaint that the Louisiana Commission filed with regard to the effect that including interruptible load was having on Entergy system production cost equalization since the System Agreement had last been examined.<sup>135</sup>

68. Staff asserts that Commission orders subsequent to *Louisiana Commission v. FERC* have identified section 206 complaints such as that filed by the Louisiana Commission here as a means for modifying the bandwidth formula itself to maintain rough production cost equalization prospectively,<sup>136</sup> and not as a means for maintaining rough production cost equalization by examining prior years' costs, which is the exclusive province of the yearly implementation filing. Staff therefore argues that it is incorrect to claim, as the Louisiana Commission claims, that *Louisiana Commission v. FERC* limits the Presiding Judge's discretion to adopt or reject an amendment based on the monetary impact that the amendment would have. Staff contends that the monetary impact of the Louisiana Commission's proposal is not dispositive, and that the proper standard for assessing the Louisiana Commission's proposed amendment is whether the amendment would result in a just and reasonable formula rate.

#### **4. Commission Determination**

69. We affirm the Presiding Judge's determination to deny the Louisiana Commission's proposal to revise Service Schedule MSS-3 to directly assign the Waterford 3 Sale-Leaseback Account 190 ADIT to the production function. As discussed below, we disagree with the Louisiana Commission's argument that direct assignment of the Waterford 3 Sale-Leaseback Account 190 ADIT is mandated by Commission policy, and we agree with the Presiding Judge that it would be unjust,

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<sup>134</sup> *Id.* at 26-27 (citing *Louisiana Commission v. FERC*, 184 F.3d at 894; Opinion No. 480, 111 FERC ¶ 61,311).

<sup>135</sup> *Id.* at 27 (citing *Louisiana Commission v. FERC*, 184 F.3d at 895).

<sup>136</sup> *Id.* at 29 (citing *Louisiana Public Service Commission v. Entergy Services, Inc.*, 117 FERC ¶ 61,203, at P 69 (2006)).

unreasonable, unduly discriminatory or preferential to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT.

70. The Louisiana Commission's argument that direct assignment of the Waterford 3 Sale-Leaseback Account 190 ADIT is mandated by Commission policy favoring direct cost assignment where feasible is simply wrong. In *Kern River*, the case primarily relied upon by the Louisiana Commission, the Commission stated that "the Commission's general policy is that direct costs should always be directly assigned and that indirect costs should be allocated by formula. This policy is consistent with the concept that costs should follow cost causation."<sup>137</sup> The Commission further explained that "[t]he test is specifically whether the method of directly assigning the cost is consistent and the relationship obvious and reviewable."<sup>138</sup> As the Presiding Judge explains, however, the Waterford 3 Sale-Leaseback Account 190 ADIT is an indirect cost, not a direct cost that *Kern River* indicates should be directly assigned. Indeed, contrary to the Louisiana Commission's argument, *Kern River* provides that indirect costs, such as the Waterford 3 ADIT at issue here, should be allocated just as the formula in Entergy's existing and Commission-accepted Service Schedule MSS-3 provides.<sup>139</sup> Opinion No. 506, also relied upon by the Louisiana Commission, does not support the Louisiana Commission's proposal for direct assignment. In Opinion No. 506 the Commission adopted a methodology to be applied consistently across all of the Entergy Operating Companies.<sup>140</sup> However, directly assigning only Waterford 3 Sale-Leaseback Account 190 ADIT while functionalizing all the other ADIT sub-accounts as the Louisiana Commission proposes would result in inconsistent treatment of ADIT sub-accounts in the ADIT component of the bandwidth formula.<sup>141</sup>

71. Further, the Louisiana Commission's argument that *AEP*, relied upon by the Presiding Judge to support his finding that it would be arbitrary, unduly discriminatory and preferential to directly assign Waterford 3 ADIT without also directly assigning the other ADIT subaccounts, is inapplicable here is unavailing. In *AEP*, the Commission rejected an attempt to single out sale-leaseback ADIT in Account 190 for direct

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<sup>137</sup> *Kern River*, Opinion No. 486, 117 FERC ¶ 61,077 at P 290.

<sup>138</sup> *Id.*

<sup>139</sup> Initial Decision, 131 FERC ¶ 63,009 at P 57 (citing Tr. 259-60).

<sup>140</sup> Opinion No. 506, 130 FERC ¶ 61,026 at P 88.

<sup>141</sup> Moreover, there is no record in this proceeding that demonstrates that directly assigning the approximately 600 ADIT sub-accounts would be just, reasonable and not unduly discriminatory or preferential.

assignment while using the plant ratio to allocate other components of ADIT. As the Presiding Judge explains, AEP functionalized ADIT—including ADIT related to the sale and leaseback of a generating facility—using the plant ratio, thereby assigning a portion of the ADIT to the transmission function.<sup>142</sup> A group of wholesale customers proposed to remove the sale-leaseback ADIT in Account 190 from transmission rate base because they had not received offsetting gains related to the sale-leaseback. AEP and Trial Staff opposed that proposal, arguing that the customers had singled out one item (sale-leaseback ADIT) for direct assignment to generation while using the plant ratio to allocate everything else.<sup>143</sup> The Commission rejected the wholesale customers' proposal, finding it to be “a piecemeal approach that improperly focuses on a change to only one component of ADIT.”<sup>144</sup>

72. By arguing that Waterford 3 Sale-Leaseback Account 190 ADIT should be directly assigned to the production function while all other ADIT sub-accounts are functionalized using the plant ratio, the Louisiana Commission is attempting to cherry-pick Waterford 3 Sale-Leaseback Account 190 ADIT in the same manner as the wholesale customers in *AEP*. However, as explained above, directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT to the production function would be treating it differently from all other ADIT sub-accounts, and would be inconsistent with *AEP*, where the Commission rejected a “piecemeal approach” to allocating ADIT. The Louisiana Commission's assertion that *AEP* is inapplicable because it involved a proposal to remove entirely certain production-related ADIT from a transmission tariff, and was not a request for a direct assignment as is at issue in this proceeding, is also unavailing. We find that the Louisiana Commission's argument is a distinction without a difference and conclude that the finding in *AEP* rejecting a piecemeal approach to treating ADIT supports the Initial Decision and our finding here. We also reject the Louisiana Commission's argument that *AEP* is inapplicable to this case due to the D.C. Circuit's ruling in *Louisiana Commission v. FERC*.<sup>145</sup> The Louisiana Commission's argument that *Louisiana Commission v. FERC* renders *AEP* inapplicable to this case is wrong because, unlike *Louisiana Commission v. FERC*, the Commission did not dismiss

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<sup>142</sup> Initial Decision, 131 FERC ¶ 63,009 at P 33.

<sup>143</sup> *AEP*, 88 FERC ¶ 61,141, at 61,445.

<sup>144</sup> *Id.* at 61,446.

<sup>145</sup> Louisiana Commission's Brief on Exceptions at 27.

the Louisiana Commission's complaint in this case on the grounds that it did not propose an alternative overall methodology.<sup>146</sup>

73. In addition, we affirm the Presiding Judge's finding that because Account 190 ADIT increases Entergy Louisiana's rate base and Account 282 ADIT decreases Entergy Louisiana's rate base,<sup>147</sup> directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT while continuing to functionalize Account 282 ADIT would skew Account 282's offsetting effect on Account 190. As the Presiding Judge explains, directly assigning only Waterford 3 Sale-Leaseback Account 190 ADIT would change the bandwidth remedy payment/receipt dynamic among the Operating Companies in a manner inconsistent with the bandwidth formula.<sup>148</sup>

74. The Louisiana Commission's argument that its direct assignment proposal is supported by its assertion that Entergy either reviews and directly assigns other ADIT out of the bandwidth calculation or directly assigns other ADIT to production under its OATT is also unavailing. As the Presiding Judge explains, the record establishes that the (variable cost) ADIT definition reflected in Service Schedule MSS-3 expressly requires Entergy to exclude from the bandwidth calculation any "amounts not generally and properly includable for FERC cost of service purposes."<sup>149</sup> Because the record also establishes that the exclusion of amounts not generally and properly includable for Commission cost of service purposes are made without regard to function, it is not accurate to characterize this exclusion as either elective on Entergy's part or as a direct cost assignment out of the bandwidth calculation.<sup>150</sup> As the Presiding Judge explains, any assertion that Entergy directly assigns other ADIT to production under its OATT is inaccurate for the same reasons.

75. Further, the Louisiana Commission's argument that Waterford 3 Sale-Leaseback Account 190 ADIT is "unique" for purposes of direct assignment versus functionalization

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<sup>146</sup> In *Louisiana Commission v. FERC*, the D.C. Circuit found that the Commission was not permitted to deny the Louisiana Commission's complaint based on its finding that the Louisiana Commission had not established that the other changes to the Entergy system costs had not offset the destabilizing effects of including interruptible load. *Louisiana Commission v. FERC*, 184 F.3d at 899 (D.C. Cir. 1999).

<sup>147</sup> Ex. AC-1 at 5; Ex. ESI-1 at 25-26, 33-34; Tr. 84-86.

<sup>148</sup> Initial Decision, 131 FERC ¶ 63,009 at P 58 (citing Ex. AC-1 at 5).

<sup>149</sup> *Id.* P 50 (quoting Ex. ESI-4 at 10).

<sup>150</sup> *Id.* See Tr. at 219-20.

using plant ratios also fails. As the Presiding Judge explains, “unique” is defined as “being the only one,”<sup>151</sup> and the identification of Waterford 3 Sale-Leaseback Account 190 ADIT with production and its suitability for direct assignment are the predominate bases on which the Louisiana Commission characterizes it as unique.<sup>152</sup> Because Waterford 3 Sale-Leaseback Account 190 ADIT is not the only ADIT reflected in subaccounts used for the bandwidth formula, we agree with the Presiding Judge that “while the underlying Waterford 3 Sale-Leaseback transaction may be characterized as unique to Entergy Louisiana among the Entergy Operating Companies, the [Account 190] ADIT associated with that transaction/reflected in Account 190 is no more ‘unique’ for [b]andwidth [f]ormula purposes than ADIT reflected in any other discrete sub-account(s).”<sup>153</sup> For this reason, we affirm the Presiding Judge’s determination that Waterford 3 Sale-Leaseback Account 190 ADIT is not unique in any meaningful respect.<sup>154</sup>

76. Finally, we reject the Louisiana Commission’s calculations and analysis of additional subaccounts that it asserts could be directly assigned because this information is being raised for the first time in its brief on exceptions. We therefore find that the Louisiana Commission’s arguments in this regard are improperly raised.<sup>155</sup>

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<sup>151</sup> Initial Decision, 131 FERC ¶ 63,009 at P 55 (citing Merriam-Webster’s Collegiate Dictionary 1292 (10<sup>th</sup> ed. 1998)).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* (emphasis omitted).

<sup>154</sup> *Id.*

<sup>155</sup> See, e.g., *Bluegrass Generation Co., L.L.C.*, 118 FERC ¶ 61,214, at P 95, *reh’g denied*, 121 FERC ¶ 61,018 (2007) (finding that an argument was improperly raised where the party raised the argument for the first time in its Brief on Exceptions).

The Commission orders:

The Initial Decision is hereby affirmed, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.