

142 FERC ¶ 61,012
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Arkansas Public Service Commission

Docket No. EL09-43-002

v.

Entergy Corporation
Entergy Services, Inc.
Entergy Louisiana, LLC
Entergy Arkansas, Inc.
Entergy Mississippi, Inc.
Entergy New Orleans, Inc.
Entergy Gulf States Louisiana, L.L.C.
Entergy Texas, Inc.

ORDER ON REHEARING

(Issued January 3, 2013)

1. In this order, we address the Louisiana Public Service Commission's (Louisiana Commission) request for rehearing of the October 7, 2011 Order¹ denying requests for rehearing of the Commission's order denying a complaint² by the Arkansas Public Service Commission (Arkansas Commission). For the reasons discussed below, we reject the Louisiana Commission's request for rehearing of the October 7 Rehearing Order.

¹ *Arkansas Pub. Serv. Comm'n v. Entergy Corp., et al.*, 137 FERC ¶ 61,030 (2011) (October 7 Rehearing Order).

² *Arkansas Pub. Serv. Comm'n v. Entergy Corp., et al.*, 128 FERC ¶ 61,020 (2009) (Order Denying Complaint).

I. Background and Procedural History

A. Introduction to the Entergy System

2. In Opinion Nos. 480 and 480-A,³ the Commission approved a numerical bandwidth of +/- 11 percent of the Entergy Services, Inc. (Entergy) system average production cost in order to maintain the rough equalization of production costs among the Entergy Operating Companies (Operating Companies).⁴ On November 17, 2006, in Docket No. EL01-88-004, the Commission accepted amendments to Entergy's Service Schedule MSS-3 of the Entergy System Agreement (System Agreement)⁵ to include a formula to calculate bandwidth payments/receipts to achieve rough equalization of production costs.⁶

3. On May 29, 2007, in Docket No. ER07-956-000, Entergy filed, in accordance with Service Schedule MSS-3 of the System Agreement, the bandwidth payments and receipts using data as reported in the Operating Companies' 2006 FERC Form No. 1 – its first annual bandwidth filing. The filing was set for hearing by the Commission.⁷ The Presiding Judge issued his Initial Decision on September 23, 2008.⁸

³ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at PP 173-184 (Opinion No. 480), *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282, at PP 70-76 (2005) (Opinion No. 480-A), *order on compliance*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047 (2011), *order dismissing reh'g*, 137 FERC ¶ 61,048 (2011).

⁴ The Entergy Operating Companies are: Entergy Louisiana, LLC, Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy New Orleans, Inc., Entergy Gulf States Louisiana, L.L.C., and Entergy Texas, Inc.

⁵ The Entergy System Agreement is an interconnection and pooling agreement that provides for the joint planning, construction and operation of the Operating Companies' facilities and maintains a coordinated power pool among them.

⁶ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006).

⁷ *Entergy Services, Inc.*, 120 FERC ¶ 61,094 (2007).

⁸ *Entergy Services, Inc.*, 124 FERC ¶ 63,026 (2008) (Initial Decision).

4. In the relevant portion of the Initial Decision, the Presiding Judge required Entergy to change the depreciation rates approved by retail regulators in the bandwidth filing for certain nuclear generating units to conform to a previous Commission holding that nuclear depreciation and decommissioning expenses should be consistently measured by the remaining life left in the license set by the Nuclear Regulatory Commission (NRC). The Presiding Judge ordered Entergy to recalculate the nuclear depreciation and decommissioning expenses for the applicable Operating Companies and to readjust the bandwidth calculation to reflect the actual operational life as determined by the NRC-granted license.⁹

5. On January 11, 2010, the Commission issued Opinion No. 505 affirming in part and reversing in part the Initial Decision.¹⁰ The Commission reversed the Presiding Judge's determination on depreciation, finding that section 30.12 of Service Schedule MSS-3 mandates that Entergy use the actual depreciation data that exists on the Operating Companies' books included on the FERC Form No. 1.¹¹ Additionally, the Commission held that, while it has authority to change the depreciation expenses included in the bandwidth formula, it would not do so in an annual bandwidth implementation proceeding, i.e., a proceeding established to determine the production costs of the Operating Companies.¹² Rather, any changes to the bandwidth formula would require a future Federal Power Act (FPA) section 205 or 206 filing.¹³ The Commission further noted its policy for changing depreciation rates used in formula rates, stating that if Entergy desires to change the depreciation rates reflected on its books

⁹ See Initial Decision, 124 FERC ¶ 63,026 at PP 447, 492.

¹⁰ *Entergy Services, Inc.*, 130 FERC ¶ 61,023 (2010) (Opinion No. 505), *order on reh'g*, 139 FERC ¶ 61,103 (2012) (Opinion No. 505-A).

¹¹ Opinion No. 505, 130 FERC ¶ 61,023 at P 170.

¹² *Id.* PP 172-173. The Commission stated that the annual bandwidth filing is “not about what production costs would have been if different depreciation rates had been in effect in 2006, but simply about applying the formula using actual 2006 data.” *Id.* P 173.

¹³ *Id.* PP 172-173. The Commission also stated that this requirement to use the FPA section 205 or 206 process “includes amendments to correct any errors that may be discovered in the underlying methodology of Exhibits ETR-26 and ETR-28.” *Id.* P 170.

and to include such depreciation rate changes in its bandwidth calculation, it must make a section 205 filing.¹⁴

6. The Commission addressed the depreciation issue again on March 10, 2010, in an order denying interlocutory appeal in the third bandwidth proceeding.¹⁵ In that order, the Commission noted that the annual bandwidth proceeding's purpose is to assess whether Entergy properly implemented the bandwidth formula, not whether the formula itself is just and reasonable.¹⁶ The Commission reiterated that any modifications to the currently-effective Service Schedule MSS-3 bandwidth formula must be made via a separate filing under section 205 or section 206 of the FPA.¹⁷ Citing Order No. 618, the Commission again stated that depreciation rates included in a formula rate do not adjust automatically just because the depreciation rates underlying the FERC Form No. 1 numbers change; rather, a separate section 205 filing is required to change such rates.¹⁸

7. Subsequent to these orders, on October 7, 2011, the Commission issued Opinion No. 514, which addressed Entergy's second bandwidth filing. There, the Commission rejected requests to examine the justness and reasonableness of depreciation inputs within the bandwidth proceedings themselves. The Commission addressed arguments on whether the definitions of the depreciation variables allowed the Commission to substitute its own depreciation expenses for those approved by retail regulators. The Commission found that the references to Commission jurisdiction in these definitions refer to depreciation expenses charged to traditional wholesale customers that were approved by the Commission, rather than being a reference to the Commission

¹⁴ *Id.* n.205; *see also Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104, at n.25 (2000) (Order No. 618).

¹⁵ *Entergy Services., Inc.*, 130 FERC ¶ 61,170 (2010) (Order Denying Interlocutory Appeal).

¹⁶ *Id.* P 20.

¹⁷ Notably, the Commission acknowledged that statements in prior orders could be interpreted as suggesting that "parties had the opportunity in Entergy's annual bandwidth filings to challenge the reasonableness of any cost inputs in the Service Schedule MSS-3 bandwidth formula, including the depreciation rates effective for Entergy's annual bandwidth filings, but that was prior to the Commission's experience with the first annual filing, and may have been 'unintentionally misleading.'" *Id.*; *see also* October 7 Rehearing Order, 137 FERC ¶ 61,030 at P 21.

¹⁸ *Entergy Services., Inc.*, 130 FERC ¶ 61,170 at n.32.

substituting its own depreciation expenses in the bandwidth proceedings for those otherwise determined by retail regulators that have been adopted for use in the bandwidth formula in Service Schedule MSS-3.¹⁹ Thus, the variables were interpreted so that, for purposes of the bandwidth formula, depreciation rates approved by retail regulators are required to be reflected in calculations implementing the bandwidth formula.

8. Opinion No. 514 also found that the presiding judge's ruling calling for use of updated depreciation studies to determine inputs for the bandwidth formula (i.e., depreciation values other than those determined by retail regulators that have been adopted for use in the bandwidth formula in Service Schedule MSS-3) was a challenge to the bandwidth formula, and not a challenge to the inputs to the formula. The Commission held that "[r]eplacing actual state approved depreciation expense inputs required for use by the bandwidth formula with reconstructed inputs would explicitly alter the depreciation component of the bandwidth."²⁰

9. On May 7, 2012, the Commission issued Opinion No. 505-A.²¹ The Commission affirmed its findings on depreciation, stating that the bandwidth formula mandates the use of depreciation rates reported in the FERC Form No. 1, reflecting, in part, state regulator approved depreciation rates as provided in the bandwidth formula. Thus, in order to calculate a just and reasonable rate Entergy was required to use the state regulator approved depreciation expenses as adopted for use for the bandwidth formula in Service Schedule MSS-3. The Commission rejected the Louisiana Commission's argument that the Commission was abdicating its statutory duty by declining to reconsider the inputs required by the bandwidth formula in an annual bandwidth proceeding.²²

10. Also on May 7, 2012, the Commission issued Opinion No. 519, addressing a complaint filed by the Louisiana Commission under section 206 seeking to modify section 30.12 of Service Schedule MSS-3, which provides for the use of wholesale and retail depreciation expenses.²³ In Opinion No. 519, the Commission affirmed the

¹⁹ *Entergy Services, Inc.*, 137 FERC ¶ 61,029, at PP 48-49 (2011) (Opinion No. 514).

²⁰ *Id.* P 51.

²¹ Opinion No. 505-A, 139 FERC ¶ 61,103.

²² *Id.* P 50.

²³ *See Louisiana Pub. Serv. Comm'n v. Entergy*, 139 FERC ¶ 61,107 (2012) (Opinion No. 519).

determination of the presiding judge that the Louisiana Commission had not met its burden of proof under section 206 to show the existing bandwidth formula is unjust and unreasonable or unduly discriminatory or preferential. Specifically, the Commission referenced Opinion No. 514's clarification that the definitions of the bandwidth formula depreciation variables require depreciation rates approved by retail regulators to be reflected in calculations implementing the bandwidth formula.²⁴ The Commission found that in light of that interpretation of the depreciation variables, it was unnecessary for Entergy to make a section 205 filing in order to seek approval to include revised depreciation rates adopted by any of its retail regulators in the bandwidth formula and clarified that the Commission's policy on changes in depreciation in formula rates established in Order No. 618 does not apply to the bandwidth formula.²⁵ The Commission further explained that it was reversing statements to the contrary in Opinion No. 505 and the Order Denying Interlocutory Appeal.²⁶

11. In Opinion No. 519, the Commission also agreed with the presiding judge that the Commission has the authority to adopt retail-determined depreciation rates in the jurisdictional bandwidth formula. In distinguishing the Commission's findings in Opinion No. 519 from those in Opinion No. 505, the Commission explained that in Opinion No. 505:

[t]he Commission stated that any changes to the bandwidth formula would require a future FPA section 205 or 206 filing. As the Commission has subsequently clarified, if parties believe that Entergy inputted data from the wrong parts of FERC Form [No.] 1 in its bandwidth formula, or that the data used was incorrectly calculated, such objections are properly raised in an annual bandwidth proceedings. Conversely, if parties believe that the methodology in Service Schedule MSS-3 with respect to depreciation expenses should be changed, they should file a separate section 206 complaint (or, in the case of Entergy, a section 205 filing).²⁷

²⁴ *Id.* P 26.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* P 110 (citing Opinion No. 514, 137 FERC ¶ 61,029 at P 27).

12. The Commission has also found that parties may challenge the prudence of cost inputs to the bandwidth formula in bandwidth proceedings.²⁸ This approach was followed in the first annual bandwidth proceeding where a prudence issue was litigated and decided in Opinion No. 505.²⁹

B. The Arkansas Commission's Complaint

13. Prior to the issuance of Opinion No. 505, on March 20, 2009, the Arkansas Commission filed a complaint (Complaint) in Docket No. EL09-43-000, pursuant to sections 206 and 306 of the FPA,³⁰ against Entergy Corporation and the Operating Companies. In the Complaint, the Arkansas Commission sought to modify certain text in section 30.12 of Service Schedule MSS-3 to the Entergy System Agreement relating to depreciation expense, nuclear decommissioning expense, and accumulated provision for depreciation and amortization.

14. The Arkansas Commission asserted that this modification would remove certain language from section 30.12 that had been construed by the presiding judge in the first annual bandwidth filing in Docket No. ER07-956-000 to provide this Commission with authority to substitute imputed depreciation and decommissioning expenses for those actual expenses that are approved by retail regulators and, as such, reported on the FERC Form No. 1 filings. The Arkansas Commission argued that such substitution can lead to unintended, perverse outcomes, rendering Service Schedule MSS-3 unjust and unreasonable.

15. In its complaint, the Arkansas Commission stated, for example, that Nuclear Accumulated Provision for Depreciation is defined in section 30.12 as: "Nuclear Accumulated Provision for Depreciation and Amortization excluding [Asset Retirement Obligations] associated with [Nuclear Production Plant in Service] above, as recorded in FERC Accounts 108 and 111 (consistent with the accounting related to Statement of Financial Accounting Standards (SFAS) 143 approved by the retail regulator having jurisdiction over the Company, *unless the [Commission] determines otherwise.*" (emphasis added). In addition, it noted that Nuclear Depreciation and Amortization Expense is defined in section 30.12 as: "Nuclear Depreciation and Amortization Expense associated with [Nuclear Production Plant in Service] as recorded in Accounts 403 and 404 and Decommissioning Expense, as approved by Retail Regulators, *unless the*

²⁸ *Entergy Services, Inc.*, 137 FERC ¶ 61,019, at P 13 (2011).

²⁹ *See* Opinion No. 505, 130 FERC ¶ 61,023.

³⁰ 16 U.S.C. §§ 824e, 825e (2006).

jurisdiction for determining the depreciation and/or decommissioning rate is vested in the [Commission] under otherwise applicable law.” (emphasis added). The Arkansas Commission sought removal of the italicized language from Service Schedule MSS-3 and similar language in the other definitions at issue.

16. On July 14, 2009, the Commission issued an order denying the Complaint. The Commission stated that most of the Arkansas Commission’s arguments were directed at the Initial Decision issued in Docket No. ER07-956-000 and were beyond the scope of the Complaint.³¹ The Order Denying Complaint further stated that the Commission had acted in Opinion Nos. 480 and 480-A pursuant to its authority under the FPA to regulate wholesale transactions of electricity in interstate commerce. The Commission determined that the allocation among Operating Companies of production costs was no longer just and reasonable, and established the rough production cost equalization bandwidth as a remedy. The Order Denying Complaint stated that in order for the bandwidth calculation to provide a just and reasonable result under the FPA, the Commission must ensure that the inputs used to calculate the bandwidth are also just and reasonable. The Commission concluded that the authority to determine the payments under the bandwidth necessarily must include the ability to examine the inputs used to calculate the bandwidth, including nuclear depreciation, decommissioning expenses, and accumulated provision for depreciation and amortization.³² The Commission found that the language at issue was appropriate and consistent with the Commission’s authority under the FPA. The Order Denying Complaint concluded that the Arkansas Commission had provided no justification that would warrant removing the language.

17. Following the issuance of the Order Denying Complaint, the Arkansas Commission and Entergy sought rehearing. On October 7, 2011, the Commission issued an order denying the requests for rehearing and clarifying that:

Consistent with our interpretation of the treatment of depreciation expenses in the annual bandwidth proceedings...we clarify that the cited language from the [Order Denying Complaint] was not intended to suggest that the justness and reasonableness of the various inputs to the

³¹ Order Denying Complaint, 128 FERC ¶ 61,020 at P 24.

³² *Id.* P 25 (citing *Ark. Pub. Serv. Comm’n. v. Entergy Services, Inc.*, 119 FERC ¶ 61,223, at P 47, *reh’g denied*, 121 FERC ¶ 61,226 (2007) (“The annual filings thus provide the Commission and all interested parties the opportunity to analyze all production-related costs of each of the Entergy Operating Companies to make sure all such costs are just and reasonable and prudently incurred.”)).

bandwidth formula was open to challenge in the bandwidth proceedings. Instead, that language was intended to mean that each input in the bandwidth formula should be examined to make sure that the correct data was used in determining the bandwidth payments. Thus, if parties believe that Entergy has inputted data from the wrong parts of FERC Form No. 1 in its bandwidth formula, or that the data used was incorrectly calculated, such objections are properly raised in the bandwidth proceeding. If parties believe that the methodology in Service Schedule MSS-3 with respect to depreciation expenses should be changed, they should file a separate section 206 complaint (or, in the case of Entergy, a section 205 filing).³³

18. Here, the Louisiana Commission seeks rehearing of the October 7 Rehearing Order.

II. The Louisiana Commission's Rehearing Request

19. The Louisiana Commission seeks rehearing of the Commission's alleged reversal of its prior ruling in the Order Denying Complaint that cost inputs to the bandwidth formula can be challenged in a bandwidth docket.³⁴ The Louisiana Commission argues that the October 7 Rehearing Order's clarification that challenges to data inputs are properly raised in a bandwidth proceeding and challenges to the formula methodology require a separate section 206 complaint is a reversal of rationale. The Louisiana Commission argues that the October 7 Rehearing Order erred by denying an adequate remedy consistent with the requirements of the FPA to effectively challenge potentially unjust and unreasonable cost inputs.³⁵ Further, the Louisiana Commission contends that if a section 206 complaint is required, unless a section 206 complaint can correct the alleged unjust and unreasonable rate and provides refunds retroactively to the date that the challenged cost inputs were included in the formula, the complainant will have no remedy for unjust and unreasonable costs being passed through the formula. The Louisiana Commission argues that, because potentially unjust and unreasonable cost inputs will only be revealed and discoverable after they are included in the bandwidth

³³ October 7 Rehearing Order, 137 FERC ¶ 61,030 at P 23.

³⁴ Rehearing Request at 1 (citing Order Denying Complaint, 128 FERC ¶ 61,020 at P 25).

³⁵ *Id.* at 2-3.

formula, a section 206 complaint requirement that only applies prospectively to future bandwidth filings does not provide a remedy, or at most, provides an inadequate remedy. Additionally, the Louisiana Commission points out that parties may be denied a statutory remedy because the Commission ruled in Opinion No. 514 that depreciation expense is not an “input.”³⁶

20. The Louisiana Commission states that the section 206 process does not provide an adequate remedy if it allows the unreasonable cost inputs from the past to remain in place. The Louisiana Commission contends that this violates the FPA requirement that the Commission correct unjust, unreasonable, and unduly discriminatory rates.³⁷ The Louisiana Commission states that the Commission has made clear that it only approves the “algebraic equation” that makes up the formula, not the costs that enter the algebraic equation. Therefore, the Louisiana Commission argues that these costs are always subject to review in section 206 cases if the utility is not required to demonstrate their reasonableness when the rates change.³⁸ The Louisiana Commission argues that this approach applies even if the unreasonable inputs are discovered “well after” they are filed.³⁹ Moreover, the Louisiana Commission argues that the Commission reached this conclusion in a number of cases.⁴⁰ Further, the Louisiana Commission states that the Commission has reaffirmed its authority to adjust unjust and unreasonable “actual” costs included in a formula rate in section 206 cases on numerous occasions.⁴¹

³⁶ *Id.* at 3 (citing Opinion No. 514, 137 FERC ¶ 61,029).

³⁷ *Id.* at 4 (citing 16 U.S.C. §§ 824d, 824e (2006)).

³⁸ *Id.* (citing *Louisiana Pub. Svc. Comm’n v. FERC*, 688 F.2d 357, 361 (5th Cir. 1982) (approving the adoption of formula rates by relying on the Commission’s assurance that inappropriate cost inputs could be corrected in section 206 cases)).

³⁹ *Id.* (citing *American Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306, at P 35 (2008) (*AEP*)).

⁴⁰ *Id.* at 5-6 (citing *e.g.*, *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, at P 112 (2009); *PPL Elec. Util. Corp.*, 125 FERC ¶ 61,121, at P 36 (2008); *Pub. Serv. Elec. and Gas Co.*, 124 FERC ¶ 61,303, at P 17 (2008)).

⁴¹ *Id.* at 6 (citing *e.g.*, *Tampa Elec. Co.*, 133 FERC ¶ 61,023, at P 60 (2010); *New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,068, at P 93 (2008); *Pub. Serv. Elec. and Gas Co.*, 124 FERC ¶ 61,303, at P 17 (2008)).

21. The Louisiana Commission argues that these decisions not only establish that inputs may be corrected, but also establish that they may be corrected back to the time that they were introduced into the formula. The Louisiana Commission believes that, because the inputs to formula rates were never subject to regulatory review, the retroactive correction does not implicate the rule against retroactive ratemaking; moreover it is necessary to protect consumers. The Louisiana Commission states the Commission's requirement that challenges to cost inputs be filed under a section 206 complaint without the option of retroactive refunds does not clearly protect the right to challenge the inputs of formula rates.⁴²

22. Finally, the Louisiana Commission states that the Commission failed to explain its reversal in policy. The Louisiana Commission argues that the Commission failed to explain "what has changed about the tariff language that permits a reversal of the holding as to its meaning."⁴³

III. Discussion

23. We reject the Louisiana Commission's request for rehearing of the October 7 Rehearing Order. The Commission does not allow rehearing of an order denying rehearing.⁴⁴ Any other result would lead to never-ending litigation, as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to the Commission's previous order.⁴⁵ Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end – and so the Commission does not allow parties to seek rehearing of an order denying rehearing. And, as the United States Court of

⁴² *Id.* at 4.

⁴³ *Id.* at 7.

⁴⁴ See, e.g., *Entergy Serv., Inc.*, 124 FERC ¶ 61,203, at PP 10-11 (2008); *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, 112 FERC ¶ 61,153 (2005); *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

⁴⁵ Accord, e.g., *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of "infinite regress" that would "serve no useful end").

Appeals for the District of Columbia Circuit has stated, even “an improved rationale” would not justify a further request for rehearing.⁴⁶

24. Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.⁴⁷ Here, we find that is not the case.

25. The October 7 Rehearing Order clarified that:

Consistent with our interpretation of the treatment of depreciation expenses in the annual bandwidth proceedings ...we clarify that the cited language from the [Order Denying Complaint] was not intended to suggest that the justness and reasonableness of the various inputs to the bandwidth formula was open to challenge in the bandwidth proceedings. Instead, that language was intended to mean that each input in the bandwidth formula should be examined to make sure that the correct data was used in determining the bandwidth payments. Thus, if parties believe that Entergy has inputted data from the wrong parts of FERC Form No. 1 in its bandwidth formula, or that the data used was incorrectly calculated, such objections are properly raised in the bandwidth proceeding. If parties believe that the methodology in Service Schedule MSS-3 with respect to depreciation expenses should be changed, they should file a separate section 206 complaint (or, in the case of Entergy, a section 205 filing).⁴⁸

⁴⁶ See *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)); see also *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001) (*Londonderry*).

⁴⁷ See *Londonderry*, 273 F.3d at 423; see also *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Massachusetts v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).

⁴⁸ October 7 Rehearing Order, 137 FERC ¶ 61,030 at P 23.

Thus, the October 7 Rehearing Order does not modify the results of the Order Denying Complaint; it supplies an “improved *rationale*.”⁴⁹ The Louisiana Commission incorrectly argues that the Commission “revers[ed] its prior ruling that cost inputs to the bandwidth formula can be challenged in a bandwidth docket.”⁵⁰ As stated above, the October 7 Rehearing Order did not reverse a prior ruling in the Order Denying Complaint. Rather, it clarified the proper procedural manner in which to raise objections concerning bandwidth formula inputs, on the one hand, and changes to the methodology of Service Schedule MSS-3, on the other.⁵¹

26. We also take this opportunity to further clarify certain aspects of the October 7 Rehearing Order in the context of the Louisiana Commission’s request for rehearing. The Louisiana Commission raises concerns that the Commission’s clarification does not provide a vehicle to effectively challenge potentially unjust and unreasonable bandwidth formula cost inputs. It argues that a section 206 complaint only applies prospectively to future bandwidth filings and does not provide a remedy, or at most, provides an inadequate remedy for unjust and unreasonable costs being passed through the formula. Principally, the Louisiana Commission seeks assurance from the Commission that it may correct cost inputs, and obtain refunds, in a section 206 complaint that will relate back to the date that the alleged improper inputs were first used. The Louisiana Commission contends that this treatment is consistent with Commission precedent.

27. We agree with the Louisiana Commission that the Commission has held that it may order refunds for past periods where a utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate.⁵² In *AEP*, the Commission found that public utility protocols that imposed time limits for raising preliminary and formal challenges to the application of the formula rate improperly precluded challenges to inputs in the formula. The Commission explained that, “in approving any formula rate, the Commission approves the formula itself, the algebraic equation used to calculate the rates. It does not approve the inputs into the formula or the charges resulting from the application of the inputs to the algebraic equation.”⁵³ The Commission added that, “[t]he

⁴⁹ *California Department of Water Resources v. FERC*, 306 F.3d 1126.

⁵⁰ Rehearing Request at 1.

⁵¹ October 7 Rehearing Order, 137 FERC ¶ 61,030 at P 23.

⁵² *See AEP*, 124 FERC ¶ 61,306 at P 35 n.50. *See also Appalachian Power Co.*, 23 FERC ¶ 61,032, at 61,088 (1983); *DTE Energy Trading, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,062, at P 28 (2005).

⁵³ *Id.* P 34.

Commission's long-standing precedent is that, under formula rates, parties have the right to challenge the inputs to or the implementation of the formula at whatever time they discover errors in the inputs to or implementation of the formula."⁵⁴

28. The Commission has also previously noted its authority to order refunds for imprudent costs charged to customers through an existing formula rate.⁵⁵ As with challenges premised upon misapplication of formula rates, the Commission has rejected attempts to limit the timeframe for prudence inquiries.⁵⁶

29. The rationale for permitting such challenges, and related refunds, is clear. In *AEP*, for example, we noted that "customers may not uncover errors in data or imprudent or otherwise inappropriate costs until well after the challenge period."⁵⁷

30. The precedent cited by the Louisiana Commission in support of its demands for retroactive refunds includes the same, or similar, cases to the precedent cited above. *Louisiana Public Service Comm'n v. FERC*⁵⁸ and *Public Utilities Comm'n of the State of California v. FERC*,⁵⁹ cited by the Louisiana Commission, include language that inaccurate or unjust or unreasonable costs in formula rates may be corrected through an audit, investigation, or section 206 proceeding.⁶⁰ The Louisiana Commission also cites

⁵⁴ *Id.* P 35.

⁵⁵ See *Midwest Independent Transmission System Operator*, 139 FERC ¶ 61,127, at P 15 n.14 (2012) (citing *Yankee Atomic Elec. Co.*, 60 FERC ¶ 61,316, at 62,096-97 (1992)).

⁵⁶ See, e.g., *North Carolina Electric Membership Corp. v. CPL*, 57 FERC ¶ 61,332, at 62,065 (1991) (rejecting a utility's request to limit the scope of a prudence inquiry in an automatic adjustment clause complaint proceeding to outages occurring in the preceding 12 months because such a policy would preclude the Commission from providing relief for excessive fuel adjustment clause billings).

⁵⁷ *AEP*, 124 FERC ¶ 61,306 at P 36 and n.51 (citing *Yankee Atomic Electric Co.*, 60 FERC ¶ 61,316, at 62,096-97 (1992) (allowing review of potentially imprudent costs charged to customers in the prior-year formula rates)).

⁵⁸ 688 F.2d 357 (5th Cir. 1982).

⁵⁹ 254 F.3d 250 (D.C. Cir. 2001).

⁶⁰ See *Louisiana Public Service Comm'n v. FERC*, 688 F.2d 357 at 361 (noting "the accuracy of the costs included under the formula could be verified by FERC audit, or

(continued...)

to other Commission precedent involving holdings similar to *AEP*, which we have discussed above.⁶¹

31. The Commission has acted in accordance with such precedents in its decisions concerning the bandwidth remedy. The Commission has explained the scope of the annual proceedings to examine Entergy's computation of the bandwidth remedy, noting that the purpose of the annual bandwidth implementation proceedings is to determine whether Entergy properly implemented the bandwidth formula⁶² by applying the specified formula using the required data⁶³ to determine whether or not there was rough production cost equalization.⁶⁴ As the Commission explained in an order on rehearing in the fourth bandwidth proceeding:

[i]n determining whether Entergy has properly implemented the bandwidth formula using the required data inputs in a bandwidth filing, parties in a bandwidth implementation proceeding may challenge: (1) whether the inputs were calculated consistent with the formula and the applicable accounting rules; (2) conformance with

by an investigation instituted under section 206 of the FPA"); *Public Utilities Comm'n of the State of California v. FERC*, 254 F.3d 250 at 257-58 (noting that because relief could be sought pursuant to section 206 in the event a pass through of non-jurisdictional contract costs results in unjust and unreasonable rates, Commission acceptance of the California Independent System Operator's formula rate without additional section 205 filings did not leave ratepayers and other interested parties without any statutory recourse).

⁶¹ Rehearing Request at 5-6 (citing *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, at P 112 (2009); *PPL Elec. Util. Corp.*, 125 FERC ¶ 61,121, at P 36 (2008); *Pub. Serv. Elec. and Gas Co.*, 124 FERC ¶ 61,303, at P 17 (2008); *Tampa Elec. Co.*, 133 FERC ¶ 61,023, at P 60 (2010); *New York Independent Sys. Operator, Inc.* 125 FERC ¶ 61,068, at P 93 (2008)).

⁶² Opinion No. 505-A, 139 FERC ¶ 61,103 at P 48.

⁶³ Section 30.12 provides that all rate base, revenue and expense items "shall be based on the actual amounts on the Company's books for the twelve months ended December 31 of the previous year as reported in FERC Form 1 or such other supporting data as may be appropriate for each Company...." Entergy Service Schedule MSS-3, section 30.12.

⁶⁴ *Entergy Services, Inc.*, 137 FERC ¶ 61,019, at P 10 (2011).

retail regulatory approvals to the extent the formula requires use of values approved by retail regulators; and, (3) in instances where there are details omitted from the accepted Service Schedule MSS-3 formula, with the underlying details included in the methodology used in Exhibit Nos. ETR-26 and ETR-28.⁶⁵

Thus, if parties believe that Entergy inserted data from the wrong parts of FERC Form No. 1 in its bandwidth formula, or that the data used was incorrectly calculated, such objections are properly raised in the annual bandwidth proceedings.⁶⁶ Since these proceedings are based upon the prior year's test data, the period of refunds extends for the fully applicable period for each year's bandwidth calculation.

32. The Louisiana Commission asserts that the only remedy to challenge unjust and unreasonable cost inputs in the formula rate is through a section 206 proceeding, which would limit refunds to periods after the refund effective date, usually established by the Commission to be no earlier than the date of the filing of the complaint. This assertion is in error. In the order on rehearing in the fourth bandwidth proceeding, the Commission reiterated that parties may challenge the prudence of cost inputs to the bandwidth formula in the annual bandwidth proceedings.⁶⁷ Allowing such prudence challenges is consistent with the Commission's consideration of prudence issues in the first bandwidth proceeding.⁶⁸ Parties may seek refunds related to such prudence challenges.

33. In sum, the precedent that the Louisiana Commission cites concerning the right to challenge the misapplication of a formula rate or the charging of rates other than a filed rate and the resulting receipt of refunds, would apply where erroneous data, incorrect calculations or imprudent costs are used in the formula.⁶⁹

⁶⁵ *Id.* P 13; *see also* Opinion No. 505-A, 139 FERC ¶ 61,103 at P 50.

⁶⁶ Opinion No. 514, 137 FERC ¶ 61,029 at P 27; Opinion No. 519, 139 FERC ¶ 61,107 at P 110.

⁶⁷ *Entergy Services, Inc.*, 137 FERC ¶ 61,019 at P 13 & n.22 (“Further, with respect to whether or not particular costs were prudently incurred, consistent with Opinion No. 505, the Louisiana Commission and other parties may challenge the prudence of cost inputs to the bandwidth formula in this bandwidth proceeding”).

⁶⁸ *Id.* P 13 n.22 (citing Opinion No. 505, 130 FERC ¶ 61,023 at PP 9, 51-64).

⁶⁹ *See, e.g., Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 at P 112.

34. This precedent, however, is not applicable to many of the refund challenges that the Louisiana Commission has made in the context of various bandwidth remedy proceedings. Rather than challenging any misapplication of a formula rate, the charging of a rate contrary to the filed rate, or the prudence of a rate input, the Louisiana Commission has instead challenged the bandwidth formula itself, the rate already approved by the Commission.⁷⁰

35. The Commission found the formula rate contained in Service Schedule MSS-3 to be just and reasonable when it accepted that formula as being in compliance with Opinion No. 480.⁷¹ In Opinion No. 514, the Commission noted that because it approved the formula, it is the filed rate and under the filed rate doctrine may not be changed absent a section 205 or 206 proceeding.⁷²

36. With respect to depreciation rates, in Opinion No. 514 the Commission clarified that the bandwidth formula mandates the use of depreciation rates that, in part, reflect state regulator-approved depreciation rates that the Commission has adopted for use in the bandwidth formula. Therefore, in order to calculate a just and reasonable rate, Entergy is required to use the state regulator-approved depreciation expenses.⁷³ This is because a component of this formula is the depreciation variable “Depreciation and Amortization Expense,” that is defined as:

Depreciation and Amortization Expense associated with the plant investment in [Production Plant in Service] as recorded in FERC Accounts 403 and 404, as approved by Retail Regulators unless the jurisdiction for determining the depreciation rate is vested in the FERC under otherwise applicable law.⁷⁴

37. This depreciation variable requires the use of depreciation and amortization expense that, in part, reflects depreciation and amortization expenses approved by retail

⁷⁰ See, e.g., Opinion No. 519, 139 FERC ¶ 61,107 at P 26; Opinion No. 505, 130 FERC ¶ 61,023 at PP 172-173 n.205; Opinion No. 514, 137 FERC ¶ 61,029 at P 51.

⁷¹ *Louisiana Pub. Serv. Comm’n v. Entergy Serv., Inc.*, 119 FERC ¶ 61,095 at P 50.

⁷² Opinion No. 514, 137 FERC ¶ 61,029 at P 49.

⁷³ *Id.*

⁷⁴ Service Schedule MSS-3 at 57.

regulators.⁷⁵ Such specification and incorporation of retail regulator-approved depreciation rates has been reviewed and accepted by the Commission as a just and reasonable element of the bandwidth formula methodology.⁷⁶ A challenge to this element of the bandwidth formula does not represent a challenge to the application of the formula or to the prudence of its inputs, unlike, for example, a challenge to the prudence of plant costs being depreciated at the retail regulator-approved depreciation rate and included in plant balances included in ratebase, categories that, as discussed above, allow for refunds.

38. In Opinion No. 514, in the context of considering the Louisiana Commission's challenges to the use of retail-determined depreciation rates in the annual bandwidth remedy computation, the Commission noted that certain statements in earlier orders "were made prior to final Commission action on the first annual bandwidth filing and thus did not benefit from experience in addressing these annual bandwidth filings."⁷⁷ Thus, in Opinion No. 514, and subsequently in Opinion No. 519, the Commission clarified, by applying contractual interpretation principles to interpret the depreciation variables, which types of bandwidth-remedy related-challenges relate to which categories of the Commission's refund precedent. Allowing independent challenges to formula rate components that are essentially fixed would open the door to essentially reading out the precise terms of a contract, which the Commission rejected in Opinion No. 514⁷⁸ and recently rejected in another case involving interpretation of the System Agreement.⁷⁹

⁷⁵ Opinion No. 514, 137 FERC ¶ 61,029 at P 49.

⁷⁶ This depreciation variable, which is the methodology to allocate plant costs over time in the bandwidth formula, requires that such allocation, in part, reflect the depreciation rates approved by retail regulators. *See Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006).

⁷⁷ Opinion No. 514, 137 FERC ¶ 61,029 at P 48.

⁷⁸ *See* Opinion No. 514, 137 FERC ¶ 61,029 at P 54 n.77 ("It is well established in contract law that a contract should be construed so as to give effect to all of its provisions and to avoid rendering any provision meaningless. *See, e.g., Central Maine Power Co.*, 128 FERC ¶ 61,143, at P 31 (2009).").

⁷⁹ *See Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 521, 139 FERC ¶ 61,240, at P 109 (2012) (finding that ignoring a contractual clause in the System Agreement would violate Commission precedent requiring interpreting a tariff to give meaning to all its provisions).

39. In Opinion No. 519, in considering the Louisiana Commission's direct challenge to the justness and reasonableness of the underlying rate, the Commission reiterated that to the extent the bandwidth depreciation variables require the use of depreciation rates approved by retail regulators, those depreciation rates are the Commission-approved depreciation rates for bandwidth formula purposes.⁸⁰ The Commission held that this was consistent with its finding in *Ohio Edison*⁸¹ that amounts booked to FERC depreciation accounts should reflect Commission-approved depreciation rates and differences between those rates and state-approved depreciation rates should be recorded as regulatory assets and regulatory liabilities.⁸² Because the bandwidth formula's depreciation expense components constitute the filed rate, they may only be changed prospectively through a section 205 or 206 proceeding.⁸³

40. The Commission reached a similar result in an order on the Louisiana Commission's complaint regarding refunds and surcharges that was issued the same day as Opinion No. 519. In that decision, the Commission rejected the Louisiana Commission's attempt to secure retroactive relief for allegedly unjust and unreasonable bandwidth remedy costs through the exclusion of out-of-period revenues and expenses related to interruptible load from bandwidth remedy calculations.⁸⁴ The Commission there, as in Opinion No. 519, concluded that the Louisiana Commission's suggested alteration of inputs would improperly change the filed rate. The Commission stated that Service Schedule MSS-3 does not provide for the exclusion of out-of-period revenues and expenses, but instead, requires Entergy to use actual costs recorded by each Operating Company on its FERC Form No. 1 for the previous year. Therefore the Commission found that, where the actual costs properly recorded on the FERC Form No. 1s include out-of-period expenses and revenues, those out-of-period revenues and expenses are properly included in the annual bandwidth calculation.⁸⁵ In that decision,

⁸⁰ *Louisiana Pub. Serv. Comm'n v. Entergy Serv., Inc.*, 139 FERC ¶ 61,107, at P 113 n.317 (2012).

⁸¹ *Id.* (citing *Ohio Edison Co.*, 84 FERC ¶ 61,157 (1998)).

⁸² *Ohio Edison*, 84 FERC ¶ 61,157 at 61,862.

⁸³ See Opinion No. 514, 137 FERC ¶ 61,029 at P 52; see also Opinion No. 505-A, 139 FERC ¶ 61,103 at P 50.

⁸⁴ See *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,102 (2012).

⁸⁵ *Id.* P 26.

the Commission explicitly rejected the applicability of *AEP* and similar cases advanced in this proceeding by the Louisiana Commission for reasons equally applicable here:

The kinds of challenges to inputs or implementation contemplated by the AEP Order or by the North Carolina Order,^[86] such as a showing that the reported out-of-period adjustments were for a wrong amount (input challenge) or a showing that recovery is not allowed for these amounts under the prescribed formula (implementation challenge) are not applicable here. This is not a situation of an error in implementing the bandwidth formula for the 2007 and 2008 test years, as previously explained, nor is it a situation of Entergy having flowed through an expense that the Commission had not previously reviewed for justness and reasonableness. To the contrary, the interruptible load refunds and surcharges were required by the Commission as part of the just and reasonable rate adopted under FPA section 206 in the interruptible load proceeding. The Louisiana Commission does not challenge the fact that Entergy properly reported the refunds and surcharges in the appropriate accounts in its FERC Form [No.] 1s as a result of Entergy implementing the Commission's orders on interruptible load. Therefore, Entergy has neither misapplied the bandwidth formula under Service Schedule MSS-3 nor charged rates contrary to the filed rate, and it has not flowed through an unreasonable or imprudently incurred expense. Thus, we decline to order adjustments to be made to the bandwidth calculations for the 2007 and 2008 bandwidth test years to undo out-of-period revenues and expenses properly included under the bandwidth formula in effect for that period.⁸⁷

41. In sum, the Louisiana Commission's depreciation expense challenges have not been premised upon erroneous inputs, implementation errors, or prudence concerns. Rather, the Commission previously reviewed the justness and reasonableness of inclusion

⁸⁶ *North Carolina Electric Membership Corp. v. CPL*, 57 FERC ¶ 61,332, 62,065 (1991).

⁸⁷ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 139 FERC ¶ 61,102 at P 27.

of depreciation elements in bandwidth formula methodologies that require use of retail regulator-approved depreciation rates in the Opinion No. 480 compliance proceeding. The Commission has noted that the Louisiana Commission is free to file a section 206 complaint to change the methodology (including elements) of the bandwidth formula, including the depreciation variables that require the use of retail regulator-approved depreciation rates. Indeed, as noted, it has done so.⁸⁸ However, as explained in Opinion No. 519, consistent with any change to a filed rate, the effect of any changes to such terms contained within the bandwidth formula, including the manner in which data is sourced, will be prospective only.⁸⁹

42. The Louisiana Commission's assertion in its rehearing request that the Commission has neglected to explain "what has changed about the tariff language that permits a reversal of the holding as to its meaning"⁹⁰ is without foundation. The October 7 Rehearing Order did not reverse the Order Denying Complaint as the Louisiana Commission argues. As discussed above, the October 7 Rehearing Order provided clarification of the proper procedural manner in which to raise issues concerning bandwidth formula inputs and the methodology of Service Schedule MSS-3, respectively, and did so consistent with the Commission's precedent.

The Commission orders:

The Louisiana Commission's request for rehearing is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁸⁸ See Opinion No. 519, 139 FERC ¶ 61,107.

⁸⁹ *Id.* P 110.

⁹⁰ Rehearing Request at 7.