153 FERC ¶ 61,019
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
and Tony Clark.

Louisiana Public Service Commission Docket No. EL09-50-002

v.

Entergy Services, Inc.

OPINION NO. 515-A

ORDER DENYING REHEARING

(Issued October 8, 2015)

1. On November 21, 2011, the Louisiana Public Service Commission (Louisiana Commission) filed a request for rehearing of a Commission opinion[1] that affirmed an initial decision[2] regarding the functionalization of 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 the production function. In Opinion No. 515, the Commission affirmed the Initial Decision, which rejected 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 below, we deny the Louisiana Commission's request for rehearing of Opinion No. 515.

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[1] *Louisiana Public Service Comm'n v. Entergy Services. Inc.*, Opinion No. 515, 137 FERC ¶ 61,070 (2011) (Opinion No. 515).

[2] *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 131 FERC ¶ 63,009 (2010) (Initial Decision).

I. Background and Procedural History

A. The Bandwidth Formula

2. The Entergy[3] 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. In Opinion No. 480, the Commission found that "rough production cost equalization on the Entergy system had been disrupted."[4] The Commission imposed a "bandwidth remedy" to help keep the Entergy system in rough production cost equalization.[5] The Commission also required that annual bandwidth filings be made to determine any necessary payments among the Entergy Operating Companies. The bandwidth formula is included in Service Schedule MSS-3 of the System Agreement.

3. Before 1989, Entergy's Waterford 3 nuclear power plant (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 (Waterford 3 Sale-Leaseback).[6] The transaction, which was intended to help Entergy Louisiana reduce its debt costs associated with the plant, involved a simultaneous sale of a 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. As a consequence, the tax basis of the 9.3 percent interest subject to the Waterford 3

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[3] Entergy refers to Entergy Corporation and its subsidiaries, Entergy Services Inc., and six public utility operating companies. The Entergy operating companies are: Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc., Entergy New Orleans, Inc.; and Entergy Texas, Inc. (collectively, Entergy Operating Companies).

[4] *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), *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 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.

[5] Opinion No. 480, 111 FERC ¶ 61,311 at P 44.

[6] *See* Ex. LC-3 at 2.

Sale-Leaseback transaction was lower than its $353.6 million sales price.[7] This produced a taxable gain to Entergy Louisiana approximating $240 million.[8] For accounting purposes, the Waterford 3 Sale-Leaseback was not treated as a sale and subsequent leaseback, but instead treated as a financing transaction similar to traditional debt financing.[9] As a result, the 9.3 percent interest that was subject to the Waterford 3 Sale-Leaseback transaction continued to be recorded as part of Entergy Louisiana's production facilities as a capital lease.[10] Because no sale was deemed to have occurred for accounting purposes, the 9.3 percent interest was recorded at its pre-Waterford 3 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).[11]

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.[12] 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.[13] The bandwidth formula in Service

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[7] Ex. LC-1 at 5.

[8] Ex. LC-24 at 5.

[9] Ex. LC-3 at 2.

[10] *Id*.

[11] Ex. LC-21 at 12.

[12] The rate base in the bandwidth formula is adjusted by the ADIT amounts 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). Ex. LC-8 at 12. There are four categories of ADIT recognized in the Uniform System of Accounts in four separate accounts, and only three of these categories of ADIT are used in the bandwidth formula. Only two of the three categories, those reflected in Account 190 and Account 282, materially affect the bandwidth calculation. Initial Decision, 131 FERC ¶ 63,009 at PP 7-8.

[13] Tr. at 81-82.

Schedule MSS-3 functionalizes a portion of the ADIT recorded in each Entergy Operating Company's books to the production function using plant ratios.

B. The Louisiana Commission Complaint, the Initial Decision on the Complaint, and Opinion No. 515

5. On May 1, 2009, the Louisiana Commission filed a complaint 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."[14] With respect to the "Complaint Issue," the Louisiana Commission maintained that, under the current Service Schedule MSS-3, "only a portion of the [Waterford 3 Sale-Leaseback Account 190 ADIT] cost would be included in production costs with the remainder of the ADIT costs being functionalized to transmission or distribution."[15] The Louisiana Commission asserted, however, that "the sale-leaseback ADIT is 100 percent production related and should be directly assigned to the production function."[16]

6. 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."[17]

7. In the Initial Decision on the Louisiana Commission Complaint, the Presiding Judge specified that the issue before him was "[w]hether [the Waterford 3 Sale-

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[14] Complaint of the Louisiana Public Service Commission at 1-2, Docket No. EL09-50-000 (May 1, 2009) (Louisiana Commission Complaint).

[15] *Louisiana Public Service Commission v. Entergy Services, Inc.*, 128 FERC ¶ 61,225, at P 9 (2009) (Hearing Order).

[16] *Id.* P 9.

[17] *Id.* P 17. In the Hearing Order, the Commission also accepted the Louisiana Commission's offer to amend its complaint to remove paragraphs 32 through 51, which related 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 those two issues were properly before the Commission in Docket No. ER08-1056-000, the Commission proceeding regarding Entergy's second bandwidth filing. *Id.* P 16.

Leaseback Account 190 ADIT] associated with a partial sale-leaseback of Entergy's Waterford 3 nuclear power plant should be functionally allocated among production, transmission and distribution or directly assigned to the production function alone."[18] The 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 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.[19]

8. The Louisiana Commission filed a Brief on Exceptions to the Initial Decision. Briefs Opposing Exceptions were filed by Entergy, the Arkansas Public Service Commission and Commission Trial Staff.

9. The Commission affirmed the Initial Decision in Opinion No. 515. In Opinion No. 515, the Commission stated that the issue of whether Waterford 3 Sale-Leaseback Account 190 ADIT is "'generally and properly includable'" in the bandwidth calculation for Commission "'cost of service purposes'" was at issue in Docket No. ER08-1056-000, the docket in which the Commission was considering Entergy's second annual bandwidth filing required under Opinion Nos. 480 and 480-A, and which yielded Opinion No. 514.[20] In the Opinion No. 514 proceeding, the Commission determined that the ADIT issue was covered by a Joint Stipulation signed by the parties, and therefore would not be relitigated in Docket No. ER08-1056-000,[21] which resulted in the exclusion of the Waterford 3 Sale-Leaseback Account 190 ADIT from the bandwidth calculation in that proceeding, as Entergy had originally proposed. The Commission concluded in Opinion No. 515 that the central issue presented by the Louisiana Commission, namely, whether it

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[18] Initial Decision, 131 FERC ¶ 63,009 at P 1. While the instant proceeding was ongoing, the Commission issued *Entergy Services, Inc.*, Opinion No. 506, 130 FERC ¶ 61,026 (2010) (Opinion No. 506), which changed the way that General and Intangible Plant costs were functionalized. 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.

[19] Initial Decision, 131 FERC ¶ 63,009 at PP 53, 59.

[20] Opinion No. 515, 137 FERC ¶ 61,070 at P 9 (quoting Initial Decision, 131 FERC ¶ 63,009 at P 40).

[21] *Entergy Services, Inc.*, Opinion No. 514, 137 FERC ¶ 61,029 (2011), Opinion No. 514-A, 142 FERC ¶ 61,013, at P 23 (2013) (Opinion No. 514-A).

would be just and reasonable to revise Service Schedule MSS-3 to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to the production function, was therefore moot. Nevertheless, the Commission stated and explained why even if the issue raised by the Louisiana Commission was not rendered moot by the Commission's previous determinations, the Commission would still deny the Louisiana Commission's complaint.

II. Request for Rehearing

10. The Louisiana Commission requests rehearing of Opinion No. 515 and lists five issues relating to the Commission's opinion.[22] First, the Louisiana Commission argues that although the Commission found that the issues in Opinion No. 515 are moot based on the Commission's decision regarding the Waterford 3 Sale-Leaseback Account 190 ADIT in Opinion No. 514, if the Commission grants rehearing of Opinion No. 514, then the issues in this case will require a decision. Second, the Louisiana Commission challenges the Commission's conclusion that Service Schedule MSS-3 does not result in an over- or under-allocation of ADIT to the production function. According to the Louisiana Commission, Opinion No. 515 recognizes that no party in this proceeding disputes that Waterford 3 Sale-Leaseback Account 190 ADIT is 100 percent production-related, and that the functionalization ratio only allocates a portion of the Sale-Leaseback ADIT to the production function. The Louisiana Commission alleges that despite these facts, the Commission concludes, without any basis, that these facts do not establish that Service Schedule MSS-3 results in an incorrect over- or under-allocation of ADIT to the production function. The Louisiana Commission argues that this conclusion is incorrect and that the Commission cites "no offset that renders the conclusion correct as to all ADIT."[23]

11. Third, the Louisiana Commission argues that by ruling that it "must show that the failure to directly assign one ADIT component renders the allocation of all ADIT components unjust and unreasonable," the Commission places the burden on the complainant to refute the position that other offsetting amounts might exist that could be directly assigned and would counter the sale-leaseback ADIT underallocation. The Louisiana Commission argues that this burden shift is inconsistent with *Louisiana Public Service Comm'n v. FERC*,[24] and the Hearing Order. The Louisiana Commission claims that under these precedents, the burden is on other parties to establish that ADIT offsets

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[22] Request for Rehearing on Behalf of the Louisiana Public Service Commission at 1-4, Docket No. EL09-50-002 (Nov. 21, 2011) (Louisiana Commission Request for Rehearing).

[23] *Id.* at 2.

[24] 184 F.3d 892 (D.C. Cir. 1999) (*Louisiana Commission v. FERC*).

exist and the materiality of such offsets. Fourth, the Louisiana Commission alleges that the Commission did not support its conclusion that the Waterford 3 Sale-Leaseback Account 190 ADIT is an indirect cost, and that if the Commission intended to establish a new definition of direct versus indirect costs, it must explain and support that definition. Fifth, the Louisiana Commission challenges the Commission's reliance on *American Electric Power Service Corp.*,[25] which the Louisiana Commission distinguishes on several bases and claims would, in the context of Federal Power Act section 206 complaint cases, place an undue burden on ratepayers to achieve direct assignments.

III. Discussion

12. As discussed in further detail below, the Commission denies the Louisiana Commission's request for rehearing.

A. The Commission's Holding in Opinion No. 514 Regarding Waterford 3 Sale-Leaseback Account 190 ADIT.

1. Opinion No. 515

13. In Opinion No. 515, the Commission stated that the issue of whether Waterford 3 Sale-Leaseback Account 190 ADIT is "'generally and properly includable'" in the bandwidth calculation for Commission "'cost of service purposes'" was at issue in Docket No. ER08-1056-000, the docket in which the Commission was considering Entergy's second annual bandwidth filing required under Opinion Nos. 480 and 480-A and which yielded Opinion No. 514.[26] In Docket No. ER08-1056-000, the Commission found that the parties had agreed in a trial stipulation that the issue of ADIT as it relates to the Waterford 3 Sale-Leaseback should not be relitigated in that proceeding,[27] which resulted in the exclusion of the Waterford 3 Sale-Leaseback Account 190 ADIT from the bandwidth calculation in that proceeding, as Entergy had originally proposed. The Commission concluded in Opinion No. 515 that the central issue presented by the Louisiana Commission, namely, whether it would be just and reasonable to revise Service Schedule MSS-3 to directly assign Waterford 3 Sale-Leaseback Account 190 ADIT to the production function, was therefore moot. Nevertheless, the Commission stated and explained why even if the issue raised by the Louisiana Commission was not rendered

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[25] 88 FERC ¶ 61,141 (1999) (*AEP*).

[26] Opinion No. 515, 137 FERC ¶ 61,070 at P 9 (quoting Initial Decision, 131 FERC ¶ 63,009 at P 40).

[27] Opinion No. 514-A, 142 FERC ¶ 61,013 at P 23.

moot by the Commission's previous determinations, the Commission would still deny the Louisiana Commission's complaint.

2. Request for Rehearing

14. The Louisiana Commission states that the mootness determination is correct as of now, but believes that the Commission may ultimately be required to reverse the holding in Opinion No. 514 that forms the basis for the mootness determination. The Louisiana Commission states that it raises the mootness issue on rehearing to preserve it pending the outcome of rehearing and any appeal of Opinion No. 514 in Docket No. ER08-1056.[28]

3. Commission Determination

15. As noted above, in Opinion No. 515, the Commission indicated that the issue raised by the Louisiana Commission regarding the proper assignment of ADIT for Waterford 3 in the bandwidth formula was moot. The basis for the mootness finding in Opinion No. 515 was that, as the Commission had found in Opinion No. 514, ADIT for Waterford 3 could not be included at all in the bandwidth formula, making the question of whether to functionalize or directly assign those costs no longer relevant.[29]

16. The Louisiana Commission argues that its request should be preserved pending appeal. The rationale for the Louisiana Commission's rehearing request no longer applies. In Opinion No. 514-A, the Commission denied the requests for rehearing of Opinion No. 514. With respect to the Waterford 3 Sale-Leaseback Account 190 ADIT, the Commission reaffirmed its determination in Opinion No. 514 that the parties and Trial Staff had agreed not to re-litigate issues in the Opinion No. 514 proceeding that were the subject of other proceedings; the exclusion of the Waterford 3 Sale-Leaseback Account 190 ADIT was one of those issues.[30] The Louisiana Commission has appealed the orders in Opinion Nos. 514 and 514-A to the United States Court of Appeals for the Fifth Circuit, but did not include in that appeal the issue of whether to include Waterford

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[28] Louisiana Commission Request for Rehearing at 1.

[29] Opinion No. 515, 137 FERC ¶ 61,070 at P 9 ("Because the Waterford 3 Sale-Leaseback Account 190 ADIT is not included in the bandwidth calculation for 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.").

[30] Opinion No. 514-A, 142 FERC ¶ 61,013 at P 23.

3 Sale-Leaseback Account 190 ADIT costs in the bandwidth formula.[31] As such, the question at issue here remains moot. However, we note that related issues involving the treatment of Waterford 3 Sale-Leaseback Account 190 ADIT costs are pending in other Commission dockets.[32] Therefore, we address below the substantive issues raised by the Louisiana Commission in its rehearing request.

B. Opinion No. 515 Did Not Alter The Burden of Proof That a Party Bringing an FPA Section 206 Complaint Against a Component of a Formula Rate Must Sustain.

1. Opinion No. 515

17. In Opinion No. 515, the Commission agreed 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."[33] Notwithstanding general language in the Initial Decision criticizing the Louisiana Commission's focus on a single cost element within the bandwidth formula, the Commission explained that the Louisiana Commission "*was not* required by the Presiding Judge to demonstrate that the entire rate is unjust and unreasonable" because the bandwidth formula does not require direct assignment of the Waterford 3 Sale-Leaseback Account 190 ADIT.[34] The Commission concluded that such language in the Initial Decision suggesting that the Louisiana Commission was required to prove that the entire bandwidth formula is unjust and unreasonable was irrelevant in any case given that the Presiding Judge found that the Louisiana Commission is "required only to establish that it is unjust and unreasonable, unduly discriminatory or preferential

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[31] *See* Brief for Petitioner, *Louisiana Pub. Serv. Comm. v. FERC*, Nos. 13-60140 and 13-60141 (5th Cir. July 5, 2013).

[32] The Louisiana Commission raised the Waterford 3 Sale-Leaseback Account 190 ADIT issue in three bandwidth implementation proceedings (Docket Nos. ER07-956, ER08-1056, and ER09-1224) and a complaint filed in Docket No. EL10-65. The Commission recently set the Waterford 3 Sale-Leaseback Account 190 ADIT issue for hearing in Docket No. EL10-65. *See Louisiana Public Service Comm'n v. Entergy Services. Inc.*, 149 FERC ¶ 61,245 (2014) (order denying rehearing); *Entergy Services, Inc.*, 149 FERC ¶ 61,244 (2014) (establishing hearing and settlement judge procedures).

[33] Opinion No. 515, 137 FERC ¶ 61,070 at P 31 (emphasis in original).

[34] *Id.*

for Service Schedule MSS-3 to functionalize Waterford 3 Sale-Leaseback Account 190 ADIT based on plant ratios."[35]

18. The Commission also affirmed the Presiding Judge's finding that the Louisiana Commission had not demonstrated that the functionalization methodology for Waterford 3 Sale-Leaseback Account 190 ADIT is unjust, unreasonable, unduly discriminatory or preferential. Specifically, the Commission agreed with the Presiding Judge that a showing that the functionalization methodology for Waterford 3 Sale-Leaseback Account 190 ADIT resulted in an under-allocation of ADIT to the production function would represent a "'legitimate basis on which to challenge Service Schedule MSS-3.'"[36] According to the Commission, as the Presiding Judge noted in the Initial Decision, the Louisiana Commission failed to make such a showing. Rather, the Louisiana Commission based its attempt to demonstrate an under-allocation of ADIT to the production function by solely referencing "an allegedly superior methodology."[37]

19. Agreeing with the Presiding Judge, the Commission explained that 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 such a methodology results in an incorrect over-allocation or under-allocation of ADIT to the production function.[38] The Commission stated that, as noted by the Presiding Judge, "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."[39] The Louisiana Commission, however, provided no proof for its claim of under-allocation without reference to direct assignment.[40]

20. The Commission also found that by asserting that Waterford 3 Sale-Leaseback Account 190 ADIT should be directly assigned to the production function while all other

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[35] *Id.*

[36] *Id.*

[37] *Id.* P 32.

[38] *Id.* (citing Initial Decision, 131 FERC ¶ 63,009 at P 46).

[39] *Id.*

[40] *Id.* (citing Initial Decision, 131 FERC ¶ 63,009 at P 45).

ADIT remained functionalized using the plant ratio, the Louisiana Commission was cherry-picking a component of ADIT in order to increase the bandwidth payments made to Entergy Louisiana.[41] The Commission concluded 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 Sale-Leaseback Account 190 ADIT results in an incorrect over-allocation or under-allocation of ADIT to the production function that is unjust, unreasonable, unduly discriminatory or preferential. The Commission stated that 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. The Commission noted that, as explained by the Presiding Judge, the record in this proceeding establishes that many other ADIT sub-accounts relating exclusively to production (and sub-accounts relating exclusively to distribution or transmission) are currently functionalized under Service Schedule MSS-3. Accordingly, the Commission concluded that 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.[42] The Commission concluded that a component of ADIT should be functionalized in the same manner as all other ADIT amounts.

21. Finally, the Commission disagreed with the Louisiana Commission's claim in its Brief on Exceptions that the Initial Decision did not articulate what would be required to prove the overall unjustness or unreasonableness of a rough production cost implementation mechanism for the Entergy system. The Commission explained that 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.'"[43]

2. <u>Request for Rehearing</u>

22. According to the Louisiana Commission, the Initial Decision found that the Louisiana Commission proved the allegations of the complaint that: (1) the Waterford 3 Sale-Leaseback Account 190 ADIT is 100 percent production cost related; (2) the functionalization ratio in the formula allocates only a portion of this cost to production;

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[41] *Id.* P 33.

[42] *Id.*

[43] Opinion No. 515, 137 FERC ¶ 61,070 at P 34 (quoting Initial Decision, 131 FERC ¶ 63,009 at P 47).

and (3) direct assignment of the Waterford 3 Sale-Leaseback Account 190 ADIT is feasible.[44] The Louisiana Commission notes that, despite this finding, the Presiding Judge rejected the complaint and held that the Louisiana Commission was required to prove Service Schedule MSS-3's "overall (un)justness and (un)reasonableness as a rough production cost implementation mechanism for the Entergy System."[45] The Louisiana Commission asserts that in Opinion No. 515 the Commission "effectively overrules" this finding but replaced it with a ruling that raises a similar barrier to customers challenging formula rate allocations.

23. The Louisiana Commission claims that, in Opinion No. 515, the Commission has ruled that a complainant must show that the underallocation of a single ADIT component results in an underallocation of all ADIT amounts in all accounts, including all of the approximately 600 ADIT sub-accounts which comprise ADIT in the bandwidth formula.[46] The Louisiana Commission argues that the Commission has implicitly determined that parties opposing the complaint do not even have the preliminary evidentiary requirement to produce some evidence indicating that other directly assignable amounts would constitute an offset to the ADIT component in question. The Louisiana Commission maintains that this approach raises an obstacle for complainants.

24. The Louisiana Commission asserts that the Commission's finding conflicts with *Louisiana Commission v. FERC*. According to the Louisiana Commission, in that case it complained that the failure to exclude interruptible load from the ratio that allocated reserve capability costs among the operating companies was unjust and unreasonable. The Commission, however, ruled that the Louisiana Commission had not alleged that the overall results of the formula were unjust and unreasonable. The Louisiana Commission explains that, on appeal, the Commission argued that the allocation of capacity costs is but one component of a complex rate. The Louisiana Commission notes that the court of appeals held that "an undifferentiated reference to other rate components, without a showing that the other components were offsets, was not a sufficient basis to dismiss the complaint."[47] The Louisiana Commission thus contends that the court in *Louisiana Commission v. FERC* ruled that a showing of a material defect in the tariff warranted a correction absent countervailing offsets.

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[44] Louisiana Commission Request for Rehearing at 5.

[45] *Id.* (quoting Initial Decision, 131 FERC ¶ 63,009 at P 42).

[46] *Id.*

[47] *Id.* at 6.

25. The Louisiana Commission claims that the court in *Louisiana Commission v. FERC* made it clear that it is not the complainant's burden to negate the possibility that defects concerning other cost components in the tariff would not have offsetting effects. Rather, the Louisiana Commission states that the court held that a Commission ruling requiring "'a complainant to support its position with an analysis of all components of the overall rate,' would be inconsistent with Commission precedent."[48] The Louisiana Commission asserts that although the Commission's holding in Opinion No. 515 does not extend to all components of the overall rate, it does extend to all components of ADIT and that the principle is the same. The Louisiana Commission concludes that, based on the reasoning in *Louisiana Commission v. FERC*, "[r]equiring a complainant to prove a negative with respect to 600 other ADIT categories, in the absence of a prima facie showing by an opposing party that any would make a difference, allocates the burden of proof unreasonably."[49]

26. The Louisiana Commission further argues that Opinion No. 515 is inconsistent with the Hearing Order, which specified the issue to be addressed. The Louisiana Commission contends that if it had attempted to prove that other ADIT components were 100 percent production-related and sought a broader remedy than the direct assignment of Waterford 3 Sale-Leaseback Account 190 ADIT, the other parties would have objected and the Presiding Judge would likely have ruled the proof beyond the scope of the hearing.[50] The Louisiana Commission claims that the potential existence of offsetting components is akin to the nature of an affirmative defense, and that a party raising an affirmative defense must at least produce sufficient evidence to establish that the defense is legitimate. The Louisiana Commission recognizes that the party with the ultimate burden may be required to negate the defense, but argues that the complainant should not be required to search for potential defenses that might require rebuttal.

27. Finally, citing various cases, the Louisiana Commission states that judicial precedent establishes that in order to change a single component of a rate, a utility need not carry a burden with respect to multiple components – i.e., "the burdens imposed on parties relate to the specific provisions in a formula that they seek to change."[51] The Louisiana Commission contends that in Opinion No. 515 the Commission changed this burden of proof, and also departed from its practice in previous bandwidth complaint

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[48] *Id.*

[49] *Id.* at 7.

[50] *Id.*

[51] *Id.* at 8-9 (citing, *e.g.*, *ANR Pipeline Co.*, 771 F.2d (D.C. Cir. 1985), *Georgia Power Co. v. FPA*, 373 F.2d 485 (5th Cir. 1967)).

cases. With respect to the latter, the Louisiana Commission notes that in a previous complaint case, the Commission agreed with the Louisiana Commission that Waterford 3 capital lease amounts should be removed from production costs and the ratio used to functionalize ADIT to production.[52] According to the Louisiana Commission, in that case the Commission did so without conducting an inquiry into the accuracy of other ADIT allocations.

3. Commission Determination

28. We deny rehearing. In Opinion No. 515, the Commission agreed with the Louisiana Commission that it was not required to demonstrate that the entire bandwidth formula is unjust and unreasonable as a result of its failure to directly assign the Waterford 3 Sale-Leaseback Account 190 ADIT. Rather, the Louisiana Commission was 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."[53] In Opinion No. 515, the Commission affirmed the Presiding Judge's ruling that the Louisiana Commission had not made the requisite showing. The Commission agreed with the Presiding Judge that if the Louisiana Commission had made a showing that functionalization of the Waterford 3 Sale-Leaseback Account 190 ADIT results in an under-allocation of ADIT to the production function, such a showing would have represented a legitimate basis upon which to challenge Service Schedule MSS-3.[54]

29. On rehearing, the Louisiana Commission asserts that the Commission has changed the burden of proof that the Louisiana Commission must carry to prevail on its claim. The Louisiana Commission argues that by requiring it to show how directly assigning all of the approximately 600 ADIT sub-accounts would impact the ADIT component of the bandwidth formula, rather than just the Waterford 3 Sale-Leaseback Account 190 ADIT sub-account, the Commission has expanded the Louisiana Commission's burden. Based on its interpretation of *Louisiana Commission v. FERC*, the Louisiana Commission concludes that requiring it to address all ADIT sub-accounts that comprise ADIT is analogous to requiring a complainant challenging one component of a formula rate to address all components of that rate. Because the latter places an inappropriate burden on complainants, the Louisiana Commission concludes that the former does as well.

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[52] *Id.* at 10-11 (citing *Louisiana Public Service Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010 (2008) (*Louisiana Public Service Comm'n v. Entergy Corp*)).

[53] Opinion No. 515, 137 FERC ¶ 61,070 at P 31.

[54] *Id.* P 32 (citing Initial Decision, 131 FERC ¶ 63,009 at P 47).

30. The Commission rejects this argument and disagrees with the Louisiana Commission's interpretation of *Louisiana Commission v. FERC*. In relying on that decision, the Louisiana Commission attempts to eliminate the distinction between ADIT sub-accounts and the ADIT component of the formula rate. Requiring the Louisiana Commission to analyze how directly assigning all of the ADIT sub-accounts would impact the ADIT component of the bandwidth formula is not analogous to requiring a complainant to demonstrate that all of the components of a rate formula are unjust and reasonable when it is only challenging one component. Service Schedule MSS-3 functionalizes ADIT in the aggregate and the functionalization process applies to all eligible ADIT accounts whether related to production, transmission or distribution. By focusing on one ADIT sub-account, the Louisiana Commission has not demonstrated that the Service Schedule MSS-3 ADIT functionalization methodology is unjust and unreasonable, and has not met its burden of proof. The Louisiana Commission fails to demonstrate that the formula rate, or even one of the components of that rate, the ADIT component, is unjust and unreasonable. For these reasons, the Commission also rejects the Louisiana Commission's argument that the requirement to take into account the other ADIT sub-accounts is akin to requiring the Louisiana Commission to demonstrate that these other accounts serve as countervailing offsets. As explained above, the ADIT sub-accounts are functionalized in the aggregate, thus, focusing on one sub-account fails to address whether Service Schedule MSS-3 is unjust and unreasonable.

31. As the Commission also explained in Opinion No. 515, by focusing on one ADIT sub-account, the Louisiana Commission is cherry-picking a component of ADIT that would increase the bandwidth payments made to Entergy Louisiana. Focusing only on how directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT would affect the bandwidth payments received by Entergy Louisiana is not adequate to demonstrate that functionalizing Waterford 3 Sale-Leaseback Account 190 ADIT results in an incorrect over- or under-allocation of ADIT to the production function that is unjust, unreasonable, unduly discriminatory or preferential. As explained above, the need to evaluate the ADIT sub-accounts does not stem from an altered burden of proof, but from the fact that Service Schedule MSS-3 functionalizes ADIT in the aggregate.

32. Finally, the Commission finds that the Louisiana Commission's reliance on *Louisiana Public Service Comm'n v. Entergy Corp.* is also unavailing. According to the Louisiana Commission, in that decision the Commission accepted removal of certain Waterford 3 capital lease amounts in production costs without requiring an inquiry into the accuracy of other ADIT allocations.[55] In that proceeding, however, the Louisiana Commission explained that the lessor of Waterford 3, not Entergy Louisiana, owned the

[55] Louisiana Commission Request for Rehearing at 10-11 (citing *Louisiana Public Service Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010 at P 20).

portion of the Waterford 3 unit subject to the lease, and that Entergy Louisiana did not depreciate the lease portion for income tax purposes. Accordingly, the error of including these amounts could be corrected by removal of the Waterford 3 capitalized lease amounts; the reasons for removal of those costs are distinguishable from the Louisiana Commission's challenge to Waterford 3 Sale-Leaseback Account 190 ADIT in this proceeding. Thus, unlike the major modification through the direct assignment of Waterford 3 Sale-Leaseback Account 190 ADIT that the Louisiana Commission seeks here, the Commission in *Louisiana Public Service Comm'n v. Entergy Corp.*approved a modification to fix a limited flaw in the application of ADIT. In that earlier case, the plant ratio was adjusted to exclude the capital lease amounts because they did not give rise to ADIT associated with accelerated depreciation, and the result was a consistent allocation of ADIT associated with accelerated depreciation based on the plant that was the source of the ADIT.

C. The Commission Did Not Alter Its Definition of "direct" and "indirect" Costs.

1. Opinion No. 515

33. The Commission found that the Louisiana Commission erred when it argued that direct assignment of the Waterford 3 Sale-Leaseback Account 190 ADIT is mandated by Commission policy favoring direct cost assignment where feasible.[56] In *Kern River*, 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."[57] 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."[58] In Opinion No. 515, however, the Commission noted that the Waterford 3 Sale-Leaseback Account 190 ADIT is an indirect cost, not a direct cost that *Kern River* indicates should be directly assigned. The Commission noted further that *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.[59]

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[56] Opinion No. 515, 137 FERC ¶ 61,070 at P 70.

[57] *Kern River Gas Transmission Co.*, 117 FERC ¶ 61,077, at P 290 (2006) (*Kern River)*.

[58] *Id*.

[59] Opinion No. 515, 137 FERC ¶ 61,070 at P 70.

34. The Commission found that its ruling in *AEP* was also applicable.[60] In *AEP*, the Commission rejected an attempt to single out sale-leaseback ADIT in Account 190 for direct assignment while using the plant ratio to allocate other components of ADIT. 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. 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."[61] In Opinion No. 515, the Commission noted the similarity between the Louisiana Commission's proposal in this case and the wholesale customers' proposal in *AEP*. The Commission found that 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.[62]

2. **Request for Rehearing**

35. The Louisiana Commission states that Opinion No. 515 recognizes that Commission precedent requires the direct assignment of direct costs. The Louisiana Commission notes, however, that even though the Waterford 3 Sale-Leaseback Account 190 ADIT is 100 percent production-related and can be directly assigned, the Commission characterized it as an "indirect" cost that is not subject to applicable precedent.[63]

36. The Louisiana Commission explains that the Commission, relying on the Initial Decision, holds that the Waterford 3 Sale-Leaseback Account 190 ADIT is an indirect cost, not a direct cost, that, pursuant to *Kern River*, should be directly assigned. The Louisiana Commission argues that the Commission's conclusion conflicts directly with the Commission's explanation in *Kern River* of "direct" cost. The Louisiana Commission states that, in that case, the Commission dealt with Administrative and General (A&G) expenses and while these expenses generally fall into the definition of "indirect" costs – i.e. costs attributable to multiple functions – the utility had directly assigned some of the costs as directly attributable to a particular function.

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[60] *Id.* PP 71-72.

[61] *AEP*, 88 FERC ¶ 61,141 at 61,446.

[62] Opinion No. 515, 137 FERC ¶ 61,070 at PP 71-72.

[63] Louisiana Commission Request for Rehearing at 12.

37. The Louisiana Commission states that here, the parties all agree that the Sale-Leaseback ADIT is 100 percent production-related; the ADIT relates solely to Waterford 3, a production asset. Therefore, the Louisiana Commission argues that under the *Kern River* definition, this cost is a direct cost and should be directly assigned. Additionally, the Louisiana Commission argues that the Commission's statement that the parties agree the ADIT is really an indirect cost is baseless. The Louisiana Commission contends that the Initial Decision does not explain anything of the sort and the transcript reference actually supports the opposite conclusion.

38. Also, the Louisiana Commission states that the Commission's reliance on *AEP* as establishing a rule against the piecemeal allocation of ADIT conflicts with the *Kern River* policy. The Louisiana Commission explains that the *Kern River* policy allows the direct assignment of cost categories if there is an identifiable relationship with a particular function. The Louisiana Commission contends that if the Commission wishes to change that policy, it needs to explain the change, and there is no explanation in *AEP*.

3. Commission Determination

39. The Louisiana Commission takes issue with the fact that the Commission characterized the Waterford 3 Sale-Leaseback Account 190 ADIT as an indirect cost, claiming that it is a "direct" cost because it can be directly assigned to the nuclear production function. The Louisiana Commission argues that the Commission's treatment of Account 190 ADIT as an indirect cost conflicts with the precedent established in *Kern River*. However, this argument misapplies the Commission's precedent, and ignores the remainder of the Commission's findings in Opinion No. 515. In *Kern River*, the Commission stated that its general policy is to directly assign direct costs and to allocate by formula indirect costs.[64] Importantly, though, the Commission continued by saying that "the test is specifically whether the method of directly assigning the cost is consistent and the relationship obvious and reviewable."[65] At issue here is not whether the Account 190 ADIT is capable of being directly assigned – as the Presiding Judge states in the Initial Decision no party disputes that it is possible to directly assign Account 190 ADIT to the production function in the bandwidth calculation.[66] Instead, as the Presiding Judge

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[64] *Kern River*, 117 FERC ¶ 61,077 at P 290.

[65] *Id.*

[66] Opinion No. 515, 137 FERC ¶ 61,070 at P 37.

notes,[67] it is the second part of the Kern River test, consistency, which the Louisiana Commission has failed to satisfy.

40. The Louisiana Commission's proposal is not consistent because it fails to consider other ADIT sub-accounts. The Louisiana Commission focuses solely on Account 190, but neglects the fact that there are other ADIT amounts, such as those in Account 282 that are associated with the Waterford 3 Sale-Leaseback transaction.[68] As the Commission noted in Opinion No. 515, the Louisiana Commission's proposed treatment would result in inconsistent treatment of ADIT sub-accounts in the ADIT component of the bandwidth formula.[69] Such cherry-picking is contrary to Commission precedent, including the Commission's finding in *AEP* rejecting an attempt to create a piecemeal approach to allocating ADIT components.[70] Far from altering policy as the Louisiana Commission claims, the Commission is instead upholding and applying *Kern River* and doing so consistently with the *AEP* precedent as well. Contrary to the Louisiana Commission's claims, there is no conflict between the Commission's decisions in *Kern River* and *AEP*. Both cases stand for the proposition that direct costs should be directly assigned where possible, but that such assignment must be done in a consistent and reviewable manner. Here, as in *AEP*, the proposed direct assignment of only one portion of the ADIT sub-accounts is not consistent and would produce an unjust and unreasonable result.

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[67] Initial Decision, 131 FERC ¶ 63,009 at P 57. The Presiding Judge stated:

> Moreover, the direct assignment test articulated in *Kern River* is whether the method is consistent. [*Reference omitted*] Here, the method [the Louisiana Commission]—directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT—is indisputably inconsistent with the way the revision would leave many similar ADIT sub-accounts functionalized under Service Schedule MSS-3.

[68] We note that Account 190 has the effect of increasing Entergy Louisiana's rate base while Account 282 has the opposite effect.

[69] Opinion No. 515, 137 FERC ¶ 61,070 at P 70.

[70] *AEP*, 88 FERC ¶ 61,141, at 61,446.

D. The Commission's Refusal to Respond to an Argument Raised for the First Time in the Louisiana Commission's Brief on Exceptions was Proper.

1. Opinion No. 515

41. In Opinion No. 515, the Commission rejected as improperly raised the Louisiana Commission's calculations and analysis of additional sub-accounts that the Louisiana Commission asserted could be directly assigned. The Commission rejected the Louisiana Commission's analysis because the information was "being raised for the first time in [the Louisiana Commission's] brief on exceptions."[71]

2. Request for Rehearing

42. The Louisiana Commission argues that it was fundamentally unfair for the Commission to refuse to consider in Opinion No. 515 the evidence it presented on additional sub-accounts that it asserts could be directly assigned.[72] The Louisiana Commission argues that although the Initial Decision imposed a new burden on it, it was able to show in its Brief on Exceptions that the total of possibly directly assignable ADIT components would not offset the impact of allocating the Waterford 3 Sale-Leaseback Account 190 ADIT to the production function. According to the Louisiana Commission, parties in this proceeding have contended that there are other items of ADIT that could be directly assigned, but those parties did not attempt to show that the ADIT components they identified would constitute an offset to the impact of directly assigning Waterford 3 Sale-Leaseback Account 190 ADIT. The Louisiana Commission argues that in its Reply Brief it addressed the contentions concerning other ADIT components, examining them individually and showing that their impact would not constitute an offset.[73]

43. The Louisiana Commission states that it documented its argument in more detail in its Brief on Exceptions, after the Initial Decision imposed the additional requirement of showing that the overall impact on the Bandwidth Formula is unjust and unreasonable. According to the Louisiana Commission, in that pleading it again demonstrated that the direct assignment of all "arguably-directly-assignable" ADIT components would add to the Entergy Louisiana benefit from directly assigning the Waterford 3 Sale-Leaseback Account 190 ADIT.[74] The Louisiana Commission maintains that it first raised the other

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[71] Opinion No. 515, 137 FERC ¶ 61,070 at P 76.

[72] Louisiana Commission Request for Rehearing at 14.

[73] *Id.* at 15.

[74] *Id.* at 16.

parts of its argument in its Reply Brief, and that it showed that its evidence met not only the burden with respect to the Waterford 3 Sale-Leaseback Account 190 ADIT, but also with respect to all components of ADIT that parties had identified as potentially directly assignable. The Louisiana Commission asserts that refusing to consider arguments that its evidence satisfies the new barriers erected by the Commission constitutes arbitrary decision making.[75]

3. Commission Determination

44. We deny rehearing. While the Louisiana Commission presented some analysis of other ADIT sub-accounts in its Reply Brief,[76] which the Presiding Judge considered, the Louisiana Commission presented additional analysis covering additional ADIT subaccounts in its Brief on Exceptions.[77] Thus the Commission properly rejected, in Opinion No. 515, the Louisiana Commission's analysis of "additional sub[-]accounts"[78] beyond what it had previously presented in its Reply Brief because that additional information was raised for the first time in the Louisiana Commission's Brief on Exceptions.

45. However, even if the Louisiana Commission's arguments were properly raised, the Commission would still reject them on a substantive basis. In Opinion No. 515, the Commission stated that the Louisiana Commission was seeking to cherry-pick one component of ADIT for special treatment in order to increase the bandwidth payments made to Entergy Louisiana.[79] The Commission found that in order to show that functionalizing Waterford 3 Sale-Leaseback Account 190 ADIT results in an incorrect over-allocation or under-allocation of ADIT to the production function that is unjust, unreasonable, unduly discriminatory or preferential, 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.[80] The Commission

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[75] *Id*.

[76] Louisiana Commission Request for Rehearing at 15 (citing Reply Brief on Behalf of the Louisiana Public Service Commission, Complainant at 12-17, Docket No. EL09-50-000 (Mar. 12, 2012)).

[77] Brief on Exceptions on Behalf of the Louisiana Public Service Commission, Complainant at 31-40, Docket No. EL09-50-000 (June 1, 2010).

[78] Opinion No. 515, 137 FERC ¶ 61,070 at P 76.

[79] *Id*. P 33.

[80] *Id.*

explained further 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.[81] As discussed above, 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 ADIT should be functionalized in the same manner as all other ADIT amounts.[82]

46. The Louisiana Commission's analysis presented in its Brief on Exceptions consists of examining various ADIT sub-accounts mentioned by witnesses during the course of the proceeding and attempting to show that those amounts do not offset the impact of allocating the Waterford 3 Sale-Leaseback Account 190 ADIT to the production function. In short, the Louisiana Commission's analysis regarding offsets is an attempt to cherry-pick one component of ADIT for special treatment without taking into account the other sub-accounts. Accordingly, the Louisiana Commission's approach is inconsistent with the functionalization of ADIT in the aggregate, as required by the Bandwidth Formula, and falls short of the comprehensive analysis of the ADIT sub-accounts required by the Commission in Opinion No. 515.

The Commission orders:

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

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[81] *Id.*

[82] *Id.*