

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

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

Entergy Arkansas, Inc.	Docket Nos. ER12-1384-003
Entergy Gulf States Louisiana, L.L.C.	ER12-1385-003
Entergy Louisiana, LLC	ER12-1386-003
Entergy Mississippi, Inc.	ER12-1387-003
Entergy New Orleans, Inc.	ER12-1388-003
Entergy Texas, Inc.	ER12-1390-003

Louisiana Public Service Commission	EL11-57-003 (Consolidated)
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v.

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

OPINION NO. 542-A

ORDER DENYING REHEARING

(Issued May 10, 2016)

1. In this order, the Commission addresses requests for rehearing of Opinion No. 542¹ filed by the Mississippi Public Service Commission (Mississippi Commission), the Arkansas Public Service Commission (Arkansas Commission), and the Council of the

¹ *Entergy Servs. Inc.*, Opinion No. 542, 153 FERC ¶ 61,183 (2015).

City of New Orleans (New Orleans Council) on December 21, 2015. In Opinion No. 542, the Commission affirmed in part and denied in part an Initial Decision addressing Entergy Services, Inc.'s (Entergy) proposal, filed under section 205 of the Federal Power Act (FPA)² and a complaint filed by the Louisiana Public Service Commission under section 206 of the FPA³ seeking to include costs associated with the cancelled Little Gypsy Repowering Project in the rough production cost equalization bandwidth formula (bandwidth formula) set forth in Service Schedule MSS-3 to the Entergy System Agreement (System Agreement). As discussed more fully below, we deny the requests for rehearing.

I. Background

2. This proceeding is part of a long history of litigation over the allocation of the production costs of electric power plants among the Entergy Operating Companies under the System Agreement. A detailed recitation of the procedural history of this proceeding is set forth in Opinion No. 542 and will not be repeated here.⁴ As relevant to the rehearing requests, the System Agreement (a rate schedule on file at the Commission) allows the Entergy Operating Companies⁵ to plan, construct, and operate their generation and transmission facilities as a single, integrated electric system (Entergy System). In Opinion No. 480, the Commission found that rough production cost equalization on the Entergy System had been disrupted and therefore accepted a “bandwidth remedy” to help

² 16 U.S.C. § 824(d) (2012).

³ 16 U.S.C. § 824e.

⁴ *See* Opinion No. 542, 153 FERC ¶ 61,183 at PP 2-29.

⁵ The Entergy Operating Companies are Entergy Arkansas, Inc. (Entergy Arkansas); Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States); Entergy Louisiana, LLC (Entergy Louisiana); Entergy Mississippi, Inc. (Entergy Mississippi); Entergy New Orleans, Inc. (Entergy New Orleans); and Entergy Texas, Inc. (Entergy Texas). On October 1, 2015, Entergy Gulf States and Entergy Louisiana concluded a transaction in which they combined substantially all of their respective assets and liabilities into a single successor public utility operating company, Entergy Louisiana Power, LLC, which subsequently was renamed Entergy Louisiana, LLC. The Commission authorized the transaction in *Entergy Gulf States Louisiana, L.L.C.*, 151 FERC ¶ 62,018 (2015), and Entergy Services filed a notice of consummation in Docket No. EC15-47-000 on October 9, 2015.

keep the Entergy System in rough production cost equalization.⁶ The Commission also required that Entergy make annual bandwidth filings to determine any necessary bandwidth payments among the Entergy Operating Companies. In its compliance filing implementing the directives of Opinion Nos. 480 and 480-A, Entergy included in Service Schedule MSS-3 the formula for implementing the rough production cost equalization bandwidth remedy (bandwidth formula).⁷

II. Discussion

A. Interpretation of Section 3.01 of the System Agreement

1. Opinion No. 542

3. In Opinion No. 542, the Commission reversed the Presiding Judge's determination that it would be inappropriate to include the Little Gypsy cancellation costs in the bandwidth formula because the Little Gypsy Repowering Project was "planned, subsequently cancelled, and never provided any service." The Commission rejected the Presiding Judge's reading of section 3.01 of the System Agreement as "unreasonably narrow."⁸ In its entirety, section 3.01 provides as follows:

The purpose of this Agreement is to provide the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the Companies in such a manner as to achieve economies consistent with the highest practicable reliability of service, subject to financial considerations, reasonable utilization of

⁶ See *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 44, *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. La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047, *order dismissing reh'g*, 137 FERC ¶ 61,048 (2011), *order on reh'g*, 146 FERC ¶ 61,152, *order rejecting compliance filing*, 146 FERC ¶ 61,153 (2014), *Entergy Services, Inc., order on compliance*, 151 FERC ¶ 61,112 (2015).

⁷ Opinion No. 542, 153 FERC ¶ 61,183 at P 2 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203, *order on reh'g and compliance*, 119 FERC ¶ 61,095).

⁸ *Id.* P 66.

natural resources and minimization of the effect on the environment. This Agreement also provides a basis for equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies.⁹

4. The Commission acknowledged the Presiding Judge's assertion that section 3.01 may be "a fundamental provision" of the System Agreement describing its purpose, but found that the Presiding Judge "closely focused on one word (i.e., used) in the second sentence of that provision rather than reading the provision as a whole[.]"¹⁰ The Commission further found in Opinion No. 542 that a more "reasonable interpretation" of the purpose of the System Agreement is to "enable the Entergy Operating Companies to equalize the imbalance in costs that encompasses the planning, construction, and operation of the electric generation, transmission, and other facilities of the Entergy Operating Companies."¹¹ Therefore, the Commission concluded, it was unable to interpret the term "used" in section 3.01 of the System Agreement "as an equivalent to the used and useful principle, as that principle has traditionally been applied in utility ratemaking."¹² The Commission further found that the Presiding Judge's interpretation of section 3.01 is "restrictive" and "inconsistent" with the implementation of the bandwidth formula in practice under both the System Agreement and Opinion No. 480.¹³ Finally, the Commission found that inclusion of some production-related cost items in the bandwidth formula that have already been found just and reasonable would be foreclosed if the Commission were to adopt the Initial Decision's narrow interpretation of section 3.01.¹⁴

⁹ System Agreement, Article III, § 3.01.

¹⁰ Opinion No. 542, 153 FERC ¶ 61,183 at P 66.

¹¹ *Id.* P 67 (citing Entergy Brief on Exceptions at 19).

¹² *Id.*

¹³ *Id.* P 68.

¹⁴ *Id.*

2. Requests for Rehearing

5. The Arkansas Commission argues that Opinion No. 542 misreads section 3.01 of the System Agreement as “[e]rroneously conflating the first and second sentences of [section] 3.01” thereby permitting the Commission “to characterize the Judge’s reading of the plain language of [section] 3.01’s second sentence, specifying what costs can be used for equalization, as unreasonably narrow.”¹⁵ The Arkansas Commission asserts that such a misinterpretation amounts to arbitrary and capricious conduct contrary to the law.¹⁶ The Arkansas Commission argues that section 3.01’s first sentence merely establishes the purpose of the System Agreement, but does not identify how this purpose is to be achieved, which is accomplished by the second sentence of section 3.01.¹⁷ The Arkansas Commission asserts that the Commission allows the general purposes statement of the first sentence of section 3.01 to modify and expand the specific cost limitations found in the second sentence, namely that it renders the restrictive modifier in the second sentence, “as are used,” meaningless.¹⁸ The Arkansas Commission contends that the Presiding Judge’s interpretation of section 3.01 is the only reasonable interpretation because it properly restricts production costs to be equalized to those that are or have been capable of both operation and use.¹⁹

6. The Mississippi Commission similarly argues that the Commission misconstrued the relationship between the first and second sentences of section 3.01 of the System Agreement by conflating sentence one with sentence two.²⁰ The Mississippi Commission contends that because the principles of textual construction demand that the “specific controls the general,” the second sentence of section 3.01 that includes the “such facilities as are used” clause must control in evaluating whether it limits costs eligible for equalization.²¹ The Mississippi Commission argues that the first sentence provides the contractual basis for joint, system-wide, pre-use planning and construction, but that the

¹⁵ Arkansas Commission Request for Rehearing at 8.

¹⁶ *Id.*

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 9-10.

¹⁹ *Id.* at 11.

²⁰ Mississippi Commission Request for Rehearing at 2.

²¹ *Id.* at 7.

second sentence does not provide for bandwidth cost equalization of all facilities planned or constructed, whether or not used.²² The Mississippi Commission also asserts that the second sentence of section 3.01 is consistent with general ratemaking principles and is supposed to ensure that “where costs provide no benefit to jurisdictions outside the [Operating Company] that incurs them, those costs will not be spread to those other jurisdictions.”²³

3. Commission Determination

7. As the Commission found in Opinion No. 542, a more “reasonable interpretation” of the purpose of the System Agreement is to enable the Entergy Operating Companies to equalize the imbalance in costs that encompasses the planning, construction, and operation of the electric generation, transmission, and other facilities of the Entergy Operating Companies. This includes costs associated with cancelled plant, like Little Gypsy, which was found by the Presiding Judge to have been planned for the benefit of the entire Entergy System,²⁴ and the costs of which were found by the Louisiana Commission to have been prudently incurred.²⁵ The Presiding Judge also found that the parties do not dispute that the costs of the Little Gypsy project would have been included in the bandwidth formula if Little Gypsy had been completed and placed into service.²⁶

8. We disagree with the Arkansas Commission’s contention that the Commission, in Opinion No. 542, misreads section 3.01 of the System Agreement and renders the restrictive modifier in the second sentence, “as are used,” meaningless. The phrase “as are used” must be read in the context of the whole provision of section 3.01 as it relates to the purpose of the System Agreement. The contested phrase cannot swallow the entire provision or the System Agreement. We also disagree with the Mississippi Commission that the Commission’s reading misconstrues the relationship between the first and second sentences of section 3.01 of the System Agreement. Even if it was undisputed that the

²² *Id.* at 7-8.

²³ *Id.* at 24.

²⁴ *Entergy Servs., Inc.*, 143 FERC ¶ 63,012 at P 11 (2013) (Initial Decision).

²⁵ *Docket No. U-30192 Phase III, Application of Entergy Louisiana, LLC for Approval to Repower Little Gypsy Unit 3 Electric Generation Facility and for Authority to Commence Construction and for Certain Cost Production and Cost Recovery*, Order No. U-30192-E (May 17, 2011) (Louisiana Commission Settlement Order) at 5-8.

²⁶ Initial Decision, 143 FERC ¶ 63,012 at P 12.

phrase “as are used” in section 3.01 means exactly the same as the “used and useful” ratemaking principle, which, as the Commission found in Opinion No. 542 and continues to find that, it does not, such an interpretation does not automatically or categorically require ignoring the purpose of the System Agreement: to equalize the imbalance in costs that encompasses the planning, construction, and operation of the electric generation, transmission, and other facilities of the Entergy Operating Companies. Further, when the Mississippi Commission claims that the Commission interpreted section 3.01 of the System Agreement as intending to provide equalization of costs associated with a project that was cancelled without being used for the benefit of any Operating Company, it improperly suggests that the Little Gypsy project was not planned for the benefit of the entire Entergy System, was not part of an established system planning process, or was otherwise not beneficial to any Operating Company whatsoever. The facts that the Commission relied upon in affirming the Presiding Judge’s finding that the Little Gypsy Repowering Project was designed to meet the needs of the Entergy System²⁷ show clearly that is not the case here. Therefore, we reiterate the determination in Opinion No. 542 that in the instant case the Little Gypsy cancellation costs are appropriate for inclusion in the bandwidth formula.

9. Further, we disagree with the Mississippi Commission’s contention that the Commission contradicted itself by finding that consideration of cancelled plant costs in the bandwidth formula was a “matter of first impression” and that past Commission decisions foreclosed a reading of section 3.01 under which only costs associated with “used” facilities are subject to bandwidth cost equalization.²⁸ Although the Mississippi Commission does not elaborate on why it asserts there is a contradiction, as a preliminary matter, both the Presiding Judge and the Commission found that this issue was a matter of first impression.²⁹ Moreover, the Commission stated that it is uncontroverted in the record that when the Commission issued Opinion No. 480, and the subsequent orders accepting Entergy’s compliance filings to implement rough production cost equalization, none of the Entergy Operating Companies had cancelled a plant in the period covered in Entergy’s exhibits implementing the bandwidth formula.³⁰ Therefore, we reiterate the determination in Opinion No. 542 that consideration of cancelled plant costs in the bandwidth formula is a matter of first impression. Additionally, the Mississippi

²⁷ Opinion No. 542, 153 FERC ¶ 61,183 at P 39.

²⁸ Mississippi Commission Request for Rehearing at 1.

²⁹ Opinion No. 542, 153 FERC ¶ 61,183 at P 65 (citing Initial Decision, 143 FERC ¶ 63,012 at P 15).

³⁰ *Id.*

Commission's assertion of a contradiction is misplaced because when the Commission points out that (and rejects) the Presiding Judge's narrow interpretation of section 3.01 would foreclose the inclusion in the bandwidth formula of production-related costs items that have already been found just and reasonable for inclusion, this does not imply that the Commission had expressly considered the specific issue of whether cancelled plant costs should be included in the bandwidth formula in those decisions.

B. Consistency with Order No. 480

1. Opinion No. 542

10. In Opinion No. 542, the Commission found that including the Little Gypsy cancellation costs in the bandwidth formula is consistent with the purpose of the bandwidth remedy as established by Opinion No. 480 and the history of the Entergy System.³¹ The Commission found that the objective of the bandwidth formula, as approved by the Commission in Opinion No. 480, "is to ensure that the purpose of the System Agreement is achieved—i.e., to roughly equalize production costs among the Entergy Operating Companies."³² After agreeing with the Presiding Judge that, in Opinion No. 480, the Commission had found that rough rather than full equalization of production costs was consistent with the purpose of the System Agreement, the Commission explained that it had also found that rough production cost equalization on the Entergy System should be determined based on "[f]uture production cost comparisons among the [Entergy] Operating Companies."³³ In Opinion No. 542, the Commission further found that the Commission did not suggest in Opinion No. 480 that certain production-related costs should be considered for rough production cost equalization purposes while others should not.³⁴

11. Significantly, in Opinion No. 542, the Commission found that the Presiding Judge misconstrued Opinion No. 480 by concluding that it incorporates and relies on the "used" language in section 3.01 to mean that production costs can only be equalized when a project is constructed, owned, and operated, and then at one time or another is "used" by the Entergy System.³⁵ In Opinion No. 542, the Commission found that it has never

³¹ *Id.* P 89.

³² *Id.* P 68 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 44).

³³ *Id.* P 86 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 33).

³⁴ *Id.*

³⁵ *Id.* P 87.

interpreted the section 3.01 phrase “used for the benefit of the Companies” to foreclose consideration of cancellation costs or any other costs in the bandwidth formula.³⁶ Given that the Commission concluded in Opinion No. 480 that a bandwidth remedy of +/- 11 percent between the Entergy Operating Companies on an annual basis is just and reasonable and will help keep the Entergy System in rough production cost equalization, the Commission found, in Opinion No. 542, that the Presiding Judge failed to explain how Entergy’s Little Gypsy cancellation cost proposal would disrupt the +/- 11 percent bandwidth established by Opinion No. 480 or “would represent a dramatic disruption of the [Entergy] system’s historical operations and of the states’ settled interests and expectations.”³⁷ The Commission stated that including the Little Gypsy cancellation costs in the bandwidth formula would not be antithetical to the history and purpose of the System Agreement.³⁸

2. Rehearing Requests

12. The Arkansas Commission argues that, contrary to Opinion No. 542, the Initial Decision is not at odds with Opinion No. 480 and its foundational exhibits.³⁹ The Arkansas Commission asserts that the Commission gave greater weight to Entergy’s current position that the costs should be included, rather than to the Presiding Judge’s finding to the contrary.⁴⁰ The Arkansas Commission contends that because Entergy originally rejected the notion of including the cancelled Little Gypsy costs in the bandwidth formula, only changing course due to the Louisiana Commission’s “insistence,” Entergy’s flip-flop indicates that Opinion No. 480 is at best ambiguous about whether or not cancelled plant costs should be included in the bandwidth formula.⁴¹ The Arkansas Commission further argues that Opinion No. 480 relied upon the “used for the mutual benefit” language from Opinion No. 234, where the Commission found that nuclear plant investment costs associated with units that were not used for the benefit of

³⁶ *Id.*

³⁷ *Id.* PP 88-89 (quoting Opinion No. 480, 111 FERC ¶ 61,311 at P 70 (citing *Miss. Indus. v. FERC*, 808 F.2d at 1565)).

³⁸ *Id.* P 89.

³⁹ Arkansas Commission Request for Rehearing at 17.

⁴⁰ *Id.*

⁴¹ *Id.*

the Operating Companies were not subject to rough equalization.⁴² The Arkansas Commission acknowledges that while it is technically true that the cited language from Opinion No. 234, “did not interpret the meaning of ‘used for the benefit of the Companies,’” as found in section 3.01 in the System Agreement, the Arkansas Commission insists that the Commission does not explain how the identical words in one situation (nuclear plant costs in Opinion No. 234) led to exclusion of unused plant from wholesale rates, but lead to the opposite result in the instant case.⁴³

13. The Mississippi Commission argues that the bandwidth remedy adopted in Opinion No. 480 was meant to continue the deference to the “use” clause of section 3.01 of the System Agreement that existed following Opinion No. 234.⁴⁴ The Mississippi Commission contends that this deference is evidenced by the fact that Opinion No. 480 began its discussion of the decision to adopt rough production cost equalization by quoting the “use” language that Opinion No. 234 recited from section 3.01, thus making it clear that the bandwidth remedy was meant to reach only “units used for the mutual benefit of all companies.”⁴⁵ The Mississippi Commission further claims that Opinion No. 480 also made clear that the bandwidth remedy was meant to respect “[the presiding judge’s] ruling concerning the importance of state regulatory bodies” and “the policy consideration that generation facilit[ies] should be left to the states.”⁴⁶ The Mississippi Commission asserts that the Commission’s rough cost equalization principle avoided a mismatch between single state regulatory duties regarding facility certifications, and shared cost responsibility for those certificated facilities, which demonstrates that the bandwidth remedy was always intended to respect the limitation of the “used” language in section 3.01.⁴⁷

14. The Mississippi Commission further contends that the intent of Opinion No. 480 was to “depart no more than necessary from historical practices,” which did not spread

⁴² *Id.* at 18 (citing Opinion No. 542, 153 FERC ¶ 61,183 at n.170 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 65)).

⁴³ *Id.* at 19 (quoting Opinion No. 542, 153 FERC ¶ 61,183 at P 87 & n.170).

⁴⁴ Mississippi Commission Request for Rehearing at 13.

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting Opinion No. 480, 111 FERC ¶ 61,311 at P 67).

⁴⁷ *Id.* at 14 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 69).

cancelled plant costs.⁴⁸ The Mississippi Commission argues that Construction Work in Progress (CWIP) and cancelled plant costs were deliberately left out of the bandwidth remedy fashioned in Opinion No. 480, despite the fact that the Commission and participants in the proceeding were fully aware that an operating company could incur costs to build generation facilities even though those facilities sometimes are cancelled without ever entering service.⁴⁹ The Mississippi Commission further asserts that the exclusion of Account 426.5 (cancelled plant costs) from the bandwidth formula was no accident, particularly because only a few years before the bandwidth proceeding, Entergy had written off almost a billion dollars of cancelled plant costs and several other generating plants owned by individual Operating Companies had also been cancelled not long before the bandwidth formula was created.⁵⁰

3. Commission Determination

15. In Opinion No. 542, the Commission fully addressed the issues raised by the Arkansas Commission and Mississippi Commission with respect to Opinion No. 480. Contrary to the Arkansas Commission's and Mississippi Commission's assertions, in Opinion No. 542 the Commission correctly found and adequately explained that including the Little Gypsy cancellation costs in the bandwidth formula is consistent with the purpose of the bandwidth remedy as established by Opinion No. 480. Specifically, in Opinion No. 542 the Commission found that the Presiding Judge misconstrued Opinion No. 480 in concluding that it incorporates and relies on the "used for the mutual benefit" language in section 3.01 to mean that production costs can only be equalized when a project is constructed, owned, and operated, and then is "used" by the Entergy System.⁵¹

16. The Arkansas Commission's argument that the Commission fails to explain how the identical words in one situation ("used" in Opinion No. 234⁵²) led to the exclusion of cancelled plant costs from wholesale rates, but leads to the opposite result in the instant case, misconstrues the facts of and the Commission's reasoning in Opinion No. 234. Contrary to the Arkansas Commission's reference to Grand Gulf Unit No. 2, which was

⁴⁸ *Id.* at 25.

⁴⁹ *Id.* at 26-27.

⁵⁰ Mississippi Commission Request for Rehearing at p. 30.

⁵¹ Opinion No. 542, 153 FERC ¶ 61,183 at P 87.

⁵² *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305 (1985).

at issue in Opinion No. 234, as cancelled plant costs⁵³ on par with Little Gypsy, at the time of that proceeding Grand Gulf Unit No. 2 was plant planned for construction. In Opinion No. 234, the Commission simply affirmed the Presiding Judge's *deferral* of approval of rates for Grand Gulf Unit No. 2.⁵⁴ Grand Gulf Unit No. 2's construction was suspended, and its construction commencement date had yet to be determined, but it had not been cancelled. Also contrary to the Arkansas Commission's suggestion, the Commission did not rely on the "used for the mutual benefit" language in affirming the Presiding Judge's deferral of recovery with respect to Grand Gulf Unit No. 2. Moreover, as the Commission stated in Opinion No. 542, it has never interpreted the section 3.01 "used for the mutual benefit of the Companies" language to foreclose consideration of cancellation costs or any other costs in the bandwidth formula.⁵⁵

17. Further, the Mississippi Commission's contention that the bandwidth remedy was meant to continue the deference to the "used for the mutual benefit" language of section 3.01, as evidenced by the fact that in Opinion No. 480 the Commission began its discussion of the decision to adopt rough production cost equalization by quoting the "used for the mutual benefit" language that Opinion No. 234 recited from section 3.01, disregards the fact that the Commission did not interpret that language in Opinion No. 480; the Commission merely quoted it. Additionally, even though the Mississippi Commission argues that CWIP and cancelled plant costs were deliberately left out of the bandwidth remedy, and that the exclusion of Account 426.5 (cancelled plant costs) from the bandwidth formula was no accident, this is not evidence of intentional policy treatment of cancelled plant costs with respect to the bandwidth formula. The issue of cancelled plant costs was not directly before the Commission in the Opinion No. 480 proceeding. Therefore, we reiterate the determination in Opinion No. 542 that in Opinion No. 480 the Commission did not suggest that certain production-related costs should be considered for rough production cost equalization purposes while others should not.

C. System Agreement Cost Equalization in Practice

1. Opinion No. 542

18. In Opinion No. 542, the Commission found that Entergy's proposal to amend the bandwidth formula to include the Little Gypsy cancellation costs is not inconsistent with

⁵³ Arkansas Commission Request for Rehearing at 18, n. 16.

⁵⁴ Opinion No. 234, 31 FERC ¶ 61,305 at 61,632 n.2 (emphasis added).

⁵⁵ Opinion No. 542, 153 FERC ¶ 61,183 at P 87 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 65).

section 3.01 of the System Agreement.⁵⁶ The Commission stated that the Initial Decision's interpretation of section 3.01 was overly restrictive, and was inconsistent with how rough production cost equalization has been implemented under the System Agreement in general and Opinion No. 480 in particular.⁵⁷ The Commission further found that adopting the Initial Decision's interpretation of section 3.01 would foreclose the inclusion of a number of production-related costs items in the bandwidth formula that have already been found just and reasonable for inclusion.⁵⁸ The Commission noted that it has allowed costs associated with generating assets that are purchased, not constructed, by Entergy Operating Companies to flow through the bandwidth formula.⁵⁹

2. Rehearing Requests

19. The Arkansas Commission argues that in Order No. 542 the Commission erred in finding that the Presiding Judge's application of the "used for the mutual benefit" language from section 3.01 was inconsistent with cost equalization practice under the System Agreement.⁶⁰ The Arkansas Commission states that the Commission erroneously implies that generating plants that are purchased, i.e., not constructed,⁶¹ are somehow not "used" for the benefit of all the Entergy Operating Companies, considering the Commission cited those generating plants as being foreclosed for inclusion in the bandwidth formula under the Presiding Judge's rationale.⁶² The Arkansas Commission also finds flaw in the Commission's reliance on the "fact that [the Commission] has never interpreted the section 3.01 phrase 'used for the mutual benefit of all the Companies' to

⁵⁶ *Id.* P 69.

⁵⁷ *Id.* P 68.

⁵⁸ *Id.*

⁵⁹ *Id.* n.126.

⁶⁰ Arkansas Commission Request for Rehearing at 14.

⁶¹ *Id.* at 15 (referring to the Hinds and Hot Springs generating units that were acquired in 2012 by Entergy Mississippi and Entergy Arkansas, respectively).

⁶² *Id.* at 15.

foreclose consideration of cancellation costs or any other cost in the bandwidth formula” as part of its argument for including those costs in the bandwidth formula.⁶³

20. The Mississippi Commission argues that the Commission ignores historical precedent regarding the limitation on cost equalization to mutually “used” facilities, which, according to the Mississippi Commission, has been a recognized principle in applying the language of the System Agreement to cost allocation disputes between the Entergy Operating Companies.⁶⁴ The Mississippi Commission also contends that the Commission erred in implying that costs associated with generating facilities that are purchased after their construction are not associated with “ownership.”⁶⁵ The Mississippi Commission asserts that the purchased-asset costs referenced by the Commission provide no counter-example to the Presiding Judge’s proper interpretation of section 3.01 because those purchased assets would not have been excluded from the bandwidth formula.⁶⁶

21. The Mississippi Commission further argues that the bandwidth formula was a limited remedy intended to emulate Entergy’s past arrangements under which each new generation unit’s owner bore the cancellation risk.⁶⁷ The Mississippi Commission asserts that Entergy has conceded that the risk of project cancellation historically has been part of the bundle of ownership responsibilities that was assigned rotationally under the System Agreement.⁶⁸ The Mississippi Commission further contends that this placement of generation project development risk dates back to the original 1951 version of the System Agreement, and was extended under the 1973 and 1982 versions of the System Agreement.⁶⁹ The Mississippi Commission states that project cancellation risk under

⁶³ *Id.* (quoting Opinion No. 542, 153 FERC ¶ 61,183 at P 87) (internal quotations omitted).

⁶⁴ Mississippi Commission Request for Rehearing at 10-15.

⁶⁵ *Id.* at 1.

⁶⁶ *Id.* at 16 and n. 31 (citing Opinion No. 542, 153 FERC ¶ 61,183 at P 68 and n.126).

⁶⁷ *Id.* at 24.

⁶⁸ *Id.*

⁶⁹ *Id.* at 24-25.

these arrangements was divided between shareholders and ratepayers and not spread to the other Operating Companies.⁷⁰

3. Commission Determination

22. We reject the Arkansas Commission's contention that the Commission erred in finding that the Presiding Judge's application of the "used for the mutual benefit" language from section 3.01 was inconsistent with System Agreement cost equalization practice. As determined above in section II.B, the Commission, in Opinion No. 542, correctly found and adequately explained that including the Little Gypsy cancellation costs in the bandwidth formula is consistent with the purpose of the bandwidth remedy as established by Opinion No. 480. Further, in Opinion No. 542, the Commission correctly found and adequately explained that Entergy's proposal to amend the bandwidth formula to include the Little Gypsy cancellation costs is not inconsistent with section 3.01 of the System Agreement. It is of no consequence that the Commission did not find that the generating plants it cites as being foreclosed for inclusion in the bandwidth formula under the Presiding Judge's rationale are not used for the benefit of all the Entergy Companies, as the Arkansas Commission suggests. In Opinion No. 542, when the Commission found that adopting the Presiding Judge's narrow interpretation of section 3.01 would foreclose the inclusion of a number of production-related costs items in the bandwidth formula that have already been found just and reasonable for inclusion in the bandwidth formula, the Commission was referencing the first part of the Presiding Judge's three-part test for bandwidth formula inclusion: whether the unit was "constructed."⁷¹ The Commission elaborated its reasoning in footnote 126, stating "[t]he Commission has allowed costs associated with generating assets that are purchased, not *constructed*, by Entergy Operating Companies to flow through the bandwidth formula."⁷² Therefore, when the Arkansas Commission attempts to assert that the Commission historically has only included costs in the bandwidth formula that are used for the mutual benefit of all the Entergy Companies, it ignores the Commission's other considerations, as plainly expressed in Opinion No. 542.

⁷⁰ *Id.* at 25.

⁷¹ *See* Opinion No. 542, 153 FERC ¶ 61,183 at P 44 ("The Presiding Judge found that the language of this provision and the use of the conjunction "and" make clear that costs are only subject to equalization when a project is (1) constructed; (2) owned; and (3) operated, and then at one time or another is "used" by the Entergy System.").

⁷² *Id.* n.126 (emphasis added).

23. Similarly, we also reject the Mississippi Commission's contention that the Commission erred in supposedly implying that costs associated with generating facilities that are purchased after their construction is complete are not associated with "ownership." First, the Commission did not imply that to be the case. As discussed immediately above, the Commission was merely referencing the first part of the Presiding Judge's three-part test for bandwidth formula inclusion, that a project be "constructed," to demonstrate that such a narrow interpretation of section 3.01 would lead to an inconsistency in how the bandwidth formula has already been applied in some instances. Contrary to the Mississippi Commission's assertion, the Commission did not imply that costs associated with generating facilities that are purchased after their construction is complete are not associated with "ownership"; therefore, the Commission did not err in pointing out the obvious implication of the Presiding Judge's unreasonably narrow interpretation of section 3.01 regarding projects that are "purchased" as opposed to "constructed."

24. While the Mississippi Commission argues that the placement of project cancellation risk prior to the adoption of the bandwidth formula means the Commission erred by allowing the inclusion of cancelled plant costs in the bandwidth formula, this ignores the fact that the bandwidth remedy has a fundamental (and novel) purpose of providing rough cost equalization, and that the instant proceeding is the first opportunity that the Commission has had to address directly cancelled plant costs as they apply to the bandwidth remedy.

D. Applicability of Opinion No. 295's⁷³ Cancelled Plant Policy

1. Opinion No. 542

25. In Opinion No. 542, the Commission found that Opinion No. 295 is not applicable to the circumstances presented in the instant proceeding. The Commission stated that, although Service Schedule MSS-3 is not an agreement for "the transmission of electric energy in interstate commerce[.]" . . . "the sale of electric energy at wholesale in interstate commerce," or concerning "the facilities used for such transmissions or sales of electric energy[.]" it lies within the Commission's jurisdiction because it affects wholesale rates pursuant to section 205(a) of the FPA.⁷⁴ In contrast, the Commission

⁷³ *New England Power Co.*, Opinion No. 295, 42 FERC ¶ 61,016, at 61,081-83, *order on reh'g*, Opinion No. 295-A, 43 FERC ¶ 61,285, *reh'g denied*, 44 FERC ¶ 61,092 (1998).

⁷⁴ *Id.* P 120 (quoting 16 U.S.C. § 824(b)(1)); (citing *Entergy Servs., Inc.*, Opinion No. 505-A, 139 FERC ¶ 61,103, at P 33 (2012)).

found that its cancelled and abandoned plant policy “has typically addressed the recovery of costs in wholesale power sales or transmission rates and the appropriate allocation between shareholders and ratepayers.”⁷⁵ The Commission therefore concluded that because the interests of shareholders and ratepayers of the recovery in wholesale rates is not implicated by the bandwidth formula, Opinion No. 295’s cancelled plant policy does not apply to the instant case.⁷⁶ The Commission added that the specific circumstances of the Little Gypsy project support a finding that cancellation costs should be included: Entergy Louisiana was selected under the rotational assignment procedure of the System Agreement as a means to diversify fuel for generation for the benefit of the entire Entergy System; a substantial decline in natural gas prices reversed the economics of the project; and the Louisiana Commission found that the cancellation costs were prudently incurred.⁷⁷

2. Rehearing Requests

26. The Arkansas Commission argues that the Commission erred in finding that the Opinion No. 295 cancelled plant policy does not apply here.⁷⁸ The Arkansas Commission states that in not applying its cancelled plant policy merely because the bandwidth formula is not a vehicle for direct cost recovery from ratepayers, the Commission again exalts form over substance.⁷⁹ The Arkansas Commission argues that while the bandwidth formula may not involve direct recovery of costs from ratepayers, the rate changes required by the bandwidth formula are directly passed on to ratepayers, and inclusion of the Little Gypsy cancellation costs in the bandwidth formula will lead to higher rates in Arkansas.⁸⁰ According to the Arkansas Commission, the Opinion No. 295 policy unquestionably should apply to the instant case because it involves a wholesale ratemaking issue subject to FERC jurisdiction and policies.⁸¹

⁷⁵ *Id.* P 121.

⁷⁶ *Id.*

⁷⁷ *Id.* P 123.

⁷⁸ Arkansas Commission Request for Rehearing at 19.

⁷⁹ *Id.* (citing Opinion No. 542, 153 FERC ¶ 61,183 at P 121).

⁸⁰ *Id.* at 20.

⁸¹ *Id.*

3. Commission Determination

27. We affirm the Commission's finding in Opinion No. 542⁸² that the circumstances surrounding the cancellation of the Little Gypsy project support a finding that the Little Gypsy cancellation costs be included in the bandwidth formula. First, contrary to the Arkansas Commission's assertions, the bandwidth formula is not a typical agreement for wholesale power sales. The bandwidth formula is not itself a rate for wholesale power. As the Commission fully discussed in Opinion No. 542, the bandwidth formula "is a means of narrowing production cost disparities among the Entergy Operating Companies and not a vehicle for direct cost recovery from ratepayers."⁸³

28. Furthermore, the policy underlying Opinion No. 295 is not applicable here. In Opinion No. 295, in which the Commission adopted a 50/50 cost sharing policy, the Commission sought to achieve an equitable balance between the interests of shareholders and ratepayers.⁸⁴ As the Commission explained in Opinion No. 542, that concern is not implicated here because the bandwidth formula is a means of narrowing production disparities among the Entergy Operating Companies and not a vehicle for direct cost recovery from ratepayers.⁸⁵ Unlike the situation in Opinion No. 295, which involved New England Power Company's investment and subsequent cancellation of Seabrook Nuclear Unit No. 2, there is no issue here concerning the balance of interests between ratepayers and shareholders.

29. With regard to the Little Gypsy Repowering Project, after a substantial decline in natural gas prices reversed the economics of the Little Gypsy Repowering Project such that the project no longer represented the lowest reasonable cost alternative, Entergy Louisiana sought to cancel the project. Subsequently, the Louisiana Commission approved an uncontested settlement for retail ratemaking cancelling the project.⁸⁶ As noted in Opinion No. 542, the Louisiana Commission found that the Little Gypsy cancellation costs were prudently incurred and approved securitization of the Little Gypsy cancellation costs and found that Entergy Louisiana could recover \$200 million of

⁸² Opinion No. 542, 153 FERC ¶ 61,183 at P 123.

⁸³ *Id.* P 120.

⁸⁴ *Id.* P 121.

⁸⁵ *Id.*

⁸⁶ *Id.* P 123.

the \$207 million total Little Gypsy cancellation costs that Entergy sought to recover, as well as carrying charges, over a 10-year amortization period.⁸⁷

30. Accordingly, the issue before the Commission is not the equitable balance of costs between Entergy Louisiana's shareholders and ratepayers. Rather, the issue is whether costs associated with the cancellation of the Little Gypsy Repowering Project, which was designed to meet the needs of the entire Entergy system, are production costs appropriate for inclusion in the bandwidth formula to enable the Entergy Operating Companies to achieve rough production cost equalization. We affirm the Commission's finding in Order No. 542 that under the circumstances present in this case, the Opinion No. 295 policy does not apply to the issue of whether the Little Gypsy cancellation costs should be included in the bandwidth formula.

E. CWIP and Extended Reserve Shutdown

1. Opinion No. 542

31. In Opinion No. 542, the Commission disagreed with the Presiding Judge's finding that the Little Gypsy cancellation costs are similar to CWIP and should therefore be excluded from the bandwidth formula.⁸⁸ Specifically, the Commission found unpersuasive the Presiding Judge's finding that it is necessary to apply the Commission's treatment of CWIP to the treatment of the Little Gypsy cancellation costs because, had the Little Gypsy project not been cancelled, the costs would have been classified as CWIP.⁸⁹ Because Entergy elected to cancel the Little Gypsy project and securitize the Little Gypsy cancellation costs, the Commission found that the Little Gypsy cancellation costs are securitized cancelled plant costs, which are distinct from CWIP.⁹⁰

2. Requests for Rehearing

32. The Arkansas Commission argues that the Commission in Opinion No. 542 again exalts form over substance with respect to the treatment of the Little Gypsy cancellation costs because those costs were incurred while construction work was in progress but before the Little Gypsy project went into service, and thus would not be includable in the

⁸⁷ *Id.* P 6 (citing Louisiana Commission Settlement Order at 5).

⁸⁸ *Id.* P 103.

⁸⁹ *Id.*

⁹⁰ *Id.*

bandwidth calculation under normal circumstances.⁹¹ The Arkansas Commission also states that the Commission even agrees that had the Little Gypsy project not been cancelled before construction began, its costs would have constituted CWIP that would be excluded from the bandwidth calculation.⁹² The Arkansas Commission elaborates that securitization does not change that substance, and if utilities could obtain immediate recovery of CWIP via securitization it would undermine the policy not to allow CWIP recovery until after the plant goes into service.⁹³ The Arkansas Commission further argues that the inclusion of production costs associated with Extended Reserve Shutdown (ERS) units in the bandwidth formula is evidence that the Commission's interpretation of the "as are used" language of section 3.01 is flawed.⁹⁴

33. The Mississippi Commission also argues that the bandwidth formula's longstanding treatment of CWIP embodies a bright line separating facilities that have entered service from facilities that have not entered service, and that the Little Gypsy cancellation costs cross that line.⁹⁵ The Mississippi Commission further contends that inclusion of ERS unit costs in the bandwidth formula are justified in that ERS units are "used and useful" within the meaning of section 3.01 because they have been in service and are available to again produce electricity, whereas the Little Gypsy cancellation costs are not.⁹⁶ The Mississippi Commission also asserts that Commission and judicial precedent applying the System Agreement and bandwidth formula to the Spindletop Regulatory Asset make clear that the proper test for determining whether costs are eligible for equalization depends on whether they are "used" for mutual benefit.⁹⁷ Finally, the Mississippi Commission argues that the bandwidth formula's treatment of the Vidalia plant costs demonstrates that not all production costs are bandwidth-eligible.⁹⁸

⁹¹ Arkansas Commission Request for Rehearing at 12.

⁹² *Id.* at 18 (citing Opinion No. 542, 153 FERC ¶ 61,183 at P 103).

⁹³ Arkansas Commission Request for Rehearing at 12.

⁹⁴ *Id.* at 13.

⁹⁵ Mississippi Commission Request for Rehearing at 20.

⁹⁶ *Id.* at 21.

⁹⁷ *Id.* See, e.g., *La. Pub. Serv. Comm'n v. Entergy Corp., et al.*, Opinion No. 509, 132 FERC ¶ 61,253 (2010), *reh'g denied*, 139 FERC ¶ 61,101 (2012).

⁹⁸ Mississippi Commission Request for Rehearing at 22.

3. Commission Determination

34. We disagree with the Arkansas Commission and the Mississippi Commission that the Little Gypsy cancelled plant costs should be treated in the same manner as CWIP and thus excluded from the bandwidth formula. As noted by Trial Staff witness Sammon in his cross-answering testimony, while it may be true that recovery of the Little Gypsy Repowering Project costs would be “akin” to recovery of CWIP for the period prior to the Louisiana Commission granting approval of Entergy Louisiana’s request to terminate the project, once the Louisiana Commission approved Entergy Louisiana’s request to terminate, Entergy Louisiana’s investment in the project became abandoned plant costs, not CWIP.⁹⁹ As noted by Trial Staff witness Sammon, the costs associated with production-related CWIP are roughly equalized when the plant goes into service, whereas the costs associated with abandoned plant would never be roughly equalized, absent an amendment to the bandwidth formula, because abandoned plant, by definition, never goes into service.¹⁰⁰ Therefore, it would be unfair to exclude from the bandwidth formula a legitimate production investment that was incurred for the benefit of the entire Entergy System simply because an unanticipated change in economic conditions compelled the Entergy Operating Committee to abandon the production-related project.

F. Accounting/ Books Requirement for Bandwidth Formula

1. Opinion No. 542

35. In Opinion No. 542, the Commission reversed the Presiding Judge’s finding that the Little Gypsy cancellation costs are of the same character as costs that are not included in the bandwidth formula. The Commission noted that the Presiding Judge himself stated “the mere fact that [the Little Gypsy cancellation] costs are not housed in an account that flows into the formula is not dispositive.”¹⁰¹ The Commission also noted that, at the time the bandwidth formula was formed, none of the Entergy Operating Companies had cancelled plant costs reflected on their accounting books, and thus, the fact that the account with the Little Gypsy cancellation costs, FERC Account 426.5, is not included in

⁹⁹ *Id.* Exhibit S-7 at 4.

¹⁰⁰ *Id.* at 18.

¹⁰¹ Entergy Brief on Exceptions at 30 (citing Initial Decision, 143 FERC ¶ 63,012 at P 29).

the bandwidth formula does not justify excluding the Little Gypsy cancellation costs from the bandwidth formula.¹⁰²

2. Rehearing Requests

36. The New Orleans Council argues that the securitized costs at issue in this proceeding are not on the books of any Entergy Operating Company that is a party to the System Agreement and subject to the cost equalization bandwidth formula.¹⁰³ The New Orleans Council contends that the bandwidth provisions of the System Agreement expressly require that “[a]ll Rate Base, Revenue and Expense items” included in the bandwidth formula “shall be based on the actual amounts on the Company’s books for the twelve months ended December 31 of the previous year.”¹⁰⁴ The New Orleans Council also claims that the Commission has repeatedly stated that “the bandwidth formula only allows for assets on the books at the end of the calendar-year to be reflected in the bandwidth calculation.”¹⁰⁵ The New Orleans Council argues that “costs that are on the books of companies – even Entergy affiliates – outside the System Agreement are not eligible to be included in the annual rough production cost equalization” which, according to the New Orleans Council, is consistent with Commission treatment of other securitized costs (e.g., storm damage) in the prior bandwidth proceedings.¹⁰⁶ The New Orleans Council further contends that the Commission’s rationale concerning FERC Account No. 426.5 and why that account had not been part of the bandwidth formula is flawed.¹⁰⁷ The New Orleans Council argues that not only is Entergy not proposing to include FERC Account No. 426.5 in the bandwidth formula, but “[w]hether or not an item *could be accounted for* in this account is wholly irrelevant to whether the securitized

¹⁰² Opinion No. 542, 153 FERC ¶ 61,183 at P 102.

¹⁰³ New Orleans Council Request for Rehearing at 5.

¹⁰⁴ *Id.* (quoting System Agreement Section 30.12, Note 1).

¹⁰⁵ *Id.* at 6 (quoting *Entergy Services, Inc.*, Opinion No. 518, 139 FERC ¶ 61,105, at P 61 (2012)).

¹⁰⁶ *Id.* at 8.

¹⁰⁷ *Id.* at 10 (citing Opinion No. 542, 153 FERC ¶ 61,183 at P 102) (stating that “[t]his particular account was not picked up in the Bandwidth Formula, the Commission reasons, because at the time that the Bandwidth remedy was created, Entergy had no cancelled plant costs on its books.”).

Little Gypsy costs, which reside on no Operating Company's books, are appropriate for inclusion in the [bandwidth formula]."¹⁰⁸

3. Commission Determination

37. We disagree with the New Orleans Council's interpretation of the bandwidth provisions of the System Agreement that only costs on a company's books may be included in the bandwidth formula. The New Orleans Council mischaracterizes System Agreement Section 30.12, Note 1 of the System Agreement by quoting language out of context; that provision of the System Agreement accommodates use of inputs as may be prescribed by the System Agreement or Commission order that differ from actual amounts on a company's books for the twelve months ended December 31 of the previous year.¹⁰⁹ Merely because costs are not on a company's books does not mean that the costs were not properly incurred or should be barred from inclusion in the bandwidth formula *per se*.¹¹⁰ Here, the Little Gypsy cancelled plant costs have been accurately identified and the quantity of relevant costs is not in dispute. Therefore, we find that the Little Gypsy cancelled plant costs are appropriate for inclusion in the bandwidth formula despite not being on Entergy's books.

¹⁰⁸ *Id.*

¹⁰⁹ See System Agreement, Article III, § 3.12, Note 1 ("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; and shall include certain retail regulatory adjustments . . . including but not limited to: . . . (3) repricing of energy associated with the Vidalia purchase power contract[.]**") (emphasis added). Moreover, the Commission's findings in Opinion No. 518 and other annual bandwidth proceedings cited by the New Orleans Council are not dispositive on this topic, as these findings addressed specific inputs where no value other than actual amounts on a company's books was prescribed.

The Commission orders:

The requests for rehearing of Opinion No. 542 are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.