

137 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.

Docket No. ER08-1056-002

OPINION NO. 514

ORDER AFFIRMING IN PART AND REVERSING IN PART INITIAL DECISION

(Issued October 7, 2011)

1. This case is before the Commission on exceptions to an Initial Decision¹ issued September 10, 2009, and involves rates filed by Entergy Services, Inc. (Entergy)² on behalf of the Entergy operating companies (Operating Companies)³ pursuant to Service Schedule MSS-3 of the Entergy System Agreement (System Agreement), implementing the Commission's bandwidth remedy based on calendar year 2007 data as provided for in Opinion Nos. 480 and 480-A.⁴ In this order we reverse the Presiding Judge's rulings

¹ *Entergy Services, Inc.*, 128 FERC ¶ 63,015 (2009) (Initial Decision).

² Entergy is a wholly-owned subsidiary of Entergy Corporation.

³ At the time the Commission issued Opinion Nos. 480 and 480-A, the Operating Companies were Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Louisiana, Inc. (Entergy Louisiana), Entergy Mississippi, Inc. (Entergy Mississippi), Entergy New Orleans, Inc. (Entergy New Orleans), and Entergy Gulf States, Inc. (Entergy Gulf States). At the end of 2007, Entergy Gulf States was split into Entergy Texas, Inc. (Entergy Texas) and Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana). Accordingly, the Operating Companies involved with this proceeding are Entergy Arkansas, Entergy Gulf States Louisiana, Entergy Louisiana, Entergy Mississippi, Entergy New Orleans and Entergy Texas.

⁴ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005), *order on reh'g, Louisiana Pub. Serv. Comm'n v. Entergy* (continued...)

pertaining to depreciation expense, accumulated deferred income taxes (ADIT), the methodology to allocate bandwidth receipts between two new Operating Companies, and affirm on all other issues.

I. Background

2. On June 14, 2001, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint against Entergy pursuant to section 206 of the Federal Power Act (FPA).⁵ The Louisiana Commission alleged that the System Agreement, a rate schedule that includes seven service schedules governing the allocation of certain costs associated with the integrated operations of the Entergy system, no longer operated to produce rough production cost equalization, as required by Commission precedent.⁶

3. That complaint resulted in Opinion No. 480, in which the Commission found that rough production cost equalization had been disrupted on the Entergy system. In Opinion Nos. 480 and 480-A the Commission accepted a numerical bandwidth of +/- 11 percent of the Entergy system average production cost in order to maintain the rough equalization of production costs among the Operating Companies. The Commission stated that the bandwidth would be implemented prospectively and would be effective for calendar year 2006, and that any equalization payments would be made in 2007 after a full calendar year of data became available.

4. On April 10, 2006, Entergy submitted a compliance filing to implement the directives of Opinion Nos. 480 and 480-A (April 2006 Compliance Filing). In its order⁷ accepting the compliance filing, the Commission accepted Entergy's proposal to include the bandwidth formula in Service Schedule MSS-3.⁸ However, the Commission rejected

Servs., Inc., Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in part and remanded in part, sub nom. Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

⁵ 16 U.S.C. § 791a *et seq.*, § 824 *et seq.* (2006).

⁶ A lengthy history of Commission precedent regarding rough production cost equalization can be found in the Initial Decision addressing Entergy's first filing implementing the Commission's bandwidth remedy based on calendar year 2006 data. *Entergy Services, Inc.*, 124 FERC ¶ 63,026, at P 21-37 (2008).

⁷ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006) (November 2006 Compliance Order).

⁸ Service Schedule MSS-3 has two separate and distinct functions. The first function includes a methodology for pricing energy exchanged among the Operating Companies and provides for an after-the-fact, hour-by-hour allocation of the cost of

(continued...)

proposed revisions to Service Schedule MSS-3 that had not been ordered by the Commission in Opinion Nos. 480 and 480-A. The Commission stated that Entergy should make a section 205 filing if it desired to make any changes to the methodology in Exhibit Nos. ETR-26 and ETR-28.

5. Another compliance filing was filed on December 18, 2006 (December 2006 Compliance Filing), and accepted by the Commission on April 27, 2007.⁹ Additionally, on March 30, 2007 and April 6, 2007, the Operating Companies submitted certain proposed modifications to the December Compliance Filing.¹⁰ On May 25, 2007, the Commission issued additional orders regarding those filings.¹¹

6. On May 28, 2008, Entergy filed rates pursuant to Service Schedule MSS-3 of the System Agreement, implementing the bandwidth remedy for calendar year 2007. This proceeding involves the second annual filing required under the Commission's previously issued Opinion Nos. 480 and 480-A.¹² In its filing, Entergy calculated the bandwidth payments and receipts under the Service Schedule MSS-3 bandwidth formula using data as reported in each Operating Companies' 2007 FERC Form 1. According to Entergy, the proposed rates in this bandwidth filing were calculated in accordance with Service Schedule MSS-3, as revised, pursuant to the May 25 Orders. The compliance filing quantified the disparities in the production costs for each Operating Company, and based upon the calculation, determined the payments and receipts for each Operating Company,

energy from an Operating Company whose generation provided energy in excess of that company's load to an Operating Company that produced less than its load. The second function contains the formula to calculate the annual bandwidth remedy payments and receipts.

⁹ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 119 FERC ¶ 61,095 (2007) (April 2007 Compliance Order).

¹⁰ See March 30, 2007 filings in Docket Nos. ER07-682-000, ER07-683-000 and ER07-684-000, and April 6, 2007 filing in Docket No. ER07-727-000.

¹¹ *Entergy Services, Inc.*, 119 FERC ¶ 61,190 (2007); *Entergy Services, Inc.*, 119 FERC ¶ 61,191 (2007); *Entergy Services, Inc.*, 119 FERC ¶ 61,192 (2007); *Entergy Services, Inc.*, 119 FERC ¶ 61,193 (2007) (collectively, May 25 Orders).

¹² The Commission addressed the first annual filing in *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010).

consistent with the bandwidth formula.¹³ The resulting percentage disparities for each Operating Company are as follows:

Company	Initial Disparity	Final Disparity
Entergy Arkansas, Inc.	-27.80%	-11.00%
Entergy Gulf States, Inc. ¹⁴	11.08%	3.08%
Entergy Louisiana, LLC	5.05%	3.08%
Entergy Mississippi, Inc.	5.33%	3.08%
Entergy New Orleans, Inc.	5.44%	3.08%

7. Entergy Arkansas and Entergy Gulf States both had initial disparities exceeding +/- 11 percent. As shown below, Entergy Arkansas was the only company obligated to make payments, which totaled \$251.8 million:

¹³ The actual production costs of each Operating Company and the average production costs of the system are calculated consistent with Service Schedule MSS-3. The system average production costs are then allocated to each Operating Company to obtain each Operating Company's respective allocation of system average production costs. Next, each Operating Company's allocated average production costs are compared to the Operating Company's actual production costs to determine the dollar and percent disparity from system average costs.

¹⁴ On December 31, 2007, Entergy Gulf States, Inc. jurisdictionally split into two separate Operating Companies, Entergy Gulf States, Louisiana LLC and Entergy Texas, Inc.

Company	(Payment)/Receipt in Millions of Dollars
Entergy Arkansas, Inc.	(251.8)
Entergy Gulf States Louisiana LLC	124.4
Entergy Louisiana, LLC	35.1
Entergy Mississippi, Inc.	20.4
Entergy New Orleans, Inc.	6.5
Entergy Texas, Inc.	65.4

8. The production costs include all direct costs, fixed and variable, of the Operating Company's owned generation facilities. It includes the demand and energy costs associated with power purchases. It also includes indirect costs or common costs, such as administrative and general expense, and the return of and on general intangible plant functionalized to the production function.

9. On July 29, 2008, the Commission issued an order establishing hearing and settlement procedures to examine evidence pertaining to the underlying production costs from which Entergy calculated its filing.¹⁵ A hearing was held and ultimately resulted in the Initial Decision. Briefs were filed by Commission Trial Staff (Trial Staff), Entergy, the Louisiana Commission, the Arkansas Commission, the Mississippi Commission, Texas Industrial Energy Consumers (Industrial Consumers), Occidental Chemical Corporation (Occidental), and, collectively, East Texas Electric Cooperative Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc. (Texas Cooperatives).

10. Having fully evaluated the Initial Decision, the parties' briefs, and the record before us, we affirm the Presiding Judge's findings that: (1) Entergy's adjustment to the long-term debt and common equity components of Entergy Louisiana's capital structure to reflect the "reversal of the Vidalia capital transaction" was appropriate; (2) there should not be an adjustment to Entergy Louisiana's Variable Production Costs to reflect the re-pricing of the Evangeline Gas Sales Contract costs at the retail level; and (3) the Commission has jurisdiction to approve Entergy's allocation of Entergy Gulf States'

¹⁵ *Entergy Services, Inc.*, 124 FERC ¶ 61,101 (2008).

disparity payments between Entergy Texas and Entergy Gulf States Louisiana, the successors of Entergy Gulf States. However, we reverse the Presiding Judge's findings that: (1) the Commission should use updated depreciation studies to determine inputs for the bandwidth formula; (2) Entergy should not have excluded certain ADIT amounts, related to the Waterford 3 sale-leaseback, from the bandwidth calculation; and (3) Entergy used an appropriate methodology to allocate bandwidth receipts among Entergy Texas and Entergy Gulf States Louisiana, as well as to Entergy Gulf States Louisiana's wholesale jurisdictions.

II. Discussion

A. Depreciation

1. Background

11. Depreciation expense is a component of "Actual Production Costs" under section 30.12 of the bandwidth formula contained in Service Schedule MSS-3. At the hearing, Entergy proposed to use, as required by the bandwidth formula, state approved depreciation expense amounts that are recorded in specified accounts in the Operating Companies' FERC Form 1s for determining production costs for the bandwidth calculation.

12. The Louisiana Commission challenged the depreciation expenses used by Entergy, contending that they were unreasonable and unduly discriminatory "because they conflict with Commission policy requiring a systematic recovery of capital costs over the service lives of assets."¹⁶ The Louisiana Commission argued that language in the bandwidth formula and Commission precedent gave the Commission jurisdiction to review the justness and reasonableness of depreciation figures. Trial Staff stated that the data used by Entergy must be just and reasonable and argued that a new depreciation study should be performed to determine what data is just and reasonable.

2. Initial Decision

13. The Presiding Judge finds that Entergy's depreciation figures may be unjust and unreasonable, and requires Entergy to submit new depreciation studies for evaluation.¹⁷ The Presiding Judge finds that accepting any depreciation figure whatsoever as just and reasonable as long as it appears in Entergy's FERC Form 1 is counter to the governing

¹⁶ Initial Decision, 128 FERC ¶ 63,015 at P 189 (quoting Louisiana Commission Initial Brief at 3).

¹⁷ *Id.* P 214.

statute. The Presiding Judge finds that the FPA obligates the Commission to judge if rates and charges made subject to Commission jurisdiction are just and reasonable, rather than accepting the decisions of a state regulatory agency.

14. The Presiding Judge finds that the existing depreciation studies, with the exception of the 2008 study conducted for Entergy New Orleans, are stale and may result in unjust and unreasonable depreciation inputs to the bandwidth formula. The Presiding Judge points to testimony by Trial Staff witness Pewterbaugh that depreciation rates can change over time and accordingly a new study should be performed every three to five years. The Presiding Judge argues that the dispositive fact for determining whether depreciation entries in the 2008 bandwidth filing are just and reasonable is that the current depreciation studies, with the exception of Entergy New Orleans' study, were performed during the period of 1986-1998.¹⁸ The Presiding Judge further relies on testimony given by Entergy witness Spanos that conducting a new depreciation study every five years is reasonable but not required.¹⁹ The Presiding Judge contends that while the current rates may be accurate, there is no way to know without new depreciation studies.

15. The Presiding Judge argues that, contrary to the arguments made by Entergy, a component of the formula rate is not being challenged; rather an input to the component of the formula is being challenged. He also disagrees with Entergy's argument that the depreciation rate used as a component of the bandwidth formula can only be changed through a section 205 proceeding. The Presiding Judge further finds that Entergy's argument that there was no showing at the hearing that the 2007 depreciation rates were unreasonable is accurate. However, the Presiding Judge finds that there was evidence presented at the hearing to show that the current depreciation rates are stale. The Presiding Judge concludes that the only way to discern whether the rates are just and reasonable is with a new depreciation study. The Presiding Judge agrees with the argument presented by Trial Staff that this is a section 205 proceeding and the burden is upon Entergy to prove that the current depreciation rates are just and reasonable, which it did not.

16. The Presiding Judge finds that Entergy erred in relying on *American Electric Power Service Corp.*²⁰ for support of its proposition that the depreciation rate used as a component of the bandwidth calculation can only be changed in a section 205 proceeding. He asserts that that case is distinguishable because the Commission was

¹⁸ *Id.* P 213.

¹⁹ *Id.* (citing Tr. at 372-73 (Spanos)).

²⁰ *American Elec. Power Service Corp.*, 120 FERC ¶ 61,205, *order on reh'g and compliance*, 121 FERC ¶ 61,245 (2007).

reviewing tariff sheets increasing electric rates, which would be converted into a formula rate adjustable each year based on the utility's costs, and the utility suggested that there was no reason to set its depreciation rate for hearing because the rate would be derived from its FERC Form 1. The Presiding Judge notes that here it is not the utility's rate that is under review, but instead is a formula established by the Commission to equalize costs among the Operating Companies. The Presiding Judge instead relies on *Arkansas Public Service Comm'n v. Entergy Corp.*, which he argues made it clear in that case that all aspects of the bandwidth formula are reviewable to determine whether the result is just and reasonable.²¹

17. The Presiding Judge finds that if depreciation studies conducted in 2009 result in different depreciation rates, this would indicate that the 2008 depreciation rates were not just and reasonable. Therefore, the Presiding Judge finds that the 2008 depreciation numbers are stale and orders Entergy to re-make its 2008 bandwidth filing correcting, if necessary, the depreciation component of production costs.

3. Briefs on Exceptions

18. Entergy argues that the bandwidth formula requires it to use actual depreciation expenses reported in FERC Form 1 and approved by retail and wholesale regulators.²² Entergy argues that the Commission has consistently recognized that the bandwidth formula requires Entergy to use "actual" costs in determining the fair share of system costs each Operating Company should be paying.²³ As such, Entergy argues that the purpose of the bandwidth formula was to roughly equalize the actual production costs as approved by retail and wholesale regulators, and that the Commission should therefore use actual depreciation expenses in keeping with this purpose, rather than using fictitious depreciation expenses based on Commission standards that do not apply to retail regulators.

19. Entergy argues that the dispute in this proceeding arises, in large part, from a disagreement over the proper interpretation of the bandwidth formula. It contends that a proper reading of the term DEXN, which is a variable in the formula, supports its

²¹ Initial Decision, 128 FERC ¶ 63,015 at P 216 (citing 128 FERC ¶ 61,020, at P 25 (2009) (*Arkansas Commission v. Entergy*)).

²² Entergy Brief on Exceptions at 11.

²³ *Id.* at 12 (citing November 2006 Compliance Order, 117 FERC ¶ 61,203 at P 15).

position that the bandwidth formula requires the use of actual production costs.²⁴ In Service Schedule MSS-3, variable DEXN is defined as:

Depreciation and Amortization Expense associated with the plant investment in PPXN as recorded in FERC Accounts 403 and 404, as approved by Retail Regulators *unless the jurisdiction for determining the depreciation rate is vested in the FERC under otherwise applicable law.*^[25]

Entergy argues that the last portion of the phrase mentioning FERC jurisdiction was intended to refer to the Commission's jurisdiction to regulate depreciation to wholesale customers, rather than the Commission's full jurisdiction over the bandwidth formula. Entergy asserts that the Commission always has full jurisdiction over the bandwidth formula, so the word "unless" in the definition would be meaningless under such a reading. Additionally, if the phrase was determined to be referring to the Commission's jurisdiction to substitute new depreciation figures, Entergy argues that the Commission would be required to do so under the terms of the definition, rather than having the option to do so as some have argued.²⁶

20. Entergy also states that the definition for the ADXN, another bandwidth formula variable pertaining to depreciation expense, was used during the hearing to justify replacement of the depreciation rates, but that ADXN refers to depreciation over the lifetime of the plant, rather than from the previous year.²⁷ As such, it argues the definition is not relevant to the Commission's authority to substitute depreciation figures, because the Commission cannot revise expenses accrued over 30 or 40 years under the principle of retroactive ratemaking. Additionally, Entergy argues that parties pointing to the phrase "unless FERC determines otherwise" in the definition of ADXN ignore the placement of that phrase within parentheses discussing financial accounting standards.²⁸

²⁴ The Presiding Judge did not directly address the arguments regarding the correct interpretation of variable DEXN, although the issue was argued at the hearing.

²⁵ Service Schedule MSS-3 at section 30.12, Ex. ESI-3 at 57 (emphasis added).

²⁶ Entergy Brief on Exceptions at 15.

²⁷ ADXN is defined in part as "Accumulated Provisions for Depreciation and Amortization associated with [Production Plant in Service excluding Nuclear Plant] and [Coal Mining Equipment] above, as recorded in FERC Accounts 108 and 111. Service Schedule MSS-3 at 56.

²⁸ Entergy Brief on Exceptions at 16-19.

21. Entergy also argues that the history of the bandwidth proceeding provides justification for its argument that actual retail depreciation expenses should be used as inputs, as the Commission relied upon the methodology in Exhibit Nos. ETR-26 and ETR-28 in formulating the cost-equalization methodology. Entergy maintains that both of these exhibits used the actual depreciation expenses reported on FERC Form 1, and that any change to the methodology used in the exhibits can only occur through a filing under section 205 or 206 of the FPA.²⁹

22. Entergy contends that the Initial Decision relied heavily on the Commission's decision in *Arkansas Commission v. Entergy*. Specifically, the Initial Decision pointed to Paragraph 25 of that decision, where, Entergy states, the Commission also included language suggesting that the bandwidth formula may authorize the Commission to re-evaluate and potentially replace the nuclear depreciation expense inputs. However, Entergy notes that this issue was not briefed or discussed in any detail in the proceeding, and states that Entergy has requested rehearing.³⁰

23. Entergy next argues that the bandwidth formula is a formula rate and, therefore, under the filed rate doctrine, Entergy is obligated to use the actual per books depreciation expenses as inputs. Replacing those inputs with imputed figures would challenge the filed rate in two ways, Entergy argues. First, Entergy argues that it would challenge directly the requirement that inputs include the amounts "reported in Accounts 403 and 404." Second, Entergy argues that it would challenge directly the requirement that depreciation expense inputs include amounts "as approved by Retail Regulators."³¹

24. Entergy also argues that the annual filing requirement under section 205 of the FPA to implement the bandwidth formula does not give the Commission *carte blanche* to reevaluate approved FERC Form 1 depreciation expenses. Entergy maintains that the bandwidth proceeding is different from other formula rate proceedings, where a Commission finding on depreciation rates can directly affect in a positive manner the rates that customers must pay. In the bandwidth proceeding, Entergy contends, the Commission cannot change retail rates if it determines that depreciation rates are too high (or too low), but can only correct the effects of the mis-payment on the bandwidth findings. Entergy argues that this will not help customers, but could actually have a counterproductive effect in distorting the bandwidth payments. Additionally, yearly re-

²⁹ *Id.* at 19.

³⁰ *Id.* at 20-21.

³¹ *Id.* at 23.

evaluation of depreciation rates would be time-consuming and administratively inefficient according to Entergy.³²

25. Finally, Entergy argues that even if the 2007 depreciation expense inputs could be re-evaluated in this proceeding, Commission precedent prohibits the inputs from being revised here. Entergy notes that the Commission stated in Order No. 618³³ that in both stated rates and formula rates the depreciation rate cannot be changed absent a section 205 or 206 filing. Entergy points to the Commission's decision in *American Elec. Power Serv. Corp.*, where intervenors had protested the depreciation rates used in a formula rate filing.³⁴ Entergy states that the Commission found that depreciation rates do not adjust automatically just because the rates underlying the FERC Form 1 numbers change; rather, once the Commission accepts a rate, any change requires a separate section 205 filing. However, Entergy argues that in the bandwidth proceeding, the Commission did accept a depreciation expense variable that would automatically update based on the prior calendar year's depreciation expense recorded in Accounts 403 and 404.

26. The Arkansas Commission also argues that the Initial Decision erred in recommending the use of imputed, rather than actual, depreciation expenses in the calculation of the Operating Companies' production costs. First, the Arkansas Commission argues that the Initial Decision's findings violate the FPA, because the Presiding Judge did not make a finding under section 206 of the FPA that the filed rate is unjust, unreasonable or unduly discriminatory.³⁵ The Arkansas Commission argues that the Service Schedule MSS-3 bandwidth formula has been accepted by the Commission and is thus a filed rate that cannot be changed absent an order from the Commission. The Arkansas Commission contends that the third-party challenges to the depreciation rate calculations require a section 206 proceeding with a dual burden of proof: first establishing that the current rate is unjust and unreasonable, and then establishing that an alternative rate proposal is just and reasonable. The Arkansas Commission argues that the Presiding Judge, by finding only that there *may* be unjust and unreasonable rates, has failed to follow the statutory presumption of reasonableness based on the filed rate doctrine, and impermissibly shifts the burden of proof from the third party to Entergy. Accordingly, the Arkansas Commission argues that the Initial Decision's requirement

³² *Id.* at 24-26.

³³ *Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104, at n.25 (2000).

³⁴ *Id.* at 27 (citing *American Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205, *order on reh'g and compliance*, 121 FERC ¶ 61,245 (2007)).

³⁵ Arkansas Commission Brief on Exceptions at 10.

that Entergy submit a compliance filing based on new depreciation studies should be overturned and replaced with a finding that the 2008 bandwidth filing is just and reasonable based on the use of actual depreciation expenses.³⁶

27. The Arkansas Commission states that the Presiding Judge also addressed whether the 2009 depreciation studies should be used to recalculate the 2008 bandwidth filing or should only be used prospectively. The Initial Decision found that the updated depreciation studies should be used to recalculate the 2008 bandwidth filing, if a change resulted.³⁷ The Arkansas Commission disagrees, arguing that the Commission has no power to provide retroactive relief in section 205 or 206 proceedings. Thus, the Arkansas Commission explains, any change to depreciation rates in a future section 205 or 206 proceeding could only go into place prospectively. The Arkansas Commission notes that the bandwidth formula requires Entergy to use the amounts entered in FERC Form 1 for depreciation and other expenses, and that the Commission approved the use of FERC Form 1 data as providing a just and reasonable result for a rough equalization. The Arkansas Commission disagrees with the Presiding Judge's finding that the depreciation figures are "incorrect" and thus need to be corrected.³⁸

28. The Arkansas Commission argues that the bandwidth formula was approved as a formula rate, as the Initial Decision indicates. The Arkansas Commission explains that when the Commission approves a formula rate, it approves the formula itself, not the inputs, and that finding otherwise would eliminate the efficiency gained by use of a formula rate. The Arkansas Commission argues that the Presiding Judge's attempt to change the formula rate was improper, as the Commission had previously approved the use of actual costs in the bandwidth filing, and Entergy's filing had not sought a change from that ruling. The Arkansas Commission also argues that the Initial Decision ignores the requirement in note 1 of section 30.12 of the Service Schedule MSS-3 tariff indicating that all inputs should be based on the actual amounts in a company's books as reported in FERC Form 1.

29. The Arkansas Commission also alleges that the Presiding Judge misread its argument on the delegation of authority to state retail commissions. The Arkansas Commission states that it argued that this case does not involve a claimed delegation of Commission authority, because the Service Schedule MSS-3 tariff is on file with and under the jurisdiction of the Commission, and requires the use of FERC Form 1 data. The Arkansas Commission argues that the use of actual FERC Form 1 data is integral to

³⁶ *Id.* at 17.

³⁷ Initial Decision, 128 FERC ¶ 63,015 at P 227.

³⁸ Arkansas Commission Brief on Exceptions at 19.

the bandwidth formula in order to maintain rough production cost equalization. The Arkansas Commission sets forth several reasons why uniform depreciation studies across state lines are unnecessary, including the lack of Commission policy mandating uniform depreciation rates, the potential for usurpation of state authority, and the inclusion of state depreciation rates in Exhibit Nos. ETR-26 and ETR-28, used in the bandwidth proceeding.³⁹ The Arkansas Commission also argues that an expansive reading of the “unless” clause in section 30.12 of Service Schedule MSS-3 to include the ability of the Commission to overturn depreciation inputs would render much of the section’s language meaningless, violating the principle that every word in a contract should be given effect and a reasonable meaning.⁴⁰

30. The Arkansas Commission contends that Entergy has followed the Uniform System of Accounts in submitting its depreciation data, and no party has alleged that the figures are not based on the actual amounts inputted in FERC Form 1, or that those figures are mis-stated or inaccurately reported.⁴¹

31. Finally, the Arkansas Commission argues that any new depreciation figures from studies that were not approved by retail regulators would be imputed figures, thus improperly skewing the bandwidth formula. The Arkansas Commission notes that depreciation expenses are not collected through bandwidth payments and receipts, but instead through retail rates and *bona fide* wholesale sales for resale rates. The bandwidth formula, the Arkansas Commission argues, is not a sales for resale rate, because it provides no service to anyone. The Arkansas Commission argues that allowing imputed figures for depreciation would lead to perverse consequences due to the lack of retail rate approval, where ratepayers would see a net increase in impact if their production costs were reduced for bandwidth calculation purposes.⁴²

4. Briefs Opposing Exceptions

32. Trial Staff states that the Presiding Judge correctly applied Commission precedent in reaching a determination on the justness and reasonableness of depreciation expense inputs. Trial Staff points to the Commission’s order setting the first annual implementation bandwidth for hearing, where the Commission stated that the “determination necessarily will be based on underlying cost inputs and the

³⁹ *Id.* at 37.

⁴⁰ *Id.* at 40-41.

⁴¹ *Id.* at 45.

⁴² *Id.* at 51.

reasonableness thereof.”⁴³ Trial Staff argues that the Commission thus clearly intended that the reasonableness of underlying cost inputs to the bandwidth formula would be considered in the bandwidth proceedings, as the Initial Decision in the first bandwidth proceeding determined.⁴⁴

33. Trial Staff contends that arguments regarding interpretation of the variables “DEXN” and “ADXN” are similar to arguments regarding the definitions of the variables “NDE” and “NAD” in the 2007 bandwidth proceeding. Trial Staff states that the Initial Decision in the 2007 proceeding found that the Commission had authority to determine the justness and reasonableness of the depreciation figures based on these definitions, which the Commission affirmed in an order on the complaint filed in *Arkansas Commission v. Entergy*. Trial Staff argues that the Commission stated in *Arkansas Commission v. Entergy* that “[i]n order for the bandwidth calculation to provide a just and reasonable result under the FPA, the Commission must ensure that the inputs used to calculate the bandwidth are also just and reasonable.”⁴⁵

34. Trial Staff also argues that the Presiding Judge was correct to reject Entergy’s reliance on *American Electric Power Service Corp.* Trial Staff asserts that the Arkansas Commission failed to explain how the decision in *American Electric Power Service Corp.* was inconsistent with *Arkansas Commission v. Entergy* and that, either way, the issues in *American Electric Power Service Corp.* were ultimately resolved in a settlement and thus do not establish clear precedent.⁴⁶

35. Trial Staff argues that the Presiding Judge properly found that Entergy’s depreciation rates had not been reviewed from eight to twenty years, more than the five years recommended, and are thus stale and may be unjust and unreasonable. Trial Staff argues that Entergy misstates its burden to prove that its bandwidth filing is just and reasonable by arguing that opponents should have to prove that the rates are unjust and unreasonable. Trial Staff addresses Entergy’s argument that reviewing the justness and reasonableness of the depreciation rates would eliminate the beneficial value of formula rates by pointing to another Commission case where the Commission found that under a

⁴³ *Entergy Services, Inc.*, 120 FERC ¶ 61,094, at P 16 (2007).

⁴⁴ Staff Brief Opposing Exceptions at 9.

⁴⁵ *Id.* at 13 (citing *Arkansas Commission v. Entergy*, 128 FERC ¶ 61,020 at P 25).

⁴⁶ Staff Brief Opposing Exceptions at 17.

formula rate the utility would continue to bear the burden of demonstrating the justness and reasonableness of the rate resulting from the application of its formula.⁴⁷

36. Trial Staff also argues that the court cases involving the Commission's authority under sections 4 and 5 of the Natural Gas Act (NGA) are applicable here. Trial Staff argues that similar to the distinction drawn between retroactive payments in sections 4 and 5 of the NGA, refunds are allowed in a section 205 proceeding where they would not be allowed in a section 206 proceeding. Trial Staff argues that Entergy bears the burden under section 205 to prove that its filing is just and reasonable, and should not blur the distinction between sections 205 and 206.⁴⁸ Trial Staff also argues that Entergy's reading of the definitions for DEXN and ADXN is incorrect, and that the Commission does indeed have exclusive jurisdiction to determine the justness and reasonableness of the depreciation expense inputs to the bandwidth formula.⁴⁹

37. Trial Staff argues that the Presiding Judge's ruling requiring new depreciation studies is not an improper violation of the filed rate doctrine, as the formula rate approved by the Commission is the bandwidth formula itself, not the specific inputs involved.⁵⁰ Thus, the Presiding Judge is not prevented from using a depreciation expense other than the actual amounts recorded in FERC Form 1, Trial Staff argues. Trial Staff notes that the determination of bandwidth payments redistributes Operating Company depreciation expense costs, and other expenses, among retail and wholesale customers, but does not establish depreciation rates for state retail regulatory purposes and thus does not infringe on state interests. Trial Staff argues that the Presiding Judge's decision was not inconsistent with a formula rate, as the review of an input's justness and reasonableness does not change the formula itself.⁵¹

38. The Louisiana Commission argues that the depreciation rates and resulting expense reflected in Entergy's 2008 bandwidth filing are unreasonable and unduly discriminatory. The Louisiana Commission states that Entergy's depreciation rates are based on outdated studies that employ incorrect service lives for generating units, and do not recover capital costs in a consistent fashion due to differences in methodology among

⁴⁷ *Id.* at 23 (citing *Virginia Elec. & Power Co.*, 125 FERC ¶ 61,386, at P 15 (2008)).

⁴⁸ *Id.* at 26-29.

⁴⁹ *Id.* at 31.

⁵⁰ *Id.* at 33.

⁵¹ *Id.* at 40.

retail regulators. This, the Louisiana Commission argues, leads to a redistribution in capital costs, which is especially discriminatory due to Entergy Arkansas and Entergy Mississippi's intent to withdraw from the System Agreement.⁵²

39. The Louisiana Commission asserts that Commission policy is that depreciation rates should allocate capital costs reasonably over the service lives of assets. The Louisiana Commission argues that Entergy's depreciation rates are unreasonable for a variety of reasons, including: the service life figures are inaccurate for many of the units, including units that were scheduled to be retired in the 1990s but are still being depreciated; and the length of time that has passed since depreciation studies were performed. Additionally, the Louisiana Commission argues that inconsistencies in the methods used to set depreciation rates make them unduly discriminatory. Additionally, the Louisiana Commission notes that Entergy failed to meet its burden to show that its depreciation inputs were just and reasonable, as the Initial Decision found.

40. The Louisiana Commission further argues that the Commission established the bandwidth proceedings as section 205 proceedings, where the reasonableness of cost inputs was open to review. The Louisiana Commission cites to the Commission's opinion in *Arkansas Commission v. Entergy*, and the orders on the first two bandwidth proceedings, as proof that the Commission intended for the bandwidth proceedings to include inquiry into the reasonableness of Entergy's "actual" cost inputs.⁵³ With respect to the use of FERC Form 1 data, the Louisiana Commission argues that the claim that the Commission is bound to accept figures included in Entergy's FERC Form 1 is specious based on the Commission's prior decisions which hold that the Commission may examine the reasonableness of the cost inputs to the bandwidth remedy.⁵⁴ Additionally, the Louisiana Commission maintains that depreciation figures are not "actual" cash outlays, and that the argument that they must be accepted as written is a circular claim that ignores the Commission's power under the FPA. The Louisiana Commission also asserts that allowing states to set their own depreciation rates could lead to manipulation, as shown by Entergy failing to update Entergy Arkansas' depreciation rates after a 2005 study.

41. The Louisiana Commission points to the language in the bandwidth formula that, according to the Louisiana Commission, authorizes the Commission to adjust the depreciation expense used to establish rates, including the "unless" clause of the DEXN variable defined above. The Louisiana Commission contends that section 302 of the FPA

⁵² Louisiana Commission Brief Opposing Exceptions at 10-14.

⁵³ *Id.* at 21-22.

⁵⁴ *Id.* at 26 (citing *Entergy Services, Inc.*, 120 FERC ¶ 61,094 at P 16).

gives the Commission exclusive jurisdiction to establish depreciation rates for public utilities and precludes utilities from charging different rates.⁵⁵ The Louisiana Commission argues that the “unless” clause does not invalidate the other terms of the definitions relating to retail regulators, as the Commission has the responsibility to step in only when rates have been shown to be unreasonable. The Louisiana Commission also argues that there is no “methodology” from Exhibit Nos. ETR-26 and ETR-28 that requires the use of actual data as Entergy argues, and that Order No. 618 does not prevent the Commission from reviewing depreciation expenses.⁵⁶

42. The Louisiana Commission also argues that the Commission may not delegate its jurisdiction over depreciation expenses under the FPA to state agencies. The Louisiana Commission cites to the Commission’s decision in *Entergy Services, Inc.*, 120 FERC ¶ 61,020 (2007), where it argues that the Commission held that its authority may not be delegated to state agencies, and to court decisions holding that power vested in a federal agency by Congress may not be delegated to state agencies. The Louisiana Commission contends that the Commission could not know in advance the depreciation rates a state regulator may set, so a preemptive finding that those rates are valid would be an unlawful delegation.⁵⁷

43. The Louisiana Commission also asserts that Entergy did not carry its burden of proving the reasonableness of its depreciation rates, as required under section 205. The Louisiana Commission argues that Entergy made no substantive response to evidence calling into question its depreciation rates or that its rates conflicted with Commission policy.⁵⁸

44. The Louisiana Commission argues that correcting the depreciation figures will eliminate, rather than create, perverse consequences. It contends that setting depreciation rates based on correct service lives in the bandwidth ensures that the wholesale rates are nondiscriminatory and conform to Commission policy. On the other hand, the Louisiana Commission argues that incorrect depreciation rates in the bandwidth may lead to

⁵⁵ *Id.* at 29 (citing 16 U.S.C. § 825a(a) (2006)).

⁵⁶ *Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104, at n.25 (2000).

⁵⁷ Louisiana Commission Brief Opposing Exceptions at 34-36.

⁵⁸ *Id.* at 38.

companies exporting accelerated depreciation expenses to other states in each bandwidth year, creating a perverse subsidy.⁵⁹

45. Finally the Louisiana Commission argues that the only way to ensure that 2008 bandwidth rates are just and reasonable is to require a new study to correct depreciation rates in the 2008 bandwidth proceeding. Louisiana Commission notes that such a result is consistent with the rationale behind the bandwidth proceedings.⁶⁰

5. Commission Determination

46. We reverse the Presiding Judge's findings that Entergy's depreciation expense may be unjust and unreasonable and that Entergy must submit updated depreciation studies for use in the 2008 bandwidth calculation. As more fully set forth below, the Presiding Judge's findings are inconsistent with prior Commission orders involving Entergy's bandwidth formula.

47. In order to comply with Opinion Nos. 480 and 480-A, Entergy submitted a compliance filing that added several new sections to Service Schedule MSS-3 of the System Agreement to implement rough production cost equalization among the Operating Companies. One of these sections was section 30.12 (Actual Production Cost) that sets forth the formula for calculating actual production cost for the Operating Companies, which is based on the methodology in Entergy's Exhibit Nos. ETR-26 and ETR-28 in that proceeding. A component of this formula is the variable DEXN that is defined as:

DEXN = Depreciation and Amortization Expense associated with the plant investment in [Production Plant in Service] PPXN as recorded in FERC Accounts 403 and 404, as approved by Retail Regulators unless the jurisdiction for determining the depreciation rate is vested in the FERC under otherwise applicable law.⁶¹

Significantly, section 30.12 requires that depreciation expense, as well as all other expense items, 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.

⁵⁹ *Id.* at 40.

⁶⁰ *Id.* at 41.

⁶¹ Service Schedule MSS-3 at 57.

48. The Commission has made clear that changes to the bandwidth formula must be done through either a section 205 or 206 proceeding. For example, in the Commission order approving Entergy's April 2006 Compliance Filing to implement the directives of Opinion Nos. 480 and 480-A, the Commission denied requests for changes to the proposed formula stating that changes to the methodology reflected in Exhibit Nos. ETR-26 and ETR-28 must be done with either a section 205 or 206 filing with the Commission.⁶² Likewise, in Opinion No. 505, issued in Entergy's first bandwidth filing, the Commission declined to consider attacks on elements of the bandwidth formula while considering a compliance filing that implements the formula.⁶³ The Commission held that the purpose of a compliance bandwidth proceeding is not about what production costs would have been if different depreciation rates had been in effect at that time, but simply about applying the formula using data from the appropriate year.⁶⁴ After the issuance of Opinion No. 505, the Commission issued an order denying interlocutory appeal that addressed a motion appealing an order by the Presiding Judge in the 2009 bandwidth proceeding removing depreciation issues from the proceeding. The Commission upheld the Presiding Judge's order, finding that "the purpose of the annual bandwidth filings is to apply the specified formula using *actual* data to determine whether or not there was rough production cost equalization, and not to determine what production costs would have been if different depreciation rates had been in effect for the relevant period."⁶⁵ The Commission acknowledged that it had made statements in orders issued prior to the bandwidth proceeding (noting *Arkansas Commission v. Entergy*) that could be interpreted to suggest that parties had the opportunity to challenge the reasonableness of inputs in the bandwidth proceedings. However, the Commission explained that these statements "were made prior to final Commission action on the first annual bandwidth filing and thus did not benefit from experience in addressing these annual bandwidth filings."⁶⁶

49. The Commission already found the formula rate contained in Service Schedule MSS-3 to be just and reasonable when it approved that formula as being in compliance with Opinion No. 480.⁶⁷ Because the Commission has approved the formula, it is the

⁶² November 2006 Compliance Order, 117 FERC ¶ 61,203 at P 69.

⁶³ Opinion No. 505, 130 FERC ¶ 61,023 at P 172.

⁶⁴ *Id.* P 173.

⁶⁵ *Entergy Services, Inc.*, 130 FERC ¶ 61,120, at P 20 (2010).

⁶⁶ *Id.*

⁶⁷ April 2007 Compliance Order, 119 FERC ¶ 61,095 at P 50.

filed rate and under the filed rate doctrine may not be changed absent a section 205 or 206 proceeding. The formula mandates the use of depreciation rates reported in the FERC Form 1, reflecting, in part, state regulator approved depreciation rates, which the Commission has adopted for use in the bandwidth formula. Therefore, in this bandwidth proceeding, in order to calculate a just and reasonable rate Entergy was required to use the state regulator approved depreciation expenses as filed in FERC Form 1. As noted above, the variable DEXN requires the use of depreciation and amortization expense associated with the plant investment in production plant in service, as recorded in FERC Accounts 403 and 404, and this includes depreciation and amortization expenses approved by retail regulators.

50. Thus, the issue for the Commission here (as was the issue in Opinion No. 505) is whether Entergy has correctly implemented the just and reasonable bandwidth formula and this involves ensuring that Entergy has used the correct FERC Form 1 data in the formula. Significantly, no party alleges that Entergy used incorrect depreciation expense numbers in submitting its bandwidth filing.

51. We disagree with the Presiding Judge that his rulings do not challenge a component of the bandwidth formula, and instead only challenge “the input for that component.”⁶⁸ Replacing actual state approved depreciation expense inputs required for use by the bandwidth formula with reconstructed inputs would explicitly alter the depreciation component of the bandwidth.

52. We also disagree with the Louisiana Commission’s argument that we have delegated our jurisdiction to state agencies regarding depreciation expense. The fact that the Commission utilizes inputs that may have been determined at the state level does not make it a delegation of authority. The Commission previously approved Entergy’s compliance filings implementing the bandwidth formula, which include the use of actual depreciation expenses as approved by the relevant state commissions, as just and reasonable.⁶⁹ If any entity wants to change the depreciation rates used in that formula, it must seek a modification to the bandwidth formula in a section 205 or 206 filing. It cannot do so in this proceeding, which is simply to implement the bandwidth formula for 2007.⁷⁰

⁶⁸ Initial Decision, 128 FERC ¶ 63,015 at P 215.

⁶⁹ April 2007 Compliance Order, 119 FERC ¶ 61,095 at P 50.

⁷⁰ We also note that actual state depreciation expenses were used in Exhibit Nos. ETR-26 and ETR-28.

53. In support of the position that the depreciation expenses could be changed in this proceeding, the Presiding Judge, Trial Staff and the Louisiana Commission all rely on *Arkansas Commission v. Entergy* for the proposition that the Commission must make sure that the inputs used in the bandwidth formula are also just and reasonable and that “the authority to determine the payment under the bandwidth necessarily must include the ability to examine the inputs used to calculate the bandwidth.”⁷¹ However, that case was issued prior to Opinion No. 505 and the “Order Denying Interlocutory Appeal” issued in Docket No. ER09-1224-001.⁷² In the order denying interlocutory appeal, the Commission addressed a motion appealing an order by the Presiding Judge in the 2009 bandwidth proceeding removing depreciation issues from the proceeding. The Commission upheld the Presiding Judge’s order, finding that “the purpose of the annual bandwidth filings is to apply the specified formula using *actual* data to determine whether or not there was rough production cost equalization, and not to determine what production costs would have been if different depreciation rates had been in effect for the relevant period.”⁷³ The Commission acknowledged that it had made statements in orders issued prior to the bandwidth proceeding that could be interpreted to suggest that parties had the opportunity to challenge the reasonableness of inputs in the bandwidth proceedings, and *Arkansas Commission v. Entergy* was one of the cases considered by the Commission in that case.⁷⁴ However, the Commission explained that these statements “were made prior to final Commission action on the first annual bandwidth filing and thus did not benefit from experience in addressing these annual bandwidth filings.”⁷⁵

54. At the hearing and in their exceptions, parties debated whether the definitions of the DEXN and ADN variables provided justification for the Commission to substitute different depreciation expense amounts from those submitted on the FERC Form. For example, the Louisiana Commission and Trial Staff focus on the portion of the definition of DEXN that states “unless the jurisdiction for determining the depreciation rate is vested in the FERC under otherwise applicable law,” arguing that this authorizes Entergy to use depreciation expense inputs other than those recorded on the books. We disagree. Significantly, they ignore the first part of the definition of DEXN contained in the filed

⁷¹ Initial Decision, 128 FERC ¶ 63,015 at P 216 (citing *Arkansas Comm’n v. Entergy*, 128 FERC ¶ 61,020 at P 25).

⁷² *Entergy Services, Inc.*, 130 FERC ¶ 61,170 (2010).

⁷³ *Id.* P 20.

⁷⁴ *Id.* n.17.

⁷⁵ *Id.* P 20.

and accepted rate: “Depreciation and Amortization Expense associated with the plant investment in [Production Plant in Service] PPXN as recorded in FERC Accounts 403 and 404, as approved by Retail Regulators.” The amounts recorded in Accounts 403 and 404 are the actual depreciation expenses approved by regulators, whether retail or wholesale, and required to be used in the bandwidth formula. Thus, we interpret the “unless” clause, while ambiguous, as establishing that some of the actual depreciation expenses recorded and reflected in the bandwidth formula may include depreciation expenses charged to traditional wholesale customers that were approved by the Commission and not the retail regulators, rather than as an acknowledgement of the possibility that in a filing implementing the bandwidth remedy the Commission will require Entergy to input depreciation expenses other than the expenses already approved for inclusion in the bandwidth formula as approved by retail regulators and recorded in FERC Accounts 403 and 404. The first part of the definition establishes *where* Entergy is to get the information to populate the variable. Nothing in the second half of the definition, including the “unless” clause, expressly provides that in a filing implementing the bandwidth remedy the Commission will require Entergy to input any depreciation expenses other than the amounts recorded in Accounts 403 and 404 which, in part, are approved by, as relevant here, retail regulators of the Entergy Operating Companies. It is well established that the Commission has exclusive jurisdiction over the bandwidth formula.⁷⁶ As Entergy explains, if the “unless” clause was intended to refer to the Commission’s exclusive jurisdiction over the bandwidth formula, that clause would always apply and the remaining language of the definition would be rendered meaningless.⁷⁷

55. Lastly, we disagree with the Presiding Judge’s finding that the dispositive fact for determining if the depreciation entries were just and reasonable was that they are based on studies that were performed during the 1986-1998 time period and had become stale. While this may be a justification for Entergy to file under section 205 of the FPA to change the rates or the Commission to initiate a section 206 proceeding, it is not justification to change the depreciation expenses in this proceeding, which is a section 205 filing by Entergy to implement the bandwidth remedy for calendar year 2007, in compliance with Opinion Nos. 480 and 480-A. Further, we see no need to initiate a section 206 proceeding regarding Entergy’s depreciation rates because as noted earlier the Louisiana Commission has already filed a section 206 complaint seeking to change

⁷⁶ See, e.g., Opinion No. 480-A, 113 FERC ¶ 61,282 at P 101-02.

⁷⁷ Entergy Brief on Exceptions at 15. It is well established in contract law that a contract should be construed so as to give effect to all of its provisions and to avoid rendering any provision meaningless. See, e.g., *Central Maine Power Co.*, 128 FERC ¶ 61,143, at P 31 (2009).

the depreciation and decommissioning data included in the bandwidth formula (Docket No. EL10-55-000).

B. Vidalia

1. Background

56. Vidalia refers to a long-term purchase power contract entered into between Entergy Louisiana and Catalyst Old River Hydroelectric Limited Partnership in 1985. In Opinion No. 480, the Commission ruled that the costs of the Vidalia contract should be excluded for purposes of the bandwidth remedy calculation, finding that the Vidalia resource was not a system resource.⁷⁸ The Commission relied, in part, upon a retail ratemaking settlement approved by the Louisiana Commission in 2002 concerning Entergy Louisiana's proposal to seek with the Internal Revenue Service an accelerated deduction of Vidalia purchase power costs that Entergy Louisiana believed it could take over the remaining life of the contract.⁷⁹ The fact that the tax benefits from the Vidalia accelerated deduction were being exclusively retained by Entergy Louisiana and flowed, in part, directly to retail ratepayers was one basis for the Commission's conclusion that Vidalia was an Entergy Louisiana-only resource.⁸⁰ The Commission also ruled that none of these Vidalia tax savings were to be shared with other Operating Companies.⁸¹ Consequently, when Entergy submitted its April 10, 2006 compliance filing to add the bandwidth formula to Service Schedule MSS-3, Entergy also incorporated an adjustment to reflect the "reversal of the Vidalia capital transaction" in its bandwidth calculation.⁸²

2. Initial Decision

57. The Presiding Judge states that the three issues regarding the "reversal of the Vidalia capital transaction" from Service Schedule MSS-3, section 30.12, are: (1) whether Entergy inappropriately made changes to the methodology reflected in Exhibit Nos. ETR-26 and ETR-28; (2) whether the meaning of the phrase "reversal of the

⁷⁸ Opinion No. 480, 111 FERC ¶ 61,311 at P 182.

⁷⁹ *Id.* P 183.

⁸⁰ *Id.* P 183-84.

⁸¹ *Id.*

⁸² "Reversal of the Vidalia capital transaction," as identified in footnote 1 of section 30.12 of Service Schedule MSS-3, refers to adding the long-term debt and common equity reductions made with Entergy Louisiana's share of the Vidalia tax proceeds back into the capital structure for cost-of-service-purposes.

Vidalia capital transaction” is clear; and (3) whether the reversal of the Vidalia transaction is consistent with the order adopting the bandwidth remedy.

58. With regard to the first issue, the Presiding Judge disagrees with the Louisiana Commission’s claim that Entergy had inappropriately made changes to Exhibit Nos. ETR-26 and ETR-28. The Presiding Judge explains that the Commission has held that future changes to the methodology set forth in Exhibit Nos. ETR-26 and ETR-28 require a section 205 filing.⁸³ However, the Presiding Judge states that in the April 2006 Compliance Filing and the December 2006 Compliance Filing submitted to implement Opinion No. 480’s bandwidth remedy, Entergy asked for a change in capital structure through its addition of the “reversal of the Vidalia capital transaction” language in footnote 1⁸⁴ to Service Schedule MSS-3. The Presiding Judge finds that Entergy should have been required to make a section 205 filing to incorporate this adjustment into Service Schedule MSS-3 because it changes the methodology set forth in Exhibit Nos.

⁸³ Initial Decision, 128 FERC ¶ 63,015 at P 266 (citing November 2006 Compliance Order, 117 FERC ¶ 61,203 at P 69).

⁸⁴ Footnote 1 of Service Schedule MSS-3 provides as follows:

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 pursuant to the production cost methodology set forth in Exhibit [Nos.] ETR-26/ETR-28 filed in Docket No. EL01-88-001, including but not limited to: (1) the Deregulated Asset Plan adjustment for [Entergy Gulf States Louisiana]; (2) the regulated portion (70%) of river Bend for [Entergy Gulf States Louisiana]; (3) *re-pricing of energy associated with the Vidalia purchase power contract for [Entergy Louisiana] based on the average annual Service Schedule MSS-3 rate paid by [Entergy Louisiana,] including the exclusion of the income tax savings of the Vidalia purchase power contract from ADIT and reflecting the reversal of the Vidalia capital transaction, and the debt rate associated with the Waterford 3 Sale/Leaseback for [Entergy Louisiana];* (4) exclusion of the [Entergy Arkansas] and [Entergy Mississippi] retail approved Grand Gulf Accelerated Recovery Tariff effects on purchased power on [Entergy Arkansas’] and [Entergy Mississippi’s] production cost; and (5) exclusion of any increased costs resulting from the amended Toledo Bend Power Sales Agreement accepted for filing in Docket No. ER07-984.

Ex. ESI-3 at 51 (emphasis added).

ETR-26 and ETR-28.⁸⁵ However, the Presiding Judge notes that the Commission did not choose to require Entergy to make such a filing and accepted the adjustments made to Service Schedule MSS-3.⁸⁶ The Presiding Judge notes that, moreover, parties were given the opportunity to respond to Entergy's compliance filings and challenge the adjustment, but the Louisiana Commission failed to do so. The Presiding Judge accordingly finds that the reversal of the Vidalia capital transaction language included in footnote 1 of Service Schedule MSS-3 should be incorporated when making the bandwidth calculation.

59. The Presiding Judge also rejects the Louisiana Commission's argument that Entergy failed to provide sufficient notice that it made a change to its approved rate schedule. Instead, he finds that Entergy stated in its transmittal letter included with its April 2006 compliance filing that adjustments would be made so that Service Schedule MSS-3 would be consistent with Exhibit Nos. ETR-26 and ETR-28, and that these adjustments included the "reflect[ion of] the reversal of the capital cost transaction regarding Vidalia on behalf of [Entergy Louisiana] ... consistent with [Exhibit Nos.] ETR-26 and ETR-28."⁸⁷ He also notes that the adjustments were clearly listed in a section titled "Description of Amendments," and that the filing included a red-line version of revised Service Schedule MSS-3, which indicated that footnote 1 had been added in conjunction with the compliance filing.

60. The Presiding Judge also disagrees with the Louisiana Commission's contention that the meaning of the phrase "reversal of the Vidalia capital transaction" is unclear. He notes that this language refers to the requirement in the Louisiana Commission's order adopting the Vidalia tax settlement that Entergy Louisiana maintain its pre-existing capital structure in any rate proceeding for a ten-year period. He states that as part of a rate case subsequent to that order, Entergy Louisiana's capital structure was adjusted in a manner that reversed "both debt and common equity related transactions identified as resulting from the application of the Vidalia tax Deduction."⁸⁸ He states that this analysis included a heading explaining that it was Entergy Louisiana's cost of capital, adjusted to reverse the Vidalia capital transaction. He states that this analysis was submitted to the Louisiana Commission. The Presiding Judge finds that Entergy Louisiana made these same adjustments in a 2007 retail rate proceeding with the Louisiana Commission. He also cites to Entergy's Initial Brief for the proposition that the Louisiana Commission

⁸⁵ Initial Decision, 128 FERC ¶ 63,015 at P 271.

⁸⁶ *Id.* P 272 (citing November 2006 Compliance Order, 117 FERC ¶ 61,206; Compliance Order, 119 FERC ¶ 61,095 at P 50).

⁸⁷ *Id.* P 276 (citing Ex. LC-109 at 16).

⁸⁸ *Id.* P 278 (citing Ex. ESI-59 at 11).

reviewed and accepted the method for making this reversal, and also authorized the order that required such treatment, and “thus should know and understand the meaning of the language.”⁸⁹ The Presiding Judge concludes that the Louisiana Commission’s argument that it now does not understand what this language means is unconvincing given its prior experience with the reversal of the Vidalia capital transaction.⁹⁰

61. The Presiding Judge also disagrees with the Louisiana Commission’s arguments that the language in footnote 1 is inconsistent with Opinion No. 480. He notes that while the Commission did not specifically address reversing the Vidalia transaction, it held that Vidalia was built to benefit Louisiana and that production costs of the plant should accordingly stay in Louisiana.⁹¹ He notes that the Commission further held that Vidalia “was not part of Entergy’s overall system planning and that its costs should not now be spread throughout Entergy’s system.”⁹² The Presiding Judge finds that the Commission’s acceptance of the compliance filing is consistent with these principles. He explains (citing Entergy witness Peters) that if the Vidalia capital transaction were not reversed, then Entergy Louisiana would receive increased bandwidth payments because its production costs would increase.⁹³ The Presiding Judge finds that this result would be inconsistent with the Commission’s holding in Opinion No. 480 that costs associated with the Vidalia capital transaction should remain within Louisiana.

3. Briefs on Exceptions

62. The Louisiana Commission argues that the Initial Decision erroneously held that Entergy could accomplish a change in bandwidth methodology through unclear language inserted in a tariff footnote, while representing to the Commission that the tariff fully complied with the methodology. It contends that prior Commission orders held that Entergy should follow the methodology reflected in Exhibit Nos. ETR-26 and ETR-28 in comparing production costs among the Operating Companies, and that changes to that methodology would require a section 205 filing.⁹⁴

⁸⁹ *Id.* P 277 (citing Entergy Initial Brief at 29).

⁹⁰ *Id.* P 278.

⁹¹ *Id.* P 279 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 174).

⁹² *Id.* (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 174).

⁹³ *Id.* P 280 (citing Ex. ESI-22 at 14).

⁹⁴ Louisiana Commission Brief on Exceptions at 1 (citing *Louisiana Pub. Serv. Comm’n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 at P 69).

63. The Louisiana Commission contends that Entergy changed the methodology for calculating the capital structure of Entergy Louisiana from that reflected in Exhibit Nos. ETR-26 and ETR-28 in a tariff footnote. It contends that the Initial Decision erred in finding that this footnote constituted proper notice that the filing was making a change inconsistent with Exhibit Nos. ETR-26 and ETR-28. It contends that the Initial Decision found that the Commission knowingly departed from its requirement that Entergy make a separate section 205 filing.⁹⁵ The Louisiana Commission further contends that footnote 1 cannot be considered sufficient notice because Entergy represented this footnote as dealing with “Rate Base, Revenue and Expense items,” not capital structure items.⁹⁶ It also argues that footnote 1 provided inadequate guidance to alert the Commission or the public to its meaning.

64. The Louisiana Commission argues that the Initial Decision erred in finding that the reversal of the Vidalia capital transaction is consistent with Opinion No. 480. It contends that reflecting the actual capital structure of Entergy Louisiana in the bandwidth calculation cannot spread the costs of Vidalia throughout the system. It argues that, instead, it preserves a retail benefit of a retail settlement related to a Vidalia tax deduction to Louisiana. The Louisiana Commission argues that the Initial Decision erroneously approves sharing the capital structure benefit achieved in the settlement, while all costs of Vidalia are exclusively retained by Entergy Louisiana and its ratepayers. It adds that assuming that Opinion No. 480 would support a capital structure adjustment to reverse the Vidalia capital transaction, the adjustment from a retail settlement reflected here by Entergy reverses securities redemptions that could not have been made with Vidalia tax proceeds. It argues that the Initial Decision erroneously treated the error as a retail issue of no concern to the Commission.⁹⁷

65. Entergy argues that the Presiding Judge erred in finding that Entergy should have made a section 205 filing to reflect the reversal of the Vidalia capital transaction. It contends that in drafting the bandwidth formula, Entergy was required to follow the Commission’s directives in Opinion Nos. 480 and 480-A, the orders adopting the bandwidth remedy. It argues that reversal of the Vidalia capital transaction was consistent with the Commission’s directives in Opinion Nos. 480 and 480-A. Entergy maintains that, in any event, even if Entergy was required to make a section 205 filing to incorporate the reversal of the Vidalia capital transaction into the bandwidth formula, Entergy did make a section 205 filing to add that adjustment. It contends that the section

⁹⁵ *Id.* at 2 (citing Initial Decision, 128 FERC ¶ 63,015 at P 274).

⁹⁶ *Id.* (citing Ex. LC-109 at 35).

⁹⁷ *Id.* at 3 (citing Initial Decision, 128 FERC ¶ 63,015 at P 282).

205 filing was Entergy's April 2006 Compliance Filing, which added footnote 1 to section 30.12 of Service Schedule MSS-3.⁹⁸

4. Briefs Opposing Exceptions

66. Entergy contends that the reversal of the Vidalia capital transaction is consistent with Exhibit Nos. ETR-26 and ETR-28. Entergy argues that the Louisiana Commission ignores the fact that the two exhibits were prepared in January of 2003 and were used during the hearing in Docket No. EL01-88-000 (the proceeding that eventually resulted in Opinion No. 480), which was held in July and August 2003. Entergy explains that the two exhibits did not reflect the reversal of the Vidalia capital transaction because the Louisiana Commission's order directing Entergy to reverse the Vidalia capital transaction was issued on October 16, 2002, after the time period covered by Exhibit Nos. ETR-26 and ETR-28. It contends that more significantly the Louisiana Commission's order approving Entergy's retail ratemaking adjustment that reversed the Vidalia capital transaction did not occur until May 2005, almost two and a half years after Exhibit Nos. ETR-26 and ETR-28 were prepared.⁹⁹

67. Entergy and Trial Staff reiterate the Presiding Judge's finding that reversal of the Vidalia capital transaction is consistent with Opinion No. 480, and ensures that production costs associated with Vidalia stay with Entergy Louisiana and are not included in the bandwidth calculation. They contend that if the costs were reflected in the bandwidth calculation, Entergy Louisiana's production costs would increase and, in turn, increase the amount of Entergy Arkansas bandwidth payments and reduce the amount of bandwidth receipts of all companies except Entergy Louisiana.¹⁰⁰ They contend that such a result would violate the Commission's ruling that production costs associated with Vidalia should stay in Louisiana.

68. Entergy argues that, even if the reversal of the Vidalia capital transaction constituted a change in the methodology used in Exhibit Nos. ETR-26 and ETR-28 that required a section 205 filing, it has already made such a filing: the April 2006 Compliance Filing that added the bandwidth formula to the System Agreement. It contends that this filing included footnote 1 that includes "retail regulatory adjustments" including "reflecting the reversal of the Vidalia capital transaction."¹⁰¹ Entergy adds that

⁹⁸ Entergy Brief on Exceptions at 43.

⁹⁹ Entergy Brief Opposing Exceptions at 11.

¹⁰⁰ *Id.* at 12 (citing Ex. ESI-22 at 14); Trial Staff Brief Opposing Exceptions at 46.

¹⁰¹ Entergy Brief Opposing Exceptions at 13 (citing Ex. ESI-3 at 51).

the Commission accepted footnote 1 in its order on compliance.¹⁰² Trial Staff agrees that the Presiding Judge properly relied upon the Commission's acceptance of the adjustments made to Service Schedule MSS-3 in the two compliance filings. Both Entergy and Trial Staff observe that the Louisiana Commission did not protest the "reversal of the Vidalia capital transaction" language. Entergy adds that in the numerous challenges to Entergy's compliance filings, the Louisiana Commission never raised any issue regarding the reversal of the Vidalia capital transaction.

69. Entergy and Trial Staff further argue that the Louisiana Commission had adequate notice about the proposed change in footnote 1. Entergy and Trial Staff note that Entergy's April 2006 Compliance Filing included language in the bandwidth formula that authorized the reversal of the Vidalia capital transaction, and that such language was highlighted in the transmittal letter.¹⁰³ Trial Staff adds that the Presiding Judge properly relied upon the fact that the filing included a red-lined version of revised Service Schedule MSS-3, which indicated that the language of footnote 1 had been added in conjunction with the compliance filing.

70. Entergy and Trial Staff dispute the Louisiana Commission's claim that Entergy did not make the adjustment correctly. Entergy argues that it reversed the Vidalia capital transaction in the identical manner it has been accepted by the Louisiana Commission. It disputes the Louisiana Commission's claim that its adjustment does not actually "reverse" the Vidalia capital transaction. Entergy argues that the Louisiana Commission is asking the Commission to adopt a different method of reversing the Vidalia capital transaction than the Louisiana Commission adopted itself for retail ratemaking purposes. It contends that for retail ratemaking purposes, the Louisiana Commission adopted a method that results in lower Entergy Louisiana production costs and lower retail rates, but for bandwidth purposes, the Louisiana Commission is urging adoption of a method that results in higher Entergy Louisiana production costs and higher bandwidth receipts.¹⁰⁴

71. Entergy and Trial Staff contend that the reversal of the Vidalia capital transaction is consistent with the directives of Opinion No. 480 that the Vidalia tax benefits should remain in Louisiana. Entergy argues that reversing the Vidalia capital transaction in the bandwidth formula does not cause Vidalia tax benefits to be shared with other Operating

¹⁰² *Id.* at 14 (citing November 2006 Compliance Order, 117 FERC ¶ 61,203 at Ordering Paragraph (A)).

¹⁰³ *Id.* at 17 (citing Ex. LC-109 at 36); Trial Staff Brief on Exceptions at 44.

¹⁰⁴ *Id.* at 21.

Companies. It contends that rather the record evidence presented by Entergy and Trial staff demonstrates that there is no such sharing of Vidalia tax benefits.¹⁰⁵

5. Commission Determination

72. We affirm the Presiding Judge's findings regarding the reversal of the Vidalia capital transaction. First, we disagree with the Louisiana Commission's assertion that Entergy inappropriately added tariff language to the bandwidth calculation in the April Compliance Filing without sufficient notice. The Presiding Judge recognized that the Commission had previously accepted Entergy's amended Service Schedule MSS-3, including footnote 1 authorizing the reversal of the Vidalia capital transaction.¹⁰⁶ The Louisiana Commission protested certain parts of the April 2006 Compliance Filing, but did not protest language regarding Vidalia in footnote 1. In its December 2006 Compliance Filing, Entergy proposed several changes to the bandwidth formula, but did not modify the language authorizing the reversal of the Vidalia capital transaction. The Louisiana Commission again failed to challenge footnote 1 in that filing. As the Initial Decision in this proceeding noted, the Commission had not one, but two opportunities to reject the adjustment as a material change that required a separate section 205 filing.¹⁰⁷ Instead, as the Presiding Judge observes, the Commission accepted the changes, making them part of Service Schedule MSS-3.

73. We also reject the Louisiana Commission's argument that Entergy did not provide sufficient notice that it was proposing to reverse the Vidalia capital transaction in the bandwidth calculation. As the Presiding Judge explained, the Louisiana Commission's argument is not persuasive. As noted by the Presiding Judge, Entergy's transmittal letter included with its April 2006 Compliance Filing listed adjustments that would be made to Service Schedule MSS-3.¹⁰⁸ Among these adjustments was language specifically addressing the reversal of the Vidalia capital cost transaction; the adjustments were listed in a section titled "Description of the Amendments," and explicitly provided that "adjustments to exclude income tax savings associated with the Vidalia purchase power contract, and to reflect the reversal of the capital cost transaction regarding Vidalia on behalf of Entergy Louisiana also will be made, consistent with Exhibit Nos. ETR-26 and

¹⁰⁵ *Id.* at 23.

¹⁰⁶ November 2006 Compliance Order, 117 FERC ¶ 61,203 at Ordering Paragraph (A).

¹⁰⁷ Initial Decision, 128 FERC ¶ 63,015 at P 274.

¹⁰⁸ *Id.* P 276.

ETR-28.”¹⁰⁹ In addition, Entergy included a red-lined version of revised Service Schedule MSS-3, indicating that the language of footnote 1 had been added in conjunction with the compliance filing. Given the evidence in the record, there is little support for the Louisiana Commission’s contention that Entergy did not provide sufficient notice and tried to “slip” a formula adjustment into the bandwidth compliance filing.

74. In addition, we agree with the Presiding Judge that the Louisiana Commission’s assertion that the meaning of the phrase “reversal of the Vidalia capital transaction” is unclear is not convincing. As explained by Entergy, those words “should have a clear meaning to the [Louisiana Commission], as it has reviewed and accepted the method for reversing the Vidalia capital transaction numerous times.”¹¹⁰ As the Presiding Judge explained, the “reversal of the Vidalia capital transaction” language has been used to refer to the requirement in the Louisiana Commission’s order adopting the Vidalia tax settlement that Entergy Louisiana maintains its pre-existing capital structure in any rate proceeding for a ten-year period.¹¹¹ As part of a rate case subsequent to that order, Entergy Louisiana’s capital structure was adjusted in compliance with the Louisiana Commission’s order. This adjustment “reversed both debt and common equity related transactions identified as resulting from the proceeds from the Vidalia Tax Deduction.”¹¹² Entergy Louisiana made these same adjustments with the Louisiana Commission in a 2007 retail rate proceeding.¹¹³ In addition, Entergy’s 2003 SEC 10-K also indicated the requirement that Entergy Louisiana maintain the existing capital structure.¹¹⁴ The Louisiana Commission accepted this ratemaking treatment in 2005. Accordingly, it seems implausible for the Louisiana Commission to claim that it did not understand the meaning of the phrase “reversal of the Vidalia capital transaction.”

75. In its exceptions to the Initial Decision, the Louisiana Commission argues that because the Vidalia language in footnote 1 indicated that the footnote pertained to “All Rate Base, Revenue and Expense items,” it could not have known that language included

¹⁰⁹ *Id.* P 276 (citing Ex. LC-109 at 8).

¹¹⁰ Entergy Brief Opposing Exceptions at 17.

¹¹¹ Initial Decision, 128 FERC ¶ 63,015 at P 278.

¹¹² *See* Ex. ESI-59 at 11.

¹¹³ *See* Ex. LC-110 at 1.

¹¹⁴ *See* Ex. LC-88 at 5.

in footnote 1 could pertain to Entergy Louisiana's capital structure.¹¹⁵ We disagree. As discussed above, the "reversal of the Vidalia capital transaction" language included in footnote 1 has a specific meaning in Louisiana Commission retail ratemaking that refers to an adjustment to Entergy Louisiana's capital structure. In addition, footnote 1 is located at the end of the first sentence of section 30.12 of Service Schedule MSS-3, which refers to the bandwidth formula in that section. Again, the record evidence all points to the conclusion that the Vidalia language in footnote 1 refers to an adjustment of Entergy Louisiana's capital structure, and there is no reason to think that the Louisiana Commission should not have been aware of or misunderstood the language. As discussed by Trial Staff witness Sammon, the amended Service Schedule MSS-3 contains the "reversal of the Vidalia capital transaction" clause, and meaning must be given to this clause if possible.¹¹⁶ As noted by Trial Staff, the Louisiana Commission has not offered any plausible alternative for what adjustment is required by the "reversal of the Vidalia capital transaction" clause other than an assertion that the clause is too vague to give any meaning to it.¹¹⁷ We agree with Entergy and Trial Staff that the Presiding Judge's finding that the reversal of the Vidalia capital transaction is consistent with Opinion No. 480 and ensures that production costs associated with Vidalia stay with Entergy Louisiana and are not included in the bandwidth calculation.

76. We also take issue with the Louisiana Commission's argument that Entergy's adjustment does not actually "reverse" the Vidalia capital transaction, and that such a reversal is inconsistent with Opinion No. 480 and Exhibit Nos. ETR-26 and ETR-28. The Louisiana Commission argues that Entergy's adjustment did not reverse the Vidalia capital transaction because it "reverses debt redemptions that could not have been made pursuant to the tax settlement nor with Vidalia tax proceeds"¹¹⁸ and it "did not impute the debt rates to the capital structure that were associated with the add-backs of debt."¹¹⁹ While it may be possible to more accurately calculate the impact of the Vidalia capital transaction on Entergy Louisiana's production costs by examining the actual cost of debt that was reduced with the tax benefits associated with the Vidalia purchase, no participant has proffered specific alternative adjustments for reversing the effects of the Vidalia capital transaction for our consideration. In the absence of specific alternative adjustments for reversing the effects of the Vidalia capital transaction for our

¹¹⁵ Louisiana Commission Brief on Exceptions at 29.

¹¹⁶ Ex. S-14 at 22.

¹¹⁷ Trial Staff Initial Brief at 29.

¹¹⁸ Louisiana Commission Brief on Exceptions at 33.

¹¹⁹ *Id.* at 35.

consideration, we find that Entergy's proposed adjustment, which has been previously accepted by the Louisiana Commission for retail ratemaking purposes reflecting its average cost of outstanding debt, to be reasonable.

77. Lastly, we disagree with the Louisiana Commission's argument that the Presiding Judge's finding is inconsistent with Opinion No. 480's requirement that the Vidalia tax benefits should remain in Louisiana. In that order, the Commission stated that "[t]he [Vidalia] hydroelectric plant was built to benefit Louisiana and that is where the production costs of the plant should stay."¹²⁰ The Commission also found that Vidalia was not part of Entergy's overall system planning and that its costs should not be spread throughout the Entergy system.¹²¹ The Presiding Judge properly recognized the Commission's acceptance of the compliance filings approving the reversal of the Vidalia capital transaction is consistent with these principles.¹²² Accordingly, Entergy followed the Commission's directives and did not include the Vidalia tax benefits in the bandwidth calculations. Reversing the Vidalia capital transaction in the bandwidth formula does not cause Vidalia tax benefits to be shared with other Operating Companies as the Louisiana Commission claims. To the contrary, the record evidence presented by Trial Staff demonstrates there is no such sharing with other Operating Companies. As explained by Trial Staff witness Sammon:

This adjustment is currently made by the [Louisiana Commission] for retail ratemaking purposes to protect retail ratepayers from adverse effects that might result from how Entergy Louisiana chose to use its retained share of the Vidalia tax proceeds. Extending this protection to the [b]andwidth formula similarly protects ratepayers of the other Operating Companies from adverse effects that might result from how Entergy Louisiana chose to use its retained share of the Vidalia tax proceeds. This adjustment does not involve any impermissible sharing of the Vidalia tax benefits as alleged by [Louisiana Commission] witness Kollen. It is merely an extension of [a] [Louisiana Commission]-characterized "customer protection" to all Entergy System ratepayers.¹²³

¹²⁰ Opinion No. 480, 111 FERC ¶ 61,311 at P 174.

¹²¹ *Id.*

¹²² Initial Decision, 128 FERC ¶ 63,015 at P 280.

¹²³ Ex. S-24 at 6.

78. In addition, if the Vidalia capital transaction were not reversed, Entergy Louisiana would receive bandwidth payments because its production costs would increase.¹²⁴ This would result in a reduction of bandwidth receipts for other Operating Companies. We agree with the Presiding Judge that this result would directly contradict the Commission's prior holdings that costs associated with Vidalia must stay in Louisiana.¹²⁵ Reversing the Vidalia capital transaction keeps the costs of the transaction from spreading throughout Entergy's system and keeps Louisiana from shifting costs to other states on the Entergy system.

C. Evangeline Contract

1. Background

79. The Evangeline Contract is a "long-term natural gas commodity and transportation agreement between Entergy Louisiana and the Evangeline Gas Pipeline Company (Evangeline)" where Evangeline provides natural gas to Entergy Louisiana at a fixed reservation fee, plus a commodity charge based on the pipeline's weighted average cost of gas plus a margin for the seller.¹²⁶ According to Entergy, the Louisiana Commission determined that a different "imputed" commodity price under the Evangeline Contract would be passed on to retail customers.¹²⁷ In its bandwidth formula, Entergy included the actual contract price for the Evangeline Contract as recorded in Account 501 in Entergy Louisiana's books and reported on its FERC Form 1.

80. The Mississippi Commission argued that the contract price for the Evangeline Contract should be modified in the bandwidth proceeding to include only the amount of Evangeline contract costs actually paid by retail ratepayers. The Mississippi Commission proposed that "a cost should not be included in the bandwidth calculation unless: (1) it is associated with production costs; and (2) it is included in retail rates."¹²⁸

¹²⁴ Initial Decision, 128 FERC ¶ 63,015 at P 280 (citing Ex. ESI-22 at 14).

¹²⁵ *Id.*

¹²⁶ *Id.* P 447 (quoting Entergy Initial Brief at 61).

¹²⁷ *Id.* P 448. The imputed price was set at "Henry Hub first of month cash market price (as reported by the publication, *Inside FERC*) plus \$0.24 per mmBtu for the month in which the [fuel adjustment clause] is calculated, irrespective of the actual cost for the Evangeline Contract quantity reflected in that month's [fuel adjustment clause]." *Id.* (quoting Entergy Initial Brief at 61-62).

¹²⁸ *Id.* P 453 (quoting Mississippi Commission Initial Brief at 9).

2. Initial Decision

81. In the Initial Decision, the Presiding Judge finds that the Mississippi Commission had failed to carry its burden of proof on this issue, and also finds that there was no evidence in the record that the Evangeline Contract was entered into imprudently.¹²⁹ The Presiding Judge notes that a reading of the Commission's Opinion Nos. 480 and 480-A shows that the Commission's focus in the bandwidth proceeding was not on retail ratepayers, but instead on the equalization of costs among the Operating Companies.¹³⁰ The Presiding Judge finds that the Mississippi Commission's witness did not provide convincing evidence to support its request for relief.¹³¹

3. Brief on Exceptions

82. The Mississippi Commission argues that the Initial Decision erred because it did not require Entergy to adjust the actual costs of the Evangeline Contract to reflect re-pricing at the retail level.¹³² It reiterates the testimony of Mississippi Commission witness Larkin and maintains that there should be an adjustment of Entergy Louisiana's variable production costs to reflect the re-pricing of the Evangeline Contract price at the retail level. According to Mr. Larkin, Entergy Louisiana's variable production costs should be reduced by \$7,676,051.44.

83. The Mississippi Commission also argues that the Initial Decision erred in addressing the prudence of the Evangeline Contract in this proceeding.¹³³ The Mississippi Commission contends that if the Commission adopts the Mississippi Commission's two-part test for including costs in the bandwidth calculation, then the Commission need not make a finding of imprudence regarding the Evangeline Contract in this proceeding.

4. Briefs Opposing Exceptions

84. Entergy argues that the Mississippi Commission's position conflicts with footnote 1 to section 30.12 of Service Schedule MSS-3, which specifies that all expense items shall be based on the actual amounts on the Company's books as reported in

¹²⁹ *Id.* P 471, 477.

¹³⁰ *Id.* P 469.

¹³¹ *Id.* P 470.

¹³² Mississippi Commission Brief on Exceptions at 5-6.

¹³³ *Id.* at 7.

FERC Form 1, with the exception of certain, specific retail regulatory adjustments.¹³⁴ Entergy asserts that no party presented evidence that the Evangeline Contract costs fall within one of the exceptions listed in footnote 1 in Service Schedule MSS-3, and, as such, Entergy was obligated to use the amount reflected on Entergy Louisiana's books and reported in the FERC Form 1. Entergy maintains that these were the costs actually incurred by Entergy Louisiana under the Evangeline Contract. Further, Entergy argues that if the bandwidth formula had intended for the bandwidth calculation to operate as the Mississippi Commission claims, the bandwidth formula would have enumerated an Evangeline Contract exception in footnote 1 to section 30.12, just as it did with the other retail regulatory adjustments recognized in footnote 1.

85. Entergy also argues that the Mississippi Commission's proposed adjustment to the Evangeline Contract costs could be based only on a finding of imprudence by the Commission.¹³⁵ Entergy states that the issue of the prudence of the Evangeline Contract was included in the agreed issues list for hearing, and parties, including Entergy, presented evidence on prudence to demonstrate that no such adjustment was warranted.

86. Trial Staff agrees with the Presiding Judge that the Mississippi Commission did not provide convincing evidence that its request for relief should be granted. Trial Staff states that the focus of Opinion Nos. 480 and 480-A was not on retail ratepayers, but on the equalization of costs among the members of the Entergy System.¹³⁶

87. Trial Staff also argues that the Presiding Judge correctly addressed the issue that was presented to him, which was: "Were the Evangeline long-term gas contract costs incurred by Entergy Louisiana imprudent or unreasonable? If so, what adjustments should be made?" Trial Staff maintains that the Presiding Judge properly found that there is no evidence in the instant record that the Evangeline Contract was entered into imprudently.

88. The Louisiana Commission argues that the Mississippi Commission's two-part test has never been adopted by the Commission, applied to the bandwidth formula, or advocated by any party before this case. The Louisiana Commission maintains that the Presiding Judge properly rejected the Mississippi Commission's position as unsupported and contrary to precedent. Further, it argues that rough production cost equalization

¹³⁴ Entergy Brief Opposing Exceptions at 44 (citing Ex. ESI-1 at 21; Ex. ESI-3 at 51).

¹³⁵ *Id.* at 45 (citing Ex. LC-12 at 51; Ex. ESI-44 at 7).

¹³⁶ Staff Brief Opposing Exceptions at 48.

applies to the production costs of the Operating Companies, not the retail rates paid by the Operating Companies' retail ratepayers.¹³⁷

89. With regard to the prudence of the Evangeline Contract costs, the Louisiana Commission contends that no party, including the Mississippi Commission, presented evidence that the contract costs are unreasonable or imprudent. In support of the Presiding Judge's prudence finding, the Louisiana Commission references Entergy witness Hurtsell's testimony that the Evangeline Contract provides economic and reliable service to Entergy's customers.¹³⁸

5. Commission Determination

90. We affirm the Presiding Judge's findings on the Evangeline Contract. As the Presiding Judge indicated, the focus of the bandwidth proceedings is on the rough equalization of production costs among the Operating Companies of the Entergy system, not among retail ratepayers.¹³⁹ For the bandwidth formula what is relevant are the amounts paid by Entergy Louisiana to Evangeline, not the amounts Entergy Louisiana ultimately recovers from its retail ratepayers. We also affirm the Presiding Judge's finding that Entergy properly included the costs of the Evangeline Contract paid by Entergy Louisiana to Evangeline that were reported on its FERC Form 1, as required under Service Schedule MSS-3.¹⁴⁰

D. Accumulated Deferred Income Taxes Used in Bandwidth Calculations

1. Background

91. In 1989, Entergy Louisiana entered into a sale-leaseback of a portion of the Waterford 3 nuclear facility.¹⁴¹ While the Louisiana Commission approved the sale leaseback transaction, Entergy Louisiana was required to show ownership of the portion

¹³⁷ Louisiana Commission Brief Opposing Exceptions at 61.

¹³⁸ *Id.* at 64 (citing Ex. ESI-35 at 29-30).

¹³⁹ See Opinion No. 480, 111 FERC ¶ 61,311 at P 28; Opinion No. 480-A, 113 FERC ¶ 61,282 at P 15.

¹⁴⁰ See Service Schedule MSS-3 at n.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.").

¹⁴¹ Entergy Initial Brief at 37.

of Waterford 3 that was subject to the sale-leaseback for retail ratemaking purposes. The Waterford 3 leaseback produced a gain for tax purposes, but did not produce a gain for book purposes.¹⁴² As a result of that taxable gain, the Waterford 3 sale-leaseback Account 190 ADIT arose.

92. At hearing, the issue was not only whether the ADIT was properly excluded from the bandwidth formula, but also whether this issue should be considered in this proceeding. On November 7, 2008, the parties to this proceeding entered into a Joint Stipulation agreeing not to litigate issues that are the subject of other bandwidth proceedings.¹⁴³ One of the “Stipulated Issues” that the parties agreed will not be re-litigated in this proceeding was: “Exclusion of the categories of accumulated deferred income tax (ADIT) that Entergy excluded for the 2006 test year from Account No. 190 in the bandwidth calculation.”¹⁴⁴ Both Entergy and Trial Staff argued that this issue was addressed in Docket No. ER07-956-001, and thus should not be re-litigated in this proceeding. The Louisiana Commission argued at hearing that Entergy’s adjustment to exclude the certain Account No. 190 ADIT related to the sale-leaseback of a portion of the Waterford 3 nuclear generating station should be considered in this proceeding and should be rejected on the merits.

93. The bandwidth formula, as contained in Service Schedule MSS-3, defines ADIT in full:

Net [ADIT] recorded in FERC Accounts 190, 281 and 282 (as reduced by amounts not generally and properly includable for FERC cost of service purposes, *including but not limited to*, SFAS 109 ADIT amounts and ADIT amounts arising from retail ratemaking decisions) plus Accumulated Deferred Income Tax Credit – 3[percent] portion only recorded in FERC Account 255.[¹⁴⁵]

94. In relevant part, in Opinion No. 505, the Commission found that the tariff language of section 30.12 instructs Entergy to remove “amounts not generally and properly includable for FERC cost of service purposes.”¹⁴⁶ Further, the Commission

¹⁴² *Id.*

¹⁴³ Initial Decision, 128 FERC ¶ 63,015 at P 316.

¹⁴⁴ Ex. ESI-58 at 1, Stipulated Issue 2(iii).

¹⁴⁵ Service Schedule MSS-3 at 53.

¹⁴⁶ Opinion No. 505, 130 FERC ¶ 61,023 at P 233.

found that Service Schedule MSS-3 is the controlling methodology, and Exhibit Nos. ETR-26 and ETR-28 are only applicable where Service Schedule MSS-3 does not address a specific issue. The Commission held that therefore, amounts other than SFAS 109 ADIT may be excluded from the calculation if it is an amount that is not properly includable for Commission cost of service purposes.¹⁴⁷

2. Initial Decision

95. The Presiding Judge finds that the joint stipulation does not preclude litigating the ADIT issue as it relates to the Waterford 3 sale-leaseback in this proceeding. The Presiding Judge finds that, while Issue 2 (iii) of the joint stipulation may be read to include the issue of exclusion of the ADIT related to the Waterford 3 sale-leaseback from the 2007 bandwidth calculation, it is unclear from the Initial Decision in Docket No. ER07-956-000 whether that specific ADIT was actually considered.¹⁴⁸ The Presiding Judge notes that while the Initial Decision in Docket No. ER07-956-000 states that “Entergy properly excluded the aforementioned ADIT from the Bandwidth calculation,” the Waterford 3 sale-leaseback ADIT was not specifically mentioned in the section of the Initial Decision addressing ADIT. Further, the Presiding Judge concludes that if the Waterford 3 sale-leaseback ADIT was mentioned in the testimony in that proceeding, this was not made clear in the decision.¹⁴⁹ For the same reasons, the Presiding Judge also finds that litigation of this issue is not barred by *res judicata*¹⁵⁰ or collateral estoppel¹⁵¹ and, therefore, a determination must be made on the merits.¹⁵²

¹⁴⁷ *Id.* P 233.

¹⁴⁸ *Id.* P 317.

¹⁴⁹ *Id.*

¹⁵⁰ The doctrine of *res judicata* precludes the relitigation of a claim or issue that was the subject of a prior cause of action between the parties. “The doctrine of *res judicata* holds that a judgment on the merits in a prior suit bars a second suit involving identical parties ... based on the same cause of action.” *Nat’l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 834 (D.C. Cir. 2005) (quoting *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004)).

¹⁵¹ Collateral estoppel prohibits a party from bringing a different claim on an issue that has already been decided provided the issue was actually litigated and determined, and the determination was essential to that judgment. *Modesto Irrigation Dist.*, 125 FERC ¶ 61,174, at n.16 (2008) (citing *Norfolk & W. Ry. Co. v. United States*, 768 F.2d 373 (D.C. Cir. 1985)).

96. According to the Presiding Judge, the record indicates that the sale-leaseback ADIT cannot be excluded from the bandwidth formula under Service Schedule MSS-3's ADIT exception, which excludes "ADIT amounts arising from retail ratemaking decisions."¹⁵³ He contends that Service Schedule MSS-3's language "including but not limited to" indicates that ADIT amounts arising from retail ratemaking decisions are not the only ADIT amounts that can be excluded. However, the Presiding Judge finds that, in this instance, the Waterford 3 sale-leaseback Account 190 ADIT is generally and properly includable for Commission cost of service purposes, and therefore is not excludable for purposes of the bandwidth formula.

97. The Presiding Judge notes that both Trial Staff and Entergy stated that there is no mechanism in the bandwidth formula for functionalizing the Waterford 3 sale-leaseback ADIT with the bandwidth variable nuclear production plant ratio.¹⁵⁴ However, the Presiding Judge finds that this is not the proper venue to challenge the language of the bandwidth formula, and if the parties wish to do so they should make a section 205 filing with the Commission.

3. Briefs on Exceptions

98. Entergy argues that the parties entered into a joint stipulation agreeing not to litigate issues that are the subject of other proceedings, one of which was "Exclusion of the categories of ADIT that Entergy excluded for the 2006 test year from Account No. 190 in the Bandwidth calculation,"¹⁵⁵ and that such stipulations are to be given legal effect. Entergy contends that this issue should be controlled by the Commission's ruling in Docket No. ER07-956-000.

99. Entergy disagrees with the Initial Decision's determination that ADIT associated with the Waterford 3 sale-leaseback was not mentioned in the Initial Decision in Docket No. ER07-956-000. Entergy argues that the Initial Decision in that docket expressly cited, discussed, and found probative the testimony that specifically addressed the Waterford 3 sale-leaseback ADIT issue.¹⁵⁶ Entergy states that it is not tenable to

¹⁵² Initial Decision, 128 FERC ¶ 63,015 at P 321.

¹⁵³ *Id.* P 323 (citing Ex. ESI-3 at 52).

¹⁵⁴ *Id.* P 326 (citing Staff Initial Brief at 34; Entergy Initial Brief at 40).

¹⁵⁵ Entergy Brief on Exceptions at 32 (citing Ex. ESI-58 at 1, Stipulated Issue 2 (iii)).

¹⁵⁶ *Id.* at 32-36 (citing *Entergy Services, Inc.*, 124 FERC ¶ 63,026, at P 590-96 (2008), and its reliance on testimony presented by Entergy witness Mr. Louiselle,

(continued...)

conclude that when the Presiding Judge in Docket No. ER07-956-000 excluded ADIT, he did not also intend to refer to the exclusion of the Waterford 3 sale-leaseback ADIT. Entergy further asserts that despite the joint stipulation, the Waterford 3 sale-leaseback ADIT issue was fully litigated. Therefore, Entergy asserts that the Presiding Judge's premise for concluding that this issue was not barred by the joint stipulation, collateral estoppel or *res judicata* is flawed.¹⁵⁷

100. Entergy rebuts the Louisiana Commission's arguments that it has presented new evidence, contending that the alleged new evidence and new arguments were fully available during the proceeding in Docket No. ER07-956-000. Entergy argues that the doctrines of *res judicata* and collateral estoppel do not allow relitigation because evidence and arguments that were available during the prior proceeding were not raised then.¹⁵⁸ Further, Entergy argues that, even if the issue could be relitigated, the Louisiana Commission's argument to exclude these amounts should be rejected. Entergy asserts that the Initial Decision narrowly reads the ADIT exclusions in Service Schedule MSS-3 and that ADIT amounts associated with the Waterford 3 sale-leaseback are not properly includable in rates because shareholders, not ratepayers, paid the taxes on the taxable gain from that transaction.

101. Entergy states that it sold a portion of the Waterford 3 nuclear plant at net book value, and while there was no book gain, the tax basis for that plant was below net book value, which led to a taxable gain as a result of the transaction. The Waterford 3 sale-leaseback Account 190 ADIT arose as a result of that taxable gain, which was paid for by shareholders and not included in rates for cost-of-service purposes. Therefore, Entergy argues that the Waterford 3 sale-leaseback is not a typical ADIT that is on Entergy's books because it was not included in rates.¹⁵⁹ Further, Entergy asserts that if the ADIT associated with the Waterford 3 sale-leaseback were to be included in the bandwidth calculation, Louisiana ratepayers would gain an advantage from taxes paid by the shareholders, not the ratepayers themselves.¹⁶⁰ It contends that no party has challenged in this proceeding Entergy's inclusion of the Waterford 3 sale-leaseback capitalized costs

Mississippi Commission witness Mr. Larkin, and Louisiana Commission witness Mr. Kollen, that supported the ADIT exclusions).

¹⁵⁷ *Id.* at 36.

¹⁵⁸ *Id.* at 37 (citing *Town of Norwood v. FERC*, 476 F.3d 18, 25 (1st Cir. 2007)).

¹⁵⁹ *Id.* at 40 (citing Tr. at 628 (Peters), 1105 (Sammon)).

¹⁶⁰ *Id.*

in the bandwidth calculation; therefore, the inclusion of those costs is not at issue in this proceeding.

102. Additionally, Entergy states that ADIT associated with the Waterford 3 sale-leaseback derives from the taxes paid not the asset itself; therefore, the ADIT that derives from those taxes is not includable in rates for Commission cost of service purposes, regardless of how the asset itself is treated.¹⁶¹ Entergy further argues that the ADIT associated with the Waterford 3 sale-leaseback does constitute amounts “arising from retail ratemaking decisions” and that the Initial Decision’s reading of “arising from” is unduly narrow.¹⁶² Entergy states that the Louisiana Commission’s decision approved the Waterford 3 sale-leaseback transaction and excluded from rates the taxes on the taxable gain associated with the transaction. Further, Entergy concludes that this approval is enough to establish that these ADIT amounts arise from a retail ratemaking decision under the normal broad meaning of that phrase.

103. The Mississippi Commission asserts that the Presiding Judge is incorrect in his determination that it is unclear whether the Waterford 3 ADIT was considered in Docket No. ER07-956-000. The Mississippi Commission argues that Entergy, the Louisiana Commission, and Trial Staff all testified that the issue was litigated and the Louisiana Commission did not describe any specific ADIT amount which it believed to be improperly calculated.¹⁶³

4. Briefs Opposing Exceptions

104. Occidental argues that the joint stipulation in this docket does not preclude litigation over the exclusion of ADIT associated with the Waterford 3 sale-leaseback transaction.¹⁶⁴ Occidental contends that the joint stipulation referenced by Entergy and the Mississippi Commission states that the parties “wish to avoid litigation of issues resolved or being resolved in the bandwidth dockets,” however, “to the extent the Commission’s Orders do not fully resolve issues, this stipulation shall not affect a party’s right to argue that any such remaining issues should be litigated in this proceeding.”¹⁶⁵ Therefore, it contends that the Initial Decision in this proceeding correctly concludes that litigation is not barred here because the issue of whether Entergy properly excluded

¹⁶¹ *Id.* at 41.

¹⁶² *Id.*

¹⁶³ Mississippi Commission Brief on Exceptions at 8.

¹⁶⁴ Occidental Brief Opposing Exceptions at 8.

¹⁶⁵ *Id.* at 9 (citing Ex. ESI-58 at 1).

ADIT related to the Waterford 3 sale-leaseback from the bandwidth calculation was not fully resolved by the Initial Decision in Docket No. ER07-956-000.¹⁶⁶

105. Occidental further argues that Entergy misleadingly describes three pieces of testimony in Docket No. ER07-956-000 that mentioned ADIT associated with the Waterford 3 sale-leaseback, when that docket only discussed two of the pieces of testimony in general terms and the remaining piece of testimony focused on the scope of permissible exclusions under Service Schedule MSS-3.¹⁶⁷ Additionally, Occidental asserts that Entergy's alternative arguments, that the doctrines of *res judicata* or collateral estoppel preclude litigation of this issue, fail for the same reasons the joint stipulation argument fails.¹⁶⁸ Occidental reiterates that the issue previously litigated in Docket No. ER07-956-000 was the controlling methodology for proper exclusion of ADIT balances, not whether one particular exclusion was appropriate.¹⁶⁹

106. Occidental states that the Initial Decision's reading of the exclusions of certain categories of ADIT from the bandwidth calculation is not inexplicably narrow as Entergy claims.¹⁷⁰ Occidental contends that the Presiding Judge's decision was based on record evidence provided by Entergy witness Peters and Trial Staff witness Sammon, and that the Presiding Judge's conclusions regarding the weight of the record evidence is entitled to considerable deference.¹⁷¹

107. Occidental disputes Entergy's argument that the ADIT amounts associated with the Waterford 3 sale-lease back "arises from" retail ratemaking decisions under the

¹⁶⁶ *Id.* at 9-10.

¹⁶⁷ Occidental Brief Opposing Exceptions at 11 (citing *Entergy Services, Inc.*, 124 FERC ¶ 63,026 at P 590).

¹⁶⁸ *Id.* at 12.

¹⁶⁹ *Id.* (citing *Calpine Corp. v. California Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,271, at P 40 (2009) (declining to preclude litigation over the justness and reasonableness of a previously approved tariff provision because at the time the provision was previously accepted, the Commission was "not squarely presented with any challenges" to that specific provision)).

¹⁷⁰ *Id.* at 13.

¹⁷¹ *Id.* at 14 (see, e.g., *Winner Int'l Royalty Corp. v. Wang*, 202 F.3d 1340, 1347 (Fed. Cir. 2000); *Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038, at P 85 (2008); *Entergy Servs., Inc.*, 116 FERC ¶ 61,296, at P 152 (2006)).

normal broad meaning of that phrase.¹⁷² Further, Occidental argues that Entergy provides no citations to support its assertion that the phrase “arise from” is given a “normally broad meaning.” Further, Occidental contends that the Initial Decision relied on countervailing evidence provided by Entergy’s own witness, May, stating that “the fact that a regulator approved a project in and of itself is not sufficient to assert that the ADIT related to the transaction is arising from a retail ratemaking decision.”¹⁷³

108. The Louisiana Commission states that the Initial Decision correctly ruled that Entergy improperly excluded the ADIT for the Waterford 3 sale-leaseback from the bandwidth calculation. The Louisiana Commission contends that in 2007 accounting changes affected the bandwidth treatment of the ADIT, and therefore, Entergy requested, and the Commission agreed, to amend its formula to reflect the sale-lease back as it was reflected in Exhibit Nos. ETR-26 and ETR-28. However, in its filing Entergy excluded the sale-lease back ADIT from the calculation.¹⁷⁴

109. The Louisiana Commission contends that the Presiding Judge correctly ruled that the propriety of excluding the sale-lease back was not determined in Docket No. ER07-956-000, and that new evidence was presented in this case establishing that Entergy’s rationale for excluding sale-lease back ADIT is baseless.¹⁷⁵ The Louisiana Commission asserts that Entergy changed its argument in its brief on exceptions from what it presented in pre-filed testimony. The Louisiana Commission states that Entergy’s main witness changed the theory on which ADIT was excluded during the proceeding. The Louisiana Commission argues that exclusion of the sale-lease back ADIT is not justified because this cost is a per-books cost of the asset and the retail treatment of the sale-lease back, which uses none of the per-books numbers, is irrelevant to the calculation.

110. The Louisiana Commission argues that the sale-lease back was created when Entergy Louisiana experienced a gain for tax purposes, but not for book purposes, from the sale and lease back of a portion of the Waterford 3 nuclear generating plant. Further, the Louisiana Commission states that Entergy Louisiana entered into the sale-lease back after the Louisiana Commission approved the transaction in 1989 and required that Entergy Louisiana reflect the asset for retail ratemaking purposes, as if Entergy Louisiana

¹⁷² *Id.* at 15 (citing Entergy Initial Brief at 41-42).

¹⁷³ *Id.* (citing Tr. at 260).

¹⁷⁴ Louisiana Commission Brief Opposing Exceptions at 42.

¹⁷⁵ *Id.* at 43.

owned the leased portion of Waterford 3.¹⁷⁶ Therefore, the Louisiana Commission argues that the asset is treated as if Entergy Louisiana still owned it and produces a different total revenue requirement than the per-books amounts, but not necessarily a higher or lower revenue requirement over the life of the asset.

111. The Louisiana Commission contends that although Entergy made no mention of any change in methodology for ADIT in its compliance filing, it inserted language into one of its two ADIT definitions to permit the exclusion of some ADIT.¹⁷⁷ The Louisiana Commission further states that the language inserted by Entergy did not necessarily suggest a change in methodology. It contends that after the new language was filed in Docket No. EL01-88-000, the accounting rules changed for capital leases so that asset value and amortization amounts would not be included in the accounts used in the formula. The Louisiana Commission argues that despite Entergy's use of per-books amounts to state the cost of the sale-lease back in the formula, Entergy removed the sale-lease back ADIT for its bandwidth filing and relied on the fact that the ADIT was not reflected by the Louisiana Commission for retail ratemaking.¹⁷⁸

112. The Louisiana Commission argues that testimony submitted by Entergy from Docket No. ER07-956-000 is extra-record evidence that is improperly included on exceptions. The Louisiana Commission also states that this testimony only shows that the sale-lease back ADIT was mentioned, along with other categories, in a review of the excluded ADIT amounts. In addition, it argues that the testimony offers a justification for excluding the ADIT that Entergy has now abandoned, which is that it is not reflected in a retail ratemaking decision.¹⁷⁹

113. The Louisiana Commission contends that in this case it discovered and proved that the sale-lease back ADIT did not result from a retail ratemaking decision but from the sale-lease back transaction itself, relying on evidence that the Louisiana Commission states was not presented in Docket No. ER07-956-000.¹⁸⁰ The Louisiana Commission further argues that even Entergy's witness Peters was unaware of the nature of this ADIT until after he filed two rounds of testimony.¹⁸¹ The Louisiana Commission contends

¹⁷⁶ *Id.* at 44.

¹⁷⁷ *Id.* at 45.

¹⁷⁸ *Id.* at 46.

¹⁷⁹ *Id.* at 49.

¹⁸⁰ *Id.* at 49-50.

¹⁸¹ *Id.* at 50 (citing Tr. 518-19, Peters: "I certainly gained additional information
(continued...)

that the sale-lease back issue involved new evidence not offered in Docket No. ER07-956-000. Further, the Louisiana Commission concludes that the Initial Decision in ER07-956-000 did not address this specific category of ADIT, did not discuss how it arose, and did not address the basis for its exclusion.¹⁸²

114. The Louisiana Commission argues that Entergy's tariff language, which it uses to justify its exclusion of ADIT not excluded in Exhibit Nos. ETR-26 and ETR-28, provides no support for the exclusion of the sale-lease back ADIT.¹⁸³ The Louisiana Commission asserts that Entergy's argument that the sale-lease back ADIT was excluded because it is not included in retail rates has no basis because the retail ratemaking methodology is not used at all for the sale-lease back in the formula. Further, the Louisiana Commission argues that the tariff language permits the exclusion of ADIT arising from retail ratemaking decisions and not ADIT excluded for retail ratemaking purposes.¹⁸⁴ The Louisiana Commission states that the fact that the sale-lease back is not included in retail rates is not a basis for exclusion because the Louisiana Commission uses an entirely different method than the Commission. The Louisiana Commission states that it excludes all the per-books balances for the sale-lease back for retail ratemaking, and substitutes amounts that permit a recovery on the plant as if it were still owned by Entergy Louisiana. The Louisiana Commission argues that its treatment of the sale-lease back may or may not be advantageous to ratepayers, but the effect is irrelevant.¹⁸⁵

115. The Louisiana Commission contends that Entergy switched its rationale by asserting that the sale-lease back ADIT was an amount arising from a retail ratemaking decision because the Waterford 3 sale-lease back was approved by the Louisiana Commission. However, the Louisiana Commission argues that the ADIT was an accounting consequence of a tax timing difference and the approval of the sale-lease back transaction did not cause any ADIT to come into existence.¹⁸⁶ It argues that the fact that

about the ADIT on the sale leaseback after filing answering testimony... I found out throughout the preparation of this case and my knowledge about the sale/leaseback ADIT has increased, as I have had numerous conversations with various people within the company and outside the company.”).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 51 (citing Ex. ESI 3 at 52).

¹⁸⁵ *Id.* at 51-52.

¹⁸⁶ *Id.* at 52-53.

a retail regulator permits a transaction to occur is not the equivalent of creating ADIT through a retail ratemaking decision. It contends that Entergy introduced a new argument in a redirect examination of Mr. Peters, Entergy's witness, that ADIT would not be generally and properly excludable for Commission cost of service purposes, and provided no basis for this new argument.¹⁸⁷

116. The Louisiana Commission contends that Trial Staff agreed that the sale-lease back ADIT should be included in the bandwidth.¹⁸⁸ Further, the Louisiana Commission asserts that Entergy provides no justification for including the sale-lease back ADIT for each year subsequent to the sale-lease back transaction in Exhibit Nos. ETR-26 and ETR-28 but not in the subsequent bandwidth calculation.¹⁸⁹ The Louisiana Commission contends that Entergy's tariff at most justifies excluding a portion of the sale-lease back ADIT because ADIT is first functionalized in part to the nuclear production rate base and then in part to the fixed production rate base. Therefore, the Louisiana Commission states that under the tariff there is no basis for the exclusion of any ADIT functionalized to the fixed production rate base.

5. Commission Determination

117. We reverse the Presiding Judge's finding that the exclusion of the ADIT related to the Waterford sale-leaseback from the 2007 bandwidth calculation may be re-litigated in this proceeding. At the commencement of this proceeding, the parties entered into a Joint Stipulation,¹⁹⁰ agreeing not to re-litigate issues that are the subject of other proceedings.¹⁹¹ The exclusion of ADIT was included as one of the "Stipulated Issues" that the parties agreed "will not be re-litigated in this proceeding."¹⁹² The Louisiana Commission argues that the Joint Stipulation does not apply because the specific issue of ADIT relating to Waterford 3 was not litigated in the prior proceeding. However, as discussed below, we find that the record evidence demonstrates that the Waterford 3

¹⁸⁷ *Id.* at 54 (citing Ex. ESI 3 at 52).

¹⁸⁸ *Id.* at 56 (citing Staff Brief Opposing Exceptions at 34).

¹⁸⁹ *Id.* at 57.

¹⁹⁰ Such stipulations are to be given legal effect. *See Computer Associates International, Inc. v. NLRB*, 282 F.3d 849, 852 (D.C. Cir. 2002).

¹⁹¹ Ex. ESI-58 at 1.

¹⁹² *Id.*

ADIT issue was litigated in the proceeding in Docket No. ER07-956-001 and the Initial Decision there explicitly ruled on the Waterford 3 ADIT issue.¹⁹³

118. The Presiding Judge finds that *res judicata* and collateral estoppel do not apply because the Initial Decision in Docket No. ER07-956-001 was unclear as to whether the issue of exclusion of the ADIT related to the Waterford 3 sale-leaseback was litigated. We disagree that the Initial Decision in Docket No. ER07-956-001 is unclear. The Initial Decision in Docket No. ER07-956-001 cited and discussed testimony that specifically addressed ADIT related to the Waterford 3 sale-leaseback.¹⁹⁴ While the Initial Decision generally discussed which ADIT amounts should have been included for the bandwidth calculation, it referenced witness testimony that discussed the specific ADIT issues in a number of footnotes. In Paragraph 590 of the Initial Decision in Docket No. ER07-956-001, with respect to ADIT relating to Waterford 3, the Presiding Judge discussed testimony presented by Entergy witness Louiselle, and Mississippi Commission witness Larkin that described the methodology Entergy used in making the ADIT exclusions, and how the exclusions comply with the requirements of Service Schedule MSS-3, which sets forth the types of amounts which should be excluded from the bandwidth calculation.¹⁹⁵ In his direct testimony, which was specifically cited in the Initial Decision, Mr. Louiselle described and supported the ADIT exclusion Entergy made in the bandwidth calculations, including the exclusion of ADIT associated with the Waterford 3 sale-leaseback:

The Account 190 tax effects of the sale/leaseback primarily relate to the sale/leaseback of [Entergy Louisiana's] Waterford 3 nuclear generating station. The [Louisiana Commission] . . . specifically set forth the ratemaking treatment for that transaction, including a provision that the Account 190 tax effect would not be reflected in retail ratemaking decisions. Consequently, none of the items listed by the [Louisiana Commission] in the Supporting Affidavit at

¹⁹³ In Opinion No. 505, the Commission found that the tariff language of section 30.12 instructs Entergy to remove “amounts not generally and properly includable for FERC cost of service purposes.” The Commission found that Entergy’s exclusion of ADIT amounts is fully consistent with bandwidth formula. Further, the Commission found that amounts other than SFAS 109 ADIT may therefore be excluded from the calculation if it is an amount that is not properly includable for cost of service purposes. Opinion No. 505, 130 FERC ¶ 61,023 at P 233.

¹⁹⁴ *Entergy Services, Inc.*, 124 FERC ¶ 63,026 at P 590.

¹⁹⁵ *Id.* (citing Ex. Nos. ESI-6 (Louiselle at 56-59); ESI-50 (Louiselle Rebuttal at 41-47); MC-1 (Larkin)).

Paragraph 18 are properly included in the MSS-3 calculation.¹⁹⁶

In his rebuttal testimony, which was also specifically cited in the Initial Decision, Mr. Louiselle again specifically discussed the ADIT associated with the Waterford 3 sale-lease back: “Of the \$225.3 million differential for [Entergy Louisiana], NOLs for the Waterford 3 sale/leaseback and minimum pension liabilities account for approximately \$250 million.”¹⁹⁷

119. Further, the Initial Decision cited to the testimony of Mississippi Commission’s witness, Mr. Larkin, that directly addressed the exclusion of the Waterford 3 sale-leaseback and supported Mr. Louiselle’s testimony:

Account 190307 and 190308 relate to the sale and leaseback of the Waterford Unit in the state of Louisiana. Mr. Louiselle on page 58 of his testimony (Exhibit ESI-6) states, “the [Louisiana Commission] specifically approved the sale/leaseback of Entergy Louisiana’s Waterford 3 and specifically set forth the ratemaking treatment of that transaction, including a provision that the Account 190 tax effect would not be reflected in retail ratemaking decisions. It would be improper to reflect in production costs calculations of approximately \$88.6 million that the [Louisiana Commission] has not reflected in retail rates.”¹⁹⁸

After citing all of the testimony supporting Entergy’s ADIT exclusions, which the Presiding Judge characterized as “probative,” including the exclusion of the ADIT associated with the Waterford 3 sale-leaseback, the Presiding Judge in Docket No. ER07-956-001 concluded: “Based on all the evidence, the undersigned finds Entergy properly excluded the aforementioned ADIT from the bandwidth calculation.”¹⁹⁹

120. In addition to the compelling evidence that the Waterford 3 sale-leaseback was considered and ruled on by the Presiding Judge in Docket No. ER07-956-001, we agree

¹⁹⁶ Docket No. ER07-956-001, Ex. No. ESI-6 at 58.

¹⁹⁷ *Id.* (citing Ex. ESI-50 at 43).

¹⁹⁸ Docket No. ER07-956-001, Ex. No. MC-1 at 15 (emphasis added).

¹⁹⁹ *Entergy Services, Inc.*, 124 FERC ¶ 63,026 at P 596. The “aforementioned ADIT” exclusions include all of the ADIT exclusions Entergy made from the bandwidth calculation, including those associated with Waterford 3.

with Trial Staff that no new evidence or circumstances are present in this proceeding that would justify re-litigation and prevent *res judicata* and collateral estoppel from applying.²⁰⁰ Indeed, as Trial Staff points out in its brief, Trial Staff witness Sammon testified that this is the same issue that was addressed in the Docket No. ER07-956-000 proceeding.²⁰¹ Mr. Sammon further testified that there are no changes to the facts or circumstances regarding this issue since the Docket No. ER07-956-000 proceeding.²⁰² In its Brief Opposing Exceptions, the Louisiana Commission argues that in this proceeding it presented new evidence, specifically that the sale-leaseback ADIT “did not result from a retail ratemaking decision, but from a sale-leaseback transaction itself.”²⁰³ However, this alleged new evidence and arguments were available during the Docket No. ER07-956-001 proceeding and could have been raised by the Louisiana Commission at that time. Accordingly, for the foregoing reasons, we reverse the Presiding Judge and find that the issue of ADIT as it relates to the Waterford 3 sale-leaseback should not have been re-litigated in this proceeding.

E. Jurisdictional Separation of Entergy Gulf States into Entergy Texas and Entergy Gulf States Louisiana for the 2007 Bandwidth Calculation

1. Background

121. On January 1, 2008, Energy Gulf States jurisdictionally separated into Entergy Texas and Entergy Gulf States Louisiana. Until this time, Energy Gulf States had operated as one Operating Company serving two retail jurisdictions in separate states, Texas and Louisiana. In Docket No. ER07-956-000, the Louisiana Commission and the Texas Commission were responsible, at their discretion, for dividing

²⁰⁰ Trial Staff Initial Brief at 34-35. Even in the absence of the Joint Stipulation, the doctrines of *res judicata* or collateral estoppel are applicable to the Waterford 3 Account 190 ADIT issue. In a prior order on clarification in this proceeding, we explained that: “The Commission applies *res judicata* and collateral estoppel in appropriate circumstances, and, as a matter of policy, re-litigation of issues already decided on the merits is not sound administrative practice. However, this policy applies only where the issues presented have been fully litigated and decided on the merits, and no new evidence or new circumstances would justify re-litigation.” *Entergy Services, Inc.*, 127 FERC ¶ 61,226, at P 10 (2009).

²⁰¹ Tr. 1100 (Sammon).

²⁰² Tr. 1103 (Sammon).

²⁰³ Louisiana Commission Brief Opposing Exceptions at 49.

Entergy Gulf States' portion of the bandwidth receipts amongst their respective retail jurisdictions.

122. In Docket No. ER07-683-000, Entergy proposed an amendment to the System Agreement, pursuant to which the Commission would exercise jurisdiction to determine the amount owed to each retail jurisdiction. In the order addressing that proposed amendment, the Commission stated that the issue was premature.²⁰⁴ In Docket No. ER09-833-000, Entergy again brought the matter before the Commission stating that a trapped cost scenario had occurred and proposed the same amendments that were proposed in Docket No. ER07-683-000. The Commission rejected Entergy's proposed amendments stating that "any issues related to the allocation of an individual utility's payments or receipts to retail customers are beyond the jurisdiction of this Commission."²⁰⁵

123. The jurisdictional separation of Entergy Gulf States into Entergy Texas and Entergy Gulf States Louisiana required Entergy to develop a methodology to apportion production costs between Entergy Texas and Entergy Gulf States Louisiana. Entergy used a three-step process.²⁰⁶ The first step was to determine whether, based on the 2007 test year, any Operating Company exceeded the +/-11 percent bandwidth threshold, and, if so, how much of a change in production costs would be necessary to bring all the Operating Companies within the bandwidth.²⁰⁷ According to Entergy, this first step revealed that Entergy Arkansas exceeded the bandwidth threshold and would be required to make payments totaling \$252 million in 2008.²⁰⁸ Under this step, Entergy Gulf States was to receive a payment of \$189.8 million; no party disputes this calculation.

124. In step two, Entergy calculated the portion of bandwidth payments to be received by Entergy Gulf States Louisiana wholesale customers using an energy allocator.²⁰⁹ It stated that in order to assure that wholesale customers obtained their full benefit of Entergy Arkansas' bandwidth payment consistent with their Commission-filed rate structure, it was necessary to allocate bandwidth receipts attributable to the wholesale jurisdiction on an energy basis to remove them from the 2007 production costs to allow

²⁰⁴ *Entergy Services, Inc.*, 119 FERC ¶ 61,191, at P 25 (2007) (May 2007 Order).

²⁰⁵ *Entergy Services, Inc.*, 127 FERC ¶ 61,126, at P 23 (2009) (May 2009 Order).

²⁰⁶ Entergy Initial Brief at 48.

²⁰⁷ See Ex. ESI-4 at 33; ESI-7 at 16-20.

²⁰⁸ Ex. ESI-7 at 16.

²⁰⁹ Entergy Initial Brief at 50.

for a separate bandwidth calculation for Entergy Texas' and Entergy Gulf States Louisiana's retail jurisdictions.²¹⁰

125. In step three, Entergy allocated the remaining balance of Entergy Gulf States, Inc.'s 2007 production costs between Entergy Texas and Entergy Gulf States Louisiana using an energy allocator for variable production costs and a demand allocator for fixed production costs in the same manner prescribed by section 30.12 of Service Schedule MSS-3. This process also took into account jurisdictional specific costs (e.g. gas hedging costs) through a direct assignment of such costs to either Entergy Texas or Entergy Gulf States Louisiana depending on which jurisdiction was responsible for the costs.²¹¹ Entergy Texas' and Entergy Gulf States Louisiana's share of actual production costs was then compared to their respective share of system average production costs (calculated consistent with section 30.13 of Service Schedule MSS-3) to arrive at respective disparities.²¹² A bandwidth payment was then calculated for Entergy Texas and Entergy Gulf States Louisiana to reduce their respective disparity to the same level as the other Operating Companies receiving bandwidth payments (i.e., 3.08 percent above system average), again consistent with section 30.11 of Service Schedule MSS-3.²¹³ This resulted in bandwidth payments of \$65.4 million for Entergy Texas and \$124.3 million for Entergy Gulf States Louisiana. According to Entergy, the end result was that Entergy Texas and Entergy Gulf States Louisiana were placed in the same relative disparity position (i.e., 3.08 percent above system average) as the other Operating Companies receiving bandwidth payments in 2008.²¹⁴

2. Commission Jurisdiction

a. Initial Decision

126. The Presiding Judge finds that the Commission has jurisdiction to approve the amount of bandwidth receipts payable to Entergy Gulf States Louisiana and Entergy Texas, the successors of Entergy Gulf States, and that the allocation is not an allocation between retail jurisdictions.²¹⁵ The Presiding Judge concludes that Industrial Consumers

²¹⁰ *Id.*

²¹¹ *Id.* at 51.

²¹² *Id.*

²¹³ *Id.* at 52.

²¹⁴ *Id.* (citing Ex. ESI-7 at 25).

²¹⁵ Initial Decision, 128 FERC ¶ 63,015 at P 389.

confuse an allocation between Entergy Gulf States' successors with an allocation among retail jurisdictions. Industrial Consumers argue that the Commission has already rejected Entergy's claim that the Commission has jurisdiction to determine the share of bandwidth receipts originally allocated to Entergy Gulf States to its Louisiana and Texas retail customers.²¹⁶ However, the Presiding Judge finds that the issue in the instant proceeding differs because it does not involve an allocation of bandwidth entitlements between retail jurisdictions of a single Operating Company, where as the proceeding cited by Industrial Consumers involved an allocation of bandwidth entitlements of a single Operating Company between retail jurisdictions.²¹⁷ The Presiding Judge notes that in 2007 Entergy Gulf States split into two successor Operating Companies, Entergy Gulf States Louisiana and Entergy Texas, and that the issue in this proceeding involves the rough equalization of production costs among these two successor Operating Companies- not within the former Operating Company.

127. The Presiding Judge finds that the Commission has jurisdiction over the application of the Entergy System Agreement under the FPA,²¹⁸ and that this jurisdiction extends to the approval of the allocation of bandwidth payments and receipts. The Presiding Judge states that under the statute the Commission is "the only entity that can review the justness and reasonableness of charges under the Entergy System

²¹⁶ May 2009 Order, 127 FERC ¶ 61,126 at P 23.

²¹⁷ Initial Decision, 128 FERC ¶ 63,015 at P 385 (citing Industrial Consumers Initial Brief at 6).

²¹⁸ *Id.* P 386 (citing 16 U.S.C. § 824(b)(1) (2006)).

Agreement.”²¹⁹ Therefore, the Presiding Judge concludes that the Entergy System Agreement is a wholesale tariff over which only the Commission, and not retail regulators, has jurisdiction.

128. The Presiding Judge states that Service Schedule MSS-3 sets forth the bandwidth formula which is used to calculate payments and receipts due to the Operating Companies in order to achieve rough production cost equalization. The Presiding Judge finds that Entergy should calculate production costs for 2007, and bandwidth payments and receipts for 2007 should occur in 2008.²²⁰ The Presiding Judge notes that this creates a problem because Entergy Gulf States was not in existence in 2008 and its successors Entergy Gulf States Louisiana and Entergy Texas did not exist in 2007. The Presiding Judge finds that Service Schedule MSS-3 did not contemplate a situation where an Operating Company would not have production costs for the prior year. Therefore, in the absence of further guidance from Service Schedule MSS-3, it is logical to place Entergy Texas and Entergy Gulf States Louisiana into Entergy Gulf States’ position, using its production costs.²²¹

b. Briefs on Exceptions

129. Industrial Consumers argue that this is the third time that Entergy has asked the Commission to approve a methodology for allocating Entergy Gulf States’ bandwidth formula payments between its Texas and Louisiana retail jurisdictions. It contends that the Commission has rejected the request twice and should have done the same here.²²² Industrial Consumers argue that the Commission’s approval of a method for dividing Entergy Gulf States’ bandwidth payments between its Texas and Louisiana retail operations constitutes an impermissible retail allocation of Entergy Gulf States’ production costs.²²³

130. Industrial Consumers state that the 2008 bandwidth filing examined Operating Companies’ production costs during calendar year 2007 and throughout 2007 Entergy Gulf States was a single Operating Company with Texas and Louisiana retail operations. Industrial Consumers contend that there were no wholesale sales of power between

²¹⁹ Initial Decision, 128 FERC ¶ 63,015 at P 386 (citing *City of New Orleans v. Entergy Corp.*, 55 FERC ¶ 61,221, at 61,729 (1991)).

²²⁰ Initial Decision, 128 FERC ¶ 63,015 at P 387.

²²¹ *Id.*

²²² Industrial Consumers Brief on Exceptions at 5.

²²³ *Id.* at 5.

Entergy Gulf States' retail jurisdictions in 2007; therefore, the 2007 bandwidth receipts created by Service Schedule MSS-3 were owed to Entergy Gulf States as a unified Operating Company. As a result, Industrial Consumers argue that the Commission does not have jurisdiction to allocate Entergy Gulf States' production costs between its Texas and Louisiana retail jurisdictions in 2007.²²⁴ Industrial Consumers further contend that the result is not impacted by the fact that Entergy Gulf States' retail operations had been transferred to two separate Operating Companies when the bandwidth payments were made in 2008.

131. Industrial Consumers argue that the Initial Decision results in the violation of a Commission-filed rate because the plain terms of Service Schedule MSS-3 entitle Entergy Gulf States, not Entergy Gulf States Louisiana or Entergy Texas, to the bandwidth payments to equalize its 2007 production cost disparities.²²⁵ Further, Industrial Consumers argue that regardless of Entergy Gulf States' subsequent separation into two new Operating Companies, there were no wholesale power sales between Entergy Gulf States' Texas and Louisiana retail jurisdictions in 2007, and therefore, the Commission lacks jurisdictional authority to reach back and redistribute Entergy Gulf States' retail jurisdictional production costs.²²⁶ Industrial Consumers assert that the Commission should refuse to approve a methodology for allocating bandwidth receipts beyond the Operating Company level consistent with the FPA, Service Schedule MSS-3 and Commission precedent.²²⁷

132. Industrial Consumers state that the Initial Decision's improper conclusions stem from two primary errors. First, Industrial Consumers assert that the Initial Decision treats Entergy Gulf States Louisiana and Entergy Texas as receiving companies and this characterization is flawed because the plain language of the tariff designates Entergy Gulf States as the receiving company. Further, Industrial Consumers argue that this characterization also ignores the fact that the 2007 bandwidth receipts are based on 2007 production costs and payments for 2007 production costs cannot reasonably be owed to Operating Companies that did not have operations or production costs in that year.²²⁸

²²⁴ *Id.* at 6 (citing *Town of Norwood v. FERC*, 202 F.3d 392,396; *Cities of Anaheim v. FERC*, 669 F.2d 799, 801 (D.C. Cir. 1981)).

²²⁵ *Id.*

²²⁶ *Id.* at 7.

²²⁷ *Id.* (citing *Entergy Serv. Inc.*, 127 FERC ¶ 61,126 at P 23-25 (2009); *Entergy Serv. Inc.*, 120 FERC ¶ 61,094 at P 17 (2007)).

²²⁸ *Id.* at 14.

133. Second, Industrial Consumers argue that the Initial Decision errs because it treats the 2007 bandwidth receipts as a method to prospectively mitigate production disparities among the Operating Companies that exist in 2008, when the Commission has made clear that the bandwidth receipts are remedial payments to settle disparities from 2007.²²⁹ Industrial Consumers state that section 30.11 of the tariff defines a paying company as a company or companies with a negative disparity, and a receiving company as a company or companies with a positive disparity.²³⁰ Therefore, Industrial Consumers argue that it is illogical to interpret either of these terms to include a company for which no disparity could be calculated under the plain terms of the tariff. Further, Industrial Consumers assert that section 30.14 of the tariff also provides that amounts payable as a result of the bandwidth calculation are to be made in equal installments from June through December to the companies based on the preceding year's results. Industrial Consumers argue that basing payments on the preceding year's results is not possible in this case because Entergy Gulf States Louisiana and Entergy Texas did not have results in the preceding year. Industrial Consumers argue that applying the formula in sections 30.11-30.13 of MSS-3 results in a payment owed to Entergy Gulf States on a total company basis and not to Entergy Gulf States Louisiana or Entergy Texas, as distinct Operating Companies. Industrial Consumers state that Entergy confirmed during the hearing that Entergy Gulf States' fuel costs for 2007 would be reconciled by the Texas Commission and, like the fuel costs, the bandwidth payments are just one of a number of Entergy Gulf States' tariff rights and obligations that result from doing business in 2007.²³¹

134. Industrial Consumers state that retail allocations of a utility's payments or costs is a matter within the state's traditional police powers, not within the purview of the Commission's authority.²³² Further, Industrial Consumers argue that had Entergy Gulf States not been split into two separate Operating Companies, it is clear that the 2007 bandwidth payments would have ultimately been divided between Entergy Gulf States' Louisiana and Texas retail jurisdictions and this jurisdictional allocation would have been within the purview of the Texas Commission and the Louisiana Commission. Industrial Consumers argue that the separation should not change which regulator is to allocate Entergy Gulf States' remedy payment to its former retail operations.²³³

²²⁹ *Id.* at 9 (citing *Louisiana Pub. Serv. Comm'n*, 117 FERC ¶ 61,203 at P 41, 46, 51 (2006)).

²³⁰ *Id.* at 14-15 (citing Ex. ESI-3 at 49).

²³¹ *Id.* at 21.

²³² *Id.* at 10-11.

²³³ *Id.* at 11.

135. Industrial Consumers argue that the Initial Decision's reasoning is flawed because it concludes that the Industrial Consumers' argument would result in the funds to which Entergy Gulf States is entitled for 2007 to wind up in a vacuum.²³⁴ Industrial Consumers contend that Entergy Gulf States' 2007 bandwidth payments would not be made to a vacuum but rather would ultimately be made to the Entergy Gulf States' successors in interest- Entergy Gulf States Louisiana and Entergy Texas. However, Industrial Consumers state that this does not mean that the Louisiana and Texas Commissions somehow abdicate their authority to jurisdictionally allocate Entergy Gulf States' 2007 production costs.²³⁵

c. Briefs Opposing Exceptions

136. The Louisiana Commission asserts that the Commission has exclusive jurisdiction to allocate the 2008 bandwidth payments and receipts among the six Operating Companies that existed when the payments and receipts occurred.²³⁶ The Louisiana Commission argues that the Industrial Consumers' argument rests on the incorrect premise that the bandwidth calculation is a reallocation for a past period rather than a prospective rate. The Louisiana Commission asserts that the bandwidth is a prospective tariff that roughly equalizes production costs in the year the payments and receipts take place.²³⁷ The Louisiana Commission contends that the bandwidth payments and receipts accomplish rough equalization for 2008 and are not remedial payments to settle cost disparities for 2007. Therefore, since there was no Entergy Gulf States in 2008 the payments and receipts cannot be allocated to that company.²³⁸

137. The Louisiana Commission further argues that the Commission has exclusive jurisdiction to allocate production costs among the Operating Companies and that this jurisdiction extends to the allocation of payments and receipts between Entergy Gulf States Louisiana and Entergy Texas.²³⁹ The Louisiana Commission contends that it has some sympathy for the position taken by Industrial Consumers because it relied on the

²³⁴ *Id.* at 19.

²³⁵ *Id.*

²³⁶ Louisiana Commission Brief Opposing Exceptions at 67.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 68 (citing *Mississippi Indus. v. FERC*, 808 F.2d 1525 at 390 (D.C. Cir. 1987) (explaining the Commission has "undisputed authority over the wholesale rates of electric generating facilities in interstate commerce.")).

same premise in the compliance proceeding, arguing that the payments should bear interest to compensate for the delay in rough equalization. The Commission denied the Louisiana Commission's request for interest in the compliance proceeding holding that "as Entergy explains, the bandwidth remedy payments under section 30.09(d) bring the Operating Companies within the Opinion No. 480 bandwidth on a prospective basis."²⁴⁰ Additionally, the Louisiana Commission contends that the Commission is following its normal approach for formula rates by adopting a formula that uses a past cost input to set rates prospectively and that this methodology has been recognized for decades.²⁴¹

138. The Louisiana Commission asserts that the Industrial Consumers' allocation methodology did not withstand examination at the hearing because their witness was not sure what entity would receive the payments since Entergy Gulf States no longer existed. Additionally, according to the Louisiana Commission, the Presiding Judge determined that the Industrial Consumers methodology is logically flawed and that the only workable solution is to use the tariff to allocate the receipts to the two successor companies.²⁴² The Louisiana Commission states that since the Commission's tariff corrects undue discrimination in 2008 and Entergy Gulf States did not exist at that time, the successors became subject to both wholesale and retail jurisdictions; thus, for the bandwidth, Commission jurisdiction applies.

139. Industrial Consumers state that the Louisiana Commission incorrectly assumes that the bandwidth payments for 2007 are owed to Entergy Gulf States Louisiana, and uses that assumption as a premise to conclude that the Commission should not approve an allocation of the 2007 bandwidth payments to Entergy Gulf States Louisiana's retail jurisdiction.²⁴³ Industrial Consumers further state that they agree with the Louisiana Commission that the Commission should not approve an allocation to retail jurisdictions and that such an allocation should be left to state regulators.²⁴⁴ However, Industrial Consumers argue that the Louisiana Commission is incorrect in its conclusion that this means that the Commission cannot allocate payments to Entergy Gulf States Louisiana,

²⁴⁰ *Id.* at 69 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203, at P 51 (2006)).

²⁴¹ *Id.* at 70 (citing *Jersey Cent. Power & Light Co. v. FERC*, 589 F.2d 142, 146 (3d Cir. 1979); *Virginia Elec. Power Co. v. FERC*, 600 F.2d 944, 950 (D.C. Cir. 1979)).

²⁴² *Id.* at 71 (citing Initial Decision, 128 FERC ¶ 63,015 at P 388 n.107).

²⁴³ Industrial Consumers Brief Opposing Exceptions at 5-6.

²⁴⁴ *Id.*

as payments are due to Entergy Gulf States. Industrial Consumers argue that the legal premise that the Louisiana Commission relies upon to conclude that the Commission lacks jurisdiction to allocate payments to Entergy Gulf States Louisiana's retail jurisdictions should be applied instead to conclude that the Commission lacks jurisdiction to allocate payments to Entergy Gulf States' former retail jurisdictions.²⁴⁵

140. Industrial Consumers argue that the Louisiana Commission is wrong in seeking a remedy to the allocation of bandwidth payments beyond the Operating Company level and that its recommendation would have bandwidth payments allocated to former wholesale jurisdictions. Industrial Consumers state that Service Schedule MSS-3 was never intended to be applied beyond the Operating Company level and that the Louisiana Commission is incorrect in its assertion that an energy based allocation is in conflict with Service Schedule MSS-3. Industrial Consumers argue that Service Schedule MSS-3 provides no language to address the proper allocation of bandwidth payments beyond the Operating Company level.²⁴⁶

141. Occidental argues that the Commission should affirm the Presiding Judge's conclusion that the Commission has the jurisdiction to approve Entergy's allocation of the bandwidth payments to Entergy Texas and Entergy Gulf States Louisiana.²⁴⁷ Occidental contends that the payments made to Entergy Texas and Entergy Gulf States Louisiana are an allocation of payments to Operating Companies under the Entergy System Agreement, which the Commission has jurisdiction over. Occidental states that Industrial Consumers is incorrect in its assertion that the Commission would be approving a methodology that allocates payments between retail jurisdictions.²⁴⁸ Occidental argues that the Commission has jurisdiction over wholesale sales of energy in interstate commerce and the Commission is the only entity that can review the justness and reasonableness of the bandwidth payments and receipts.²⁴⁹

142. Occidental further argues that Industrial Consumers is incorrect in its interpretation of the case law cited in which the Commission has stated that it does not have authority over payments to retail customers. While Occidental agrees that the Commission does not have authority over the distribution of bandwidth payments

²⁴⁵ *Id.* at 6.

²⁴⁶ *Id.* at 8.

²⁴⁷ Occidental Brief Opposing Exceptions at 16.

²⁴⁸ *Id.*

²⁴⁹ *Id.* (citing Initial Decision, 128 FERC ¶ 63,015 at P 386).

between retail jurisdictions, it argues that the precedent cited is not applicable here because the methodology adopted by the Initial Decision does not allocate payments among retail customers but rather among Energy Operating Companies. Occidental asserts that the Commission's rejection of Entergy's filing in Docket No. ER07-683-000, to implement a method for allocation of payments between Entergy Gulf States' wholesale and retail customers, was not on the merits as Industrial Consumers suggests. Occidental states that the Commission rejected Entergy's filing in Docket No. ER07-683-000 because Entergy had not pointed to a specific state commission decision that was inconsistent with the implementation of Opinion No. 480.²⁵⁰

143. Occidental states that the Presiding Judge was correct in finding that Service Schedule MSS-3 does not address the issue of allocating payments when the Operating Company no longer exists, and that allocation of the bandwidth payments in this proceeding is not dictated by the plain terms of Service Schedule MSS-3, as Industrial Consumers argues.²⁵¹ Therefore, Occidental states that the Initial Decision adopted a logical solution that is supported by record evidence and reasoned decision making.²⁵²

144. Entergy argues that Industrial Consumers' jurisdictional arguments fail as a matter of law because significant case law specific to the Entergy System Agreement dictates that application of the bandwidth formula is subject to the Commission's exclusive jurisdiction.²⁵³ Entergy asserts that bandwidth payments fall clearly under the System Agreement and therefore, the Commission is the only entity "that can review the justness and reasonableness of charges under the Entergy System Agreement."²⁵⁴ Further, Entergy contends that the Commission has exclusive jurisdiction over the Entergy System Agreement under the FPA.²⁵⁵

145. According to Entergy, Industrial Consumers erred by pointing to the Commission's previous decisions declining Entergy's request to prevent or rectify a trapping of costs. Entergy states that the Presiding Judge correctly found that those prior

²⁵⁰ *Id.* at 18 (citing *Entergy Servs., Inc.*, 119 FERC ¶ 61,191, at P 25 (2007)).

²⁵¹ Occidental Brief Opposing Exceptions at 20.

²⁵² *Id.*

²⁵³ Entergy Brief Opposing Exceptions at 26 (citing *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 43 n.1 (2003); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 371 (1988)).

²⁵⁴ *Id.* (citing *City of New Orleans v. Entergy*, 55 FERC ¶ 61,221 at 61,729).

²⁵⁵ *Id.* (citing 16 U.S.C. §§ 824(a), 824d (2006)).

decisions are not controlling on the issue presented in this case. Entergy asserts that those prior decisions were based on bandwidth payments to Entergy Gulf States as single Operating Company.²⁵⁶ Entergy argues that in this proceeding it is not asking the Commission to allocate amounts among retail customers, but rather to determine the bandwidth payments and receipts among Operating Companies, which are wholesale transactions.²⁵⁷ Entergy contends that Industrial Consumers misinterpret the bandwidth formula, by construing the term “Receiving Company” in Service Schedule MSS-3 as being qualified by the reference to companies that were in existence during the historical test year used in the bandwidth calculation.²⁵⁸ Entergy states that this interpretation is wrong and that the term “Company” is a defined term in the System Agreement that, for calendar year 2008, includes Entergy Texas and Entergy Gulf States Louisiana. Further, Entergy asserts that the fact that two new Operating Companies did not have historical test year cost data does not alter the meaning of the term “Company” under the agreement, but simply creates an implementation issue requiring a division and assignment of historical costs.

146. Entergy argues that the method it used to accomplish that division and assignment of historical costs in no way superseded or changed the terms of the filed rate.²⁵⁹ Further, Entergy asserts that its determination of how to populate the formula rate under the circumstances presented does not deprive this Commission of jurisdiction. Entergy states the creation of the two Operating Companies requires, as a matter of law, that this Commission decide how to apply a wholesale rate schedule to the facts presented. Additionally, Entergy argues that the Industrial Consumers’ argument is erroneous because it is based on the presumption that the tariff is applied on a historical basis, but the Commission has made it clear that the remedy is prospective in nature.²⁶⁰ Moreover, Entergy argues that use of the word “settlement” by the Commission in orders addressing the bandwidth payments does not mean a settlement for a prior period as suggested by Industrial Consumers. Rather, Entergy argues the settlement referenced by the Commission is the settlement of any payments and receipts during the period

²⁵⁶ *Id.* at 27.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 28.

²⁵⁹ *Id.* at 29.

²⁶⁰ *Id.* (citing April 2007 Compliance Order, 119 FERC ¶ 61,095 at P 32).

immediately following the bandwidth calculation and within the same year as the year in which the calculation is filed.²⁶¹

147. Entergy argues that a review of the section 205 and 206 filings that modified Service Schedule MSS-3 makes clear that the timing of the bandwidth calculation governs the derivation of bandwidth payments and receipts. Therefore, Entergy argues that, contrary to Industrial Consumers' assumption, no obligations or rights accrue among the Operating Companies until the tariff is applied to perform the bandwidth calculation, which then determines if any bandwidth payments are required.²⁶² Further, Entergy argues that application of Service Schedule MSS-3 is entirely different from the fuel-rate Industrial Consumers references, which is an after-the-fact determination, not a calculation of new rates. Entergy further asserts that the bandwidth calculation is no different than Service Schedules MSS-1 and MSS-2, both of which use historical data to calculate rates, and both specify that the current year billing practices are based on the preceding year's results.²⁶³

148. Entergy asserts that the Initial Decision correctly found that Industrial Consumers' interpretation of the bandwidth formula was unworkable.²⁶⁴ Entergy argues that instead of the bandwidth calculation reallocating production costs among the Operating Companies, Industrial Consumers' interpretation would reallocate such costs between customers and shareholders, at the shareholders expense. Further, Entergy states that, absent a finding of imprudence, there is no basis to allow state commissions to impose such a penalty or disallowance on the Operating Companies through the bandwidth remedy.²⁶⁵

149. East Texas states that the Initial Decision correctly approved the exercise of Commission jurisdiction over the allocation of bandwidth receipts to the wholesale customers of Entergy Gulf States Louisiana.²⁶⁶ East Texas argues that long-standing court of appeals and Commission precedent, as well as the record in this proceeding, clearly demonstrate that the Commission, not a state commission, had jurisdiction to allocate bandwidth receipts or payments to wholesale customers. East Texas argues that

²⁶¹ *Id.* at 30.

²⁶² *Id.* at 31.

²⁶³ *Id.* at 32.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 34.

²⁶⁶ East Texas Brief Opposing Exceptions at 3.

the Louisiana Commission's argument is flawed because the wholesale agreements that were assigned to Entergy Gulf States Louisiana when Entergy Gulf States divided into two separate Operating Companies do not constitute a retail jurisdiction, but rather they are wholesale contracts that come under the exclusive jurisdiction of the Commission.²⁶⁷ Further, East Texas argues that the Commission's jurisdiction extends to the reallocation of system production costs among the Operating Companies through the rough production cost equalization established pursuant to Opinion Nos. 480 and 480-A. East Texas contends that in Entergy's initial annual bandwidth proceeding, the Commission explicitly exercised its jurisdiction when it stated that the issue may be addressed by the parties under the hearing and settlement judge procedures.²⁶⁸ Additionally, East Texas argues that allowing a state commission to reach up and take a piece of the Commission's ratemaking authority would allow the state commission to subvert the interests of wholesale customers operating in interstate commerce to the parochial interests of the state.

150. East Texas further argues that the record in this case does not support state commission jurisdiction over the allocation of bandwidth receipts and payments to wholesale customers. East Texas states that the Louisiana Commission attempts to use Entergy witness Peters' testimony to support its argument that retail regulators traditionally made cost and revenue allocations between wholesale and retail jurisdictions for an Operating Company.²⁶⁹ However, East Texas argues that Mr. Peters made clear in his testimony that his experience was only with retail ratemaking and proceedings.²⁷⁰

151. Trial Staff argues that Industrial Consumers confuses Entergy Gulf States' allocation of bandwidth disparity payments between Entergy Gulf States' successors, which is an allocation between jurisdictional Operating Companies, with an allocation between retail jurisdictions, as the Presiding Judge pointed out.²⁷¹ Trial Staff further argues that Industrial Consumers' jurisdictional arguments are based on the faulty premise that Entergy performed a retail allocation of Entergy Gulf States' bandwidth disparity payments between Entergy Gulf States' successors, Entergy Gulf States

²⁶⁷ *Id.* at 4 (citing 16 U.S.C. § 824 (2006)).

²⁶⁸ *Id.* at 5.

²⁶⁹ *Id.* at 8-9.

²⁷⁰ *Id.* at 9 (citing Tr. 533).

²⁷¹ Staff Brief Opposing Exceptions at 53 (citing Initial Decision, 128 FERC ¶ 63,015 at P 385).

Louisiana and Entergy Texas.²⁷² Trial Staff argues that this is inaccurate inasmuch as Entergy performed an allocation of Entergy Gulf States' bandwidth disparity payments between Entergy Gulf States Louisiana and Entergy Texas in order to effectuate the rough equalization of production costs among the Operating Companies.

152. Trial Staff asserts that as the Presiding Judge correctly points out, the Industrial Consumers confuse Entergy's allocation of bandwidth disparity payments between Entergy Gulf States successors, Entergy Gulf States Louisiana and Entergy Texas, which is an allocation between jurisdictional Entergy Operating Companies, with an allocation between retail jurisdictions.²⁷³ Further, Trial Staff explains that the Presiding Judge accurately explains that the Commission has jurisdiction over the application of the Entergy System Agreement, and the FPA provides the Commission with jurisdiction over "the sale of electric energy at wholesale in interstate commerce."²⁷⁴

153. Trial Staff argues that the Presiding Judge correctly interpreted Service Schedule MSS-3 regarding the allocation of bandwidth disparity payments and receipts at issue with respect to Entergy Gulf States. Trial Staff asserts that, as the Presiding Judge pointed out, "[i]n order to roughly equalize costs among the Operating Companies in existence in 2008, Entergy Gulf States' 2007 production costs must be used in the bandwidth formula."²⁷⁵ Further, Trial Staff asserts that Entergy Gulf States Louisiana and Entergy Texas step into the shoes of Entergy Gulf States for purposes of application of Service Schedule MSS-3.²⁷⁶

d. Commission Determination

154. We affirm the Presiding Judge's determination that the Commission has jurisdiction to approve the amount of bandwidth receipts payable to Entergy Gulf States Louisiana and Entergy Texas, the successors of Entergy Gulf States, pursuant to the Entergy System Agreement. As the Presiding Judge recognized, the issue before us is not about an allocation among retail jurisdictions, but instead is an allocation among Entergy Gulf States' successors – two Operating Companies under Service Schedule MSS-3.²⁷⁷

²⁷² *Id.* at 54.

²⁷³ *Id.* at 53.

²⁷⁴ *Id.* at 53-54.

²⁷⁵ *Id.* at 59 (citing Initial Decision, 128 FERC ¶ 63,015 at P 388).

²⁷⁶ *Id.* at 60.

²⁷⁷ Initial Decision, 128 FERC ¶ 63,015 at P 385.

While, in their Briefs Opposing Exceptions, the Louisiana Commission and Industrial Consumers argue that the Commission rejected in earlier proceedings Entergy's argument that the Commission has jurisdiction to determine the share of the bandwidth receipts allocated to Entergy Gulf States and then allocated to its Louisiana and Texas retail customers,²⁷⁸ the Presiding Judge rightfully dismissed that argument. As the Presiding Judge explained, the issue in this proceeding differs from that in the earlier case (May 2009) because

it does not involve an allocation of the bandwidth entitlement of a single Operating Company, Entergy Gulf States, between the two retail jurisdictions in which it operated. In 2007, Entergy Gulf States split into two successor Operating Companies, Entergy Gulf States Louisiana and Entergy Texas. The split requires that the bandwidth remedy payments be allocated among the two successor Operating Companies, not between two retail jurisdictions. This issue does not deal with an allocation to any retail jurisdiction. Instead, it involves the rough equalization of production costs among Entergy Operating Companies. [²⁷⁹]

155. Entergy Gulf States ceased to exist on December 31, 2007 and its two successor companies – Entergy Gulf States Louisiana and Entergy Texas – are Operating Companies in 2008 as provided in Service Schedule MSS-3. It is this Commission that has the jurisdiction to determine the rough production cost equalization under Service Schedule MSS-3 among all of the Operating Companies, including Entergy Gulf States Louisiana and Entergy Texas.

156. The Presiding Judge properly recognized that the FPA and Commission precedent specific to the Entergy System Agreement give the Commission jurisdiction over the Entergy System Agreement. The Presiding Judge explained, and Entergy and Trial Staff

²⁷⁸ Louisiana Commission Brief on Exceptions at 40 (citing May 2007 Order, 119 FERC ¶ 61,191 at P 6).

²⁷⁹ Initial Decision, 128 FERC ¶ 63,015 at P 385 (citing May 2009 Order, 127 FERC ¶ 61,126); *see also* Entergy Brief Opposing Exceptions at 27. Moreover, as East Texas explains, the Commission, in the first case (May 2007 Order, 127 FERC ¶ 61,126), rejected the proposed amendments as premature and, in the second case (May 2009 Order, 127 FERC ¶ 61,126), rejected the proposed allocation because it was within a single Operating Company. East Texas Brief Opposing Exceptions at 7-8. Those cases say nothing about a state commission's authority to determine the allocation of bandwidth receipts or payments to a wholesale customer.

emphasized in their Briefs Opposing Exceptions, that the Commission is “the only entity that can review the justness and reasonableness of charges under the Entergy System Agreement.”²⁸⁰

157. First, we agree with the Presiding Judge that payments and receipts, while based on costs for 2007, occur prospectively in 2008.²⁸¹ While Entergy Gulf States Louisiana and Entergy Texas were not in existence in 2007, the Presiding Judge recognized that it was only logical to place them into Entergy Gulf States’ position in order to ensure rough production cost equalization among the Operating Companies.²⁸² He emphasized, and we agree, that while this allocation may have an impact on retail rates (much like virtually every other Commission decision), the determination being made is not a retail allocation; it is an allocation, made pursuant to the System Agreement, between Operating Companies.²⁸³

158. Moreover, we agree with Entergy that Industrial Consumers misinterpret the bandwidth formula by construing the term “Receiving Company” in Service Schedule MSS-3 as being qualified by reference to companies that were in existence during the historical test year used in the bandwidth calculation. Industrial Consumers claims that neither Entergy Texas nor Entergy Gulf States Louisiana can logically be classified as a “Receiving Company,” which is defined in Service Schedule MSS-3 as “a Company or Companies with a positive Disparity.”²⁸⁴ Industrial Consumers argues that it is illogical to interpret this term to include a company for which no disparity could be calculated under the tariff.²⁸⁵ However, as Entergy points out, the term “Company” is defined in the System Agreement to include, for calendar year 2008, Entergy Gulf States Louisiana and Entergy Texas.²⁸⁶ As of June 1, 2008, the date of the commencement of bandwidth

²⁸⁰ *Id.* at P 386 (quoting *City of New Orleans v. Entergy Corp.*, 55 FERC ¶ 61,221, at 61,729); citing also *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm’n*, 539 U.S. 354, 43 n.1 (2003). Entergy Brief Opposing Exceptions at 26 (citing same cases and 16 U.S.C. §§ 824(a), 824d); Trial Staff Brief Opposing Exceptions at 53-54.

²⁸¹ Initial Decision, 128 FERC ¶ 63,015 at P 387.

²⁸² *Id.* P 388.

²⁸³ *Id.* P 389 n.108.

²⁸⁴ Section 30.11 of Service Schedule MSS-3 defines a “Receiving Company(ies)” as “a Company or Companies with a positive Disparity.”

²⁸⁵ Industrial Consumers Brief on Exceptions at 14-15.

²⁸⁶ Entergy Brief Opposing Exceptions at 28.

payments under the bandwidth formula, Entergy Gulf States Louisiana and Entergy Texas each were a “Company” under the Entergy System Agreement. Therefore, they are each a “Company” eligible for bandwidth payments as provided for by the bandwidth formula contained in Service Schedule MSS-3, and that defined term cannot be given a different meaning simply because a formula rate is populated with data from a historical test year. While this is consistent with Service Schedule MSS-3, it does, as Entergy recognizes, create an implementation issue requiring a division and assignment of historical costs. However, this fact does not mean that the filed rate (the formula) has been changed in any manner. Further, the determination of how to populate the formula rate under the circumstances presented does not deprive this Commission of jurisdiction. To the contrary, the creation of Entergy Texas and Entergy Gulf States Louisiana requires, as a matter of law, that the Commission decide how to apply a wholesale rate schedule to the facts presented.

159. Industrial Consumers’ argument to the contrary is based on the erroneous presumption that the tariff is applied on an historical basis.²⁸⁷ It asserts that its position is correct because the 2008 bandwidth payments are “remedial payments to settle production cost disparities from 2007.”²⁸⁸ However, while the Commission has characterized the bandwidth payments as “remedial payments,”²⁸⁹ the Commission has made clear that the remedy is prospective in nature:

The bandwidth remedy does not involve refunds. Rather, as Entergy explains, the bandwidth remedy payments made under Section 30.09(d) bring the Operating Companies within the Opinion No. 480 bandwidth on a *prospective* basis.²⁹⁰

160. Accordingly, allowing Entergy Texas and Entergy Gulf States Louisiana to take the place of Entergy Gulf States’ position as Receiving Companies, while using Entergy Gulf States production costs in the calculation of bandwidth payments and receipts is a reasonable way to address this unique problem with the bandwidth formula.

161. As the Presiding Judge points out, “in order to roughly equalize costs among the Operating Companies in existence in 2008, Entergy Gulf States’ 2007 production costs

²⁸⁷ Industrial Consumers Brief on Exceptions at 17-18.

²⁸⁸ *Id.* at 9.

²⁸⁹ See, e.g., *Louisiana Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 at P 51.

²⁹⁰ April 2007 Compliance Order, 119 FERC ¶ 61,095 at P 19.

must be used in the bandwidth formula.”²⁹¹ Entergy Gulf States Louisiana and Entergy Texas are the successors of Entergy Gulf States. Allowing the two companies to step into the shoes of Entergy Gulf States for purposes of application of Service Schedule MSS-3 is a reasonable way to roughly equalize production costs for the 2007 calendar year. We agree with Trial Staff that Industrial Consumers’ argument, which would prevent Entergy Texas and Entergy Gulf States Louisiana from being considered Receiving Companies, is at best an overly restrictive interpretation of Service Schedule MSS-3’s provisions.²⁹² We find that the Presiding Judge’s interpretation of Service Schedule MSS-3 is a reasonable interpretation under the unique circumstances at hand.

3. Methodology

a. Initial Decision

162. The Presiding Judge finds that Entergy’s method for reallocating production costs between Entergy Texas and Entergy Gulf States is consistent with Service Schedule MSS-3.²⁹³ He explains that under the principle of rough production cost equalization as explained in Service Schedule MSS-3, after the bandwidth payments are made, the disparity of any receiving company should be no less than any other receiving company. He states that because it has been determined that Entergy Texas and Entergy Gulf States Louisiana are Operating Companies under the terms of Service Schedule MSS-3 for purposes of the bandwidth calculation, their disparity in production costs must be calculated in the same manner as the other Operating Companies, and their disparities should be brought to the same level as the other Operating Companies, which in this case is 3.08 percent.²⁹⁴ The Presiding Judge states that Entergy’s method placed the two Operating Companies in the same relative disparity position, 3.08 percent above System average, as the other Operating Companies which received bandwidth payments in 2008. The Presiding Judge finds that given its consistency with Service Schedule MSS-3, Entergy’s method for allocating bandwidth receipts to Entergy Texas and Entergy Gulf States Louisiana is just and reasonable.²⁹⁵

163. The Presiding Judge also finds Entergy’s allocation of bandwidth receipts to Entergy Gulf States’ wholesale jurisdiction to be just and reasonable. He states that

²⁹¹ Initial Decision, 128 FERC ¶ 63,015 at P 388.

²⁹² Trial Staff Brief on Exceptions at 60.

²⁹³ Initial Decision, 128 FERC ¶ 63,015 at P 443.

²⁹⁴ *Id.* P 441.

²⁹⁵ *Id.* P 443.

Entergy witness Peters explained that when making this allocation, Entergy used an energy allocator because the production costs are dependent upon energy and that recovery of production costs is through an energy-related wholesale fuel clause.²⁹⁶ He notes that this method results in the same 3.08 percent disparity for Entergy Gulf States wholesale as that which was calculated for Entergy Texas and Entergy Gulf States Louisiana retail.²⁹⁷

164. The Presiding Judge states that Service Schedule MSS-3 “does not contemplate a wholesale-retail allocation using an energy-based allocation,” and refers to the situation as “unique.”²⁹⁸ But he continues that the record indicates that the methodology used by Entergy is acceptable and does not indicate that such methodology conflicts with Service Schedule MSS-3. He concludes that Entergy has shown that its methodology for allocating bandwidth payments to Entergy Gulf States Louisiana is just and reasonable and not unduly discriminatory or preferential.

b. Briefs on Exceptions

165. The Louisiana Commission asserts that the allocation of payments or receipts of an Operating Company for the purpose of determining the retail cost of service is not within the Commission’s jurisdiction. The Louisiana Commission argues that there are no electric power sales between the wholesale and retail jurisdictions of Entergy Gulf States, and therefore, there is no basis for the Commission to assert jurisdiction to allocate costs to a retail jurisdiction.²⁹⁹ It contends that the Commission can presumably allocate costs or revenues to an Operating Company’s wholesale jurisdiction for the purpose of setting the wholesale rate for a sale for resale. However, the Louisiana Commission argues that the Commission has never attempted to mandate that the retail jurisdiction accept the remaining portion of the costs or revenues.³⁰⁰

166. The Louisiana Commission asserts that the Presiding Judge offers no support for accepting the allocation to the retail and wholesale jurisdictions of Entergy Gulf States Louisiana. The Louisiana Commission states that the Presiding Judge focused on allocation to Entergy Texas and Entergy Gulf States Louisiana, and did not discuss whether the Commission has jurisdiction or tariff authority to make an intra-company

²⁹⁶ *Id.* P 444 (citing Tr. at 538 (Peters)).

²⁹⁷ *Id.* P 444.

²⁹⁸ *Id.* P 446.

²⁹⁹ Louisiana Commission Brief on Exceptions at 39.

³⁰⁰ *Id.* at 40.

allocation.³⁰¹ Therefore, the Louisiana Commission contends that no basis exists to approve a decision that conflicts with this Commission's prior rulings and the terms of the Service Schedule MSS-3.

167. The Louisiana Commission argues that Entergy's methodology, which allocates the Entergy Gulf States Louisiana payment to the wholesale jurisdiction based on its percentage of energy usage, conflicts with Service Schedule MSS-3. It asserts that Entergy allocated a payment to a jurisdiction that existed in 2007 but not 2008, and Entergy Texas had no wholesale customers in 2008. Therefore, according to the Louisiana Commission, the second step in Entergy's methodology should have been to allocate payments to the two Operating Companies and there should not have been a third step.³⁰²

168. The Louisiana Commission argues that because Operating Companies are legal entities, determining the actual production costs simply requires recognizing the costs on the companies' books, with some of those costs being allocated between production and other functions. It contends that in no instance is a cost incurred by one Operating Company allocated to another Operating Company for purposes of the calculation.³⁰³ The Louisiana Commission contends that Entergy sought to allocate the receipt of the former Entergy Gulf States to the wholesale jurisdiction based on the relative energy usage of that jurisdiction compared to all energy usage in that company. The Louisiana Commission contends that Entergy's method in reality produces different disparities for the wholesale and retail jurisdictions.³⁰⁴ Further, the Louisiana Commission argues that if there was authority in the tariff for such an allocation, the tariff would require the use of the disparity based allocation method, and therefore, the Presiding Judge's approval of Entergy's method is erroneous.³⁰⁵

169. Industrial Consumers contend that Entergy's methodology is not based on cost-causation, a Commission approved tariff or any other reasoned basis. Industrial Consumers state that Entergy's proposal would result in Texas retail customers receiving only 34 percent of Entergy Gulf States' bandwidth receipts, even though Entergy Gulf States' Texas retail operations paid 41 percent of Entergy Gulf States' actual production

³⁰¹ *Id.*

³⁰² *Id.* at 48.

³⁰³ *Id.*

³⁰⁴ *Id.* at 51.

³⁰⁵ *Id.* at 52.

costs in 2007. Further, Industrial Consumers state that if the Commission approves an allocation methodology, it should allocate the 2007 bandwidth receipts between Entergy Gulf States' former retail jurisdictions in proportion to their respective share of Entergy Gulf States' 2007 production costs.³⁰⁶

170. Industrial Consumers argue that the Initial Decision's approval of Entergy's proposal errs in characterizing the division of Entergy Gulf States' 2007 bandwidth payments as an allocation to Entergy Gulf States Louisiana and Entergy Texas, rather than between Entergy Gulf States' retail jurisdictions. Further, Industrial Consumers argue that the Initial Decision purports to use Service Schedule MSS-3 to allocate the 2007 bandwidth receipts between Entergy Gulf States Louisiana and Entergy Texas, despite the fact that neither company had production costs in 2007.³⁰⁷ Industrial Consumers assert that Service Schedule MSS-3 applies to the Operating Companies and not the retail jurisdictions of a single Operating Company. Therefore, Industrial Consumers conclude that the Initial Decision errs in its reliance on the terms of Service Schedule MSS-3, and in seeking to equalize the 2007 production cost disparities of Entergy Gulf States' retail jurisdictions using the bandwidth formula.³⁰⁸

171. Industrial Consumers propose to allocate the 2007 bandwidth receipts using a production cost allocator. Industrial Consumers explain that if Entergy Gulf States Texas retail accounted for 41.29 percent of Entergy Gulf States' production costs in 2007, a production cost allocation would result in Texas retail receiving 41.29 percent of the \$189 million receipts (i.e., \$78.3 million as opposed to the \$65.5 million that Entergy proposes).³⁰⁹ Industrial Consumers state that under their proposal a production allocation would adopt Entergy's allocation of Entergy Gulf States' fixed and variable production costs to the jurisdictions. Therefore, Industrial Consumers assert that Entergy Gulf States' production costs would be divided among the jurisdictions accounting for jurisdictional-specific production costs by directly assigning those costs to the respective jurisdictions that incurred them.³¹⁰

³⁰⁶ Industrial Consumers Brief on Exceptions at 22.

³⁰⁷ *Id.* at 23.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 25.

³¹⁰ *Id.* at 26.

c. **Briefs Opposing Exceptions**

172. Entergy argues that the Initial Decision correctly accepted Entergy's methodology for allocating the bandwidth receipts of Entergy Gulf States Louisiana between its wholesale and retail jurisdictions.³¹¹ Entergy asserts that the Louisiana Commission wrongly asserts that the Commission's decision in a previous order "confirmed the right of the state regulators to make decisions concerning the appropriate allocation of these payments or receipts to retail and wholesale customers."³¹² In the referenced order, Entergy states that the Commission only ruled that it was premature to amend the System Agreement to address potential conflicts between jurisdictions.³¹³ Entergy states that in a later order, as part of a bandwidth calculation proceeding, the Commission stated that it will exercise its exclusive jurisdiction over wholesale rates to determine the allocation of bandwidth payments/receipts to wholesale customers.³¹⁴

173. Entergy argues that the Commission's decision as to the appropriate allocation of bandwidth payments to Entergy Gulf States Louisiana's wholesale jurisdiction must result in a sum certain residual amount, which may be included in retail rates however the Louisiana Commission sees fit. Entergy contends that the Louisiana Commission fails to recognize that such distribution between wholesale and retail jurisdictions does not set retail rates.³¹⁵ In response to the Louisiana Commission's argument that it should be permitted to arrive at its own determination of the proper allocation between wholesale and retail jurisdictions, Entergy argues that the Louisiana Commission is posturing itself to distribute more of the bandwidth payment to Louisiana retail customers. It argues that if the Louisiana Commission's stance was accepted it would constitute a collateral attack on the Commission's determination of the total bandwidth payment due to Entergy Gulf States Louisiana as an Operating Company and the amount due to wholesale customers by distributing more bandwidth receipts than actually received by Entergy Gulf States Louisiana.³¹⁶

³¹¹ Entergy Brief Opposing Exceptions at 34.

³¹² *Id.* at 36 citing Louisiana Commission Brief on Exceptions at 41 (citing *Entergy Services, Inc.*, 119 FERC ¶ 61,191, at P 17 (2007)).

³¹³ *Id.* (citing *Entergy Services, Inc.*, 119 FERC ¶ 61,191 at P 25).

³¹⁴ *Id.* (citing *Entergy Services, Inc.*, 120 FERC ¶ 61,094, at P 17 (2007)).

³¹⁵ *Id.* at 37.

³¹⁶ *Id.* at 38.

174. Entergy argues that the methodology proposed by Industrial Consumers would treat Entergy Texas and Entergy Gulf States Louisiana remarkably different from the other Operating Companies, to the benefit of Entergy Texas.³¹⁷ It explains that Industrial Consumers' methodology would distort the remedy adopted by the Commission to achieve rough production cost equalization, by reducing Entergy Texas's disparity to 1.78 percent and increasing Entergy Louisiana's to 4.15 percent. According to Entergy, the Louisiana Commission takes issue with the fact that Entergy used an energy allocator instead of a disparity-based allocator to determine the amount of bandwidth receipts due to Entergy Gulf States Louisiana's wholesale customers. Entergy states that it proposed an energy allocator for the wholesale jurisdiction for two reasons: (1) the production costs driving the bandwidth payment calculated for Entergy Arkansas are largely energy-driven; and (2) the bandwidth payments and receipts are paid for and received by wholesale customers in accordance with their Commission-filed rates as energy costs via the wholesale fuel adjustment clause.³¹⁸ The amount of production costs allocated to Entergy Gulf States Louisiana's wholesale jurisdiction was then used to calculate the level of disparity experienced by Entergy Gulf States Louisiana's wholesale jurisdiction and the amount of bandwidth payments to be received by Entergy Gulf States Louisiana's wholesale jurisdiction, consistent with section 30.11 of Service Schedule MSS-3.

175. The Louisiana Commission argues that the methodology proposed by Industrial Consumers departs from that required under Service Schedule MSS-3 and results in undue discrimination.³¹⁹ Further, the Louisiana Commission states that the allocation of receipts to Entergy Gulf States Louisiana and Entergy Texas should be made to equalize the disparities from the average of these Operating Companies. The Louisiana Commission contends that the Industrial Consumers' method would produce a significant difference in the companies' disparities from average, and therefore, the Commission should reject this allocation method.³²⁰

176. The Louisiana Commission contends that the allocation method used by Industrial Consumers produces different disparities above average for Entergy Gulf States Louisiana and Entergy Texas, and does not take into account the difference in the initial Operating Company disparities when allocating receipts. Further, the Louisiana Commission argues that the method advocated by the Industrial Consumers does not attempt to equalize the disparities and, after being contrasted with the Service Schedule

³¹⁷ *Id.* at 40.

³¹⁸ *Id.* at 42.

³¹⁹ Louisiana Commission Brief Opposing Exceptions at 72-73.

³²⁰ *Id.*

MSS-3 allocation method using illustrative exhibits at the hearing, it over-allocated receipts to Entergy Texas and under-allocated receipts to Entergy Gulf States Louisiana compared to the tariff methodology.³²¹

177. The Louisiana Commission argues that the Industrial Consumers' allocation methodology is a departure from that required under Service Schedule MSS-3 and produces undue discrimination because. Additionally, the Louisiana Commission contends that the methodology advocated by Industrial Consumers does not reflect cost causation, and the cause of the payment due to the former Entergy Gulf States was not its total production costs relative to system total production costs but its disparity from average.³²²

178. Industrial Consumers state that nothing in the tariff requires or suggests that it is appropriate for the bandwidth formula to be applied beyond the Operating Company level.³²³ Industrial Consumers argue that applying the formula as the Louisiana Commission proposes would result in an unjust and inequitable allocation of the 2007 bandwidth payments.³²⁴ Industrial Consumers contend that if the Commission endorses an allocation of Entergy Gulf States 2007 bandwidth payments beyond the Operating Company level, whether to a wholesale or retail jurisdiction, the allocation should directly reflect that jurisdiction's share of the production costs that gave rise to the bandwidth payments. It states that because Service Schedule MSS-3 does not address how bandwidth payments should be allocated between the jurisdictions of an Operating Company, it is therefore proper to allocate the payments between Entergy Gulf States' former jurisdictions based on their relative share of Entergy Gulf States' 2007 production costs.³²⁵

179. Industrial Consumers argue that the Louisiana Commission assumes without reason that the jurisdictions within an Operating Company must also be brought to the same disparity above the Entergy system average.³²⁶ Industrial Consumers contend that while this is required at the Operating Company level under Service Schedule MSS-3,

³²¹ *Id.* at 73.

³²² *Id.* at 76.

³²³ Industrial Consumers Brief Opposing Exceptions at 3.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 9.

there is no language in the tariff, nor any Commission precedent, that requires the same result at the jurisdictional level.³²⁷

180. East Texas argues that the Presiding Judge considered the Louisiana Commission's argument that the tariff is silent on allocation to wholesale customers and would require use of the disparity-based allocation method and properly dismissed it. East Texas asserts that the Presiding Judge recognized that using an energy-based methodology for allocating bandwidth receipts to wholesale customers is just and reasonable, and not in conflict with Service Schedule MSS-3.³²⁸

181. East Texas contends that because Service Schedule MSS-3 prescribes a disparity-based method for allocating bandwidth payments and receipts among the Operating Companies, but does not prescribe a method to allocate bandwidth receipts and payments to wholesale customers of an Operating Company, the Commission is within its authority to approve an allocation mechanism for wholesale customers that is reasonable.³²⁹ East Texas argues that allocating bandwidth receipts based on energy, as Entergy proposed, is a reasonable approach for this test period since fuel costs are the main driver for the production cost disparities.

182. Trial Staff argues that the Presiding Judge did not ignore the Louisiana Commission's position regarding the Commission's jurisdiction over Entergy's allocation of bandwidth disparity payments and receipts between the wholesale and retail customers of Entergy Gulf States Louisiana. Trial Staff states that the Presiding Judge indicated the omission of an argument does not indicate it was not considered, but rather that it was found to be irrelevant, immaterial, and/or without merit.³³⁰ Trial Staff states that the Louisiana Commission's argument overlaps the two subparts of the jurisdictional issue, some of which are not easily separated. Trial Staff states that the Presiding Judge addressed the issue that an exercise of Commission jurisdiction usurps the authority of state regulators. Trial Staff further argues that the Commission stated in Docket No. ER07-956-000 that a hearing and settlement judge procedures is the proper venue for addressing the allocation of bandwidth payments.³³¹

³²⁷ *Id.*

³²⁸ East Texas Brief Opposing Exceptions at 11.

³²⁹ *Id.* at 12.

³³⁰ Trial Staff Brief Opposing Exceptions at 65.

³³¹ *Id.* at 67.

183. Trial Staff argues that the Presiding Judge correctly ruled that Entergy employed the correct methodology to separate Entergy Gulf States into Entergy Texas and Entergy Gulf States Louisiana in the 2007 bandwidth calculation.³³² Further, Trial Staff asserts that the Presiding Judge properly relied upon Service Schedule MSS-3 to make his ruling rejecting Industrial Consumers production cost methodology.³³³ Trial Staff argues that, as the Presiding Judge pointed out, the allocation which Entergy performed is the result of a unique circumstance; therefore, the Louisiana Commission's argument that no specific authority exists under Service Schedule MSS-3 to make any allocation to wholesale customers is immaterial and does not constitute a violation of Service Schedule MSS-3. Trial Staff further asserts that the Louisiana Commission cannot point to any provision of Service Schedule MSS-3 which expressly forbids its application in the situation at hand.³³⁴

184. Additionally, Trial Staff points out that the application of step two of Entergy's allocation methodology, to which the Louisiana Commission objects, results in the same disparity for Entergy Gulf States Louisiana wholesale as that which was calculated for Entergy Texas and Entergy Gulf States Louisiana retail.³³⁵ Trial Staff argues that Service Schedule MSS-3 cannot reasonably be expected to address all situations which may arise with respect to the allocation of bandwidth disparity payments and receipts among the Operating Companies.

185. Trial Staff argues that the Presiding Judge properly rejected Industrial Consumers' proposed production cost allocator methodology. Trial Staff agrees with the Presiding Judge that Industrial Consumers' methodology fails to recognize that rough production cost equalization occurs on a system basis under Service Schedule MSS-3 and that Service Schedule MSS-3 provides for a disparity-based allocation of production costs among the Operating Companies on that basis.

d. Commission Determination

186. As mentioned above, Entergy proposes to use a three-step methodology to allocate the bandwidth receipts between Entergy Texas and Entergy Gulf States Louisiana. Specifically, the first step determines whether any one Operating Company exceeded the +/- 11 percent bandwidth threshold, and, if so, how much of a change in production costs

³³² *Id.*

³³³ *Id.* at 70.

³³⁴ *Id.* at 72.

³³⁵ *Id.* at 72.

would be necessary to bring all Operating Companies within the bandwidth. In step two, Entergy calculated the portion of bandwidth payments to be received by Entergy Gulf States Louisiana's wholesale customers using an energy allocator. In the final step, Entergy allocated the remaining balance of Entergy Gulf States' 2007 production costs between Entergy Texas' retail customers and Entergy Gulf States Louisiana's retail customers using an energy allocator for variable production costs and a demand allocator for fixed production costs in the same manner prescribed by section 30.12 of Service Schedule MSS-3.

187. We reverse the Presiding Judge on his determination that Entergy's step two calculation of carving out the wholesale portion of Entergy Gulf States Louisiana's load by using an energy allocator is just and reasonable and consistent with Service Schedule MSS-3. As the Louisiana Commission explains, Entergy's proposed second step is inconsistent with Service Schedule MSS-3. Specifically, section 30.13 of Service Schedule MSS-3 requires that "fixed production cost" be allocated among Operating Companies using demand and that "variable production cost" be allocated among Operating Companies using an energy allocator and does not require a separate carving out of the wholesale requirements customers.³³⁶ Further, Trial Staff witness Sammon recognized this and testified that Entergy Gulf States' 2008 bandwidth receipts should be divided between Entergy Texas and Entergy Gulf States Louisiana in such a manner that Entergy Texas and Entergy Gulf States receive the bandwidth receipts they would have received if they, and not Entergy Gulf States, had existed in 2007. Thus, as he explained, the method of dividing 2008 bandwidth receipts between Entergy Texas and Entergy Gulf States Louisiana should be comparable to the method that will be used in the succeeding bandwidth proceeding where Entergy Texas and Entergy Gulf States Louisiana will be separate Operating Companies in both the test-year and the disbursement year.³³⁷

188. Likewise, Industrial Consumers' proposed approach to allocate bandwidth receipts based on each jurisdiction's pro rata share of Entergy Gulf States' production costs is inconsistent with the methodology in Service Schedule MSS-3. Industrial Consumers' approach uses a production cost allocator that differs from the demand and energy allocators used in Service Schedule MSS-3 to allocate bandwidth receipts. Thus, we

³³⁶ Trial Staff witness Sammon explained that "[t]he wholesale requirements customers of [Entergy Gulf States Louisiana] are not nor have they ever been an Operating Company; they are now part of [Entergy Gulf States Louisiana's] load." He also testified that the wholesale requirements load should not have been carved out before applying the demand and energy allocators to Entergy Gulf States' bandwidth receipts. (Ex. S-14 at 42, 44).

³³⁷ Ex. S-14 at 42.

affirm the Presiding Judge's finding that the Industrial Consumers' approach "conflicts with the rough production cost equalization approach provided for in Service Schedule MSS-3, creating undue discrimination among the Operating Companies."³³⁸

189. Therefore, with the one exception concerning step two, we affirm the Presiding Judge's finding that Entergy's methodology is consistent with the overall focus of the bandwidth proceedings, which is "the rough equalization of production costs among the Operating Companies of the Entergy system, not among retail ratepayers."³³⁹ We direct Entergy to modify its methodology to eliminate its proposed second step and to submit, within 60 days of the date of this order, a compliance filing consistent with this directive.

The Commission orders:

(A) The Initial Decision is hereby affirmed in part and reversed in part, as discussed in the body of this order.

(B) Within 60 days of the date of this order, Entergy is hereby directed to file a compliance filing, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³³⁸ *Id.* citing Ex. No. ESI-3 at 49-50.

³³⁹ *See* Opinion No. 480, 111 FERC ¶ 61,311 at P 28; Opinion No. 480-A, 113 FERC ¶ 61,282 at P 15.