

139 FERC ¶ 61,107
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

Docket No. EL10-55-001

v.

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

OPINION NO. 519

ORDER ON INITIAL DECISION

(Issued May 7, 2012)

1. This case is before the Commission on exceptions to an Initial Decision issued on February 18, 2011,¹ dismissing a complaint filed by the Louisiana Public Service Commission (Louisiana Commission) against Entergy.² The central issue

¹ *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 134 FERC ¶ 63,016 (2011) (Initial Decision).

² Entergy refers to Entergy Corporation and its subsidiaries, Entergy Services, Inc. (Entergy Services), and six public utility operating companies. The Entergy Operating Companies are: Entergy Arkansas, Inc. (Entergy Arkansas); Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana); Entergy Louisiana, LLC (Entergy Louisiana); Entergy Mississippi, Inc. (Entergy Mississippi); Entergy New Orleans, Inc. (Entergy New Orleans); and Entergy Texas, Inc. (Entergy Texas) (together, Operating Companies).

in this proceeding is whether the Louisiana Commission, as a proponent of a change in an existing rate, has demonstrated that the depreciation expenses, related depreciation inputs, and/or depreciation provisions of Entergy's rough production cost equalization bandwidth formula (bandwidth formula) in Service Schedule MSS-3 to the Entergy System Agreement (System Agreement) are unjust and unreasonable or unduly discriminatory or preferential.³

2. In this order, the Commission affirms the determination of the Presiding Administrative Law Judge (Presiding Judge) that the Louisiana Commission has not met its burden of proof under section 206 of the Federal Power Act (FPA)⁴ to show the existing bandwidth formula is unjust and unreasonable or unduly discriminatory or preferential.⁵ Because the existing bandwidth formula has not been shown to be unjust and unreasonable, we affirm the Presiding Judge's conclusion that it is not necessary to evaluate proposed alternatives to the existing bandwidth formula.

I. Background and Procedural History

A. Introduction to the Entergy System

3. Entergy Corporation is a public utility holding company that provides electricity service through its six public utility Operating Companies to customers in Louisiana, Texas, Mississippi and Arkansas. While each Operating Company owns or has under contract its own generation, transmission and distribution assets, the Entergy System is planned and operated as a single integrated electric system, pursuant to the terms of the Entergy System Agreement (System Agreement).⁶

4. For more than 50 years, the Entergy System has operated under some form of the System Agreement, which functions as an interconnection and pooling agreement, provides for the joint planning, construction and operation of the Operating Companies' facilities, and maintains a coordinated power pool among the

³ While Commission Trial Staff (Staff) does not support each aspect of the Louisiana Commission's position, Staff advocates changing the existing bandwidth formula. *See* Staff Initial Brief at 2-3; *see generally* Staff Brief on Exceptions.

⁴ 16 U.S.C. § 824e (2006).

⁵ Initial Decision, 134 FERC ¶ 63,016 at P 33.

⁶ *Id.* P 3. Entergy Services, a subsidiary of Entergy Corporation, provides general executive, management, advisory, administrative, accounting, legal, regulatory and engineering services to the Operating Companies.

six Operating Companies.⁷ The current System Agreement contains seven Service Schedules, MSS-1 through MSS-7. Each service schedule specifies the rates at which costs associated with a specific utility function are allocated among the Operating Companies. This proceeding involves Service Schedule MSS-3, which serves two separate and distinct functions: (1) the exchange and pricing of energy among the Operating Companies; and (2) a rough production cost equalization (or bandwidth) formula to maintain production costs, within a specified band, among the Operating Companies. The bandwidth formula component of Service Schedule MSS-3 is the subject of this proceeding.

5. The bandwidth formula developed in response to a 2001 complaint challenging the cost allocations among the Operating Companies. The Commission's Opinion No. 480,⁸ issued in 2005, upheld the presiding judge's findings in that proceeding that the Operating Companies' production costs were no longer roughly equal, that the System Agreement was therefore no longer just and reasonable, and that a bandwidth remedy was appropriate.

6. In Opinion Nos. 480 and 480-A, the Commission established a numerical bandwidth of +/-11 percent of the Entergy System average production costs to maintain the rough equalization of production costs among the Operating Companies. The Commission declared that the bandwidth formula remedy would be implemented prospectively, effective beginning with calendar year 2006, and that any equalization payments would be made in 2007.⁹ The Commission required Entergy thereafter to make annual bandwidth filings to determine any necessary payments among the Operating Companies. On November 17, 2006, in Docket No. EL01-88-004, the Commission accepted Entergy's proposed amendments to Service Schedule MSS-3 to include a formula (based on the methodology in Exhibit Nos.

⁷ The current System Agreement was originally approved by the Commission in 1985. *Middle South Energy, Inc.*, 31 FERC ¶ 61,305, *order on reh'g*, 32 FERC ¶ 61,425 (1985).

⁸ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006) (November Compliance Order), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007) (April 2007 Compliance Order), *aff'd in part and remanded in part*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047 (2011).

⁹ See Opinion No. 480-A, 113 FERC ¶ 61,282 at P 54.

ETR-26 and ETR-28 as directed in Opinion No. 480) to calculate bandwidth payments and achieve rough equalization of production costs.¹⁰

7. Among other things, the bandwidth formula includes depreciation expenses in the calculation of actual production costs. Section 30.12 (Actual Production Cost) of Service Schedule MSS-3 sets forth the requirement for determining each Operating Company's production costs for bandwidth calculation purposes.¹¹ In particular, section 30.12 contains text relating to depreciation expense. The definitions of the production depreciation expense variables in the bandwidth formula require Entergy to use the depreciation expenses the Operating Companies record in Account 403 (Depreciation Expense) on the FERC Form 1, and to expressly reference depreciation rates approved by retail regulators, qualified by a reference to the Commission's jurisdiction.¹²

8. Through annual compliance filings, referred to as "bandwidth proceedings," Entergy submits to the Commission its proposed calculation of the bandwidth payments and receipts under the Service Schedule MSS-3 bandwidth formula using data reported in each Operating Company's FERC Form 1.¹³ For the past five

¹⁰ November Compliance Order, 117 FERC ¶ 61,203. Exhibit Nos. ETR-26 and ETR-28 are Exhibit Nos. ENT-1 and ENT-2 respectively in this proceeding.

¹¹ Service Schedule MSS-3, section 30.12.

¹² For example, variable DEXN is defined as "Depreciation and Amortization Expense associated with the plant investment in [production plant in service, excluding nuclear plant] 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." *Id.* For the text of all definitions, *see* System Agreement, section 30.12.

¹³ An annual bandwidth formula calculation includes several steps. First, using cost data from the previous calendar year, each Operating Company's total production costs are calculated. Next, Entergy determines what each Operating Company's production costs would have been in that year had they been equal to the Company's allocated share of total system production costs. Then, an assessment is made as to whether any Operating Company's production costs deviate by more than 11 percent above or below its allocated share of total system production costs (the bandwidth). If any Operating Company's production costs fall outside the bandwidth, payments and receipts are made among the Operating Companies such that no Operating Company's production costs are more than 11 percent above or below its allocated share of the total system production costs.

years, Entergy has submitted annual bandwidth filings in accordance with Service Schedule MSS-3 of the System Agreement.¹⁴ In each of these proceedings, the Commission accepted the rates for filing, suspended them for nominal periods, and established hearing and settlement judge procedures.

9. On July 7, 2008, in response to a section 206 complaint filed by the Louisiana Commission alleging, among other things, that certain cost inputs in the first bandwidth implementation filing were unreasonable, including nuclear depreciation, the Commission dismissed the complaint in relevant part and stated that such issues should be litigated in the ongoing bandwidth implementation proceeding.¹⁵

10. On July 14, 2009, the Commission denied the Arkansas Public Service Commission's (Arkansas Commission) request under FPA section 206 to modify the definitions of the depreciation variables in the bandwidth formula.¹⁶ The Arkansas Commission sought removal of the "unless" clauses referencing Commission jurisdiction for determining depreciation rates in the depreciation variables. The Arkansas Commission argued that this modification would remove language that would provide the Commission with authority to determine depreciation and decommissioning expenses for inclusion in the bandwidth formula that differ from the depreciation rates approved by retail regulators. In its order on the complaint, the Commission stated that the Commission had acted in Opinion Nos. 480 and 480-A pursuant to its authority under the FPA to regulate wholesale transactions of electricity in interstate commerce. It explained that, in Opinion Nos. 480 and 480-A, the Commission determined that the allocation of production costs among Operating Companies was no longer just and reasonable, and established the rough production cost equalization bandwidth as a remedy. It further explained that in order for the bandwidth calculation to provide a just and reasonable result under the FPA, the Commission must ensure that the inputs used to calculate the bandwidth are also just and reasonable. The Commission concluded that the authority to determine the payments under the bandwidth necessarily must include

¹⁴ See Docket Nos. ER07-956, ER08-1056, ER09-1224, ER10-1350, and ER11-3658.

¹⁵ *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010, at P 27 (2008).

¹⁶ *Arkansas Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 (2009) (Arkansas Complaint Order), *order on reh'g*, 137 FERC ¶ 61,030, at P 2 (2011) (Arkansas Complaint Rehearing Order).

the ability to examine the inputs used to calculate the bandwidth, including depreciation and decommissioning expenses, and accumulated provision for depreciation and amortization. The Commission found that the language at issue was appropriate and consistent with the Commission's authority under the FPA. The Arkansas Complaint Order concluded that the Arkansas Commission had provided no justification that would warrant removing the language.

11. On January 11, 2010, the Commission issued an order addressing the first annual bandwidth filing.¹⁷ In Opinion No. 505, the Commission held that, under the provisions of the bandwidth formula it had accepted as just and reasonable, Entergy is required to use the data that exists on the Operating Companies' books and is included on the FERC Form 1 for each Operating Company.¹⁸ Additionally, the Commission held that, while it has authority to change the depreciation expenses included in the bandwidth formula, it would not do so in an annual bandwidth implementation proceeding, i.e., a proceeding established to determine the production costs of the Operating Companies.¹⁹ Rather, any changes to the bandwidth formula would require a future FPA section 205 or 206 filing.²⁰ The Commission further noted its policy for changing depreciation rates used in formula rates, stating that if Entergy desires to change the depreciation rates reflected on its books and to include such depreciation rate changes in its bandwidth calculation, it must make a section 205 filing.²¹

¹⁷ *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010) (Opinion No. 505).

¹⁸ *Id.* PP 171-172.

¹⁹ *Id.* PP 172-173. The Commission stated that the annual bandwidth filing is "not about what production costs would have been if different depreciation rates had been in effect in 2006, but simply about applying the formula using actual 2006 data." *Id.* P 173.

²⁰ *Id.* PP 172-173. The Commission stated that this requirement to use the FPA section 205 or 206 process "includes amendments to correct any errors that may be discovered in the underlying methodology of Exhibits ETR-26 and ETR-28." *Id.* P 170.

²¹ *Id.* n.205; *see also Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104, at n.25 (2000) (Order No. 618). In Order No. 618, the Commission established general rules for depreciation accounting and determined that utilities no longer needed to seek Commission approval for changes in depreciation rates for accounting purposes. Instead, changes in depreciation rates would be reviewed in section 205/206 proceedings involving proposals to change

(continued...)

12. Shortly before the complaint was filed in this proceeding, the Commission addressed the depreciation issue again on March 10, 2010, in an order denying interlocutory appeal in the third bandwidth proceeding.²² In that order, the Commission noted that the annual bandwidth proceeding's purpose is to assess whether Entergy properly implemented the bandwidth formula, not whether the formula itself is just and reasonable.²³ The Commission reiterated that any modifications to the currently-effective Service Schedule MSS-3 bandwidth formula must be made via a separate filing under section 205 or section 206 of the FPA.²⁴ Citing Order No. 618, the Commission again stated that depreciation rates included in a formula rate do not adjust automatically just because the depreciation rates underlying the FERC Form 1 numbers change; rather, a separate section 205 filing is required to change such rates.²⁵

13. On October 7, 2011, subsequent to the issuance of the Initial Decision in this proceeding, the Commission issued Opinion No. 514, which addressed the second bandwidth filing. There, the Commission rejected requests to examine the justness

prices for jurisdictional service to reflect changes in depreciation rates. However, where a utility has a formula rate that references the FERC depreciation accounts as inputs, it must file under section 205 when it changes its depreciation rates for accounting purposes in order to receive approval to reflect the change in depreciation rates in the prices it charges pursuant to the formula rate. Therefore, the Commission generally requires that changes in depreciation accounting must be reviewed and approved under sections 205 before a utility can reflect such changes in rates.

²² *Entergy Servs., Inc.*, 130 FERC ¶ 61,170 (2010) (Order Denying Interlocutory Appeal).

²³ *Id.* P 20.

²⁴ Notably, the Commission acknowledged that statements in prior orders could be interpreted as suggesting that “parties had the opportunity in Entergy’s annual bandwidth filings to challenge the reasonableness of any cost inputs in the Service Schedule MSS-3 bandwidth formula, including the depreciation rates effective for Entergy’s annual bandwidth filings, but that was prior to the Commission’s experience with the first annual filing, and may have been ‘unintentionally misleading.’” *Id.*; see also Arkansas Complaint Rehearing Order, 137 FERC ¶ 61,030 at P 21.

²⁵ *Entergy Servs., Inc.*, 130 FERC ¶ 61,170 at n.32 (2010).

and reasonableness of depreciation inputs within the bandwidth proceedings themselves. The Commission addressed arguments on whether the definitions of the depreciation variables, including the “DEXN” variable,²⁶ allowed the Commission to substitute its own depreciation expenses for those approved by retail regulators. The Commission found that the references to Commission jurisdiction in these definitions refer to depreciation expenses charged to traditional wholesale customers that were approved by the Commission, rather than being a reference to the Commission substituting its own depreciation expenses in the bandwidth proceedings for those otherwise determined by retail regulators that have been adopted for use in the bandwidth formula in Service Schedule MSS-3.²⁷ Thus, the variables were interpreted so that, for purposes of the bandwidth formula, depreciation rates approved by retail regulators are required to be reflected in calculations implementing the bandwidth formula. In light of this interpretation of the depreciation variables in Opinion No. 514, it is unnecessary for Entergy to make a section 205 filing in order to seek approval to include revised depreciation rates adopted by any of its retail regulators in the bandwidth formula in Service Schedule MSS-3. The Commission’s policy on changes in depreciation in formula rates established in Order No. 618 does not apply to the bandwidth formula, despite statements to the contrary in Opinion No. 505 and the Order Denying Interlocutory Appeal.

14. Separately, on October 7, 2011, the Commission denied rehearing of the Arkansas Complaint Order. The Commission noted its finding in Opinion No. 514 that the references to Commission jurisdiction in the definitions of the depreciation variables refer to depreciation expenses charged to traditional wholesale customers that were approved by the Commission, rather than being a reference to the Commission substituting its own depreciation expenses in the bandwidth formula for those otherwise determined by retail regulators that have been adopted for use in the bandwidth formula. Given this clarification of the definitions of the depreciation variables, the Commission found that it was unnecessary to revise the language of section 30.12 of Service Schedule MSS-3 as requested in the Arkansas Commission’s complaint. In addition, the Commission clarified that in bandwidth proceedings, each input in the bandwidth formula should be examined to make sure that the correct data was used in determining the bandwidth payments.²⁸ Thus, if

²⁶ For the definition of DEXN, *see supra* n.12.

²⁷ *Entergy Services, Inc.*, 137 FERC ¶ 61,029 at PP 48-49 (2011) (Opinion No. 514).

²⁸ Arkansas Complaint Rehearing Order, 137 FERC ¶ 61,030 at PP 19, 22-23.

parties believe that Entergy has inputted data from the wrong parts of FERC Form 1 in its bandwidth formula, or that the data used was incorrectly calculated, these objections are properly raised in the bandwidth proceeding. Conversely, if parties believe that the methodology in Service Schedule MSS-3 with respect to depreciation expenses should be changed, they should file a separate section 206 complaint (or, in the case of Entergy, make a section 205 filing).²⁹

B. Louisiana Commission's Complaint

15. On March 31, 2010 (in between the issuance of the orders described above), the Louisiana Commission filed a complaint against Entergy Corporation and its subsidiaries pursuant to sections 206 and 306 of the FPA.³⁰ The complaint sought to change the depreciation and decommissioning data and rates included in the bandwidth formula in section 30.12 of Service Schedule MSS-3. In particular, the Louisiana Commission aimed to revise the language in the bandwidth formula that provides for the use of depreciation expense reported in FERC Form 1, as derived from depreciation rates “approved by Retail Regulators, unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the FERC under otherwise applicable law.”³¹ The Louisiana Commission asked the Commission to require calculation of the bandwidth formula inputs in accordance with Commission policy, the FPA, the Commission’s Uniform System of Accounts (USofA) and Generally Accepted Accounting Principles (GAAP), regardless of the amounts approved by retail regulators.³² The Louisiana Commission also asked the Commission to direct Entergy to rerun the bandwidth formula depreciation calculations for filing years 2007, 2008, 2009, and 2010, and to require Entergy to use the Louisiana Commission’s recommended depreciation rates for future annual bandwidth filings.³³ The Louisiana Commission added that, if the Commission finds it necessary to amend section 30.12 of Service Schedule MSS-3 (the bandwidth formula) “to prevent the use of outdated and unreasonably discriminatory depreciation and decommissioning rates,” then the Commission should do so by modifying the definitions related to depreciation expenses, nuclear

²⁹ *Id.*

³⁰ Louisiana Commission March 31, 2010 Complaint, Docket No. EL10-55-000, at 1 (citing 16 U.S.C. §§ 824e, 825e (2006)) (Complaint).

³¹ *Id.* at 16.

³² *Id.* at 19-20.

³³ *Id.* at 5 and 20.

decommissioning expenses and the accumulated provision for depreciation and amortization.³⁴

C. Order Setting Case for Hearing

16. On July 1, 2010, the Commission issued an Order on Complaint establishing hearing and settlement judge procedures.³⁵ The Commission concluded that “[b]ased on our review of the pleadings, we find that the depreciation and decommissioning expenses included in Service Schedule MSS-3 may be unjust, unreasonable, or unduly discriminatory or preferential.”³⁶ Finding that the Louisiana Commission had raised issues of material fact that could not be resolved on the basis of the written record in the proceeding, the Commission denied the Louisiana Commission’s request for summary disposition and established a trial-type evidentiary hearing to address these factual issues.³⁷

17. After settlement efforts reached an impasse, a hearing was held from November 30, 2010 to December 7, 2010. The participants filed initial briefs on December 20, 2010 and reply briefs on January 10, 2011.

D. Hearing

18. At hearing, the Louisiana Commission focused mainly on the inputs or source of inputs to the bandwidth formula.³⁸ The Louisiana Commission’s primary position was that the current tariff language not only allows but requires the

³⁴ *Id.* at 19-20. The Louisiana Commission proposed changes to the following definitions: Nuclear Accumulated Provision for Depreciation and Amortization (NAD); Nuclear Depreciation and Amortization Expense (NDE); Accumulated Provision for Depreciation and Amortization associated with production plant in service, excluding nuclear plant (ADXN); DEXN; General Plant Accumulated Provision for Depreciation (GAD); and General Plant Depreciation Expense (GDX). *Id.* at 3-4 and 20.

³⁵ *Louisiana Pub. Serv. Comm’n v. Entergy Corp.*, 132 FERC ¶ 61,003 (2010) (Hearing Order).

³⁶ *Id.* P 28.

³⁷ *Id.* (citing *Cajun Elec. Power Corp. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1995)).

³⁸ Louisiana Commission Post-Hearing Brief at 6-10; Louisiana Commission Post-Hearing Reply Brief at 4, 7-8, 9-12.

Commission to set just, reasonable and non-discriminatory depreciation and decommissioning rates that do not violate the FPA, FERC policy, or USofA and GAAP rules. Contending that the depreciation expenses reported in the FERC Form 1 are “erroneous” or “incorrect” because the depreciation rates set by retail regulators conflict with Commission standards, and have conflicted with Commission standards since the effective date of the bandwidth formula, June 9, 2006, the Louisiana Commission insisted that these rates must be changed retroactive to 2006, and reflected in a rerun of the annual bandwidth filings back to 2007. However, if the Commission were to find it necessary to amend the tariff “to prevent the use of outdated and unreasonably discriminatory depreciation and decommissioning rates,” then the Louisiana Commission sought to modify the provisions of section 30.12 of Service Schedule MSS-3 related to the calculation of depreciation expenses, nuclear decommissioning expenses and the accumulated provision for depreciation and amortization.³⁹

19. Staff supported the Louisiana Commission’s position that the depreciation-related provisions in section 30.12 of Service Schedule MSS-3 (the existing bandwidth formula rate) are unjust and unreasonable “because they specify that depreciation rates approved by retail regulators (as reported on FERC Form 1s for each of the Operating Companies) should be used to develop the depreciation-related inputs in the bandwidth formula.”⁴⁰ Staff argued that such inputs are often based on contrary ratemaking principles and differ from the depreciation rate determination precedents of the Commission. In addition, Staff and the Louisiana Commission argued that these provisions provide an incentive for an Operating Company and its retail regulator to manipulate depreciation rates.⁴¹ Staff asserted that the bandwidth formula should be amended prospectively from the March 31, 2010 refund effective date in this proceeding, and proposed requiring Entergy to base all depreciation inputs on depreciation rates that are consistent with Commission policy and approved by the Commission.⁴² Entergy, the Arkansas

³⁹ Louisiana Commission Post-Hearing Brief at 5-6.

⁴⁰ Staff Initial Brief at 2.

⁴¹ *See id.* at 3. *See also id.* at 5-10; Louisiana Commission Brief on Exceptions at 66-68.

⁴² Staff Post-Hearing Brief at 3, 6. *See also* Staff Initial Brief at 3 (“Staff proposed that Section 30.12 be amended to require that all depreciation-related inputs be based on depreciation rates approved by the Commission and that the relevant production-related depreciation rates be specified in Section 30.12.”).

Commission and the New Orleans Council argued that the Louisiana Commission and Staff did not meet their burden of demonstrating that the bandwidth formula's depreciation-related provisions are unjust and unreasonable.

E. Initial Decision

20. The Presiding Judge issued her Initial Decision on February 18, 2011.⁴³ Emphasizing that “[a]n understanding of the origin and purpose of the bandwidth formula is critical to resolution”⁴⁴ of the dispute, the Presiding Judge began her analysis by tracing the history of the bandwidth formula. Next, placing the dispute in context, she specified the issue set for hearing as “whether, in the unique circumstances of the [b]andwidth [f]ormula calculation, the Commission can continue its established practice of using retail regulator-determined depreciation rates in the [b]andwidth [f]ormula calculation.”⁴⁵ The Presiding Judge heard arguments and took evidence on a number of issues, including: the use of state-determined depreciation rates in the bandwidth formula; the age of the studies underlying the depreciation inputs; the service life assumptions in the depreciation studies; the different depreciation methods used by the Operating Companies; the potential for manipulating the bandwidth formula; and the permissibility of changing depreciation rates used in bandwidth calculations without first making a filing under FPA section 205.⁴⁶ After considering the record evidence and pertinent Commission precedent,⁴⁷ the Presiding Judge found that the Louisiana Commission and Staff had not shown that the current bandwidth formula depreciation expenses, related depreciation inputs, and/or depreciation provisions are unjust, unreasonable, unduly discriminatory, or preferential.⁴⁸ She dismissed the Louisiana Commission's

⁴³ Initial Decision, 134 FERC ¶ 63,016.

⁴⁴ *Id.* P 21.

⁴⁵ *Id.* P 23.

⁴⁶ *Id.* P 33.

⁴⁷ In addition to Opinion Nos. 480 and 480-A, and the order accepting the compliance filing that included the bandwidth formula in Service Schedule MSS-3, November Compliance Order, 117 FERC ¶ 61,203, the Presiding Judge relied on Opinion No. 505, 130 FERC ¶ 61,023, the Order Denying Interlocutory Appeal, 130 FERC ¶ 61,170, and *Entergy Servs. Inc.*, Opinion No. 509, 132 FERC ¶ 61,253 (2010) (Opinion No. 509). *See* Initial Decision, 134 FERC ¶ 63,016 at PP 28-33.

⁴⁸ Initial Decision, 134 FERC ¶ 63,016 at PP 1, 33.

complaint for failure to meet the burden of proof under FPA section 206 to show the existing bandwidth formula remedy is unjust, unreasonable or unduly discriminatory.⁴⁹ As challengers had failed to show the existing rate is unjust and unreasonable, the Presiding Judge concluded that it was unnecessary to reach any substantive determination on the justness and reasonableness of the Louisiana Commission's or Staff's alternative proposal.⁵⁰ She also dismissed Staff's companion claim, to the extent it supported the complaint.⁵¹

F. Exceptions

21. In its Brief on Exceptions, the Louisiana Commission argues that the Initial Decision errs by: (1) redefining the issue set for hearing in a manner that enables the Presiding Judge to avoid undisputed evidence that Entergy's depreciation inputs conflict with the Commission's ratemaking and accounting standards; (2) declaring Entergy's reported depreciation inputs to be "*per se* just and reasonable" and not correctable, even if they conflict with Commission ratemaking and accounting standards, in a manner that blocks any remedy for unjust and unreasonable rates in a formula tariff; (3) holding that the Commission can delegate authority to retail regulators to set the depreciation expenses for the bandwidth, regardless of whether these inputs are just and reasonable under Commission ratemaking standards or conflict with Commission accounting procedures; (4) finding that the Commission defers to retail regulators' depreciation and accounting decisions and has approved the "blended" wholesale-retail depreciation inputs reported in the Operating Company FERC Form 1 reports; (5) relying on Opinion No. 505 as support for not applying in the bandwidth context the Commission's *Boston Edison*⁵² policy of using the length of the license life granted by the Nuclear Regulatory Commission (NRC) as the estimated service life of a nuclear facility for depreciation purposes; (6) holding that it is irrelevant that changed circumstances render depreciation expenses unjust and unreasonable as long as such depreciation expenses were just and reasonable when originally adopted and finding that the Commission intended to permit the use of inconsistent and discriminatory depreciation methodologies when it adopted

⁴⁹ *Id.* P 1.

⁵⁰ *Id.* PP 41, 43.

⁵¹ *Id.*

⁵² *Boston Edison Co.*, 59 FERC ¶ 63,028, at 65,238 (1992) ("The Commission consistently bases depreciation costs on the [NRC] license life of a nuclear plant.") (*Boston Edison*).

Entergy's bandwidth formula; (7) failing to acknowledge substantial evidence that Entergy and Entergy Arkansas chose to "sit on" incorrect depreciation rates based on outdated NRC license lives rather than change Entergy Arkansas' accounting, in order to manipulate the bandwidth calculation and minimize Entergy Arkansas' bandwidth payments; and (8) not requiring Entergy to make a section 205 filing when it changed depreciation rates in the bandwidth formula from those reflected in Exhibit Nos. ETR-26 and ETR-28 in Docket No. EL01-88.⁵³

22. Staff filed ten exceptions to the Initial Decision, arguing the Presiding Judge made the following errors: (1) finding that the Louisiana Commission and Staff failed to demonstrate that the current bandwidth formula depreciation expenses, related depreciation inputs, and/or depreciation provisions are unjust and unreasonable; (2) finding that the use of inconsistent methodologies among the various Operating Companies does not demonstrate that the current bandwidth formula depreciation expenses, related depreciation inputs, and/or depreciation provisions are unjust and unreasonable; (3) finding that the Commission's *Boston Edison* policy does not control the depreciation expense and related input calculations in the bandwidth formula; (4) finding that the use of inconsistent methodologies does not demonstrate that the current depreciation-related provisions are not just and reasonable because the Commission previously accepted the bandwidth formula and its depreciation method; (5) relying on Opinion No. 505 to find that Entergy correctly accounted for 2006 nuclear depreciation and decommissioning expense data for the nuclear units owned by the Operating Companies by using the actual data that exists on the Operating Companies' books; (6) relying on the Commission's practice to not impose a uniformity requirement for depreciation rate methodologies among jurisdictional public utilities; (7) not taking into account other aspects of the bandwidth formula that follow Commission regulatory practices and procedures; (8) finding that the current bandwidth formula depreciation expenses, related depreciation inputs and depreciation provisions are just and reasonable and not unduly discriminatory; (9) finding that the Commission's continuation of the blended depreciation method in the bandwidth formula is just and reasonable and not unduly discriminatory; and (10) finding that the current depreciation expenses, related inputs and provisions are *per se* just and reasonable and that no record evidence demonstrates that the current depreciations expenses, related inputs and provisions are unjust and unreasonable.⁵⁴

⁵³ Louisiana Commission Brief on Exceptions at 9-10.

⁵⁴ Staff Brief on Exceptions at 4-5.

23. On April 11, 2011, Entergy, the Arkansas Commission and the New Orleans Council filed Briefs Opposing Exceptions. These parties take issue with each of the exceptions filed by the Louisiana Commission and Staff and request that the Commission affirm the Initial Decision.

II. Discussion

24. The Louisiana Commission challenges the justness and reasonableness of the depreciation expenses, related depreciation inputs, and/or depreciation provisions of the bandwidth formula rate under FPA sections 206 and 306.⁵⁵ Specifically, the Louisiana Commission argues that the particular retail depreciation data Entergy inputted into the bandwidth formula calculation from 2007 to 2010⁵⁶ and the inclusion of retail depreciation data in the bandwidth formula generally are unjust and unreasonable. To prevail in a complaint under section 206 of the FPA, the complainant bears the burden of proof to establish that the existing rate is unjust and unreasonable or unduly discriminatory or preferential.⁵⁷ As discussed below, neither the Louisiana Commission nor Staff, which advocate changing the existing bandwidth formula (together, challengers), have shown that the depreciation expenses, related depreciation inputs and/or depreciation provisions of the existing bandwidth formula are unjust and unreasonable or unduly discriminatory or preferential. Therefore, as explained below, we affirm the Presiding Judge's

⁵⁵ The Louisiana Commission challenges both the bandwidth formula rate and the inputs to the bandwidth formula. Where formula rates are concerned, the formula itself is the rate. The formula includes cost variables, or categories of costs, and the inputs are the numbers that are "inputted" into the variable or cost component of the rate. In approving a formula rate, FERC approves the formula, not the inputs or the charges that result from the rate. *See generally* JAMES H. MCGREW, FERC: FEDERAL ENERGY REGULATORY COMMISSION 16.2 at 186-87 (2d. ed. 2009).

⁵⁶ The Louisiana Commission asserts that Entergy's accounting violated the Commission's requirements in 2006-09, allowing unjust and unreasonable inputs to enter the bandwidth formula calculation since 2007. The Louisiana Commission argues that the accounts should therefore be corrected and the bandwidth formula calculations revised accordingly for years 2007-2010. Louisiana Commission Brief on Exceptions at 83.

⁵⁷ *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1570 (1993) (citing *Seminole Elec. Coop., Inc.*, 32 FERC ¶ 63,087 (1985); *see also Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986).

determination that challengers have not demonstrated that the depreciation expenses, related depreciation inputs and/or depreciation provisions of the existing bandwidth formula, section 30.12 of Service Schedule MSS-3 to the System Agreement, are unjust and unreasonable or unduly discriminatory.⁵⁸ Because challengers have not met their burden of proof, we affirm the Presiding Judge's conclusion that it is not necessary to address proposed alternatives to the existing bandwidth formula rate.⁵⁹

25. At the outset of this Opinion, we will address the Louisiana Commission's challenges to the retail depreciation data Entergy inputted into the bandwidth formula from 2007 until the filing of its complaint on March 31, 2010. The Louisiana Commission argues that such retail depreciation rates data is unjust and unreasonable because updated depreciation studies show that the Operating Companies' production depreciation rates were inaccurate in substantial amounts annually.⁶⁰ The Louisiana Commission adds that pursuant to Order No. 618, Entergy was required to make FPA section 205 filings when it changed the depreciation rates for two nuclear facilities (River Bend in 2003 and Waterford in 2005), but failed to do so.⁶¹ We deny this request for retroactive relief.

26. First, as explained above, since the issuance of the Initial Decision, the Commission has clarified its interpretation of the bandwidth formula depreciation

⁵⁸ We note that the Commission's Opinion in this proceeding relies on decisions that issued after the filing of the complaint and issuance of the Initial Decision, and therefore were not available to the Presiding Judge when she rendered her decision.

⁵⁹ See Initial Decision, 134 FERC ¶ 63,016 at PP 1, 33, 41. The Louisiana Commission and Staff each propose alternatives to the existing bandwidth formula rate. See Louisiana Commission Brief on Exceptions at 68-77; 86-89; Exh. No. S-1 at 21:27-30; Staff Brief on Exceptions at 11, 21-24, 30. The Arkansas Commission, the New Orleans Council and Entergy oppose these alternative rate proposals. Arkansas Commission Brief Opposing Exceptions at 29-31; New Orleans Council Brief Opposing Exceptions at 13-16; Entergy Brief Opposing Exceptions at 66-72. See also Staff Brief Opposing Exceptions at 6 (arguing that the Commission should first remand proposed alternatives to the Presiding Judge for her determination before the Commission rules on proposed alternatives).

⁶⁰ Louisiana Commission Brief on Exceptions at 11.

⁶¹ Entergy Brief on Exceptions at 9-10; see also Staff Brief Opposing Exceptions at 9-11; Entergy Brief Opposing Exceptions at 50-52.

variables in Opinion No. 514. Specifically, the definitions of those depreciation variables require depreciation rates approved by retail regulators to be reflected in calculations implementing the bandwidth formula. In light of this interpretation of the depreciation variables in Opinion No. 514, it is unnecessary for Entergy to make a section 205 filing in order to seek approval to include revised depreciation rates adopted by any of its retail regulators in the bandwidth formula (i.e., the Commission's policy on changes in depreciation in formula rates established in Order No. 618 does not apply to the bandwidth formula) and the Commission reverses statements to the contrary in Opinion No. 505 and the Order Denying Interlocutory Appeal. To the extent that the Louisiana Commission seeks retroactive relief for Entergy's failure to file under section 205 for Commission approval changes in depreciation rates approved by retail regulators in the bandwidth formula, such relief is denied. Second, even if the Louisiana Commission had shown the existing formula to be unjust and unreasonable, we would deny the request for retroactive relief. The refund effective date in this proceeding is March 31, 2010. Retroactive relief, i.e., relief prior to the refund effective date, is only available under certain limited circumstances, such as when there has been a tariff violation, which is not alleged here. The Louisiana Commission has not provided a basis for retroactive relief.

A. Scope of the Hearing

1. Initial Decision

27. The Presiding Judge's analysis begins with the statement that "an understanding of the origin and purpose of the bandwidth formula is critical to resolution of the Complaint."⁶² She then recounts the critical backdrop to this proceeding, culminating with Opinion No. 505, in which, as she points out, "the Commission refused to change Entergy's depreciation expenses regardless of challenges to the use of retail depreciation rates in the [b]andwidth [f]ormula."⁶³ Next, the Presiding Judge describes the dispositive issue set for hearing. Noting that the Hearing Order defined "the general issue as whether the depreciation provisions and related inputs in the [b]andwidth [f]ormula are unjust, unreasonable, unduly discriminatory, or preferential,"⁶⁴ the Presiding Judge refines the issue, in light of the formula's history. The Presiding Judge states that the specific issue to be

⁶² Initial Decision, 134 FERC ¶ 63,016 at P 21.

⁶³ *Id.* P 22 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 172).

⁶⁴ *Id.* P 23 and n.101 (citing Hearing Order, 132 FERC ¶ 61,003 at P 28).

decided in this case is “whether, in the unique circumstances of the [b]andwidth [f]ormula calculation, the Commission can continue its established practice of using retail regulator-determined depreciation rates in the [b]andwidth [f]ormula calculation.”⁶⁵ She concludes that the “Commission’s continuation of the blended method in the unique circumstance of the bandwidth formula calculation is just and reasonable and not unduly discriminatory or preferential.”⁶⁶

2. Briefs on Exceptions

28. The Louisiana Commission and Staff complain that rather than deciding the issue set for hearing, the Presiding Judge redefined the issue based on an Arkansas Commission brief.⁶⁷ Staff asserts that, based on her incorrect redefinition of the depreciation issue, the Presiding Judge finds the Commission’s continuation of the blended depreciation method “in the unique circumstances of the [b]andwidth [f]ormula just and reasonable and not unduly discriminatory or preferential.”⁶⁸ The Louisiana Commission contends that the Presiding Judge has no authority to redefine the issue and thus avoid deciding the issue set for hearing. According to the Louisiana Commission, by reframing the issue, the Presiding Judge: (1) avoids confronting the undisputed evidence that Entergy’s depreciation inputs conflict with Commission ratemaking and accounting standards; (2) never rules on the issue set for hearing, i.e., whether the depreciation rates in the bandwidth formula, based on FERC Form 1 reports, are unjust, unreasonable or unduly discriminatory; and (3) determines that the Commission has delegated to state regulators authority over the depreciation rates reported on Entergy’s books and in its Commission tariffs,

⁶⁵ *Id.* (citing Arkansas Commission Reply Brief at 19). The Arkansas Commission characterized the issue as follows: “The real question is whether the Commission should continue the practice of accepting depreciation rates, for accounting and FERC Form 1 reporting, that are the product of the blended rates representing a proportionate average of (i) the depreciation rates set by the Commission for *bona fide* wholesale sales of power (which, as a cost allocation device, the bandwidth remedy is not), and (ii) the depreciation rates last set by the state regulators of the Operating Companies for retail service.” *Id.*

⁶⁶ *Id.* P 23.

⁶⁷ Louisiana Commission Brief on Exceptions at 19; Staff Brief on Exceptions at 22.

⁶⁸ Staff Brief on Exceptions at 23 (citing Initial Decision, 134 FERC ¶ 63,016 at P 23).

regardless of conflicts with Commission depreciation standards and policies.⁶⁹ The Louisiana Commission insists that reframing the issue enabled the Presiding Judge to conclude, erroneously, that it “*does not matter*, for accounting under the USofA and FERC ratemaking that Entergy records depreciation expenses that conflict with FERC requirements.”⁷⁰

29. Staff argues that the Presiding Judge’s redefinition of the issue “is more than a semantic difference”⁷¹ and that it had important consequences for the outcome of this proceeding. First, Staff contends that the Presiding Judge’s reformulation led her to evaluate incorrectly whether Staff had met its burden of proof. Staff complains that it had structured and presented its case based on the Commission’s characterization of the depreciation issue in the Hearing Order and the parties’ Joint Statement of Issues. This did not include the Presiding Judge’s emphasis on the “unique circumstances of the [b]andwidth formula calculation” or her assessment of “an established practice of using retail regulator-determined” depreciation rates.⁷² Staff argues that by “unduly emphasizing” the “unique” nature of the bandwidth formula and labeling Entergy’s previous use of retail regulator-approved depreciation rates as “established practice,” the Presiding Judge’s definition of the issue “resulted in a subtle but very real heightening of Staff’s and the [Louisiana Commission’s] burden of proof.”⁷³

30. Staff further argues that the redefinition of issues assumes an “established practice” that, based on the protracted, confusing procedural history of the bandwidth formula, does not exist. Staff notes this depreciation issue has been contested since the first annual bandwidth formula implementation filing. Staff points out that in Opinion No. 505, regarding the first annual bandwidth filing, the Commission did not decide and left for a future FPA section 205 or 206 proceeding the issue of whether it would be more equitable to ratepayers to adjust the depreciation of the Arkansas nuclear units, ANO 1 and ANO 2.⁷⁴ Quoting

⁶⁹ Louisiana Commission Brief on Exceptions at 7, 19-27.

⁷⁰ *Id.* at 20 (emphasis in original).

⁷¹ Staff Brief on Exceptions at 23.

⁷² *Id.*

⁷³ *Id.* at 24.

⁷⁴ Staff Brief on Exceptions at 24-25 & n.51 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 173).

Ohio Edison Co.,⁷⁵ Staff argues that the Commission “is not bound to follow a state commission’s considered judgment with respect to either accounting or ratemaking.”⁷⁶ Staff states that Entergy’s current application of the depreciation-related provisions of section 30.12 to use only the actual data recorded on the Operating Companies’ FERC Form 1s, as approved by the state retail regulators, precludes the Commission from adhering to its precedents or evaluating the reasonableness of all the underlying depreciation expense cost inputs in the bandwidth formula without a separate section 206 proceeding. Staff insists that neither the Presiding Judge nor the Commission have provided a reasoned explanation why the Commission should not follow its own policies, practices and precedents. Accordingly, Staff argues that the Presiding Judge decided the wrong issue by refusing to “take a step back” in this FPA section 206 proceeding and examine afresh whether or not the existing depreciation-related provisions of section 30.12 of Service Schedule MSS-3 are unjust and unreasonable.⁷⁷

3. Briefs Opposing Exceptions

31. Entergy argues that the Commission cannot ignore the purpose of the bandwidth formula in evaluating the complaint. Entergy emphasizes that this proceeding is not a non-specific investigation of the depreciation rates the Operating Companies use in reporting depreciation on their FERC Form 1s. Rather, this case involves the depreciation rates used in the bandwidth formula to attain rough production cost equalization. Therefore, Entergy insists, the Commission must assess whether the Louisiana Commission met its burden to show that use of the existing depreciation rates does not result in rough production cost equalization.

32. Entergy argues that the Louisiana Commission bases its argument on an incorrect reading of the Hearing Order. Entergy states that the Louisiana Commission incorrectly asserts that the issue set for hearing is whether “. . . the depreciation expenses included in Service Schedule MSS-3 may be unjust, unreasonable, or unduly discriminatory.”⁷⁸ In support of its position, Entergy points out that after the language quoted above, the text of the Hearing Order states that

⁷⁵ 84 FERC ¶ 61,157 (1998).

⁷⁶ Staff Brief on Exceptions at 25.

⁷⁷ *Id.* at 13.

⁷⁸ Entergy Brief Opposing Exceptions at 18-19 (citing Louisiana Commission Brief at 19 (quoting Hearing Order, 132 FERC ¶ 61,003 at P 28)).

“[w]e further find that the Louisiana Commission *has raised issues of material fact* that cannot be resolved on the basis of the record in this proceeding. For this reason, we will . . . establish a trial-type hearing before an Administrative Law Judge *to address these factual issues.*”⁷⁹ Entergy argues that this language shows that the Commission set for hearing the issues of material fact that the Louisiana Commission raised in its complaint, and not the abstract issue of the justness and reasonableness of the depreciation rates. To buttress this argument, Entergy points out that the Commission discussed at length in the Hearing Order the claims the Louisiana Commission raised, including the claim that “errors [in the depreciation rates] make the bandwidth payments unjust, unreasonable and unduly discriminatory, in violation of the FPA.”⁸⁰ Entergy argues that “[a]lthough stated somewhat differently, this is essentially the same issue defined by the Initial Decision – whether changes need to be made in the approach to calculating depreciation expense approved by the Commission in order to ensure that the [b]andwidth payments are just and reasonable.”⁸¹

33. The Arkansas Commission asserts that the Louisiana Commission’s and Staff’s claim that the Presiding Judge wrongly framed the penultimate question to be decided in this case is critical to their argument assailing the Initial Decision. The Arkansas Commission argues that the Presiding Judge did not err by defining the question to be resolved in this proceeding. Rather, she took the general directive in the Hearing Order, to establish a hearing and investigation to examine the justness and reasonableness of the depreciation expenses included in the bandwidth formula tariff, and placed it in the context of the Commission’s previous determinations in Opinion No. 505 and the Order Denying Interlocutory Appeal.⁸² The Arkansas Commission argues that the Presiding Judge brought needed focus to the specific question to be decided. The Arkansas Commission asserts that in order to press their case, Staff and the Louisiana Commission sidestep the Commission’s findings in Opinion No. 505 and the Order Denying Interlocutory Appeal regarding the bandwidth’s requirement to use the Operating Companies’ actual book-reported and FERC Form 1-reported depreciation rates and expenses.

⁷⁹ *Id.* (quoting Hearing Order, 132 FERC ¶ 61,003 at P 28) (emphasis added in Entergy’s Brief Opposing Exceptions).

⁸⁰ *Id.* at 19 (citing Hearing Order, 132 FERC ¶ 61,003 at P 28).

⁸¹ *Id.*

⁸² Arkansas Commission Brief Opposing Exceptions at 9-10.

34. The Arkansas Commission contends that Staff and the Louisiana Commission raise their argument in a vacuum, without regard to the particular circumstances and nature of the bandwidth formula and the practice that the Commission has accepted in the past with respect to the bandwidth formula. The Arkansas Commission emphasizes that the Presiding Judge correctly determined that the Commission made certain key findings and determinations in those orders: (1) the bandwidth formula became the controlling, lawful rate when the Commission accepted it on compliance; (2) the pivotal operative provision of Service Schedule MSS-3 section 30.12 of the bandwidth formula “mandates that [for annual bandwidth formula calculations] Entergy use *the actual data that exists on the Operating Companies’ books*” and such “actual data” is a blended rate of retail-approved and FERC-approved depreciation expenses, as reported on each Operating Company’s Form 1 of the previous calendar year;⁸³ (3) section 30.12 requires actual balances and expenses recorded in specified accounts by the Operating Companies in FERC Form 1; and (4) Opinion No. 505 held that Entergy properly used the blended depreciation expenses recorded on FERC Form 1 in its compliance filing and the Commission refused to change Entergy’s depreciation expenses regardless of challenges to the use of retail depreciation rates in the bandwidth formula.⁸⁴

35. The New Orleans Council argues that, although the Presiding Judge recognized that the primary issue in this proceeding is whether the blended depreciation rates reported in the Operating Companies’ FERC Form 1s were the appropriate input for the bandwidth formula, she did not neglect the Louisiana Commission’s other arguments why the depreciation rates used in the bandwidth calculation might be unjust and unreasonable.⁸⁵ The New Orleans Council argues that the Presiding Judge considered all the evidence and still concluded that the Louisiana Commission failed to demonstrate that the rates are unjust and unreasonable.⁸⁶

36. The New Orleans Council states that the Presiding Judge considered each of the four issues in the Statement of Issues, which the Louisiana Commission had

⁸³ *Id.* at 11 (emphasis in original).

⁸⁴ *Id.* at 11-12 (citations omitted).

⁸⁵ New Orleans Council Brief Opposing Exceptions at 16.

⁸⁶ *Id.* at 16-17.

approved. Further, the New Orleans Council asserts that the Presiding Judge squarely addressed the issue set for hearing in paragraph 33 of the Initial Decision.⁸⁷

4. Commission Determination

37. We conclude that the Presiding Judge appropriately defined the issue to be decided in this case by placing it in the factual context of the bandwidth formula. Her specification of the issue to be resolved through the hearing process is consistent with the Hearing Order's directives.

38. In orders establishing hearing procedures, the Commission provides the administrative law judge with sufficient flexibility to structure the hearing in a manner that will enable fair and efficient evaluation and resolution of the dispute.⁸⁸ In setting the Louisiana Commission's complaint for hearing, the Commission stated:

*[b]ased on our review of the pleadings, we find that the depreciation and decommissioning expenses included in Service Schedule MSS-3 may be unjust, unreasonable, unduly discriminatory or preferential. We further find that the Louisiana Commission has raised issues of material fact that cannot be resolved on the basis of the record in this proceeding. For this reason, we will deny the Louisiana Commission's motion for summary disposition and establish a trial-type hearing before an Administrative Law Judge to address these factual issues.*⁸⁹

⁸⁷ *Id.* at 17 (quoting Initial Decision, 134 FERC ¶ 63,016 at P 33).

⁸⁸ *Trans-Allegheny Interstate Line Co.*, 121 FERC ¶ 61,009, at 61,030 & n.13 (2007) ("When the Commission sets for hearing the justness and reasonableness of rates, it sets for hearing all issues – other than those summarily disposed of by the Commission or which the Commission has explicitly refused to set for hearing – that are relevant to assessment of justness and reasonableness.") (citing *Long Island Lighting Co.*, 83 FERC ¶ 61,076, at 61,378 (1998); *Cincinnati Gas & Electric Co.*, 59 FERC ¶ 61,072, at 61,291 (1992)). In *Cincinnati Gas & Electric Co.*, the Commission stated that when it sets for hearing the justness and reasonableness of a matter, the hearing may include all issues relevant to an assessment of the justness and reasonableness, and is not limited to issues explicitly identified, 59 FERC ¶ 61,072 at 61,291. See generally 18 C.F.R. § 384.504 (2011) (Duties and Powers of Presiding Officers).

⁸⁹ Hearing Order, 132 FERC ¶ 61,003 at P 28 (emphasis added).

39. The Louisiana Commission argues that this language directs the Presiding Judge to decide “whether the depreciation rates in the [b]andwidth [f]ormula, based on the Form 1 reports, are unjust and unreasonable or unduly discriminatory” without considering the context or purpose of the bandwidth formula.⁹⁰ We disagree with this contention. In the Hearing Order, the Commission also began its analysis with a recap of the history of the origin, purpose and implementation of the bandwidth formula remedy, to provide context for the complaint.⁹¹ Next, the Commission summarized its review of the disparate pleadings. This included the Arkansas Commission’s argument that “granting the relief requested in the Complaint would effectively nullify the fundamental purpose of the bandwidth remedy under Opinion Nos. 480 and 480-A, where the Commission required backward-looking use of actual amounts on the Operating Companies’ books for the previous year as reported on the FERC Form 1s,”⁹² as well as the reasons why parties requested a hearing.⁹³ Therefore, when the Commission expressly stated that it was setting this case for hearing, “based on its review of the pleadings,”⁹⁴ it meant based on all parties’ pleadings. Further, the Commission is only required to set for hearing issues of contested material fact that cannot be decided on the basis of the written record.⁹⁵ The Commission’s finding that “the Louisiana Commission has raised issues of material fact that cannot be resolved on the basis of the record,”

⁹⁰ Louisiana Commission Brief on Exceptions at 19.

⁹¹ Hearing Order, 132 FERC ¶ 61,003 at PP 4-5.

⁹² *Id.* P 20.

⁹³ *See id.* P 10 (Louisiana Commission states, alternatively “if a material dispute of fact is raised concerning the reasonableness of adjustments, the Commission should summarily approve the use of the new studies with the [Average Life Group] procedure for 2010 and *set the other issues for hearing*”), P 17 (Entergy states that “[t]o the extent that the Commission does not reject the Louisiana Commission’s complaint, it must establish a hearing to consider the issues it raises with regard to depreciation expense”).

⁹⁴ *Id.* P 28.

⁹⁵ *See, e.g., Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) (citing *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 369-70 (D.C. Cir. 2002); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1982)); *Cajun Elec. Power Coop. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1995) (citing *Vermont Dept. of Pub. Serv. v. FERC*, 817 F.2d 127, 140 (D.C. Cir. 1987)).

includes the Louisiana Commission's contention that errors in the depreciation component of the bandwidth formula make the "bandwidth payments unjust, unreasonable and unduly discriminatory, in violation of the FPA,"⁹⁶ as well as the opposing positions of Entergy and the Arkansas Commission, which seek to justify the depreciation rates based on the origins and purpose of the bandwidth remedy.⁹⁷

40. Furthermore, to evaluate the Louisiana Commission's complaint properly, it is essential to consider the function of the bandwidth formula. As the Presiding Judge explains, the bandwidth formula remedy is designed to ensure that the Operating Companies maintain rough production cost equalization.⁹⁸ Considering the depreciation rates that the Operating Companies use in the bandwidth formula, without considering how those depreciation rates function in the bandwidth formula, would not resolve the question of whether the bandwidth formula is, as alleged, an unjust and unreasonable remedy to ensure rough production cost equalization.

41. Next, we disagree with challengers' assertion that the way the Presiding Judge framed the case enables her to avoid confronting the evidence that Entergy's depreciation inputs conflict with Commission ratemaking and accounting standards. On the contrary, the Presiding Judge evaluated the evidence and arguments that Staff and the Louisiana Commission presented and she concluded that they fail to demonstrate the bandwidth formula expenses, inputs and/or provisions are unjust and unreasonable.⁹⁹ Additionally, notwithstanding Staff's complaint that, when preparing its case for hearing, it did not anticipate the Presiding Judge's emphasis on the unique circumstances of the bandwidth formula calculation, we find the Presiding Judge's emphasis reasonably foreseeable because the bandwidth formula

⁹⁶ Hearing Order, 132 FERC ¶ 61,003 at P 8.

⁹⁷ *See id.* PP 13, 20.

⁹⁸ Opinion No. 480, 111 FERC ¶ 62,311 at P 73; Opinion No. 505, 130 FERC ¶ 61,023 at P 103 ("[A]s Staff witness Sammon testified, the bandwidth payments are payments made by an Operating Company with actual production costs below the Entergy System average to Operating Companies with production costs above the Entergy System average in order to roughly equalize production costs among the Operating Companies."); Order Denying Interlocutory Appeal, 130 FERC ¶ 61,170 at P 20 ("[T]he purpose of the annual bandwidth filing is to determine whether or not there was rough equalization, and not to determine what production costs would have been if different depreciation rates had been in effect for the relevant period.").

⁹⁹ Initial Decision, 134 FERC ¶ 61,016 at PP 29-33.

is a rate with a particular remedial function. Although the purpose of this complaint proceeding is to evaluate the justness and reasonableness of the depreciation component of the existing bandwidth formula itself (as opposed to the inputs, which are assessed in annual bandwidth filings), such evaluation requires taking into account the reason for the bandwidth formula remedy.

42. However, we understand the Louisiana Commission's underlying argument to be that the way the Presiding Judge specified the issue resulted in her never assessing, in general or in the abstract, whether the retail depreciation rate information used in the bandwidth formula is consistent with Commission precedent concerning depreciation for wholesale sales. Nevertheless, we find the Presiding Judge's reasoning is sound. To reiterate, this case is not about the use of depreciation expenses used to establish rates for traditional wholesale sales, in general. This case, rather, is about the depreciation rates used in the bandwidth formula remedy designed and implemented to enable the Operating Companies to achieve rough production cost equalization.

43. The Louisiana Commission also argues that by redefining the issue set for hearing, the Presiding Judge concluded that the Commission has delegated to state regulators authority over the depreciation rates reported on Entergy's books and in its Commission-approved tariffs, regardless of conflicts with Commission depreciation standards and policies.¹⁰⁰ This argument misstates the Presiding Judge's holding, which explicitly refutes the assertion that the Commission has delegated authority over depreciation to states where the bandwidth formula remedy is concerned. The Presiding Judge stated that "contrary to [the Louisiana Commission's] and Staff's contentions, the Commission's adoption of the blended method in the [b]andwidth [f]ormula depreciation calculation is not an impermissible delegation of its statutory duty. Rather, such adoption represents the Commission's exercise of its statutory duty."¹⁰¹

44. Staff contends that the Presiding Judge's specification of the issue "subtly heightened" Staff's and the Louisiana Commission's burden of proof. We are not persuaded by this argument. The gist of Staff's argument is that because the Presiding Judge grounded her analysis in the bandwidth formula's history, purpose

¹⁰⁰ Louisiana Commission Brief on Exceptions at 19.

¹⁰¹ Initial Decision, 134 FERC ¶ 63,016 at P 26. The Presiding Judge notes that in the initial decision underlying Opinion No. 480, Judge Brenner "correctly recognized that the Commission is not bound by the decisions of retail regulators." *Id.* P 25.

and precedent, the Louisiana Commission and Staff could not convince the Presiding Judge to examine the formula as if it were a *tabula rasa*, a typical wholesale rate with no prior history or particular remedial function. We view the Presiding Judge's approach as appropriate and necessary in light of the complex history of the bandwidth formula remedy. Indeed, her precise statement of the issue to be decided in this proceeding is arguably an essential predicate to evaluating correctly the arguments and evidence before her in this proceeding. We conclude that the Presiding Judge ensured the appropriate burden of proof in this proceeding.

45. We also disagree with Staff's assertion that the specification of the issue to be resolved at hearing assumes an established practice that does not exist.¹⁰² On the contrary, as the Presiding Judge noted, there is an established practice of using retail regulator-determined depreciation rates, as the Commission's orders on the bandwidth filings indicate.¹⁰³ This established practice could be changed if it were shown to be unjust and unreasonable.¹⁰⁴ Indeed, that inquiry is the focus of this complaint proceeding.

46. In sum, for the reasons discussed above, we conclude that the Presiding Judge appropriately defined the issue to be resolved at hearing, and reject the exceptions raised by the Louisiana Commission and supported by Staff.

B. Inclusion of Retail Depreciation Data in the Bandwidth Formula

1. Background

47. In the November Compliance Order, the Commission accepted the addition of section 30.12 to Service Schedule MSS-3 to provide the formula for determining each Operating Company's actual production costs.¹⁰⁵ Actual production cost is defined as the sum of the actual variable production cost and the actual fixed

¹⁰² See Staff Brief on Exceptions at 24 ("Further, the restatement of the issue assumes an 'established practice' that clearly is not the case, based on the protracted, confusing procedural history described above.").

¹⁰³ See, e.g., Opinion No. 514, 137 FERC ¶ 61,029; Arkansas Complaint Rehearing Order, 137 FERC ¶ 61,030.

¹⁰⁴ See Opinion No. 505, 130 FERC ¶ 61,023 at PP 172-173.

¹⁰⁵ November Compliance Order, 117 FERC ¶ 61,203 at P 26.

production cost.¹⁰⁶ Depreciation data is used in section 30.12 to calculate the actual variable and fixed production cost.¹⁰⁷

48. Section 30.12 requires Entergy to use depreciation expense amounts recorded in FERC Form 1 under particular Commission USofA.¹⁰⁸ The definitions of the production plant depreciation variables require that the depreciation inputs reflect depreciation rates approved by retail regulators, except for depreciation expenses charged to traditional wholesale customers, by stating “as approved by the retail regulator having jurisdiction over the Company, unless the FERC determines otherwise” or “unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the FERC under otherwise applicable law.”¹⁰⁹

¹⁰⁶ See Service Schedule MSS-3, section 30.12.

¹⁰⁷ General plant depreciation expense, GDX, and depreciation and amortization expense for non-nuclear production plant investment, DEXN, are included in fixed production expense. See Service Schedule MSS-3, section 30.12. General plant accumulated provision for depreciation, GAD, and accumulated provision for non-nuclear production depreciation and amortization, ADXN, are included in the fixed production rate base. *Id.* Fixed production expense and fixed production rate base are used to calculate fixed production cost. *Id.* Nuclear depreciation and amortization expense, NDE, is included in variable production expense, and nuclear accumulated provision for depreciation and amortization, NAD, is included in the variable production rate base. *Id.* Variable production expense and variable production rate base are used to calculate variable production cost. *Id.*

¹⁰⁸ See Service Schedule MSS-3, section 30.12 definitions of GDX, DEXN, GAD, ADXN, NDE and NAD. See also section 30.12 n.1 (all rate base, revenue and expense items in the formula are based on the actual amounts on the Operating Company’s books as of December 31 of the previous year as recorded in FERC Form 1 or other such supporting data as may be appropriate for each Company); Section 30.12 n.2 (rate base values are based on the actual balances on the Company’s books as of December 31 of the previous year except for fuel inventory, materials, and supplies and prepayments, which shall be based on the average of the beginning and ending actual balances on the Company’s books).

¹⁰⁹ See section 30.12 definitions of DEXN, GAD, ADXN, NDE and NAD. We note that GDX does not include such language. MSS-3, section 30.12 (defining GDX as “General Plant Depreciation Expense recorded in FERC Account 403”).

Two provisions of section 30.12 address nuclear depreciation expense: NDE¹¹⁰ and NAD.¹¹¹

2. Initial Decision

49. The Presiding Judge finds that the Commission has authority to use retail-determined depreciation rates in a Commission-jurisdictional bandwidth formula.¹¹² She points to the Commission's determination in Opinion No. 505 that it has "the authority to determine depreciation and decommissioning expenses for purposes of setting a wholesale rate."¹¹³ The Presiding Judge states that the Commission has accorded deference to retail regulators' depreciation decisions since the inception of the bandwidth formula.¹¹⁴

50. The Presiding Judge uses two analyses to determine that the Commission is not bound by its general depreciation policy in determining the nuclear depreciation rates in the bandwidth formula. First, she notes that section 30.12 of Service Schedule MSS-3 gives deference to the depreciation decisions of retail regulators unless the Commission determines otherwise.¹¹⁵ On this basis, she rejects Staff's argument that the Commission alone must determine the depreciation expense and related inputs in section 30.12 because the bandwidth formula is a Commission-

¹¹⁰ The term is defined as follows: "Nuclear Depreciation and Amortization Expense associated with [Nuclear Product Plant (NPP)] as recorded in Accounts 403 and 404 and Decommissioning Expense, as approved by Retail Regulators, unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the FERC under otherwise applicable law." *Id.*

¹¹¹ The term is defined as follows: "Nuclear Accumulated Provision for Depreciation and Amortization excluding [Asset Retirement Obligations] associated with NPP . . . , as recorded in FERC Account 108 and 111 (consistent with the accounting related to Statement of Financial Accounting Standards (SFAS) 143 approved by the retail regulator having jurisdiction over the Company, unless the FERC determines otherwise." *Id.*

¹¹² *See* Initial Decision, 134 FERC ¶ 63,016 at P 24.

¹¹³ *Id.* (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 173).

¹¹⁴ *Id.* P 25.

¹¹⁵ *Id.* (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 133; Exh. No. S-1 at 17-18); *see also id.* at n.108.

jurisdictional rate.¹¹⁶ The Presiding Judge also criticizes Staff for disregarding the fact that the bandwidth formula “is not a formula rate in the usual sense” because it is not a rate paid directly by ratepayers, but rather a method for allocating production costs among the Operating Companies.¹¹⁷ For this reason, the Presiding Judge concludes that the Commission is “not bound by its general depreciation policy in determining the nuclear depreciation rates in the [b]andwidth [f]ormula.”¹¹⁸

51. Second, the Presiding Judge states that in Opinion No. 505, the Commission reversed the finding that only Commission-determined depreciation rates may be used in the bandwidth formula calculation.¹¹⁹ She recounts that in that order, the Commission clarified that its *Boston Edison* policy, which bases depreciation costs on the length of the NRC license life of a nuclear plant, does not control the depreciation expense and related input calculations in the bandwidth formula.¹²⁰ The Presiding Judges states that in Opinion No. 505, the Commission found that Entergy had correctly accounted for nuclear depreciation and decommissioning expense data for the Operating Companies’ nuclear units by using the actual data on the Operating Companies’ books, rather than following the Commission’s *Boston Edison* policy and basing depreciation on the duration of the NRC license in effect.¹²¹

¹¹⁶ *Id.* P 27 (citing Exh. No. S-1 at 17-21; Staff Initial Brief at 6-14). The Presiding Judge explains that Staff fails to mention the qualifying language in section 30.12, “unless the FERC determines otherwise,” and ignores the fact that the Commission accepted section 30.12 with the retail regulator language. *Id.* (citing Exh. No. S-1 at 17-21; November Compliance Order, 117 FERC ¶ 61,203).

¹¹⁷ *Id.* P 27 (citing Arkansas Commission Reply Brief at 4, 21-22, 24).

¹¹⁸ *Id.*

¹¹⁹ *Id.* P 25 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 170 (finding that Entergy correctly accounted for 2006 nuclear depreciation and decommissioning expense data by using the actual data that exists on the Operating Companies’ books)); *see also id.* at n.110.

¹²⁰ *Id.* P 28.

¹²¹ *Id.* (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 161 (noting that Louisiana Commission argued that Entergy failed to record its nuclear depreciation costs in accordance with Commission policy requiring nuclear depreciation costs be based on service lives consistent with the license lives approved by NRC), P 170 (reversing finding that Entergy should have calculated nuclear depreciation

(continued...)

52. The Presiding Judge observes that with “full knowledge” of its *Boston Edison* nuclear depreciation policy, in the Order Denying Interlocutory Appeal, the Commission reaffirmed that the purpose of the annual bandwidth proceedings is to establish the payments and receipts necessary under the bandwidth formula set forth in Service Schedule MSS-3.¹²² Thus, the Presiding Judge concludes that Entergy appropriately uses the depreciation expenses as recorded on the Operating Companies’ FERC Form 1s, “even if the nuclear depreciation expenses in the [bandwidth Formula differ from the [Nuclear Regulatory Commission] license lives.”¹²³ The Presiding Judge adds that pursuant to Order No. 618, the Commission applies its depreciation policies on a case-by-case basis.¹²⁴ She reasons that the Commission may deviate from its general depreciation policy to apply a specific depreciation policy in the bandwidth context.¹²⁵

53. The Presiding Judge states that the Louisiana Commission has conceded that the Commission has the discretion to defer to retail-determined depreciation rates.¹²⁶ She explains that FPA section 302 does not require the Commission to disregard depreciation rates that retail regulators approved as just and reasonable.¹²⁷ She finds that it provides that the Commission may require “proper and adequate” depreciation rates.¹²⁸ The Presiding Judge finds that, in exercising its permissive

expenses based on the duration of the NRC license in effect, including extensions granted)).

¹²² *Id.* (citing Order Denying Interlocutory Appeal, 130 FERC ¶ 61,170 at P 7 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 173)).

¹²³ *Id.* (citing Entergy Reply Brief at 12-14).

¹²⁴ *Id.* (citing Order No. 618, FERC Stats. and Regs. ¶ 31,104, at 31,694-95 (2000)).

¹²⁵ *Id.* (citing Entergy Reply Brief at 14-15; Arkansas Commission Reply Brief at 23-25).

¹²⁶ *Id.* P 26 (citing Arkansas Commission Reply Brief at 20 (referencing Tr. at 183-184 (Kollen))).

¹²⁷ *Id.*

¹²⁸ *Id.* (citing 16 U.S.C. § 825a(a) (2006)).

FPA section 302(a) authority, the Commission must account for the recommendations of retail regulators per FPA section 302(b).¹²⁹

54. The Presiding Judge concludes that the Commission's adoption of the method in the bandwidth formula depreciation calculation is an exercise of its statutory authority, rather than an impermissible delegation of that authority.¹³⁰ The Presiding Judge states that the Commission has the discretion to approve an allocation mechanism among the Operating Companies that bases the depreciation expenses and related inputs on actual depreciation data from retail regulator-approved and Commission-approved depreciation rates.¹³¹ The Presiding Judge further notes that the bandwidth formula is a Commission-accepted lawful rate.¹³²

55. Next, the Presiding Judge rejects the Louisiana Commission's and Staff's argument that Entergy should base the bandwidth formula depreciation expenses only on Commission-approved depreciation rates because section 30.12 creates an incentive for retail regulators to manipulate the bandwidth formula.¹³³ First, the Presiding Judge finds no evidence that retail regulators have manipulated or plan to manipulate section 30.12 by setting high depreciation expenses.¹³⁴ She points out that the depreciation expenses approved by retail regulators other than the Arkansas Commission for the Operating Companies are still lower than the depreciation expense that Louisiana Commission witness King recommends in this proceeding.¹³⁵ Second, the Presiding Judge notes that in Opinion No. 509, the Commission dismissed allegations of potential manipulation as a justification for excluding costs from the bandwidth formula because "arguments as to potential

¹²⁹ *Id.* (citing Arkansas Commission Reply Brief at 11-12, 20-21).

¹³⁰ *Id.* (citing Arkansas Commission Reply Brief at 11-12, 19-21).

¹³¹ *Id.*

¹³² *See id.* P 24 (citing November Compliance Order, 117 FERC ¶ 61,203; Opinion No. 505, 130 FERC ¶ 61,023 at P 133), P 26 (citing November Compliance Order, 117 FERC ¶ 61,203).

¹³³ *Id.* P 31 (citing Louisiana Commission Reply Brief at 22-26; Staff Initial Brief at 8-9; Staff Reply Brief at 11-12).

¹³⁴ *Id.* (citing Entergy Initial Brief at 24-25 n.45 (citing Exh. No. LC-26 at 1)).

¹³⁵ *Id.*

future manipulations are speculative and can form no basis for any action.”¹³⁶ Finally, the Presiding Judge highlights Staff witness Sammon’s testimony that “the potential for manipulation doesn’t really form the basis for [his] opinion that the bandwidth formula should be changed.”¹³⁷ For these reasons, the Presiding Judge holds that concerns regarding potential manipulation of the bandwidth formula by retail regulators do not demonstrate that the current bandwidth formula depreciation expenses, related inputs, and/or depreciation provisions are unjust and unreasonable.¹³⁸

56. Also, the Presiding Judge finds that Entergy’s current depreciation expenses, related inputs, and provisions are “*per se* just and reasonable.”¹³⁹ She states that the bandwidth formula depreciation rates and related expenses are “just and reasonable as a matter of law as long as the inputs for the depreciation expenses comply with Note 1 of section 30.12.”¹⁴⁰ She notes that neither the Louisiana Commission nor Staff seeks to modify Note 1.¹⁴¹ The Presiding Judge finds no evidence suggesting that Entergy used incorrect FERC Form 1 depreciation data in the bandwidth formula calculations.¹⁴²

3. Briefs on Exceptions

57. According to the Louisiana Commission, the Presiding Judge found that the Commission can delegate authority to retail regulators to set the depreciation expenses for the bandwidth formula and for Commission accounting, even if these inputs are unjust and unreasonable under Commission ratemaking standards and conflict with Commission accounting instructions.¹⁴³ The Louisiana Commission

¹³⁶ *Id.* (quoting Opinion No. 509, 132 FERC ¶ 61,253 at P 39).

¹³⁷ *Id.* (quoting Tr. at 1002).

¹³⁸ *Id.*

¹³⁹ *Id.* P 27.

¹⁴⁰ *Id.* (citing Arkansas Commission Reply Brief at 10-11). For text of Note 1, *see* Service Schedule MSS-3, section 30.12.

¹⁴¹ *Id.* (citing Arkansas Commission Reply Brief at 10-11).

¹⁴² *Id.*

¹⁴³ *See* Louisiana Commission Brief on Exceptions at 7 (citing Initial Decision, 134 FERC ¶ 63,016 at P 24), 10-11 (citing Initial Decision, 134 FERC

claims that the Presiding Judge ruled that retail ratemaking decisions control the costs recorded for accounting and used in the bandwidth formula.¹⁴⁴ The Louisiana Commission surmises that, because the bandwidth formula relies on accounting data like most Commission formula rates, the Initial Decision would also permit the states to set depreciation rates.¹⁴⁵

58. The Louisiana Commission argues that under the FPA, the Commission has the authority and duty, independent of the actions of state regulators, to ensure just and reasonable wholesale rates that comply with its policies.¹⁴⁶ The Louisiana Commission points to FPA section 201 (giving the Commission jurisdiction over all wholesale sales of electricity); FPA section 206 (requiring the Commission, upon complaint or sua sponte, to establish just and reasonable rates); and precedent confirming the Commission's exclusive jurisdiction over wholesale rates. The Louisiana Commission adds that *Mississippi Industries v. FERC* held that the Commission has this exclusive jurisdiction irrespective of the impact on retail ratemaking.¹⁴⁷ The Louisiana Commission argues that the Commission must follow its own ratemaking policies, not those adopted by state commissions.¹⁴⁸ The Louisiana Commission claims that Entergy and the Arkansas Commission have successfully advocated that the Commission should follow its own depreciation policy for ratemaking.¹⁴⁹

¶ 63,016 at PP 25-26) (claiming that the Presiding Judge delegated virtually all authority over wholesale depreciation rates and depreciation accounting to retail agencies), 20.

¹⁴⁴ *Id.* at 20-21.

¹⁴⁵ *Id.* at 21 (citing Exh. No. LC-3 at 8 (Service Schedule MSS-3 § 30.12)).

¹⁴⁶ *Id.* at 8, 21, 22 (citing 16 U.S.C. §§ 824(b), 824e; *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988)).

¹⁴⁷ *Id.* at 22-23 (quoting *Mississippi Industries v. FERC*, 808 F.2d 1525, 1544 (D.C. Cir. 1987)).

¹⁴⁸ *Id.* at 23 (quoting *Cities of Bethany v. FERC*, 727 F.2d 1131, 1137 (D.C. Cir. 1984); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999); *Middle South Servs., Inc.*, 13 FERC ¶ 63,032, at 65,107 (1980)).

¹⁴⁹ *Id.* at 15, 24 (citing Exh. No. LC-42 (Kollen) at 18-22, 20-21; Exh. No. LC-51; Exh. No. LC-52; *Louisiana Pub. Serv. Comm'n v. System Energy Resources, Inc.*, 124 FERC ¶ 61,003, at P 14 (2008) (dismissing Louisiana Commission's

(continued...)

59. The Louisiana Commission asserts that the Presiding Judge rejected any consideration of a conflict between Entergy's depreciation rates and Commission standards, instead holding that the Commission may defer to state regulatory determinations rather than require compliance with Commission standards.¹⁵⁰ The Louisiana Commission contends that such a determination is contrary to precedent stating that absent express authority, a federal entity exercising powers delegated by Congress may not sub-delegate its authority to another entity, including a state agency.¹⁵¹

60. The Louisiana Commission disagrees that *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.* accorded deference to retail regulators' depreciation decisions.¹⁵² It argues that contrary to the Presiding Judge's assumption, when a retail regulator assumes a life extension for a generating unit for retail ratemaking, the costs are still in rate base, earn a return and must be recovered over the extended service life of the facility.¹⁵³ The Louisiana Commission claims that Entergy and the Arkansas Commission have acknowledged that a depreciation rate adjustment only affects when the customers pay for use of the assets.¹⁵⁴ The Louisiana Commission states that *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.* retained Commission accounting for the production cost comparison, ignoring retail

complaint seeking to extend nuclear service life of Grand Gulf unit for depreciation expense calculation)).

¹⁵⁰ *Id.* at 24.

¹⁵¹ *Id.* at 24-25 (quoting *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004); *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1077 (D.C. Cir. 2003); *Enron Power Marketing v. FERC*, 296 F.3d 1148, 1153 (2002); *Shook v. District of Columbia Fin. Resp. and Man. Ass. Auth.*, 132 F.3d 775 (D.C. Cir. 1998)).

¹⁵² *Id.* at 35 (citing Initial Decision, 134 FERC ¶ 63,016 at 25 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 106 FERC ¶ 63,012 at P 89)).

¹⁵³ *Id.* at 35-36 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 106 FERC ¶ 63,012 at PP 89, 94-97 (2004); Initial Decision, 134 FERC ¶ 63,016 at P 25).

¹⁵⁴ *Id.* at 36-37 (citing Tr. at 721, 725-26, 782-83; Exh. No. LC-93).

regulatory adjustments.¹⁵⁵ The Louisiana Commission adds that Entergy has consistently opposed reflecting retail regulatory adjustments other than imprudence adjustments in production cost comparisons.¹⁵⁶ It claims that if a retail regulator chooses a more accelerated service life than what is permitted under accounting standards and Commission policy, it eliminates the capital obligation on the accelerated basis for retail ratemaking and creates an inequitable redistribution of added costs and their return in the bandwidth calculation.¹⁵⁷

61. Staff disagrees that because the bandwidth formula is a method for allocating costs, the Commission is not bound by its depreciation policy and practices in determining the nuclear depreciation rates.¹⁵⁸ Staff recognizes that the bandwidth formula is not a formula that devises a rate to be paid directly by a ratepayer in the usual sense, but states that nonetheless the Commission has acknowledged that it is a formula and a rate under its jurisdiction.¹⁵⁹ Staff argues that the bandwidth remedy cannot prevent undue discrimination unless Commission-approved rates are reflected in the bandwidth formula.¹⁶⁰ Staff adds that the bandwidth formula allocations should be equitable to ensure reasonable implementation of rough production cost equalization.¹⁶¹

62. The Louisiana Commission disagrees that when the Commission accepted section 30.12, it delegated authority to state commissions to set depreciation rates.¹⁶² The Louisiana Commission states that the Commission has neither addressed the depreciation language in section 30.12 nor suggested that the language permits Entergy to use depreciation rates that conflict with Commission

¹⁵⁵ *Id.* at 37 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 106 FERC ¶ 63,012 at P 99).

¹⁵⁶ *Id.* at 37-38 (citing Tr. at 715; Exh. No. LC-42 at 15-16; Exh. No. LC-44 at 2; Exh. No. LC-46 at 2-4; Exh. No. LC-47 at 2).

¹⁵⁷ *Id.* at 37 (citing Tr. at 732-33).

¹⁵⁸ Staff Brief on Exceptions at 28.

¹⁵⁹ *Id.* (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 170).

¹⁶⁰ *Id.* at 29.

¹⁶¹ *Id.*

¹⁶² *Id.* at 38 (citing Initial Decision, 134 FERC ¶ 63,016 at P 25).

practice.¹⁶³ The Louisiana Commission contends that section 30.12 permits the Commission to correct the depreciation rates if they are inconsistent with Commission standards¹⁶⁴ and adjust the depreciation inputs.¹⁶⁵ The Louisiana Commission states that the Commission has jurisdiction over all aspects of the bandwidth formula and underlying costs.¹⁶⁶ The Louisiana Commission claims that the Presiding Judge did not address this precedent, but relied on the Arkansas Commission's proposition that the Commission's adoption of the blended method in the bandwidth formula depreciation calculation is a permissible delegation of the Commission's statutory duty.¹⁶⁷ The Louisiana Commission adds that the approval of a formula as the rate is not an approval of the inputs to that formula.¹⁶⁸ The Louisiana Commission concludes that, when the Commission accepted the bandwidth formula, it would have been unlawful for it to cede its authority over depreciation to state regulators without regard to Commission standards.¹⁶⁹

63. The Louisiana Commission argues that the Commission has not approved the "blended" depreciation inputs that are based on retail depreciation rates and reported in the FERC Form 1s.¹⁷⁰ The Louisiana Commission claims that "blended" depreciation rates mean rates set exclusively by state agencies because Commission-

¹⁶³ *Id.* at 39 (citing November Compliance Order, 117 FERC ¶ 61,203).

¹⁶⁴ *Id.* (citing Exh. No. LC-3 at 9 (NAD definition), 11 (NDE definition)).

¹⁶⁵ *Id.* at 39-40 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 172; *Arkansas Public Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020, at P 25 (2009); Order Denying Interlocutory Appeal, 130 FERC ¶ 61,170, at P 21 (2010); *Entergy Servs., Inc.*, 128 FERC ¶ 63,015, at P 216 (2009)).

¹⁶⁶ *Id.* at 26 (quoting *Entergy Servs., Inc.*, 124 FERC ¶ 63,026, at P 478 (2008); *Entergy Servs., Inc.*, 128 FERC ¶ 63,015, at P 211 (2009)).

¹⁶⁷ *Id.* (citing Initial Decision, 134 FERC ¶ 63,016 at P 26, n.111).

¹⁶⁸ *Id.* at 40-41 (citing *Public Serv. Elec. and Gas Co.*, 124 FERC ¶ 61,303, at P 17 (2008); *Public Utils. Comm'n v. FERC*, 254 F.3d 250, 257-58 (D.C. Cir. 2001); *Louisiana Public Serv. Comm'n v. FERC*, 688 F.2d 357, 361 (5th Cir. 1982)).

¹⁶⁹ *Id.* at 41 (citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)).

¹⁷⁰ *Id.* at 8 (citing Initial Decision, 134 FERC ¶ 63,016 at P 26), 41 (citing Initial Decision, 134 FERC ¶ 63,016 at P 19 (heading), 24).

set depreciation rates are not used to calculate any portion of the expenses reported by the Operating Companies.¹⁷¹ The Louisiana Commission argues that retail rate decisions cannot be followed for accounting purposes if they conflict with the accounting depreciation rule in Order No. 618 and General Instruction No. 22.¹⁷² The Louisiana Commission claims that *Ohio Edison* and Order No. 618 require utilities to account for depreciation and report it in the FERC Form 1s according to Commission directives.¹⁷³ The Louisiana Commission states that the Commission has directed that depreciation rates must allocate the value of property, even the service life of the property, in a systematic and rational manner and that estimated useful service lives must be supported by engineering, economic and other depreciation studies.¹⁷⁴ The Louisiana Commission contends that any depreciation expenses recorded pursuant to that standard, and state retail ratemaking practices, are recorded as regulatory assets and liabilities, not in the depreciation accounts.¹⁷⁵

64. The Louisiana Commission adds that *Ohio Edison* and Order No. 618 repudiate Entergy's theory that its accounts may reflect a "blend" of state depreciation methods.¹⁷⁶ The Louisiana Commission argues that the Commission's jurisdiction (and the bandwidth formula tariff) extend to all the costs used to produce the electricity used in the system, while retail agency jurisdiction is constrained by state territorial boundaries.¹⁷⁷ The Louisiana Commission states that

¹⁷¹ *Id.* at 21 (citing Exh. No. LC-32 (Futral) at 16-17; Exh. No. LC-87 (Entergy data response showing change from Commission wholesale rate to Louisiana retail rate for wholesale portion of blended rate)).

¹⁷² *Id.* at 8 (citing Order No. 618, FERC Stats. & Regs. ¶ 31,104); *id.* at 27, 29.

¹⁷³ *Id.* at 31-32 (citing *Ohio Edison Co.*, 84 FERC ¶ 61,157 at 61,860-62 (1998)).

¹⁷⁴ *Id.* at 32 (citing Exh. No. LC-83 at 9; General Instr. No. 22, 18 C.F.R. pt. 101).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 27-30 (citing Order No. 618, FERC Stats. & Regs. ¶ 31,104; General Instruction No. 22; *Arkansas Power & Light Co. v. FPC*, 185 F.2d 751 (D.C. Cir. 1950)), 32 (citing Exh. No. ESI-29 at 3).

¹⁷⁷ *Id.* at 34 (citing *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987)).

the Commission does not establish depreciation rates only for the portion of plant dedicated exclusively to wholesale requirements service, leaving the remaining portion to retail agencies; instead, utilities maintain separate books if needed for retail ratemaking.¹⁷⁸ The Louisiana Commission argues that the Commission would have to abandon any pretense of uniform accounting if it defers to state regulators because state regulators may pursue any number of local policies when setting depreciation for ratemaking and utilities control the timing and issues in retail rate cases.¹⁷⁹ The Louisiana Commission concludes that both total deference to retail regulators (as with the “blended” method) or partial deference to retail regulators conflict with the Commission’s depreciation rules and eviscerate uniform accounting.¹⁸⁰

65. The Louisiana Commission disagrees that FPA section 302 allows the use of state-set depreciation rates that conflict with the Commission’s depreciation rule.¹⁸¹ The Louisiana Commission argues that legislative history shows that Congress designed the FPA to promote uniform accounting so that investors and regulators could accurately appraise and compare utilities.¹⁸² The Louisiana Commission argues that FPA section 302 requires utilities to use depreciation charges and rates prescribed by the Commission.¹⁸³ The Louisiana Commission contends that the

¹⁷⁸ *Id.* at 30 (quoting *MidAmerican Energy Co.*, 81 FERC ¶ 61,081, at 61,327, 61,330 (1997)); *id.* at 31-32 (quoting *Ohio Edison Co.*, 84 FERC ¶ 61,157).

¹⁷⁹ *Id.* at 34.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 27 (citing Initial Decision, 134 FERC ¶ 63,016 at PP 24-26, 30), 43 (citing Initial Decision, 134 FERC ¶ 63,016 at P 26).

¹⁸² *Id.* at 29 (citing 16 U.S.C. § 825a (utilities must implement their depreciation in accordance with Commission rules, regulations and forms of accounts); S. Rep. No. 621, 74th Cong., 1st Sess., 53 (1935) (Senate Report accompanying FPA section 301 stating that the Commission’s authority over the accounts of companies under its jurisdiction extends to their entire business); *Arkansas Power & Light Co. v. Federal Power Comm’n*, 185 F.2d 751 (D.C. Cir. 1950)); Louisiana Commission Brief on Exceptions at 33-34 (quoting Committee on Interstate Commerce, 74th Cong., 1st Sess., Public Utility Holding Company Act of 1935, S. Hrgs. at 347, 807-08).

¹⁸³ *See id.* at 30 (quoting *MidAmerican Energy Co.*, 81 FERC ¶ 61,081, at 61,328 (1997)). The Louisiana Commission concedes that *MidAmerican Energy Co.* was reversed; however, it argues that the appeal only addressed whether utilities

(continued...)

Presiding Judge failed to quote the portion of FPA section 302 that requires compliance with Commission rules.¹⁸⁴ The Louisiana Commission adds that FPA section 301 requires utilities to keep their accounts in accord with methods prescribed in the Commission's Rules and Regulations.¹⁸⁵ The Louisiana Commission argues that, if the statute contemplated the "blended" accounting approach, then it would be unnecessary for the statute to reserve state power to set depreciation rates for retail ratemaking.¹⁸⁶ The Louisiana Commission concludes that FPA section 302, like section 301, contemplates uniform depreciation accounting.¹⁸⁷ The Louisiana Commission states that a contrary finding ignores the Commission's action in Order No. 618 and General Instruction No. 22, in which it exercised its statutory authority over depreciation-accounting and then codified its depreciation rule.¹⁸⁸

66. The Louisiana Commission disputes that it conceded that the Commission has the discretion to defer to retail-determined depreciation rates, stating that its testimony indicates that the Commission cannot accept retail ratemaking depreciation expenses that conflict with Commission policy.¹⁸⁹ The Louisiana Commission states that agreeing that the Commission could accept as just and reasonable retail depreciation rates that comply with Commission requirements does

have to file for approval of depreciation changes for accounting purposes. Louisiana Commission Brief on Exceptions at 30-31 (citing *Alabama Power Co. v. FERC*, 160 F.3d 7 (D.C. Cir. 1998)). The Louisiana Commission adds that no participant in the subsequent rulemaking that led to Order No. 618 argued that a "blended" rate approach is permissible. *Id.* at 31 (citing Order No. 618, FERC Stats. & Regs. ¶ 31,104).

¹⁸⁴ *Id.* at 43-44 (quoting 16 U.S.C. § 825a).

¹⁸⁵ *Id.* at 44 (citing 16 U.S.C. § 825).

¹⁸⁶ *Id.* (citing 16 U.S.C. § 825 (noting state agencies may set depreciation rates "for the purpose of determining rates or charges")).

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 27-28, 43 (citing Initial Decision, 134 FERC ¶ 63,016 at P 26; Order No. 618, FERC Stats. & Regs. ¶ 31,104; Exh. LC-83 at 9; General Instruction No. 22, 18 C.F.R. Pt. 101; *Alabama Power Co. v. FERC*, 160 F.3d 7, 9, 14).

¹⁸⁹ *Id.* at 41 (citing Initial Decision, 134 FERC ¶ 63,016 at P 26; n.113 (citing Arkansas Reply Brief at 20 (referencing Tr. at 183-84)); 42 (citing Tr. at 83)).

not mean that it does not dispute the Commission's authority to accept an unjust and unreasonable depreciation rate.¹⁹⁰

67. Staff argues that neither the Presiding Judge nor the Commission has provided the required, reasoned explanation of why the Commission should not follow its own policies, practices and precedents with respect to section 30.12.¹⁹¹ Staff adds that precedent supports the practice of using Commission-approved depreciation rates in formula rates, noting that the Commission-approved rate is used in a transmission cost of service formula rate for a utility that reported "blended" depreciation rates in past versions of the FERC Form 1.¹⁹²

68. Also, the Louisiana Commission and Staff argue that the bandwidth formula should reflect the Commission's depreciation policies. They challenge the Presiding Judge's finding that, in the Order Denying Interlocutory Appeal, the Commission held that its policy to base depreciation lives for nuclear plants on the approved NRC license does not apply to the bandwidth formula.¹⁹³ The Louisiana Commission and Staff argue that the Commission declined to reach the issue in the bandwidth implementation proceeding, finding it a matter for a future FPA section 205 or 206 proceeding.¹⁹⁴ Staff states that *this* proceeding is the FPA section 206 proceeding in which the Commission may consider depreciation rate adjustments. The Louisiana Commission adds that *Boston Edison* is only mentioned in the summary of the parties' arguments and the Commission would have discussed the

¹⁹⁰ *Id.* at 42 (citing Tr. at 183-84, 265).

¹⁹¹ Staff Brief on Exceptions at 25 (citing *Ohio Edison Co.*, 84 FERC ¶ 61,157), 25-26 (citing *Kentucky v. FERC*, 760 F.2d 1321, 1327 (D.C. Cir. 1984); *Houlton Water Co.*, 60 FERC ¶ 61,141, at 61,515 (1992); *Boston Edison Co.*, 40 FERC ¶ 63,048, at 65,187 (1987); *Delmarva Power and Light Co.*, Opinion No. 185, 24 FERC ¶ 61,199, at 61,457 (1983); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1137 (D.C. Cir. 1984)).

¹⁹² *Id.* at 26 (quoting *Xcel Energy Servs., Inc.*, 125 FERC ¶ 61,092, at P 14 (2008) ("[W]hile SPS' past versions of the FERC Form 1 filings reported the 'blended' depreciation rates, the Commission-approved rate will be used in the formula rate").

¹⁹³ Louisiana Commission Brief on Exceptions at 60.

¹⁹⁴ *Id.* at 61-62 (citing Opinion No. 505, 130 FERC ¶ 61,023, at PP 172-173 (2010); Initial Decision, 134 FERC ¶ 63,016 at P 28); Staff Brief on Exceptions at 15 (quoting Opinion No. 505, 130 FERC ¶ 61,023 at P 173).

case if it had intended to overrule or depart from it.¹⁹⁵ The Louisiana Commission argues that failure to persuasively distinguish the policy could be error as a matter of law.¹⁹⁶ Staff asserts that it is erroneous circular reasoning to rely upon the Commission's decision to not adjust depreciation rates in a bandwidth formula implementation proceeding to conclude that the *Boston Edison* policy does not apply to this FPA section 206 proceeding.¹⁹⁷

69. The Louisiana Commission states that the service lives used for the nuclear plants owned by the Operating Companies conflict with both the Entergy studies that use the NRC license lives to estimate the nuclear units' service lives and the *Boston Edison* policy requiring the use of the NRC license lives.¹⁹⁸ In particular, the Louisiana Commission notes that the NRC license lives for Entergy Louisiana's Waterford 3 unit and Entergy Gulf States Louisiana's River Bend unit are 40 years, but the lives Entergy uses for accounting purposes assume 20-year extensions.¹⁹⁹ The Louisiana Commission also notes that, in 2001 and 2005, the NRC extended the Entergy Arkansas ANO units' service lives to 60-years, but, until September 2010, their depreciation rates were calculated using the 40-year service life assigned by the Arkansas Commission.²⁰⁰ The Louisiana Commission concludes that, therefore, the retail depreciation rates cannot allocate the service value of properties in a systematic and rational manner over the estimated service lives.²⁰¹

¹⁹⁵ Louisiana Commission Brief on Exceptions at 62 (citing Opinion No. 505, 130 FERC ¶ 61,023 at PP 170-173).

¹⁹⁶ *Id.* (citing *Louisiana Public Service Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999)).

¹⁹⁷ Staff Brief on Exceptions at 15.

¹⁹⁸ Louisiana Commission Brief on Exceptions at 15, 29 (citing *Boston Edison Co.*, 59 FERC ¶ 63,028, at 65,238 (1992); *Boston Edison Co.*, 52 FERC ¶ 61,010, at 61,079-80 (1990); *Louisiana Pub. Serv. Comm'n v. System Energy Resources, Inc.*, 124 FERC ¶ 61,003, at P 14 (2008)).

¹⁹⁹ *Id.* at 15 (citing Exh. No. LC-1 (Kollen) at 16).

²⁰⁰ *Id.* (citing Exh. No. LC-1 (Kollen) at 16; *Entergy Servs., Inc.*, 132 FERC ¶ 61,252 (2010)).

²⁰¹ *Id.* at 29.

70. Next, the Louisiana Commission alleges that Entergy manipulated retail depreciation data. The Louisiana Commission argues that the Presiding Judge did not address the evidence showing that Entergy manipulated the bandwidth formula by not immediately adopting the 60-year NRC service life for the ANO units.²⁰² The Louisiana Commission contends that using the higher, incorrect depreciation cost in the bandwidth formula lowered Entergy Arkansas' bandwidth payments, effectively accelerating and exporting its capital cost recovery to the other Operating Companies and producing a huge benefit for Entergy Arkansas and its ratepayers.²⁰³

71. For support, the Louisiana Commission points to Entergy's study of the effect of the 60-year service lives on the bandwidth formula, which compared the impact on the bandwidth calculation of immediately implementing the extended service lives with delaying implementation until 2014.²⁰⁴ The Louisiana Commission states that, according to the Entergy study, the immediate implementation of the NRC 60-year service lives would have lowered the ANO depreciation cost from \$69 million per year to \$32.3 million per year.²⁰⁵ The Louisiana Commission claims that, by instead keeping the depreciation rate stable at \$69 million, Entergy Arkansas caused the other Operating Companies to pay \$29.4 million annually of the \$36.7 million in higher depreciation costs, thus exporting approximately 80 percent of its excessive ANO 1 and 2 depreciation expense to the other Operating Companies.²⁰⁶ The Louisiana Commission also claims that, by doing so, Entergy Arkansas reduced its capital costs by hundreds of million of dollars.²⁰⁷ The Louisiana Commission states that, in 2014 (when the Entergy study assumes the NRC extended service lives are implemented), the depreciation cost will be only \$21.1 million per year because the capital recovery will be accelerated.²⁰⁸

²⁰² *Id.* at 66.

²⁰³ *Id.* (citing Exh. No. LC-17).

²⁰⁴ *Id.*

²⁰⁵ *Id.* (citing Exh. No. LC-17, Cols. D, II).

²⁰⁶ *Id.* at 66-67 (citing Exh. No. LC-17; Exh. No. LC-17, Col. J).

²⁰⁷ *Id.* at 67 (citing Exh. No. LC-17, Col. K).

²⁰⁸ *Id.* at 66-67 (citing Exh. No. LC-17, Col. D).

72. The Louisiana Commission claims that Entergy and Entergy Arkansas decided to “sit on” the information that the license lives had been changed in order to benefit Entergy Arkansas in the bandwidth calculation.²⁰⁹ The Louisiana Commission asserts that an email exchange shows that they concluded that leaving the 40-year depreciation rates in place could export \$500 million in costs to the other Operating Companies.²¹⁰ The correspondence between an Entergy Arkansas’ employee in the Regulatory Strategy Department and an Entergy Services employee states that:

[g]iven the assumptions, [Entergy Arkansas] customers would pay an absolute \$500 million more if depreciation rates were reduced now based upon reflecting the longer depreciation ANO lives compared to leaving the depreciation rates the way they are now, but reducing them after the [System Agreement] remedy payments are over. On a [present value] basis, the figure is about \$230 million, right?²¹¹

The Entergy Services employee responded to the Entergy Arkansas employee’s message above with “Yes, you are correct.”²¹²

73. The Louisiana Commission alleges that, after this exchange, Entergy Arkansas employees met with Arkansas Commission staff on several occasions and informed the Arkansas Commission staff that Entergy Arkansas would not seek revisions to its depreciation rates.²¹³ The Louisiana Commission states that, despite a history of requiring updates to depreciation rates in rate proceedings and previously reducing Entergy Arkansas’ nuclear decommissioning expense to reflect the extensions in the service lives of the ANO units, the Arkansas Commission staff did not address Entergy’s outdated depreciation rates in the 2006 retail rate proceeding.²¹⁴

²⁰⁹ *Id.* at 68.

²¹⁰ *Id.* at 67.

²¹¹ *Id.* (quoting Exh. No. LC-17).

²¹² *Id.*

²¹³ *Id.* (citing Exh. No. LC-1 (Kollen); Exh. No. LC-18).

²¹⁴ *Id.* at 68.

74. The Louisiana Commission argues that Entergy's and Entergy Arkansas' alleged conduct conflicts with Commission precedent stating that a utility may not sit on depreciation expenses that the utility has incurred until such time as the utility believes it is most auspicious to record the depreciation expense or to seek their recovery in electric rates.²¹⁵ The Louisiana Commission states that the alleged conduct underscores the need for the Commission to exert control over the depreciation calculation and ensure that rates are just and reasonable.²¹⁶ The Louisiana Commission argues that the Commission should reverse the Initial Decision and correct the improper conduct.²¹⁷

75. Last, the Louisiana Commission and Staff argue that the Presiding Judge erred in concluding that Entergy's depreciation expenses are *per se* just and reasonable.²¹⁸ The Louisiana Commission and Staff challenge the Presiding Judge's reliance on Opinion No. 505 and the November Compliance Order.²¹⁹ The Louisiana Commission claims that the Presiding Judge incorrectly relied upon those orders to find that Commission precedent does not apply to the bandwidth formula, depreciation inputs do not need to comply with Commission accounting standard, and the bandwidth calculation may include outdated information and discriminatory methodologies.²²⁰

76. Staff argues that the finding in Opinion No. 505 that "Entergy correctly accounted for 2006 nuclear depreciation and decommissioning expense data for the nuclear units owned by the operating companies by using the actual data that exists on the Operating Companies' books *for 2006*" is not the same as finding that the actual data that exists on the Operating Companies' books for any year is *per se* just

²¹⁵ *Id.* (quoting *Midwest Power Sys., Inc.*, 67 FERC ¶ 61,076, at 61,209 (1994)).

²¹⁶ *Id.*

²¹⁷ *Id.* at 66, 68.

²¹⁸ *Id.* at 6-7, 44-64; Staff Brief on Exceptions at 26-28.

²¹⁹ Louisiana Commission Brief on Exceptions at 45, 55, 60-64; Staff Brief on Exceptions at 26-27.

²²⁰ Louisiana Commission Brief on Exceptions at 45 (citing Initial Decision, 134 FERC 63,016 at PP 27-30).

and reasonable.²²¹ The Louisiana Commission and Staff reiterate that the Commission did not determine whether an adjustment to the nuclear depreciation and decommissioning expense data was equitable; and, therefore, Opinion No. 505 does not justify a *per se* determination that the expenses reported in the Operating Companies' FERC Form 1s are just and reasonable.²²²

77. The Louisiana Commission argues that the Presiding Judge's finding that the inputs are *per se* just and reasonable leaves state agencies and consumers without a remedy, in spite of the Commission having set the issue for hearing.²²³ The Louisiana Commission argues that this result is inconsistent with Commission orders on the bandwidth formula that preserved the right to contest the reasonableness of cost inputs somewhere and its assurances to the courts with respect to the review of formula rates.²²⁴ The Louisiana Commission claims that the Presiding Judge's decision would create a "regulatory imbalance" under the FPA by maintaining Entergy's right to file for and obtain depreciation changes when desirable but denying consumers a similar remedy.²²⁵ The Louisiana Commission adds that precluding a regulatory review and remedy for unjust and unreasonable rates in a formula tariff conflicts with the FPA requirement that rates must be just and reasonable and not unduly discriminatory and precedent providing that the inputs to a formula rate may be examined in an FPA section 206 proceeding.²²⁶

²²¹ Staff Brief on Exceptions at 27 (quoting Opinion No. 505, 130 FERC ¶ 61,023 at P 170) (emphasis added in Staff Brief on Exceptions).

²²² Louisiana Commission Brief on Exceptions at 60-63; Staff Brief on Exceptions at 28 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 173).

²²³ Louisiana Commission Brief on Exceptions at 50-54.

²²⁴ *Id.* at 54.

²²⁵ *Id.* (citing *Entergy Services, Inc.*, 132 FERC ¶ 61,252 (2010) and *Entergy Services, Inc.*, 134 FERC ¶ 61,079 (2011)).

²²⁶ *Id.* at 10-11, 44-46, 46-48 (citing *Louisiana Pub. Serv. Comm'n v. FERC*, 688 F.2d 357 (5th Cir. 1982); *Public Utilities Comm'n v. FERC*, 254 F.3d 250, 257-58 (D.C. Cir. 2001); Exh. No. LC-56 at 2-3; *American Elec. Power. Serv. Corp.*, 124 FERC ¶ 61,306, at PP 34-35 (2008); *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, at P 112 (2009); *PPL Elec. Utilities Corp.*, 125 FERC ¶ 61,121, at P 36 (2008); *Pub. Serv. Elec. and Gas Co.*, 124 FERC ¶ 61,303, at PP 17, 20 (2008); *Tampa Elec. Co.*, 133 FERC ¶ 61,023, at P 60 (2010); *New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,068, at P 93 (2008)).

78. Staff disagrees with the Presiding Judge's reliance on Staff's failure to propose a change to Note 1 of section 30.12 of Service Schedule MSS-3 to support the finding that the current depreciation expenses, related inputs, and provisions are *per se* just and reasonable.²²⁷ Staff asserts there was no need to change Note 1 because FERC Form 1 Account No. 403 should only reflect Commission-approved depreciation amounts.²²⁸

4. Briefs Opposing Exceptions

79. Entergy responds that the Louisiana Commission mischaracterizes the Presiding Judge's discussion of the Commission's exercise of its jurisdiction over wholesale rates.²²⁹ Entergy states that the Presiding Judge did not find that the Commission should delegate its responsibility to the retail regulators but rather that, when exercising its statutory duty, the Commission is entitled to approve an allocation mechanism among the Operating Companies that bases depreciation expenses and related inputs on actual depreciation data from retail-approved and Commission-approved depreciation rates.²³⁰

80. Entergy claims that the Commission's decision to use actual costs reported in the FERC Form 1s did not delegate to the retail regulator the authority to set depreciation rates for use in wholesale rates.²³¹ Entergy states that, to the contrary, the Commission exercised its exclusive authority over wholesale rates to determine that the use of actual costs, including the use of retail depreciation inputs, as reported on the FERC Form 1s was the best manner to achieve the purpose of the bandwidth formula: to compare the actual production costs of the Operating Companies and roughly equalize those costs.²³²

²²⁷ Staff Brief on Exceptions at 29-30 (citing Initial Decision, 134 FERC ¶ 63,016 at P 27).

²²⁸ *Id.* at 30.

²²⁹ Entergy Brief Opposing Exceptions at 22-23 (citing Louisiana Commission Brief on Exceptions at 20-44).

²³⁰ *Id.* at 23 (citing Initial Decision, 134 FERC ¶ 63,016 at P 26).

²³¹ *Id.* at 24.

²³² *Id.* at 23-25 (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 33; Exh. No. ESI-1 at 58, Tr. at 51, 67, 739-40, 991-93; Exh. No. LC-3 at 11, 14; November Compliance Order, 117 FERC ¶ 61,203; Opinion No. 505, 130 FERC ¶ 61,023 at PP 170-173; Order Denying Interlocutory Appeal, 130 FERC ¶ 61,170 at PP 19-20).

(continued...)

81. The Arkansas Commission urges the Commission to dismiss the claims of impermissible delegation of authority as it did in Opinion No. 505. The Arkansas Commission states that, since the inception of the bandwidth remedy and formula, the Commission has given deference to retail regulator depreciation decisions.²³³ New Orleans Council also claims that the Louisiana Commission has conceded that the Commission has discretion to defer to retail-determined rates.²³⁴

82. The Arkansas Commission notes that section 30.12 expressly authorizes deference to retail regulators' decisions (for the retail segment of the blended depreciation rate and expense amounts) unless the Commission determines otherwise²³⁵ and includes return on common equity cost inputs, which use the "[s]imple average of the [Operating] Companies' approved retail return on common equity rates at December 31 of the previous year" as a component of the weighted average cost of capital for the Operating Companies.²³⁶ The Arkansas Commission notes that neither the Louisiana Commission nor Staff has sought to modify the language in section 30.12.²³⁷

83. Entergy challenges the Louisiana Commission's reliance on Order No. 618 and *Ohio Edison* to argue that only the Commission can set depreciation rates for

Entergy adds that, in a non-bandwidth proceeding, the Commission accepted a Service Schedule MSS-4 Service Agreement with a formula rate that used inputs that reflect decisions made by the Public Utility Commission of Texas on the nuclear plant value, depreciation rate and decommissioning rate. Entergy Brief Opposing Exceptions at 24 (citing *Entergy Servs., Inc.*, Docket No. ER08-31-000 (delegated letter order) (Dec. 19, 2007); *Entergy Servs., Inc.*, Docket No. ER08-31-000, Rate Filing (filed Oct. 5, 2007)).

²³³ Arkansas Commission Brief Opposing Exceptions at 24 (citing Initial Decision, 134 FERC ¶ 63,016 at P 25). *See also* Arkansas Commission Brief Opposing Exceptions at n.13, 25 (deference to retail regulators for the retail component is a core characteristic of the blended rate approach).

²³⁴ New Orleans Council Brief Opposing Exceptions at 11 (citing Tr. at 183-84 (Kollen)).

²³⁵ Arkansas Commission Brief Opposing Exceptions at 6, 24 (quoting Initial Decision, 134 FERC ¶ 63,016 at P 25).

²³⁶ *Id.* at 24 (quoting Exh. No. ESI-3 at 53).

²³⁷ *Id.* at 6, 25.

accounting.²³⁸ Entergy contends that Order No. 618 allows utilities to make changes to depreciation expenses for accounting purposes without Commission approval, unless the depreciation expense or rates will be included in a wholesale rate.²³⁹ Entergy argues that the finding that the retail-approved method for recording depreciation expense in *Ohio Edison* violated the USofA is not equivalent to holding that it is never appropriate to use retail-approved depreciation rates in a formula rate.²⁴⁰

84. Entergy adds that the facts here are not analogous to *Ohio Edison* and, therefore, an “*Ohio Edison*” solution is not warranted.²⁴¹ New Orleans Council agrees that *Ohio Edison* is distinguishable²⁴² and contends that Staff has conceded that *Ohio Edison* is distinguishable.²⁴³ New Orleans Council contends that Staff also agrees that a retail regulator and the Commission can adopt differing service life assumptions for plant that are both systematic and rational.²⁴⁴

85. The New Orleans Council states that the argument that the Commission may not defer to retail regulators overlooks the fact that the bandwidth formula is not a “rate for wholesale sales,” but rather a formulaic cost allocation mechanism for balancing costs among the Operating Companies based on actual expenses.²⁴⁵ New Orleans Council argues that Staff’s request that the Commission modify section 30.12 to disallow retail depreciation and related inputs ignores that the bandwidth

²³⁸ Entergy Brief Opposing Exceptions at 28-29.

²³⁹ *Id.* at 28 (citing Order No. 618, FERC Stats. & Regs. ¶ 31,104 at 31,694-31,695 & n.26).

²⁴⁰ *Id.* at 28-29 (citing *Ohio Edison Co.*, 84 FERC ¶ 61,157 at 61,861).

²⁴¹ *Id.* at 29 (citing Tr. at 115-118, 134, 888; Order No. 618, FERC Stats. & Regs. ¶ 31,104; Exh. No. ESI-29 at 10, 19, 21).

²⁴² New Orleans Council Brief Opposing Exceptions at 11-12.

²⁴³ *Id.* (citing Tr. at 884:8-13 (Nicholas); Tr. at 884:14-20 (Nicholas); Tr. at 891:17-893:20; Tr. at 897:23-898:8 (Nicholas)).

²⁴⁴ *Id.* at 11 (citing Tr. at 885:4-9 (Nicholas)).

²⁴⁵ *Id.* at 19 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 171).

remedy requires actual production costs that are determined in part by retail regulators and in part by the Commission.²⁴⁶

86. Both Entergy and New Orleans Council contend that, if the bandwidth remedy is based solely on the Commission rate, then it would reallocate hypothetical, not actual, costs to the Operating Companies.²⁴⁷ Entergy argues that the use of hypothetical rather than actual costs would skew the calculation of the Operating Companies' position relative to the system average costs, which would undermine the purpose of the bandwidth formula.²⁴⁸ Entergy contends that, therefore, the Commission's decision to use actual depreciation expense inputs is a reasonable policy decision, based on the facts of this proceeding, that does not abdicate the Commission's responsibility over wholesale rate setting.²⁴⁹ Entergy adds that the majority of the actual depreciation expenses incurred by the Operating Companies are a function of the retail depreciation rates.²⁵⁰ Entergy states that the Louisiana Commission agrees that the wholesale rate is the algebraic formula.²⁵¹ The Arkansas Commission argues that Staff's request to depart from the use of actual amounts to using hypothetical depreciation expenses calculated by the Commission solely for purposes of the bandwidth is unprecedented and contrary to the USofA.²⁵²

87. Entergy disagrees that FPA section 302 requires the Commission to independently determine depreciation rates used exclusively for accounting

²⁴⁶ *Id.* at 19-20 (citing Exh. No. S-1 at 22:3-6).

²⁴⁷ *Id.* at 20; Entergy Brief Opposing Exceptions at 25.

²⁴⁸ Entergy Brief Opposing Exceptions at 25 (citing Exh. No. ESI-1 at 16, 21-22).

²⁴⁹ *Id.* at 25.

²⁵⁰ *Id.* Entergy notes that Entergy Louisiana and Entergy New Orleans have no wholesale for resale customers; Entergy Arkansas has one such customer with *de minimis* load; and Entergy Mississippi, Entergy Texas and Entergy Gulf States Louisiana have few of these customers. *Id.* at n.31 (citing Exh. No. ESI-1 at 16-17, 60).

²⁵¹ *Id.* at 25 (citing Louisiana Commission Brief on Exceptions at 5, 46-47).

²⁵² Arkansas Commission Brief Opposing Exceptions at 7 (citing Staff Brief on Exceptions at 30).

purposes and that inconsistencies with Commission policy render the Operating Companies' depreciation accounting incorrect and make it unjust and unreasonable to input those values in the bandwidth formula.²⁵³ Entergy contends that these arguments assume that there is a set of Commission depreciation policies and guidelines that apply in every situation, ignoring the realities of depreciation accounting for multi-jurisdictional utilities.²⁵⁴ The Arkansas Commission disputes the assertion that FPA section 302 requires the Commission to set the depreciation rates for all the Operating Companies' production costs, even if an Operating Company (like Entergy Louisiana and Entergy New Orleans) has no wholesale sales subject to the Commission's ratemaking precedent.²⁵⁵

88. Entergy states that FPA section 302 authorizes the Commission to set depreciation rates for facilities used to serve wholesale customers; however, it leaves the retail regulators to set depreciation rates for facilities used to serve retail customers.²⁵⁶ The Arkansas Commission claims that, if section 302 requires the Commission to always preempt retail regulators' depreciation rate decisions as the Louisiana Commission and Staff claim, then section 302(b), stating that the Commission must account for the recommendations of retail regulators when exercising its section 302(a) authority, would be unnecessary.²⁵⁷ Entergy adds that FPA section 302 does not limit the Commission's discretion to choose the depreciation expense to use in wholesale rates, prohibit the Commission from using depreciation expense based on something other than Commission-prescribed rates, or preclude blended-rate accounting.²⁵⁸

89. The Arkansas Commission states that any inconsistency among regulators was not a concern when the Commission relied on Exhibit Nos. ETR-26 and

²⁵³ Entergy Brief Opposing Exceptions at 26 (citing Louisiana Commission Brief on Exceptions at 10, 13, 27, 29, 38-40, 43-44).

²⁵⁴ *Id.*

²⁵⁵ Arkansas Commission Brief Opposing Exceptions at 26.

²⁵⁶ Entergy Brief Opposing Exceptions at 26 (quoting 16 U.S.C. § 825a).

²⁵⁷ Arkansas Commission Brief Opposing Exceptions at 26 (citing Initial Decision, 134 FERC ¶ 63,016 at P 26).

²⁵⁸ Entergy Brief Opposing Exceptions at 27 (citing Exh. No. ESI-1 at 11-13 (quoting input variables that refer to retail-approved rates). *See also* Arkansas Commission Brief Opposing Exceptions at 7, 26 (citing Initial Decision, 134 FERC ¶ 63,016 at P 26).

ETR-28 in Opinion No. 480 and should not be a concern now.²⁵⁹ The Arkansas Commission adds that the Commission warned that the goal of equalizing any imbalances of costs among the Operating Companies through the rough production cost equalization must not “intrude extensively” into areas of state regulation.²⁶⁰ The Arkansas Commission argues that it is difficult to imagine a more intrusive result or extreme departure from Commission practice than the Commission setting depreciation rates for the Operating Companies’ production plant that is completely subject to state regulation for retail service.²⁶¹ The Arkansas Commission adds that the Commission has not required uniform depreciation rate methodologies among public utilities, noting, in Order No. 618, that such a requirement “would be overly prescriptive.”²⁶² New Orleans Council states that, while the Commission has authority to adjust depreciation rates used for Commission-jurisdictional wholesale sales, it should avoid modifying the depreciation rates set for retail sales,²⁶³ and adds that the difference between the Commission-determined rate and retail rate, standing alone, is also not a proper basis for adjustments to the bandwidth formula or Entergy’s FERC Form 1.²⁶⁴

90. Entergy argues that precedent supports the Commission’s decision to use actual depreciation expense based, in part, on retail-approved rates to set wholesale rates.²⁶⁵ Entergy points to the Commission’s routine acceptance of the use of depreciation expense that reflects retail-approved depreciation rates to set rates charged under Open Access Transmission Tariffs.²⁶⁶ Entergy adds that utilities

²⁵⁹ Arkansas Commission Brief Opposing Exceptions at 7 (citing Opinion No. 480, 111 FERC ¶ 61,311; Staff Brief on Exceptions at 16).

²⁶⁰ *Id.* at 25 (quoting Opinion No. 480, 111 FERC ¶ 61,311 at PP 65-67).

²⁶¹ *Id.*

²⁶² *Id.* at 8 (quoting Order No. 618, FERC Stats. & Regs. ¶ 31,104 at 31,695).

²⁶³ New Orleans Council Brief Opposing Exceptions at 12.

²⁶⁴ *Id.* at 13.

²⁶⁵ Entergy Brief Opposing Exceptions at 27.

²⁶⁶ *Id.* at 27 (citing *Kansas City Power & Light Co.*, Certification of Uncontested Settlement, 133 FERC ¶ 63,002, at P 7 and Attachment 6 (2010); *American Elec. Power Serv. Co.*, Certification of Uncontested Settlement, 131 FERC ¶ 63,012, at P 15 (2010) (OATT proceedings showing depreciation rates were based on a blend of retail and FERC depreciation rates); *Florida Power Corp.*,

routinely report depreciation expenses on a blended-rate basis.²⁶⁷ Entergy claims that, if FPA section 302 were interpreted and applied as the Louisiana Commission suggests, then these situations would not and could not exist and there would have been uniform reporting of only Commission-ordered depreciation expense since the issuance of *Ohio Edison*.²⁶⁸

91. Entergy also disagrees with the Louisiana Commission's reliance on *MidAmerican Energy* for the proposition that FPA section 302 precludes use of blended-rate accounting for depreciation expense.²⁶⁹ Entergy asserts that actual industry depreciation accounting practice, Commission-approved formula rates, Opinion No. 505 and Order No. 618 (which allows utilities to change depreciation accounting without Commission approval) defeat this argument.²⁷⁰ Entergy argues that the Commission has neither interpreted nor applied FPA section 302 in the broad, exclusive manner the Louisiana Commission suggests.²⁷¹ Entergy urges the Commission to refrain from doing so here in response to the Louisiana Commission's limited interest of shifting costs among the Operating Companies in the bandwidth formula.²⁷²

92. Entergy claims that the Louisiana Commission did not conduct research of actual accounting practices to support the principles it presents as industry-wide accounting requirements.²⁷³ New Orleans Council states that the Louisiana

Order Accepting Depreciation Rates, 134 FERC ¶ 61,145, at P 5 and n.8 (2011) (OATT proceeding discussing use of retail-approved depreciation rates and a blend of retail and FERC depreciation rates for accounting and Form 1 reporting)).

²⁶⁷ *Id.* (citing Tr. at 864-65, 875, 898 (Nicholas); Exhs. Nos. ESI-57 and ESI-58 (Kansas City Power and Light and Southwestern Public Service Company FERC Form 1s); Tr. at 867-872).

²⁶⁸ *Id.* at 28 (citing *Ohio Edison Co.*, 84 FERC ¶ 61,157 at 61,861).

²⁶⁹ *Id.* at 29 (citing *Mid American Energy Co.*, 81 FERC ¶ 61,081; Louisiana Commission Brief on Exceptions at 30-31).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 29-30.

²⁷³ *Id.* at 28 (citing Tr. at 141-42).

Commission and Staff have failed to demonstrate that blended depreciation rates that have been endorsed by the industry as an appropriate accounting method for multi-jurisdictional entities are *prima facie* unjust and unreasonable.²⁷⁴ New Orleans Council argues that, under the zone of reasonableness standard, it is possible for the Commission and retail regulators to have differing just and reasonable rates based on similar underlying assumptions; therefore, the difference in rates does not make either rate unjust and unreasonable.²⁷⁵ New Orleans Council adds that, under the zone of reasonableness doctrine, there is no single just and reasonable rate, but rather a range of possible just and reasonable rates.²⁷⁶

93. Next, Entergy disagrees that the Commission's depreciation policies apply to the bandwidth formula. Entergy argues that the Commission should reject the Louisiana Commission's argument that the *Boston Edison* policy applies here. Entergy points out that Opinion No. 505 reversed the portion of the Initial Decision (in that proceeding) that specifically relied on *Boston Edison* to find Entergy's nuclear depreciation and decommissioning expenses to be inconsistent with Commission precedent.²⁷⁷ Entergy also states that the fact that the Commission did not mention *Boston Edison* by name is of no consequence because the substantive policy issue was squarely before the Commission, and the Commission was well aware that the depreciation expense used in the bandwidth calculation was based on service life assumptions that the retail regulators had adopted for the ANO units, Waterford 3 and River Bend, and that these service life assumptions differed from the NRC operating licenses for those plants. Entergy claims that the Commission considered these facts, the mandate that the bandwidth formula use actual costs, and the merits of its *Boston Edison* policy, and found that Entergy correctly accounted for nuclear depreciation and decommissioning expense using the actual data that

²⁷⁴ New Orleans Council Brief Opposing Exceptions at 12 (citing Arkansas Commission Initial Brief at 20).

²⁷⁵ *Id.* at 12-13 (citing *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008) (“The Commission correctly noted that there is not a single ‘just and reasonable rate’ but rather a zone of rates that are just and reasonable; a just and reasonable rate is one that falls within that zone.”) (citations omitted), *rev'd in part on other grounds, sub nom. NRG Power Mktg., LLC. v. Me. Pub. Utils. Comm'n*, 130 S.Ct. 693 (2010)).

²⁷⁶ *Id.*

²⁷⁷ Entergy Brief Opposing Exceptions at 30 (citing *Entergy Services, Inc.*, 124 FERC ¶ 63,026 at PP 492, 443 and 447-448 (2008)).

existed on the Operating Companies' books for 2006.²⁷⁸ The New Orleans Council contends that the Presiding Judge correctly ruled that the Commission's *Boston Edison* policy of basing depreciation costs on the NRC license life of a nuclear plant does not control in the context of the bandwidth formula, due to the Commission's ruling in Opinion No. 505.²⁷⁹

94. Entergy argues that, while the Commission in Opinion No. 505 left open the possibility for the *Boston Edison* argument to be raised in a section 206 proceeding, the Commission also made clear in that opinion that such an argument would need to be made in the context of a proposed amendment to the existing bandwidth formula. Entergy states that in Opinion No. 505 the Commission found that, under the existing tariff, it is not "incorrect" or an "error" for the bandwidth calculation to use the actual depreciation expense as recorded in the Operating Companies' Form Is based on retail-approved depreciation rates, even if the nuclear depreciation expense is different from the expense that would be calculated under the *Boston Edison* policy. Entergy adds that, at the hearing, the Louisiana Commission conceded that it did not allege that Entergy failed to properly apply the actual depreciation rates effective for the test year for nuclear plant in each bandwidth calculation. Entergy contends that there is no error in accounting that would require changing the depreciation rates for nuclear plant.²⁸⁰ Entergy concludes that the Initial Decision appropriately relied on Opinion No. 505 to reject the Louisiana Commission's challenge, which failed to propose any change to the bandwidth formula.

95. The Arkansas Commission argues that the Louisiana Commission and Staff erroneously suggest that in Opinion No. 505 the Commission (i) "took no issue" with application of the rule of *Boston Edison* to the bandwidth formula, and (ii) would so decide if complainants argued accordingly in a section 206 proceeding here. The Arkansas Commission states that the reason that the Commission "took no issue" with the presiding judge's contention in Docket No. ER07-956 that the rule of *Boston Edison* applies to the bandwidth formula is that such argument was a matter reserved to consideration in a future complaint proceeding. That reading, the Arkansas Commission asserts, is consistent with the Commission's finding in Opinion No. 505 that Entergy correctly accounted for its nuclear depreciation

²⁷⁸ *Id.* at 31 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 170).

²⁷⁹ New Orleans Council Brief Opposing Exceptions at 18 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 161).

²⁸⁰ Entergy Brief Opposing Exceptions at 32 (citing Tr. at 52).

expenses under the blended depreciation rate approach.²⁸¹ The Arkansas Commission argues that Staff and the Louisiana Commission mistake the *opportunity* to present their argument to the Commission for a failure to satisfy their burden of proof as section 206 complainants to show that Entergy's blended rate method is no longer just and reasonable (as the Presiding Judge finds at paragraph 33 of the Initial Decision).²⁸²

96. Entergy argues that, even if the Louisiana Commission were now to argue that the bandwidth formula should be amended to incorporate the *Boston Edison* policy, the Louisiana Commission has failed to demonstrate that such an amendment is required. Entergy states that no USofA provision requires the service life assumption for nuclear plant to match the NRC operating license. Entergy notes that *Boston Edison* reflects a depreciation practice that developed through contested cases.²⁸³ Entergy agrees with the Presiding Judge that in Order No. 618, the Commission found that such depreciation practices apply on a case-by-case basis and, therefore, the Commission is free to deviate from that policy based on the facts in this proceeding and the policy goals reflected in the bandwidth remedy.²⁸⁴

97. Entergy claims that the Louisiana Commission provides no support for the use of different nuclear service life assumptions other than the *Boston Edison* policy.²⁸⁵ Entergy states that, without any evidentiary support for applying the general *Boston Edison* policy to the specific circumstances of the bandwidth formula, the Initial Decision correctly found that the Commission should decline to apply that policy here.²⁸⁶ Entergy states that the more specific policy mandate in Opinion No. 480 to use actual costs should prevail over the general *Boston Edison* policy, which developed in the context of establishing wholesale rates for sales from nuclear facilities.²⁸⁷ Entergy also asserts that it is inconsistent with the purpose of the bandwidth remedy to rely on the NRC operating license lives to set different and

²⁸¹ Arkansas Commission Brief Opposing Exceptions at 23 (citing Opinion No. 505, 130 FERC ¶ 61,023 at n.206).

²⁸² *Id.* at 22.

²⁸³ Entergy Brief Opposing Exceptions at 32.

²⁸⁴ *Id.* (citing Initial Decision, 134 FERC ¶ 63,016 at P 27; Order No. 618, FERC Stats. & Regs. ¶ 31,104 at 31,695 and n.26).

²⁸⁵ *Id.* at 34.

²⁸⁶ *Id.* at 35.

²⁸⁷ *Id.*

hypothetical depreciation rates for nuclear plant, which do not match the depreciation rates used by retail regulators.

98. The Arkansas Commission states that the deference basic to the Commission-accepted blended rate method naturally results in retail regulator decisions over Operating Company retail depreciation rates based on methodologies that may differ from each other and from the *Boston Edison* wholesale ratemaking rule.²⁸⁸ The Arkansas Commission claims that FERC Form 1s have always reflected this blended method of reporting depreciation expense, noting that the depreciation expense amounts that are recorded on the books and records of the Operating Companies under Account 403 and reported in the FERC Form 1s consist of the actual amounts determined for the retail segment by state regulators and for the sales of power at wholesale by the Commission.²⁸⁹ The Arkansas Commission argues that, given the Commission's finding that the blended rate approach is lawful, it follows that section 30.12 would defer to state regulator decisions for bandwidth formula purposes.²⁹⁰

99. Also, Entergy argues that the Commission should reject the Louisiana Commission's claims of manipulation of the ANO 1 and ANO 2 depreciation expense inputs. Entergy notes that the Louisiana Commission made these same manipulation claims in the first annual bandwidth proceeding in Docket No. ER07-956. Entergy states that the Presiding Judge concluded that there was no evidence of any improper motive and that the Arkansas Commission's reasons for retaining the 40-year retail nuclear service lives for ANO units was irrelevant in that proceeding. Entergy contends that Opinion No. 505 did not disturb these findings. Entergy adds that Staff testified that there was no evidence that the Arkansas Commission manipulated Entergy Arkansas' depreciation rates for bandwidth purposes.²⁹¹ Likewise, the Arkansas Commission states that the Louisiana Commission raised the same claim that Entergy manipulated the bandwidth formula in the Opinion No. 505 proceeding, and another bandwidth manipulation claim in the Opinion No. 509 proceeding, and notes that the Commission appropriately dismissed them, and states it should do so here.²⁹²

²⁸⁸ Arkansas Commission Brief Opposing Exceptions at 7.

²⁸⁹ *Id.* at 7, 25.

²⁹⁰ *Id.* at 25 (citing Initial Decision, 134 FERC ¶ 63,016 at P 26).

²⁹¹ Entergy Brief Opposing Exceptions at 49 (citing Tr. at 995).

²⁹² Arkansas Commission Brief Opposing Exceptions at 28-29.

100. Furthermore, Entergy argues that it was reasonable for the Arkansas Commission to continue using a 40-year life, even after the NRC granted license extensions for the nuclear units, during the time frame that the Louisiana Commission claims Entergy Arkansas and the Arkansas Commission “sat on” depreciation rates. Entergy asserts it was reasonable because there were significant capital additions associated with the steam generator replacements, worth hundreds of millions of dollars, thus offsetting the effect of the license extension.²⁹³ Therefore, Entergy argues that the Presiding Judge’s rejection of the Louisiana Commission’s manipulation claim is fully supported.

101. The Arkansas Commission states that Entergy’s actions did not persuade the Arkansas Commission to “sit on” service life extensions for ANO 1 and ANO 2 after the NRC granted those extensions. The Arkansas Commission states that, as the retail regulator, it approved Entergy Arkansas’ recovery of production costs at retail. Furthermore, the Arkansas Commission complains that the Louisiana Commission ignores the fact that the purpose of the bandwidth formula remedy is not punitive.

102. As for the Presiding Judge’s *per se* finding, Entergy concedes that, read out of context, the Presiding Judge’s *per se* language does appear to be overly broad.²⁹⁴ Nevertheless, Entergy contends, if read in the context of the Louisiana Commission’s position at hearing, the Presiding Judge correctly states the Commission’s holding in Opinion No. 505. Entergy asserts that in Opinion No. 505, the Commission held that the use of depreciation expense recorded in the FERC Form 1s pursuant to the bandwidth formula must be found to be just and reasonable if the current bandwidth formula is not being challenged.²⁹⁵ Entergy states that during the hearing in this proceeding, instead of pursuing modification of the bandwidth formula, the Louisiana Commission raised the exact same argument that it raised previously, and which the Commission rejected in Opinion No. 505. Specifically, Entergy states that at hearing, the Louisiana Commission challenged the depreciation expense reported in the FERC Form 1s as inconsistent with Commission policy and argued that this expense should be restated for use in the annual bandwidth calculations without changing the bandwidth formula itself.²⁹⁶ Entergy states that, in this context, the Presiding Judge’s description of Opinion

²⁹³ Entergy Brief Opposing Exceptions at 49 (citing Tr. at 694 (Lewis)).

²⁹⁴ *Id.* at 20.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 20-21.

No. 505 is correct. Entergy asserts that, as the Commission held in Opinion No. 505, the procedural avenue to challenge the depreciation expense used in the bandwidth formula is to challenge the provisions of the bandwidth formula requiring the use of the FERC Form 1s' depreciation expense. Entergy states that the Louisiana Commission failed to do this. Entergy argues that the *per se* finding by the Presiding Judge is most logically read as nothing more than a holding that, under Opinion No. 505, the Louisiana Commission is barred from challenging the inputs to the current bandwidth formula itself. Entergy adds that the Presiding Judge properly rejected Staff's attempt to modify the bandwidth formula because there are no changed circumstances to justify such a change.²⁹⁷

103. Entergy points out that the Louisiana Commission advocated a *per se* rule for depreciation rates based on studies that are out of date or otherwise subject to criticism.²⁹⁸ Entergy contends that the Louisiana Commission's argument implies that it has no obligation to demonstrate that the depreciation rates (as opposed to the underlying depreciation studies) are unjust and unreasonable. Entergy finds this argument meritless. Entergy states that the Presiding Judge's finding is nothing more than a refutation of the Louisiana Commission's *per se* argument.²⁹⁹

104. Entergy suggests that the Commission uphold the Presiding Judge's rejection of the Louisiana Commission's argument but clarify the *per se* language. Entergy states that the Commission should explain that use of the FERC Form 1s' data may be challenged through an FPA section 206 complaint proposing amendments to the existing bandwidth formula. Entergy claims that to succeed in arguing that the existing bandwidth formula should be amended it is necessary first to demonstrate that the existing bandwidth formula is unjust and unreasonable, which neither the Louisiana Commission nor Staff accomplished here.³⁰⁰

105. The New Orleans Council and Arkansas Commission argue that the Presiding Judge's finding that an approved Commission tariff is *per se* just and reasonable does not block any remedy for unjust and unreasonable rates in a formula tariff³⁰¹ or preclude any party from successfully presenting evidence that

²⁹⁷ *Id.* at 21.

²⁹⁸ *Id.* at 21-22.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 22.

³⁰¹ New Orleans Council Brief Opposing Exception at 20; Arkansas Commission Brief Opposing Exceptions at 2.

circumstances or conditions have changed since the Commission approved the bandwidth formula tariff, causing section 30.12 of Service Schedule MSS-3 to become unjust and unreasonable. The New Orleans Council and Arkansas Commission argue that the Presiding Judge found that the Commission previously approved section 30.12, Entergy comported with the requirements of that provision, and no changed circumstances or conditions exist since that language was approved which would warrant changing it.³⁰²

106. The Arkansas Commission asserts that the Commission reached no finding in Opinion No. 505, which ruled on the first annual bandwidth filing under section 30.12, on the justness and reasonableness of the proposal to employ NRC license lives to determine depreciation rates and expense amounts for bandwidth formula purposes. The Arkansas Commission states that the Commission decided not to consider this issue in the annual bandwidth proceeding and left it for a future section 206 proceeding. Having left it for a future proceeding, the Arkansas Commission posits that the Commission made no determination in Opinion No. 505 whether or not using NRC license lives to calculate depreciation in the bandwidth formula would be more equitable to ratepayers.³⁰³

107. The Arkansas Commission states that the Commission in paragraph 173 of Opinion No. 505 did not suggest that there is anything more than the mere opportunity to bring a claim.³⁰⁴ It argues that the Commission did not suggest in Opinion No. 505 that the actual depreciation cost inputs from the FERC Form 1s would be replaced by hypothetical amounts, whether based on the use of NRC license lives or use of a method other than the blended rate approach.³⁰⁵ The Arkansas Commission argues that Staff and the Louisiana Commission mistake the opportunity to bring a complaint for a guarantee that such a complaint would be granted.³⁰⁶

³⁰² New Orleans Council Brief Opposing Exceptions at 30 (citing Exh. Nos. S-1 at 17 and LC-3 at 9).

³⁰³ Arkansas Commission Brief Opposing Exceptions at 23.

³⁰⁴ *Id.*

³⁰⁵ The blended rate approach refers to a blended state-federal rate, i.e., the bandwidth formula's (section 30.12 of Service Schedule MSS-3) use of state-established depreciation rates for retail transactions and Commission-established depreciation rates for wholesale transactions. *See* Entergy Brief Opposing Exceptions at 13.

³⁰⁶ Arkansas Commission Brief Opposing Exceptions at 23-24.

5. Commission Determination

108. We affirm that neither the Louisiana Commission nor Staff has shown the existing bandwidth formula in Service Schedule MSS-3 is unjust and unreasonable. Specifically, challengers have not demonstrated that the inclusion of retail depreciation data in the depreciation and decommissioning components of the bandwidth formula is unjust and unreasonable or unduly discriminatory or preferential. Additionally, we do not find sufficient evidence that the bandwidth formula has been manipulated. We further find that the fact that the Operating Companies use different depreciation methods, which are reflected in the bandwidth formula, does not render the bandwidth formula unjust and unreasonable or unduly discriminatory or preferential. Finally, we find the Presiding Judge's labeling of the inputs to the bandwidth formula that are in accordance with the formula as "*per se* just and reasonable" does not undermine her conclusion that challengers fail to meet their burden of proof under FPA section 206.

109. At the outset, we agree with the Presiding Judge that that "the Commission has the authority to adopt retail-determined depreciation rates in the 'jurisdictional' [b]andwidth [f]ormula."³⁰⁷ However, we do not affirm this finding based on the holdings in Opinion No. 505 and the Order Denying Interlocutory Appeal. We agree with the Louisiana Commission and Staff that the Presiding Judge's reliance on Opinion No. 505 is misplaced.

110. In Opinion No. 505, the Commission did not reach the merits of whether the depreciation and decommissioning expenses under the bandwidth formula are unjust and unreasonable.³⁰⁸ Instead, in Opinion No. 505, which addressed the first annual bandwidth filing, the Commission held that under the provisions of the bandwidth formula, Entergy is required to use the data that exists on the Operating Companies' books and is included on the FERC Form 1. The Commission stated that any changes to the bandwidth formula would require a future FPA section 205 or 206 filing. As the Commission has subsequently clarified, if parties believe that Entergy inputted data from the wrong parts of FERC Form 1 in its bandwidth formula, or that the data used was incorrectly calculated, such objections are properly raised in an annual bandwidth proceedings.³⁰⁹ Conversely, if parties believe that the methodology in Service Schedule MSS-3 with respect to depreciation expenses

³⁰⁷ Initial Decision, 134 FERC ¶ 63,016 at P 24.

³⁰⁸ Opinion No. 505, 130 FERC ¶ 61,023 at PP 172-173.

³⁰⁹ Opinion No. 514, 137 FERC ¶ 61,029 at P 27.

should be changed, they should file a separate section 206 complaint (or, in the case of Entergy, a section 205 filing).³¹⁰ The instant proceeding involves a challenge to the formula itself; therefore, precedent from the annual bandwidth implementation proceedings, which focus on application of the formula, is not dispositive of the question whether the formula itself is just and reasonable and not unduly discriminatory or preferential. For this reason, the Order Denying Interlocutory Appeal, which involved the third annual bandwidth filing, is similarly unavailing.³¹¹ 111. We reject the notion that the Commission has delegated its authority over wholesale rates to retail regulators. The fact that the Commission has accepted a formula that utilizes inputs that may have been determined at the state level does not constitute a delegation of our jurisdiction over depreciation expenses.³¹² The Commission previously approved Entergy's compliance filings implementing the bandwidth formula, which include the use of depreciation expenses as approved by the relevant state commissions, as just and reasonable.³¹³

112. We also reject the notion that the formula in section 30.12 is unjust and unreasonable under Commission ratemaking standards and with Commission accounting instructions. The Louisiana Commission has failed to meet its burden of proof to demonstrate that the bandwidth formula is unjust and unreasonable because it does not follow particular Commission depreciation policies. Specifically, we affirm the Presiding Judge's conclusion that *Boston Edison* is not controlling in the context of the bandwidth formula remedy. As the Commission explained in Order No. 618, the Commission monitors a utility's depreciation practices on a case-by-case basis to mitigate the potential for abuse.³¹⁴ The Commission has not codified its *Boston Edison* policy, and there is no requirement in the USofA that service life assumption for a nuclear plant must always match the plant's NRC operating license. Furthermore, the Commission has found other provisions of the bandwidth formula that incorporate retail rates to be just and reasonable, despite the fact that the retail and wholesale data is derived differently. In Opinion No. 480, the

³¹⁰ *Id.*

³¹¹ *Entergy Services, Inc.*, 130 FERC ¶ 61,170 at P 20 (annual bandwidth proceedings determine whether Entergy properly implemented the bandwidth formula).

³¹² Opinion No. 514, 137 FERC ¶ 61,029 at P 52.

³¹³ *Id.* (citing April 2007 Compliance Order, 119 FERC ¶ 61,095 at P 50).

³¹⁴ Order No. 618, FERC Stats. & Regs. ¶ 31,104 at 31,695.

Commission affirmed without discussion Judge Brenner's finding in the underlying initial decision that the bandwidth formula not only could, but *should*, track retail ratemaking on prudence issues:

While not bound by the retail regulators' disallowance of plant costs due to a finding of imprudent costs for Waterford 3 and River Bend, I find neither evidence nor reason here to allow costs that have been determined to be imprudent by a state jurisdiction in one arena to be allowed in setting the wholesale rates of any of the [Entergy Operating Companies] in the context of comparing production costs among the [Entergy Operating Companies]. This would in effect allow one state jurisdiction to pass costs not allowed by it to the ratepayers of other jurisdictions. For this reason, I also am rejecting below the [Louisiana Commission's] attempt to include the disallowed costs from the River Bend Deregulated Asset Plan (DAP) for purposes of comparing [Entergy Operating Companies'] production costs.³¹⁵

Thus, the Commission has recognized that, due to the nature of the bandwidth formula, the Commission's ratemaking practices should not apply in all instances.³¹⁶ Accordingly, the fact that retail depreciation data used in the bandwidth formula may be based on service lives that are different than the NRC license service life, *i.e.*, the depreciation data does not conform to the Commission's *Boston Edison* policy, does not in and of itself render the bandwidth formula unjust and unreasonable. The Louisiana Commission has not demonstrated that the depreciation variables are a bandwidth component that must conform to certain general Commission depreciation policies.

113. As to Louisiana Commission's arguments that section 30.12 of the bandwidth formula conflicts with Commission accounting policies, the terms of the actual production cost formula in section 30.12 (the portion of the bandwidth formula at issue here) demonstrate that the retail data used in the formula comes from the

³¹⁵ *Louisiana Pub. Service Comm'n v. Entergy Servs., Inc*, 106 FERC ¶ 63,012, at 65,122-23 (2004).

³¹⁶ In addition, we note that in the November Compliance Order accepting Entergy's bandwidth remedy formula filing, the Commission accepted provisions that, like Exhibit Nos. ETR-26 and ETR-28, determine each Operating Company's actual production costs using a cost of equity set at the simple average of approved retail rates of return on common equity. *See* November Compliance Order, 117 FERC ¶ 61,203 at P 64.

FERC Form 1, which must conform with the Commission's Rules and Regulations. Specifically, to the extent the bandwidth depreciation variables require the use of depreciation rates approved by retail regulators, those depreciation rates *are* the Commission-approved depreciation rate for bandwidth formula purposes, and the resulting amount of depreciation expense is appropriately recorded by the Entergy Operating Companies in the FERC depreciation accounts in their FERC Form 1s, consistent with *Ohio Edison*.³¹⁷

114. Next, we affirm the Presiding Judge's finding that the Louisiana Commission has not shown that the Arkansas Commission manipulated the depreciation component of the bandwidth formula, nor has the Louisiana Commission shown there is a potential for manipulation of the bandwidth formula that justifies changing the bandwidth formula's depreciation rate method.

115. The Louisiana Commission's manipulation claim focuses on the fact that the Arkansas Commission did not immediately update the service lives for ANO 1 and ANO 2, which resulted in higher depreciation expenses being included in Entergy Arkansas' production costs in the bandwidth formula, impacting rough production cost equalization payments. In support of its contention that the Arkansas Commission's (or the Arkansas Commission in collusion with Entergy) intentional delay in updating these service lives is tantamount to manipulation, the Louisiana Commission points to a 2006 Entergy/Entergy Arkansas study regarding the impact of changing the service life used for retail depreciation-setting purposes on the bandwidth, an e-mail exchange between an Entergy Arkansas employee and an Entergy Service employee regarding the dollar impact of changing the service life, communications between Entergy Arkansas and staff of the Arkansas Commission regarding depreciation rates under the bandwidth, and the failure of Arkansas Commission staff to address Entergy Services' depreciation rates in a 2006 retail rate case proceeding.³¹⁸ We find this evidence insufficient to conclude that Entergy or the Arkansas Commission intended to manipulate depreciation expenses in order to game the bandwidth formula.³¹⁹

³¹⁷ *Ohio Edison Co.*, 84 FERC ¶ 61,157 at 61,862 (finding that the amounts booked to FERC depreciation accounts should reflect Commission-approved depreciation rates and differences between those rates and state-approved depreciation rates should be recorded as regulatory assets and regulatory liabilities).

³¹⁸ See Louisiana Commission Brief on Exceptions at 66-68.

³¹⁹ We note that the Louisiana Commission raised this same issue in the first bandwidth implementation proceeding, and the presiding judge in that proceeding found "no evidence of any improper motive" by the Arkansas Commission. *Entergy Servs., Inc.*, 124 FERC ¶ 63,026 at P 465.

116. At hearing in this proceeding, Staff witness Sammon testified that, while there is a potential for manipulation of the bandwidth, the internal Entergy e-mail correspondence he cites in his testimony does not provide evidence that the Arkansas Commission manipulated the nuclear units' depreciation rates for bandwidth purposes.³²⁰ Significantly, he acknowledged that, in 2010, the Arkansas Commission adopted new depreciation rates for Entergy Arkansas that incorporate the 60-year service life assumption. He further testified that he has no reason to believe any manipulation was involved with respect to the setting of Entergy Arkansas' depreciation rates from 2010 forward.³²¹ In short, he did not claim that the Arkansas Commission engaged in any manipulation.

117. Moreover, the fact that the Arkansas Commission chose not to change the service lives of ANO 1 and ANO 2 in its 2006 rate case, but did so in 2010, does not indicate that it was manipulative not to change them earlier. Rather, circumstances change over time, there is a zone of reasonableness for rates, and the state public utility commission may appropriately take a number of factors into account in establishing retail rates for its ratepayers. Depreciation is but one factor affecting retail rates. Thus we find there is no evidence that the Entergy Arkansas depreciation expense approved by the Arkansas Commission is or has been the result of any attempt by the Arkansas Commission to manipulate the bandwidth formula calculation.³²² Nor is there any record evidence that other retail regulators have manipulated the bandwidth formula calculation.³²³

118. Because the evidence the Louisiana Commission presents is not persuasive, and the Arkansas Commission has already adopted the depreciation service life that the Louisiana Commission has consistently championed in these bandwidth proceedings, we will not consider this issue further. As the proponent of a change in an existing rate, the Louisiana Commission bears the burden to demonstrate that the existing bandwidth formula is unjust and unreasonable.³²⁴ Moreover, absent rare exceptions not at issue here, pursuant to section 206, any change in an existing rate

³²⁰ Tr. at 994-997. *See also* Exh. No. S-1 at 12-13 and 16; Exh. No. AC-24 at 2.

³²¹ *See Id.* at 995; 996-97.

³²² *Id.* at 995-96.

³²³ *Id.* at 999-1000.

³²⁴ 16 U.S.C. § 824e (2006).

may be prospective only.³²⁵ Because the bandwidth implementation proceedings from 2011 going forward will reflect this changed service life assumption underlying ANO 1 and ANO 2, this issue has been effectively resolved.

119. Finally, we find the Louisiana Commission's and Staff's concerns regarding the Presiding Judge's declaration that Entergy's current depreciation expenses, related inputs, and provisions are "*per se* just and reasonable"³²⁶ to be without merit. When construed in the context of her decision, it appears that the Presiding Judge confined her analysis to the facts of this case and used the term "*per se*" as a shorthand for her conclusion that the current depreciation expenses, related inputs and bandwidth formula provisions are just and reasonable "as a matter of law" because they are the existing filed rate and have not been shown to be unjust and unreasonable. Accordingly, as explained below, the Commission affirms the Presiding Judge's finding that the Louisiana Commission and Staff have not shown that the existing bandwidth formula's depreciation expenses, related inputs and provisions are unjust and unreasonable or unduly discriminatory or preferential, although we do not endorse her use of the term "*per se*."

120. Contrary to the Louisiana Commission's contention, the Presiding Judge's holding does not preclude any regulatory review and remedy for unjust and unreasonable rates in a formula tariff. Rather, the Presiding Judge considers the evidence proffered, finds that none suggests that the inputs are incorrect and, later in her decision, *see* paragraphs 29-32, she reviews and evaluates the evidence in detail, finding it insufficient to justify changing the existing bandwidth formula. In paragraph 27 of the Initial Decision, after rejecting Staff's theoretical argument that the Commission alone must determine depreciation expense and related inputs because the bandwidth formula is a Commission-jurisdictional rate, the Presiding Judge states that "[t]here is also no record evidence of changed circumstances or conditions that would justify altering the inputs, terms, provisions, or any other

³²⁵ *See Towns of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992) (finding that the Commission's authority to order refunds for violations of a regulated entity's filed rate under section 309 must be based within a substantive statutory provision of the FPA) and *CPUC v. FERC*, 462 F.3d 1027, at 1048 (D.C. Cir. 2006) (FPA section 309 empowers the Commission to enforce against violators' compliance with the FPA and regulatory requirements unconstrained by FPA section 206 refund effective date); *N.Y. Power Authority v. Consol. Edison Co. of N.Y.*, 115 FERC ¶ 61,088, at P 15 (2006) (refunds ordered for amounts collected above filed rate).

³²⁶ Initial Decision, 134 FERC ¶ 63,016 at P 27.

language of section 30.12, or any other portion of the [b]andwidth [f]ormula.”³²⁷ Since the bandwidth formula, including section 30.12, is the existing filed rate, the Presiding Judge applies the traditional, accepted legal standard used to assess whether an existing rate is no longer just and reasonable, i.e., whether circumstance or conditions have changed since the rate was originally accepted or new evidence is available that shows the existing accepted rate is no longer just and reasonable.³²⁸ In administrative law, this is the standard traditionally used to discern whether the challenger of an existing rate has a legitimate reason to change the existing rate, as opposed to launching a collateral attack, revisiting and rehashing old arguments and evidence.³²⁹

121. We affirm the Presiding Judge’s holding that no evidence suggests the formula (or inputs) is unjust, unreasonable or unduly discriminatory or preferential. We further agree with the Presiding Judge’s conclusion that the bandwidth formula does not require modification. The Louisiana Commission and Staff argue that federal depreciation policy should trump and replace state retail depreciation policy for bandwidth purposes. To the extent their insistence that Commission depreciation policy should override the state retail rate component of the definitions of the depreciation variables can be considered an indirect request to modify those definitions, we nevertheless affirm the Presiding Judge’s determination that challengers have not met their burden of proof to demonstrate the existing bandwidth formula is unjust and unreasonable.

122. Finally, neither the Louisiana Commission nor Staff suggests any change in circumstances or offer any evidence that proves it is unjust and unreasonable or unduly discriminatory to use retail depreciation expenses for bandwidth purposes. To prevail on their argument, the Louisiana Commission and Staff needed to show that the use of depreciation rates from various regulators in the different jurisdictions produces an unjust, unreasonable, unduly discriminatory or preferential allocation of rough production costs among the Operating Companies, which, in turn, would render the Commission-jurisdictional bandwidth formula cost allocation formula unjust and unreasonable.³³⁰ They did not make this showing; consequently

³²⁷ Initial Decision, 134 FERC ¶ 63,016 at P 27.

³²⁸ See, e.g., *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1288 (D.C. Cir. 2000).

³²⁹ See *id.* at 1290.

³³⁰ See, e.g., *FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976).

we affirm the Presiding Judge's conclusion that the existing bandwidth formula has not been shown to be unjust, unreasonable, unduly discriminatory or preferential.³³¹

The Commission orders:

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³³¹ *Sithe/Indep. Power Partners, LP v. FERC*, 165 F.3d 944, at 949 (D.C. Cir. 1999) (complaint has burden of proof under FPA section 206); *Ala. Power Co. v. FERC*, 993 F.2d 1557, at 1571 (proponent of rate change has burden of proving existing rate is unlawful) (citing *Seminole Elec. Coop, Inc.*, 32 FERC ¶ 63,087 (1985)).