



ordering of these and other agency proceedings is well within its discretion to manage complex, interrelated proceedings.

Moreover, Louisiana's petition is its second attempt in as many months to override the Commission's administrative discretion through immediate judicial intervention. Louisiana first sought a writ of mandamus from the D.C. Circuit, in a petition filed December 19, 2013 (D.C. Cir. No. 13-1307), similarly demanding immediate resolution of a pending FERC proceeding. On January 24, while that petition was pending, Louisiana filed the instant petition in this Court. The D.C. Circuit denied the first petition, without comment, in a *per curiam* order issued on January 31. This Court should likewise deny the instant petition.

### **OVERVIEW OF RELEVANT FERC PROCEEDINGS**

To place the FERC proceedings that are the subject of Louisiana's Petition in context, a brief overview of related cases is necessary. Each of the subject proceedings is intertwined with the extensive litigation concerning the so-called "bandwidth" remedy among the affiliated Entergy companies. The recurrence and overlap of similar issues in multiple proceedings support FERC's discretionary ordering of the complex issues and proceedings before it and refute Louisiana's claims of unreasonable delay.

## The Bandwidth Remedy

The Commission adopted the bandwidth remedy in 2005 to address production cost disparities among the Entergy companies operating in four states (Louisiana, Texas, Arkansas, and Mississippi).<sup>1</sup> Louisiana had filed a complaint alleging that cost allocations among the Entergy companies had become unjust,

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<sup>1</sup> Cost allocations in the multistate Entergy system have given rise to many federal appeals over the past three decades. See *Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (filing of 1982 System Agreement); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987) (allocation of nuclear investment costs); *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989) (same, after remand); *City of New Orleans v. FERC*, 67 F.3d 947 (D.C. Cir. 1995) (costs of future replacement capacity after spin-off of generation plants); *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999) (determination of Operating Companies' available capability for purposes of cost equalization); *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) (allocation of capacity costs); *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (same, after remand); *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (reallocation of production costs through bandwidth remedy); *La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008) (allocation of generation resources); *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. July 6, 2009) (methodology for bandwidth calculations); *Council of New Orleans & La. Pub. Serv. Comm'n v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (withdrawal of certain operating companies from System Agreement), *cert. denied*, 133 S. Ct. 2382 (2013). See also *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) (preemption of state regulatory jurisdiction as to cost allocation); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988) (same).

Four additional cases (all captioned *La. Pub. Serv. Comm'n v. FERC*) are currently pending before the D.C. Circuit (Nos. 12-1282, *et al.* (first annual bandwidth proceeding), and No. 13-1155 (allocation of capacity costs, after remand)), and this Court (Nos. 13-60140, *et al.* (second bandwidth proceeding), and No. 13-60874 (third bandwidth proceeding)).

unreasonable, and unduly discriminatory. The Commission, after a hearing before an administrative law judge, agreed that the production costs of the Entergy companies were no longer in rough equalization, as required by the system agreement among the Entergy companies, and adopted a bandwidth formula as a remedial device to limit cost disparities to +/- 11 percent from the average for the Entergy system. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 111 FERC ¶ 61,311 at PP 136, 144, *on reh'g*, 113 FERC ¶ 61,282 (2005), *on appeal*, *La. Pub. Serv. Comm'n*, 522 F.3d 378. On appeal, the D.C. Circuit held that the Commission had jurisdiction to impose the bandwidth formula and that the remedy was reasonable, supported by substantial evidence, and well within the Commission's broad remedial discretion. 522 F.3d at 383, 391-94.

The bandwidth remedy has been implemented through seven annual filings by Entergy, each of which has been disputed on numerous grounds (often recurring) by various parties, including Louisiana. In addition, Louisiana and other parties have filed a number of complaints concerning various aspects of the bandwidth formula and related cost allocation issues. Far from delaying or neglecting those proceedings, the Commission has, since the beginning of 2010, issued at least 17 substantive orders on bandwidth issues alone — including the proper scope of issues to be litigated in annual bandwidth proceedings (rather than separately challenged by complaint), various data to be used in bandwidth

calculations (tax matters, depreciation expenses, costs related to particular assets, return on rate base, storm damage recovery costs, etc.), and other disputes as to calculations and methodology<sup>2</sup> — not counting additional rulings concerning refunds in the original bandwidth remedy proceeding, a separate cost allocation dispute concerning treatment of interruptible load, and other disputes among Entergy and its various state regulators.

### **The Annual Bandwidth Implementation Proceedings**

In May of each year, beginning in 2007, Entergy has submitted a filing, pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d, calculating the Entergy companies' respective production costs and equalization payments based on data for the previous calendar year, in accordance with the bandwidth formula.

The first three annual bandwidth filings were fully litigated in trial-type hearings before FERC administrative law judges (with an interlocutory appeal to

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<sup>2</sup> See *infra* at pp. 5-7, 9-11; see also, e.g., *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107 (2012); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,253 (2010), *on reh'g*, 139 FERC ¶ 61,101 (2012); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,100 (2012); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 137 FERC ¶ 61,070 (2011); *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 137 FERC ¶ 61,030 (2011) (on rehearing of a 2009 order), *reh'g denied*, 142 FERC ¶ 61,012 (2013), *on appeal*, *La. Pub. Serv. Comm'n v. FERC*, 5th Cir. No. 13-60140 (consolidated with appeal from second bandwidth proceeding).

This order count excludes numerous other issuances in the same period, such as orders on compliance filings, orders accepting settlements, procedural orders (such as orders setting matters for hearing or granting rehearing for further consideration), or orders or decisions issued by administrative law judges.

the Commission in the third annual proceeding<sup>3</sup>), and on exceptions to the Commission. Louisiana correctly asserts that the Commission “has issued final orders” in the first three annual bandwidth proceedings (Pet. 4)<sup>4</sup>; all of those orders are currently pending at various stages of appellate review (on Louisiana’s petitions), two before this Court and one before the D.C. Circuit. Louisiana’s appeal from the second bandwidth proceeding has already been briefed and will be argued before this Court on March 10.<sup>5</sup> (Indeed, the instant Petition (at 7-13, 19-21) revisits the same arguments that Louisiana has raised in that appeal.) Louisiana’s appeal from the third bandwidth proceeding is also before this Court, with briefing set to commence in March.<sup>6</sup> Louisiana’s appeal from the first bandwidth proceeding was held in abeyance in the D.C. Circuit pending further agency proceedings on certain issues; after the Commission issued a clarification

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<sup>3</sup> *Entergy Servs., Inc.*, 130 FERC ¶ 61,170 (2010).

<sup>4</sup> As the Commission noted in a motion for abeyance filed in 5th Cir. No. 13-60874, however, Louisiana requested agency rehearing of a compliance order in the third bandwidth proceeding; thus, that underlying FERC proceeding remains ongoing.

<sup>5</sup> *Entergy Servs., Inc.*, 137 FERC ¶ 61,029 (2011), *reh’g denied*, 142 FERC ¶ 61,013 (2013), *on appeal*, *La. Pub. Serv. Comm’n v. FERC*, 5th Cir. Nos. 13-60140 & 13-60141 (consolidated).

<sup>6</sup> *Entergy Servs., Inc.*, 139 FERC ¶ 61,105 (2012), *on reh’g and clarification*, 145 FERC ¶ 61,047 (2013), *on appeal*, *La. Pub. Serv. Comm’n v. FERC*, 5th Cir. No. 13-60874.

order in October 2013, Entergy filed a petition for review that was consolidated with Louisiana's petition, and briefing is expected to commence shortly.<sup>7</sup>

In the fourth bandwidth proceeding, the Commission has issued three rulings since 2010 addressing disputes over the scope of issues to be litigated.<sup>8</sup> That proceeding is pending before an administrative law judge, with a trial-type hearing scheduled for late March 2014.

In the fifth, sixth, and seventh annual proceedings, the Commission set various issues for hearing but held the matters in abeyance pending resolution of earlier bandwidth proceedings in order to prevent relitigation of similar issues. Contrary to Louisiana's contention that the Commission held those matters in abeyance pending the resolution of "unidentified" proceedings (Pet. 4), each of the abeyance orders noted Louisiana's own express incorporation, in each of its protests to Entergy's filings, of all issues raised in previous annual bandwidth proceedings (including the first four, which all have proceeded to trial-type hearings) and bandwidth-related issues that Louisiana had raised in complaint proceedings. *See* 136 FERC ¶ 61,057 at P 17 (2011); 140 FERC ¶ 61,111 at P 27

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<sup>7</sup> *Entergy Servs., Inc.*, 130 FERC ¶ 61,023 (2010), *on reh'g*, 139 FERC ¶ 61,103 (2012), *on clarification*, 145 FERC ¶ 61,045 (2013), *on appeal*, *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. Nos. 12-1282 & 13-1295 (consolidated).

<sup>8</sup> *Entergy Servs., Inc.*, 132 FERC ¶ 61,065 (2010), *on reh'g*, 137 FERC ¶ 61,019 (2011), *on reh'g and clarification*, 145 FERC ¶ 61,049 (2013).

(2012); 144 FERC ¶ 61,167 at P 25 (2013) (attached to Petition as Appendices 4, 5, and 6, respectively).<sup>9</sup> Accordingly, in each of the orders the Commission ruled that, “in order to prevent re-litigation of issues that are the subject of other proceedings pending before the Commission, we will hold [hearing] procedures in abeyance pending a further Commission order.” 136 FERC ¶ 61,057 at P 21; 140 FERC ¶ 61,111 at P 32; 144 FERC ¶ 61,167 at P 30.

Though a number of recurring issues have continued to be litigated in the first four bandwidth proceedings — now in three active appeals before two courts and in a forthcoming administrative hearing — Louisiana demands that the Court overrule the Commission’s determinations as to the ordering of its proceedings and

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<sup>9</sup> Specifically, Louisiana’s protest to each annual bandwidth filing contained the following (identical except for the addition in each subsequent year of the prior year’s bandwidth docket):

[Louisiana] adopts and raises in this protest all issues it previously raised in Docket No. ER07-956, ER08-1056, ER09-1224, and ER10-1350 as well as issues that it has raised in complaint dockets related to the bandwidth calculations to the extent that they are relevant to [Entergy’s] application in this docket.

Protest at 2 (filed June 17, 2011 in FERC Docket No. ER11-3658) (<http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12767493> ); Protest at 2 (filed June 21, 2012 in FERC Docket No. ER12-1920) (<http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13012614> ); Protest at 2 (filed June 19, 2013 in FERC Docket No. ER13-1595) (<http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13286505> ).

For that reason, Louisiana cannot plausibly claim to be perplexed as to the “unidentified” dockets.

direct the agency to move forward with hearings in all of the related cases. As discussed *infra*, such drastic interference with agency discretion requires extraordinary justification, which Louisiana cannot provide. Nevertheless, the Commission expects soon to issue further orders in the abeyed proceedings, managing the litigation and resolution of those matters as it finds appropriate.

### **Bandwidth-Related Complaint Proceedings**

In addition to the annual bandwidth proceedings, the Commission also has ruled on bandwidth-related issues in several complaint proceedings. Two such proceedings initiated by Louisiana are included in its demand for immediate agency action.

***FERC Docket No. EL10-65.*** In a 2010 complaint against Entergy, Louisiana raised six challenges to the bandwidth formula. The Commission dismissed one issue, dismissed another in part and set it for hearing and settlement judge procedures, and determined that four other issues should be set for hearing but held in abeyance pending the outcome of other proceedings. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,104 at P 38 (2010) (attached to Petition as Appendix 1). The following is a summary of those four issues and their progress in other FERC proceedings:

- (1) Whether to include Accumulated Deferred Income Taxes (ADIT) associated with the Waterford 3 sale-leaseback in bandwidth calculations, which the Commission held in abeyance pending consideration of the same issue in the second bandwidth proceeding.

The Commission ruled on that issue in October 2011 and denied rehearing in January 2013 (*see* orders cited *supra* note 5), based upon its determination that the parties' trial stipulation in that proceeding precluded the issue from being litigated (a ruling that Louisiana has not challenged in its appeal of those orders in 5th Cir. No. 13-60141).

(2) Depending on the outcome of the above issue, how Waterford 3 ADIT are to be treated for bandwidth calculation purposes. This issue was already pending on a separate Louisiana complaint in FERC Docket No. EL09-50, which the Commission resolved in an October 2011 order. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,070 (2011), *reh'g pending*.

(3) Treatment of the Spindletop capital lease, which was related to another pending Louisiana complaint in FERC Docket No. EL08-51, in which the Commission granted the relief that Louisiana sought in September 2010. *See La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,253 (2010), *reh'g denied*, 137 FERC ¶ 61,101 (2012).

(4) Treatment of interruptible load, which was already at issue both in another Louisiana complaint (FERC Docket No. EL07-52) and in the third bandwidth proceeding (ER09-1224). In that complaint proceeding, the Commission granted Louisiana relief for the 2007 and 2008 bandwidth years and prospectively from the 2012 bandwidth year. *See La. Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,212 (2007), *on reh'g*, 139 FERC ¶ 61,100 (2012). The Commission denied relief in the third bandwidth proceeding (*see* orders cited *supra* note 6) consistent with its precedents holding that modifications of the bandwidth formula itself must be addressed in complaint proceedings rather than in annual bandwidth implementation proceedings — an issue that is already presented in 5th Cir. No. 13-60141 and may also be raised in 5th Cir. No. 13-60874. (The Louisiana Commission has not made a filing in its EL10-65 complaint proceeding, as required by the abeyance order, to reinstate hearing and settlement judge procedures on this issue.)

***Docket No. EL11-65.*** Louisiana's 2011 complaint against Entergy sought to remove certain out of period expenses and revenues (relating to the Commission's rulings on treatment of interruptible load in the original bandwidth remedy

proceeding, but relating to the period prior to the institution of that remedy in 2006) from the annual bandwidth remedy calculations for 2007 and 2008. The complaint also sought to establish the timing and methodology for adjusting bandwidth calculations to account for changes to the formula. The Commission denied the complaint with respect to the 2007 and 2008 bandwidth calculations in May 2012, and found the issue of possible future adjustments not yet ripe, as it would depend on the outcome of a hearing already scheduled in a separate proceeding on interruptible load. *See La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,102 (2012) ) (attached to Petition as Appendix 3). The Commission issued an order in the interruptible load case in June 2011, and denied rehearing of that order in March 2013. *See La. Pub. Serv. Comm'n v. Entergy Corp.*, 135 FERC ¶ 61,218 (2011), *reh'g denied*, 142 FERC ¶ 61,211 (2013). Further rehearing requests remain pending.

## ARGUMENT

### **The Extraordinary Remedy Of Mandamus Is Not Warranted In These Circumstances**

“[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *accord, McClain v. Panama Canal Comm'n*, 834 F.2d 452, 455 (5th Cir. 1987); *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002); *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997); *see also*

*Yablonski v. United Mine Workers*, 454 F.2d 1036, 1038 (D.C. Cir. 1971) (writs of mandamus are “among the most potent weapons in the judicial arsenal” and, “as extraordinary remedies, . . . are reserved for really extraordinary causes”) (internal quotation marks and citations omitted). A petitioner’s burden is high: “The party seeking mandamus has the burden of showing that ‘its right to the issuance of the writ is clear and indisputable.’” *N. States Power Co.*, 128 F.3d at 758 (citation omitted); *accord*, *Power*, 292 F.3d at 784; *see also McClain*, 834 F.2d at 455 (writ “is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty”).

In particular, “[t]he central question in evaluating ‘a claim of unreasonable delay’” — on which Louisiana bases its request for extraordinary relief — “is ‘whether the agency’s delay is so egregious as to warrant mandamus.’” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *Telecommc’ns Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984)). The first and most important factor is that “the time agencies take to make decisions must be governed by a ‘rule of reason.’” *Core Commc’ns*, 531 F.3d at 855 (quoting *Telecommc’ns Research*, 750 F.2d at 79). “[T]he primary purpose of the writ in circumstances like these is to ensure that an agency does not thwart our jurisdiction

by withholding a reviewable decision.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004), *quoted in Core Commc’ns*, 531 F.3d at 856.

Louisiana cannot meet its high burden to show such foot-dragging. As explained *supra*, since the inception of the bandwidth remedy, the Commission has devoted significant attention and resources to bandwidth-related disputes (many, if not most, litigated by Louisiana). The Commission has issued ten orders on merits issues in the first four annual bandwidth proceedings alone, with three of those proceedings fully litigated in trial-type hearings (and the fourth soon to follow) and now pending before appellate courts; the Commission also has issued nearly as many orders in related complaint proceedings. The agency’s decisions, grounded in its substantive expertise and administrative experience, to hold some related matters in abeyance to avoid repeated litigation of recurring and overlapping issues reflect its considered judgment as to the proper ordering of those matters.

Of course, resolution of complex disputes takes time. An actively litigated agency proceeding with a trial-type hearing before an administrative law judge, briefing on exceptions to the Commission, rehearing (even multiple rounds of rehearing) by the agency, and the ordinary briefing/argument/opinion process in the federal appeals courts may take a number of years from start to finish (even longer if a petitioner were to prevail on judicial review, obtaining a remand to the agency that could include repetition of any or all of those stages). For reference,

no court has yet ruled on any of the annual bandwidth proceedings; the first to be fully briefed will be argued before this Court (Nos. 13-60140 & 13-60141) on March 10. That case — arising from the second bandwidth filing — has proceeded from the initial filing in May 2008, an administrative hearing on 11 issues, with 15 witnesses and 175 exhibits, in June 2009 (following several rounds of written testimony), an initial decision by the ALJ in September 2009, 11 briefs to the Commission on or opposing exceptions, the Commission’s opinion in October 2011, a rehearing order in January 2013, appellate briefing from July to October 2013, and oral argument in March 2014.

Moreover, it is within the Commission’s purview to determine how best to allocate its resources for the most efficient resolution of matters before it. “An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities . . . .” *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (“Absent constitutional constraints or extremely compelling circumstances . . . administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”) (internal quotation marks and citations omitted); *see also New Orleans Pub. Serv., Inc. v. FERC*, 659 F.2d 509, 515 (5th

Cir. 1981) (recognizing Commission’s “authority to tailor administrative procedures to the needs of a particular case”) (citing *Vt. Yankee*); *Tenn. Valley Mun. Gas Ass’n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) (“An agency has broad discretion to determine when and how to hear and decide the matters that come before it.”) (citing cases).

Courts are appropriately reluctant to interfere with that discretion, even in the ordinary course of appellate review — let alone on an extraordinary petition for mandamus relief. *See Mobil*, 498 U.S. at 230 (appeals court had “clearly overshot the mark” if it required the Commission to resolve a particular issue in a particular proceeding) (internal citations omitted); *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (“At least in the absence of substantial justification for doing otherwise, a reviewing court may not . . . proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry . . .”), *cited in Vt. Yankee*, 435 U.S. at 544-45.

Louisiana has vigorously pursued the interests of its constituents in many FERC proceedings concerning the Entergy system, both in protests of Entergy’s rate filings under section 205 of the Federal Power Act and in complaint proceedings initiated by Louisiana itself and by other interested parties under section 206 of the Federal Power Act, as well as in numerous appeals brought by Louisiana pursuant to the ordinary procedures under section 313 of the Federal

Power Act, 16 U.S.C. § 825*l* — for several decades primarily to the D.C. Circuit (*see supra* note 1), and more recently to this Court. But Louisiana has now embarked upon an extraordinary litigation strategy, filing two mandamus petitions in as many months, in two courts of appeals, seeking judicial intervention to overrule the Commission’s careful management of bandwidth-related disputes. The D.C. Circuit rightly rejected the first attempt. This Court should likewise reject the second.

### CONCLUSION

For the reasons stated, this Court should deny the petition for writ of mandamus.

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February 20, 2014



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