ORAL ARGUMENT IS NOT SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 20-1024

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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September 8, 2020

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioner.

B. Rulings Under Review

1. *Louisiana Public Service Commission v. Entergy Services, Inc.*, 167 FERC ¶ 61,186 (2019), JA 1; and

2. *Louisiana Public Service Commission v. Entergy Services, Inc.*, 169 FERC ¶ 61,247 (2019), JA 14.

C. Related Cases

The orders challenged in this appeal concern Entergy compliance filings implementing the Commission's "bandwidth" remedy assuring rough production cost equalization among the operating companies on the Entergy system for the period of June-December 2005. The bandwidth remedy was expanded to include this time period in response to this Court's remand of the timing issue in *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), and this Court affirmed the Commission orders expanding the remedy to the 2005 period in *La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426 (D.C. Cir. 2017).

/s/ *Lona T. Perry*
Lona T. Perry
Deputy Solicitor

September 8, 2020

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GLOSSARY

2009 Settlement	May 21, 2009 Settlement Agreement that led to the May 21, 2009 tariff amendment, JA 1295-99.
2009 Tariff Filing Letter	Entergy's May 21, 2009 letter filing the proposed tariff amendment agreed to in the 2009 Settlement, JA 1319-28.
2009 Tariff	Entergy's amendment to the bandwidth formula rate, effective May 31, 2009. *Entergy Servs., Inc.*, 128 FERC ¶ 61,069 (2009), JA 1355.
2018 Accounting Order	*La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 163 FERC ¶ 61,116 (2018), JA 727.
Commission or FERC	Respondent Federal Energy Regulatory Commission
Compliance Order	*La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 167 FERC ¶ 61,186 (2019), JA 1.
FERC Form 1	An annual report that major electric utilities must file with the Commission every April, pursuant to 18 C.F.R. § 141.1
Louisiana Commission Or Louisiana	Petitioner Louisiana Public Service Commission
Rehearing Order	*La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 169 FERC ¶ 61,247 (2019), JA 14.

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

In 2005, the Federal Energy Regulatory Commission (FERC or the Commission) determined that the production costs of the operating companies comprising the multistate Entergy power system were not roughly equal and thus were unreasonable. To remedy this disparity, the Commission required that Entergy reallocate costs on an annual basis that deviate from a fixed "bandwidth" around the system average beginning January 1, 2006. In 2008, this Court affirmed the remedy

but remanded the issue of whether the remedy should commence on June 1, 2005, when the Commission found Entergy's existing rates unreasonable. In 2011, as affirmed by this Court in 2017, the Commission moved the remedy commencement date to June 1, 2005.

In 2018, the Commission issued orders (which are not on appeal) on Entergy's compliance filing calculating bandwidth remedy payments for the June-December 2005 period. As relevant here, the Commission ordered that Entergy make certain accounting adjustments for the 2005 period and subsequent bandwidth test years "under the filed formula" if the adjustment would affect bandwidth payments.

The challenged orders accepted Entergy's compliance filing implementing the 2018 accounting adjustments. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 167 FERC ¶ 61,186, JA 1 (Compliance Order), *reh'g denied*, 169 FERC ¶ 61,247 (2019), JA 14 (Rehearing Order). In that filing, Entergy adjusted the bandwidth remedy payments based on 2005, 2006 and 2007 data. Entergy did not adjust the remedy payments based on 2008 and 2009 data because, following a tariff revision, the accounting adjustments no longer impacted the bandwidth remedy calculation.

The Louisiana Public Service Commission (Louisiana or the Louisiana Commission), to increase bandwidth payments to Entergy Louisiana and lower Louisiana ratepayer costs, argues that the Commission should have required Entergy to adjust the bandwidth payments based on 2008 and 2009 data. The issue presented here is whether the Commission reasonably accepted Entergy's compliance filing calculating remedy payments.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF FACTS

I. THE ENTERGY SYSTEM AND SYSTEM AGREEMENT

Entergy Corporation[1] is a public utility holding company that, at the time period relevant here, sold electricity at wholesale and retail in Arkansas, Louisiana, Mississippi, and Texas, through five operating

[1] For purposes of this brief, "Entergy" refers either to Entergy Corporation, the corporate parent of the Entergy operating companies and their affiliates, or to Entergy Services, Inc., a service affiliate that acted on behalf of the operating companies in various FERC proceedings.

companies.[2] *See La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 383 (D.C. Cir. 2008) (describing the Entergy system). Entergy operates the operating companies' transmission and generation facilities as a single electric system. *Id.* Entergy has a system agreement that acts as an interconnection and pooling agreement and provides for the joint planning, construction and operation of new generating capacity. *Id.* At all times relevant to this case, transactions among the operating companies were governed by the system agreement.[3] *Id.*

The system agreement requires that production costs be roughly equal among the operating companies. *Id.* at 384. Over the history of the system agreement, the Commission twice (in 1985 and 2005) found that disparities in production costs among the Entergy operating companies had disrupted the rough equalization required by the system

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[2] Those operating companies were: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, LLC; and Entergy New Orleans, Inc.

[3] Entergy Arkansas and Entergy Mississippi withdrew from the Entergy system agreement in 2013 and 2015 respectively. *See Council of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (finding no obligation on operating companies to make bandwidth remedy payments after withdrawal). The remaining companies terminated the system agreement effective August 31, 2016. *La. Pub. Serv. Comm'n v. FERC*, 860 F.3d 691, 694 n.1 (D.C. Cir. 2017).

agreement and resulted in undue discrimination, requiring a Commission-ordered remedy. *See id.* at 391-94 (affirming Commission's 2005 finding of undue discrimination and "bandwidth" remedy for rough equalization of production costs); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1553-58 (D.C. Cir. 1987), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987) (affirming Commission's 1985 finding of undue discrimination and remedy of reallocating nuclear investment costs). The orders on review in the instant case arise from the calculation of the bandwidth remedy payments for the period June-December 2005.

II. THE BANDWIDTH REMEDY AND RELATED PROCEEDINGS

A. The Bandwidth Remedy Proceeding

In 2005, the Commission granted Louisiana's 2001 complaint asserting that the allocation of production costs among Entergy operating companies was no longer in rough equalization. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 PP 28-30, *on reh'g,* Opinion No. 480-A, 113 FERC ¶ 61,282 (2005). The Commission adopted the bandwidth remedy, which provides that when an operating company's production costs deviate more than 11 percent above or below the Entergy system average on an

annual basis, operating companies with lower costs will make payments to operating companies with higher costs so that their overall costs are roughly equalized. *See La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426, 427 (D.C. Cir. 2017).

On appeal, this Court found the bandwidth remedy "well within" the Commission's broad remedial discretion. *La. Pub. Serv. Comm'n*, 522 F.3d at 383, 391-394. The Court, however, remanded the determination that the remedy would be effective January 1, 2006, when the Commission found the system agreement rates "unjust and unreasonable," and thus contrary to federal ratemaking requirements, on June 1, 2005. *Id.* at 399-400. (A Chronology of Relevant Proceedings appears at the end of this brief.).

B. The 2006 Tariff Proceeding Implementing The Bandwidth Remedy

In 2006, Entergy made tariff filings implementing the bandwidth remedy, which the Commission accepted in April 2007. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006), *on reh'g*, 119 FERC ¶ 61,095 (2007). This Court affirmed the Commission orders. *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. 2009).

In its compliance filings, Entergy added new sections 30.11 through 30.14 to service schedule MSS-3 of the system agreement. Those sections established a formula rate methodology for comparing production costs among the Entergy operating companies and roughly equalizing their respective shares of the Entergy system's costs through inter-company payments. *La. Pub. Serv. Comm'n*, 117 FERC ¶ 61,203 PP 24-27, 63. The calculations are based on data reported in the operating companies' annual FERC Form 1,[4] filed each April (covering the previous calendar year). *Id.* PP 46-47. Remedy payments are made in the year following the year in which the costs are incurred. *Id.* P 41.

C. The 2007 Bandwidth Proceeding

In May 2007, Entergy made its annual filing to calculate bandwidth remedy payments based on 2006 cost data. The Commission orders on that filing, *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010), *on reh'g*, Opinion No. 505-A, 139 FERC ¶ 61,103 (2012), were affirmed by this Court in *Louisiana Public Service Commission v. FERC*, 606 F. App'x 1 (D.C. Cir. 2015).

[4] FERC regulations require large electric utilities to file an annual report, in a format specified by the Commission (FERC Form 1), each April. *See* 18 C.F.R. § 141.1.

In that proceeding, Louisiana challenged the accounting treatment of amortization expense associated with Entergy Gulf States's Spindletop Gas Storage Facility. In 1996, the Louisiana Commission ordered Entergy Gulf States to refund to Louisiana ratepayers $63.7 million of capital costs associated with the Spindletop facility and to record the refund as a regulatory asset, which was then amortized over 40 years as it was recovered in retail rates. *Entergy Servs.,* 130 FERC ¶ 61,023 PP 248, 252. The regulatory asset had been established using Account No. 407.4 (Regulatory Credits) and the amortization expense had been recorded to Account 407.3 (Regulatory Debits). *Id.* P 262.

The Commission agreed with the Louisiana Commission that Accounts 407.4 and 407.3 should only be used when the source of the regulatory asset cannot be identified. *Id.* The source of the Spindletop regulatory asset was Account 501 (Fuel). *Id.* P 263. Accordingly, the regulatory asset should have been credited to Account 501 and the annual amortization expense should be debited from Account 501 concurrently with recovery in retail rates. *Id.* Because Account 501 is included in the bandwidth remedy formula rate, unlike Account 407.3,

the amortization expense therefore would be included in Entergy Gulf States's production costs for the purpose of calculating payments under the bandwidth remedy. *Entergy Servs.*, 139 FERC ¶ 61,103 P 63.

D. The 2008 Bandwidth Proceeding And The 2009 Settlement

Entergy initiated the annual proceeding to calculate bandwidth remedy payments based on 2007 cost data in May 2008. The Commission orders on that filing, *Entergy Services, Inc.*, Opinion No. 514, 137 FERC ¶ 61,029 (2011), *reh'g denied*, Opinion No. 514-A, 142 FERC ¶ 61,013 (2013), were affirmed by the Fifth Circuit in *Louisiana Public Service Commission v. FERC*, 761 F.3d 540 (5th Cir. 2014).

In that proceeding, Entergy revised its accounting procedures for purchased power cost deferrals ordered by retail regulators. *See* Entergy's May 21, 2009 Tariff Filing Letter at 5, JA 1323 (Attachment A to Louisiana's September 11, 2018 Motion to Lodge, R. 1217). Previously -- as with the Spindletop regulatory asset discussed above -- Entergy had accounted for deferrals ordered by retail regulators by crediting Account 407.4 (Regulatory Credits) and debiting Account 407.3 (Regulatory Debits), which are not bandwidth eligible accounts. *Id.* Under its revised procedures, Entergy would account for purchased

power deferrals ordered by retail regulators by crediting Account 555 (Purchased Power) -- which is a bandwidth eligible account -- by the deferred amount, and debiting Account 555 as the deferred amount is amortized and recovered through retail rates. *Id.*

This new accounting changed the timing of when deferred purchased power costs are reflected in the bandwidth calculation. *Id.* Previously, the bandwidth calculation reflected the full amount of each operating company's purchased power expense incurred in that year. *Id.* With the accounting change the deferred purchased power expenses are not reflected in the bandwidth calculation until they are recovered through retail rates. *Id.*

The Louisiana Commission challenged this new accounting approach with regard to the deferral of purchased power costs for Entergy Louisiana's River Bend nuclear facility. *See Entergy Servs., Inc.*, 128 FERC ¶ 63,015 P 6 (2009). On May 21, 2009, the parties entered into a settlement agreement (2009 Settlement), which settled eight disputed issues, including the River Bend accounting issue. *See* 2009 Settlement, JA 1295-99 (Attachment 2, Exhibit A to Louisiana's August 6, 2018 Protest, R. 1213). The settlement provided that the

deferred River Bend purchased power costs would be included in the 2008 bandwidth payment calculation. 2009 Settlement, Section 7, page 4, JA 1298. Additionally, the parties agreed that Entergy would make a section 205 filing amending the system agreement, "starting with the 2009 Bandwidth Calculation (i.e. effective May 31, 2009)" to provide that all operating company purchased power costs would be included in the bandwidth calculation in the year the costs were incurred, regardless of whether they are deferred on the operating company's books. 2009 Settlement, Section 7.3, page 4, JA 1298. The Parties, including Louisiana, agreed to support the section 205 filing.

E. The 2009 Tariff

In compliance with the 2009 Settlement, on May 21, 2009, Entergy filed a proposed amendment to the bandwidth remedy formula rate (the 2009 Tariff). *See* Entergy's 2009 Tariff Filing Letter, JA 1319-1328. The amendment provided that purchased power costs deferred by state regulators are reflected in each operating company's production costs in the year in which the costs are incurred for purposes of calculating bandwidth remedy payments. *Entergy Servs., Inc.*, 128 FERC ¶ 61,069 P 4 (2009) (accepting the 2009 Tariff), JA 1355. As also

required by the 2009 Settlement, Louisiana and the other parties supported the amendment and its effective date of May 31, 2009. *Id.* PP 5 & n.6, 9, JA 1356, 1358.

Specifically, Entergy proposed to amend the definition of the PURP (purchased power) variable in section 30.12, Actual Production Cost, of service schedule MSS-3. *Id.* P 6, JA 1357. *See* Entergy's 2009 Tariff Filing Letter, attaching clean and red-lined versions of the PURP variable, JA 1327-1328. The section currently defined the PURP (purchased power) variable as "Purchased Power Expense recorded in FERC Account 555, but excluding payments made pursuant to Section 30.09(d) of this Service Schedule." *Entergy Servs.,* 128 FERC ¶ 61,069 P 6, JA 1357. Entergy proposed to add at the end of this definition an additional exclusion as follows: "and excluding the effects, debits, and credits, resulting from a regulatory decision that causes the deferral of the recovery of costs or the amortization of previously deferred costs." *Id.* In its filing, Entergy stated it "is proposing that the Amendment apply only to new deferrals beginning in 2008. Thus, the Amendment will apply for the first time to the bandwidth calculation that will be

filed on or about May 29, 2009, which will be based on 2008 costs." 2009 Tariff Filing Letter at 5 n.15, JA 1323.

F. Subsequent Bandwidth Calculation Proceedings

The bandwidth proceeding to equalize 2008 production costs began in May 2009. The Commission's orders on that filing, *Entergy Services, Inc.*, Opinion No. 518, 139 FERC ¶ 61,105 (2012), *on reh'g*, 145 FERC ¶ 61,047 (2013), were affirmed by the Fifth Circuit in *Louisiana Public Service Commission v. FERC*, 771 F.3d 903 (5th Cir. 2014).

The bandwidth proceeding to equalize 2009 production costs began in May 2010. The Commission's orders on that filing, *Entergy Services, Inc.*, Opinion No. 545, 153 FERC ¶ 61,303 (2015), *reh'g denied*, 167 FERC ¶ 61,246 (2019), were not appealed.

Bandwidth calculations based on data from 2010 through 2013 are pending before the Commission in Docket No. EL10-65-005. Test year 2014 has been settled. *See Entergy Servs., Inc.*, 156 FERC ¶ 61,091 (2016) (approving settlement). The final bandwidth year, 2015, is currently pending before the Commission in Docket No. ER16-1806. The system agreement was terminated by settlement effective August 31, 2016. *La. Pub. Serv. Comm'n*, 860 F.3d at 694 n.1.

III. THE BANDWIDTH CALCULATION FOR 2005 COSTS

A. This Court Affirms Advancing The Bandwidth Remedy Effective Date To June 1, 2005.

As discussed above, in 2008, this Court upheld the Commission's bandwidth remedy but remanded the remedy's effective date of January 1, 2006 for reconsideration, given that the Commission found that the system agreement rates were "unjust and unreasonable" on June 1, 2005. *La. Pub. Serv. Comm'n*, 522 F.3d at 399-400.

In 2011, the Commission advanced the effective date of the bandwidth remedy by seven months from January 1, 2006 to June 1, 2005 and ordered that bandwidth remedy payments be calculated based on production cost disparities in the June-December 2005 period. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,047 (2011), *on reh'g*, 146 FERC ¶ 61,152 (2014). Denying Louisiana's appeal of these orders, this Court in 2017 affirmed advancement of the remedy effective date and also affirmed application of the 2006 bandwidth tariff formula rate methodology to calculate the bandwidth payments for the June-December 2005 period. *La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426, 430-431 (D.C. Cir. 2017). The Court held that "any severe production cost disparities that post-date June 2005 have been

accounted for with Bandwidth Payments, and we agree with FERC that there was nothing left for it to resolve on remand." *Id.* at 431.

B. The 2018 Accounting Order

The Commission's 2011 order on remand, implementing the bandwidth remedy as of June 1, 2005, directed Entergy to make a compliance filing calculating bandwidth payments based on June-December 2005 production cost disparities. *La. Pub. Serv. Comm'n*, 137 FERC ¶ 61,047 P 34.

Following the Commission's rejection of its first compliance filing,[5] Entergy in 2014 made another compliance filing calculating bandwidth payments based on 2005 costs. At hearing on Entergy's filing, the Administrative Law Judge followed the Commission's Spindletop accounting determination discussed above (*supra* pp. 8-9), and determined that Entergy incorrectly used Accounts 407.4 (Regulatory Credits) and 407.3 (Regulatory Debits), which are not bandwidth-eligible accounts, to record three deferred regulatory assets and their associated amortization expense. Entergy should have used Account

[5] *See La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,153 (2014), *reh'g denied*, 153 FERC ¶ 61,033 (2015).

555 (Purchased Power), which is a bandwidth-eligible account. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 157 FERC ¶ 63,018 PP 98-102 (2016), JA 279-81. The Administrative Law Judge required that Entergy correct the 2005 accounting to the extent that it affected the bandwidth remedy calculation. *Id.* PP 110-13, 115, JA 283-84, 285.

In 2018, the Commission affirmed the Administrative Law Judge's determinations for 2005 costs. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 163 FERC ¶ 61,116 PP 119-120 (2018) (2018 Accounting Order), JA 776-77, *reh'g denied*, 166 FERC ¶ 61,021 (2019). Further, the Commission agreed with Louisiana that the Entergy companies "should be required to correct their FERC Form 1 reports for the three regulatory assets at issue for subsequent bandwidth test years, and make corresponding corrections to the bandwidth payments and receipts for those test years, to ensure that legitimate production costs are properly accounted for on the FERC Form 1 reports and reflected in rates under the filed formula." *Id.* P 121, JA 778.

IV. THE CHALLENGED ORDERS

In 2018, Entergy made a further bandwidth calculation filing for the 2005 period in compliance with the 2018 Accounting Order.

Compliance Order P 8, JA 4. Entergy corrected the accounting for the three identified regulatory asset deferrals for the 2005 period and the accounting for the associated amortization used in the 2007 and 2008 bandwidth calculations (based on 2006 and 2007 data). *Id*. P 9, JA 5. Entergy did not, however, correct the accounting for the associated amortization used in the 2009 and 2010 bandwidth proceedings (based on 2008 and 2009 data) because the 2009 Tariff excluded such amortization from the bandwidth calculation. *Id*.

The Commission accepted Entergy's filing as complying with the 2018 Accounting Order, which limited accounting corrections to those having bandwidth implications. *Id*. P 23, JA 10. Because the bandwidth remedy formula rate applicable to the 2008 and 2009 calculations expressly excluded the amortization of past regulatory deferrals, the Commission found that Entergy was correct to revise the accounting only for 2005, 2006 and 2007. *Id*. PP 24-25, 27, JA 10-11, 12; Rehearing Order P 18, JA 22.

The Commission recognized that, as a result of the 2009 Tariff, amortized amounts relating to the 2005 deferrals were not fully captured in the bandwidth formula calculations based on 2008 and 2009

data. Rehearing Order P 20, JA 23. The Commission rejected the argument, however, that this meant legitimate production costs were impermissibly excluded. Compliance Order P 26, JA 11; Rehearing Order P 20, JA 23. The "trapping" of any costs outside the bandwidth calculation is the result of applying the filed rate. *Id.*

Nor is application of the 2009 Tariff to the 2009 and 2010 bandwidth payment calculations retroactive ratemaking. Compliance Order P 28, JA 12; Rehearing Order P 28, JA 27. The 2009 Tariff applies prospectively to calculations based on new deferrals beginning in 2008 as well as to current amortizations in 2008 and 2009 that stem from 2005 deferrals. Rehearing Order P 28, JA 27.

The Commission also rejected Louisiana's argument that the Commission could correct the allegedly unjust and unreasonable effect of the 2009 Tariff through its Federal Power Act section 309, 16 U.S.C. § 825h, remedial powers. First, whether the 2009 Tariff is unjust and unreasonable is beyond the scope of this compliance proceeding, which addresses only whether Entergy's filing complies with the 2018 Accounting Order and adheres to the filed tariff. Compliance Order P 29, JA 12; Rehearing Order PP 26-27, JA 26-27.

Even if this proceeding were not limited to compliance-related issues and Entergy were not required to adhere to the 2009 Tariff filed rate, the decision whether to direct remedial relief is discretionary, based on the Commission's evaluation of the relevant equities. Rehearing Order PP 26-27, JA 26-27. While parties to the 2009 Tariff proceedings may not have anticipated that accounting corrections from 2005 would impact the 2008 and 2009 test years, there is no suggestion that any party lacked notice of the 2009 Tariff. *Id.* P 27, JA 27. Nor could the Commission presume to guess, as Louisiana urged, how the 2009 Tariff (which was part of a complex, multi-issue settlement) would have been different if the 2005 bandwidth calculations had been conducted at an earlier date. *Id.* PP 26-27, JA 26-27.

SUMMARY OF ARGUMENT

In the 2018 Accounting Order -- a final order not under review -- the Commission directed Entergy to recalculate bandwidth remedy payments "under the filed formula" to correct its accounting for state regulatory cost deferrals in 2005 and the amortization of those deferrals in subsequent years. The 2018 Accounting Order required only those accounting adjustments that would impact bandwidth payments.

The challenged orders accepted Entergy's filing in compliance with the 2018 Accounting Order. Louisiana contends that the filing was deficient because it did not correct the accounting for amortization of the deferred 2005 costs in the 2009 and 2010 bandwidth calculations. However, the tariff applicable to the 2009 and 2010 calculations -- the 2009 Tariff -- expressly excluded "the amortization of previously deferred costs" from the bandwidth remedy calculation. The 2018 Accounting Order did not require accounting adjustments that would not affect the bandwidth calculation. Accordingly, the Commission reasonably found Entergy's filing in compliance with both the 2018 Accounting Order and the filed rate. The Commission could not disregard express tariff language based on Louisiana's extrinsic evidence purporting to show the parties had a different intent.

The 2018 Accounting Order did not compel Entergy to adjust the amortization accounting for the 2009 and 2010 calculations. Although the 2018 Accounting Order did not specifically mention the 2009 Tariff, the Order directed Entergy to recalculate bandwidth payments for bandwidth years subsequent to 2005 "under the filed formula" and required only those accounting adjustments that would affect the

bandwidth calculations. Entergy would be obligated to adhere to the 2009 Tariff filed rate in any event, whether or not expressly directed to do so by the 2018 Accounting Order.

Nor is application of the 2009 Tariff to the 2009 and 2010 bandwidth remedy calculations retroactive ratemaking. The effective date of the 2009 Tariff, May 31, 2009, was determined in a final order not under review here, with the support of all the parties, including Louisiana. The prospective application of the 2009 Tariff to the 2009 and 2010 bandwidth calculations is a straightforward application of the existing filed rate.

The Commission was not compelled to correct the allegedly "unjust and unreasonable" impact of the 2009 Tariff through its Federal Power Act section 309, 16 U.S.C. § 825h, remedial authority. In the first instance, as this Court has recognized, the justness and reasonableness of inputs to the bandwidth formula rate is beyond the scope of bandwidth remedy compliance proceedings such as this one, which only address compliance with the filed formula. Further, Federal Power Act section 309 does not authorize the Commission to disregard an existing filed rate, approved in a final, non-appealable order. Even if the

Commission had authority to avoid the filed rate, the Commission found it would not exercise its discretionary remedial authority here, where Louisiana supported the 2009 Tariff and its effective date.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See*, *e.g.*, *Sithe/Indep. Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). As the Supreme Court has held, "[t]he 'scope of review under the arbitrary and capricious standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.* "Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). "And nowhere is that more true than in a technical area like electricity

rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Id.* (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)). The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b).

This case concerns the Commission's application of the filed rate doctrine, which prohibits a utility from collecting a rate other than the one on file with the Commission and prohibits the Commission from retroactively changing the rate. *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018). This Court reviews the Commission's determinations applying the filed rate doctrine under the arbitrary and capricious standard. *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007).

This case also concerns FERC's interpretation of the Entergy system agreement, which is the filed tariff rate. In reviewing FERC's interpretation of a jurisdictional tariff, the Court applies the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). Under the Court's "*Chevron*-like"

interpretation of filed tariffs, the Court gives substantial deference to the Commission's interpretation unless the tariff language is unambiguous. *ESI Energy, LLC v. FERC*, 892 F.3d 321, 323 (D.C. Cir. 2018); *Old Dominion*, 892 F.3d at 1230. Unambiguous tariff language reflects the clear intent of the parties. *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814-15 (D.C. Cir. 1998).

The Court also defers to the Commission's interpretation of its own precedent. *ESI Energy*, 892 F.3d at 329; *NSTAR*, 481 F.3d at 799; *see also ANR Pipeline Co. v. FERC*, 863 F.2d 959, 963 (D.C. Cir. 1988) (noting "the Commission's superior capacity to construe its own decisions" in determining whether compliance filing complied with the Commission's order).

II. THE COMMISSION REASONABLY ACCEPTED ENTERGY'S COMPLIANCE FILING.

The Federal Power Act requires every public utility to file all rates with the Commission. *ESI Energy*, 892 F.3d at 323. When seeking to change its rate, the utility must file new schedules stating the changes and the time when the changes will go into effect. *Id.* at 324 (citing Federal Power Act section 205(d), 16 U.S.C. § 824d(d)). These statutory dictates are known collectively as the filed rate doctrine. *Old*

Dominion, 892 F.3d at 1226-27. The doctrine prohibits a utility from collecting a rate other than the one on file with the Commission, and the Commission itself cannot retroactively change the rate. *Id*. at 1227 (citing *Ark.-La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)).

Here, the bandwidth remedy is designed so that in April of each year, Entergy reports each operating company's production costs for the prior year on its annual FERC Form 1. Based on that data, in a May filing, Entergy calculates whether any operating company's production costs for the prior year exceeded the established bandwidth. If so, bandwidth payments are exchanged among the Entergy operating companies by the end of the year. The process repeats in each following year. *See La. Pub. Serv. Comm'n*, 866 F.3d at 428. This Court and the Fifth Circuit have recognized that Entergy's bandwidth formula rate is the filed rate that Entergy must apply in its annual calculation of bandwidth remedy payments. *La. Pub. Serv. Comm'n*, 606 F. Appx. at 4 (May 2007 bandwidth proceeding calculating payments based on 2006 cost data); *La. Pub. Serv. Comm'n*, 761 F.3d at 555 (May 2008 bandwidth proceeding calculating payments based on 2007 cost data);

La. Pub. Serv. Comm'n, 771 F.3d at 910 (May 2009 bandwidth proceeding calculating payments based on 2008 cost data).

In the 2018 Accounting Order -- a final order that was not appealed -- the Commission determined that Entergy had incorrectly accounted for three 2005 state regulatory deferrals of production costs in calculating bandwidth payments based on 2005 costs. *See supra* pp. 15-16 (describing the accounting issue). The Commission directed Entergy to: (1) adjust the accounting for the deferrals in 2005 and (2) make accounting adjustments in subsequent bandwidth years for the amortization of those 2005 cost deferrals to the extent it would affect bandwidth calculations "under the filed formula." 2018 Accounting Order PP 120, 121, JA 777, 778. This appeal concerns Entergy's implementation of the second directive, accounting for amortization of the 2005 deferrals in subsequent bandwidth years. (A Chronology of Relevant Proceedings follows at the end of this brief.)

In its compliance filing, Entergy adjusted the amortization accounting used to calculate bandwidth payments in 2007 and 2008 (based on 2006 and 2007 costs), but did not adjust the amortization accounting used in calculating 2009 and 2010 payments (based on 2008

and 2009 costs).[6] As of May 31, 2009, the applicable filed rate -- the 2009 Tariff -- excluded "the amortization of previously deferred costs" from the bandwidth remedy calculations. Rehearing Order PP 10, 18, JA 19, 22. The 2018 Accounting Order did not require accounting adjustments that would not affect bandwidth payment calculations. *Id.* P 22, JA 24; Compliance Order P 25, JA 11.

In the challenged orders, consistent with the filed rate doctrine and the 2018 Accounting Order, the Commission accepted Entergy's compliance filing, finding that bandwidth remedy payments post-dating the 2009 Tariff effective date (May 31, 2009) must be calculated consistently with the 2009 Tariff. Compliance Order P 25, JA 11;

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[6] Only one of the three regulatory assets identified in the 2018 Accounting Order was affected by this determination for data years 2008 and 2009. The assets identified in the 2018 Accounting Order were: (1) an Entergy Arkansas debit of $15.9 million; (2) an Entergy Gulf States credit of $8.4 million; and (3) an Entergy Louisiana credit of $56.3 million. 2018 Accounting Order P 100, JA 770. The Entergy Arkansas debit concerning its Grand Gulf regulatory asset was excluded from the bandwidth calculation by a pre-existing tariff provision not at issue here. *Id.* PP 123, 129, JA 779, 781. According to Louisiana, the deferral for Entergy Gulf States was completed in 2006. Brief at 15. Accordingly, the accounting for the 2008 and 2009 data years affected only a portion of the Entergy Louisiana deferral, which was amortized from September 2006 to August 2009. *Id.*

Rehearing Order P 12, JA 20. Indeed, under the filed rate doctrine neither Entergy nor the Commission had discretion to do otherwise. Rehearing Order PP 12, 30, JA 20, 28; Compliance Order P 25, JA 11. *See, e.g., Old Dominion*, 892 F.3d at 1230 (under the filed rate doctrine the Commission has no discretion to waive the operation of a filed rate). The Commission's determination amply meets the arbitrary and capricious standard of review of Commission filed rate doctrine determinations. *See, e.g.*, *W. Deptford*, 766 F.3d at 17; *NSTAR*, 481 F.3d at 800.

On appeal, Louisiana argues that the Commission misinterpreted the 2009 Tariff, failed to require compliance with the 2018 Accounting Order, engaged in retroactive ratemaking, and abused its discretion in failing to disregard the 2009 Tariff under its remedial authority in section 309 of the Federal Power Act, 16 U.S.C. § 825h. Each of these arguments lacks merit.

A. Explicit Tariff Language Requires Excluding Amortization From Previous Deferrals In The 2009 And 2010 Bandwidth Calculations.

Louisiana argues that the 2009 Tariff did not exclude amortization arising from 2005 state regulatory deferrals. Brief at 28-

32. Louisiana contends that "[t]he language of the amendment makes clear that it was intended to apply only to new deferral decisions." *Id.* at 29. Louisiana further contends that extrinsic evidence -- the 2009 Settlement that led to the 2009 Tariff (*see supra* pp. 10-11 (describing 2009 Settlement)), Entergy's Tariff Filing Letter, and testimony in the 2018 Accounting Order proceeding -- demonstrates that the parties never intended the 2009 Tariff to apply to amortizations from past deferrals. *Id.* at 29-32.

The Commission reasonably rejected these arguments. Rehearing Order PP 18-20, 29, JA 22-23, 28; *see also, e.g.*, Compliance Order P 27, JA 12. The 2009 Tariff revised the tariff definition of the PURP (purchased power expense) variable in the bandwidth formula rate to exclude "the effects, debits and credits, resulting from a regulatory decision that causes the deferral of the recovery of current year costs or the amortization of previously deferred costs." Rehearing Order P 10, JA 19; *see also* Entergy's 2009 Tariff Filing Letter, attaching clean and red-lined versions of the PURP variable, JA 1327-1328.

Thus, the tariff language "expressly states that PURP excludes '*the amortization of previously deferred costs*.'" Rehearing Order P 18,

JA 22. The tariff language therefore does not only apply to new deferral decisions (Brief at 29), but under its express language it also applies prospectively to amortizations stemming from previously-established deferrals. Rehearing Order PP 20, 29, JA 23, 28. Louisiana's citations to the 2009 Settlement, Entergy's 2009 Tariff Filing Letter, and "isolated statements" in the record are attempts to vary the language of the filed rate. *Id.* PP 18-19, JA 22-23.

Notwithstanding Louisiana's arguments, the Commission could not "ignore the express language of the filed rate." *Id.* P 19, JA 22; s*ee also* Compliance Order P 27, JA 12 ("The 2009 Amendment *explicitly requires* the exclusion of the effects, debits and credits resulting from a regulatory decision that causes the deferral of the recovery of current year costs or the amortization of previously deferred costs.") (emphasis added). As this Court has recognized, if the tariff unambiguously addresses the matter at issue, the language controls, "for we must give effect to the unambiguously expressed intent of the parties." *See PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011); *see also NextEra Desert Ctr. Blythe, LLC v. FERC*, 852 F.3d 1118, 1121 (D.C. Cir. 2017) (same). Where unambiguous language evidences the

parties' intent, "extrinsic evidence cannot be used as an aid to interpretation." *Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1304 (D.C. Cir. 2010).

Louisiana cites *Boston Edison Co. v. FERC*, 856 F.2d 361, 371 (1st Cir. 1988), to support consideration of the 2009 Settlement in interpreting the tariff language (Brief at 30), but that case is inapposite. There, the contract at issue was an energy purchase contract that was itself the filed rate. *See, e.g., NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010); *ESI Energy*, 892 F.3d at 323 (both cases recognizing that, under the Federal Power Act, rates may be set unilaterally by tariff or agreed upon in individual contracts between buyers and sellers). Here, Louisiana expressly recognizes that the 2009 Settlement was not incorporated into the filed tariff. Brief at 30.

The Commission further rejected Louisiana's argument (Brief at 28-29) that the Commission's interpretation is "irrational" because it separates debits from credits arising from the same regulatory decision. Rehearing Order P 20, JA 23. The Commission's interpretation was again based on the express language of the tariff. *Id*. The Commission recognized that, due to the express language of the tariff, amortized

amounts relating to 2005 deferrals were not fully captured in the bandwidth formula. *Id.* However, to the extent any costs were not fully recognized, that is a result of the application of the 2009 Tariff filed rate. *Id.*; *see also La. Pub. Serv. Comm'n*, 771 F.3d at 912 ("Although the [Louisiana Commission] protests that prohibiting challenges to the justness and reasonableness of formula inputs in annual bandwidth proceedings will leave consumers without a complete remedy, the absence of retroactive relief is a function of the filed-rate doctrine.") (internal quotation omitted); *La. Pub. Serv. Comm'n*, 761 F.3d at 556 ("The Louisiana Commission insists that FERC's interpretation precludes it from gaining retroactive relief for past inequities, but the absence of retroactive relief is a function of the filed-rate doctrine.").

B. Entergy Complied With The 2018 Accounting Order.

Louisiana also argues that the 2018 Accounting Order's reference to consistency "with the filed formula" did not require applying the 2009 Tariff to the 2009 and 2010 bandwidth calculations. Brief at 22-27. While the 2018 Accounting Order did not specifically identify the 2009 Tariff, the Commission was clear that the ordered changes in accounting should be "reflected in rates under the filed formula," which

for the 2009 and 2010 bandwidth payment calculations is the 2009 Tariff. Compliance Order PP 26, 29, JA 11, 12 (quoting 2018 Accounting Order P 121, JA 778); Rehearing Order PP 21, 26, JA 23, 26; *see also* 2018 Accounting Order P 16, JA 734 ("Although the Presiding Judge did not address whether corrections for the regulatory asset deferrals should be made for years subsequent to the 2005 bandwidth period, we find that making such corrections is necessary to ensure proper implementation of the filed rate."). The Court defers to the Commission's interpretation of its own precedent. *ESI Energy*, 892 F.3d at 329; *NSTAR*, 481 F.3d at 799; *see also ANR Pipeline*, 863 F.2d at 963 (noting "the Commission's superior capacity to construe its own decisions" in determining whether compliance filing complied with the Commission's order).

In any event, regardless of whether the 2018 Accounting Order itself required compliance with the 2009 Tariff, Entergy had no discretion to disregard the filed rate in calculating the 2009 and 2010 bandwidth payments. Rehearing Order P 21, JA 23; Compliance Order P 27, JA 12.

Louisiana also questions whether the 2018 Accounting Order limited accounting adjustments in subsequent years to those having bandwidth implications. Brief at 25-26. But the 2018 Accounting Order expressly "affirmed the Presiding Judge's determination that accounting corrections 'should be limited to accounting adjustments that have been shown to have a bandwidth implication.'" Compliance Order P 23, JA 10 (quoting 2018 Accounting Order P 120, JA 777); Rehearing Order P 22, JA 24. Further, whether or not the accounting was adjusted, the 2009 Tariff would still require Entergy to exclude amortization associated with prior period deferrals from the bandwidth calculations. Rehearing Order P 23, JA 25. Thus, any accounting revisions for the amortization of 2005 regulatory asset deferrals would have no effect on the 2009 and 2010 bandwidth payments. *Id*.

Indeed, Louisiana's arguments here may be viewed as a collateral attack on the 2018 Accounting Order. As the 2018 Accounting Order directed that Entergy only make accounting adjustments with bandwidth implications "under the filed formula," Louisiana reasonably should have anticipated that Entergy would not adjust the 2009 and 2010 payments. Rehearing Order P 26, JA 26. At hearing in the 2018

Accounting Order proceeding a Commission Trial Staff witness testified that amortization accounting corrections could not affect annual bandwidth calculations beginning in 2009 because the PURP (purchased power) variable had been changed in the 2009 Tariff. Compliance Order P 28, JA 12 (citing Staff Exhibit S-56 at 23, R. 1114, JA 368).

A "reasonable firm in [the Louisiana Commission's] position" thus "would have perceived a very substantial risk that the order meant what the Commission now says it meant." *La. Pub. Serv. Comm'n*, 341 F. Appx. at 650 (quoting *S. Co. Servs., Inc. v. FERC*, 416 F.3d 39, 45 (D.C. Cir. 2005)). Louisiana should have sought rehearing and review of the 2018 Accounting Order to challenge the Commission's directives to Entergy to limit accounting adjustments to those having bandwidth implications "under the filed formula."

C. Application Of The 2009 Tariff Is Not Retroactive Ratemaking.

Louisiana argues that the Commission's determination here violates the rule against retroactive ratemaking. Brief at 33-37. First, Louisiana argues, as it did on rehearing before the Commission, that it

is retroactive ratemaking to apply the 2009 Tariff to amortizations associated with 2005 cost deferrals. *Id.* at 33-36.

As the Commission found, this argument has no merit. The 2009 Tariff, effective May 31, 2009, was applied prospectively in the bandwidth calculation proceedings commenced in May 2009 and May 2010 to amortizations recorded in 2008 and 2009 Form 1 reports. Rehearing PP 20, 29, JA 23, 28; Compliance Order P 28, JA 12. This is a straightforward application of the existing filed rate to current amortizations. *Id.* Indeed, if Entergy had reclassified the amortization related to 2005 deferrals in the 2008 and 2009 Form 1 reports and then recalculated the 2009 and 2010 bandwidth payments on that basis, it would have violated the filed rate for those proceedings. Rehearing Order P 29, JA 28; Compliance Order P 28, JA 12.

The Commission reasonably found this treatment of amortizations recorded on the company books in 2008 and 2009 appropriate notwithstanding that the amortizations stem from regulatory deferrals made in 2005. Rehearing Order PP 20, 29, JA 23, 28. The bandwidth formula rate is applied each year to production costs recorded in the operating company's FERC Form 1 reports for the previous year. 2018

Accounting Order P 121, JA 778; *La. Pub. Serv. Comm'n*, 866 F.3d at 428; *see also La. Pub. Serv. Comm'n*, 771 F.3d at 911-12 (the bandwidth tariff "plainly states that the inputs 'shall be based on the actual *amounts on the Company's books*' for the prior year") (quoting the system agreement); *La. Pub. Serv. Comm'n*, 761 F.3d at 555 ("The System Agreement reflects a decision to incorporate actual costs reflected on FERC Form 1 into the formula.").

The Fifth Circuit therefore affirmed including in the May 2009 bandwidth calculation proceeding revenues and expenses for refunds arising from a 1995 complaint that were recorded on the books in 2008. *La. Pub. Serv. Comm'n*, 771 F.3d at 912. Similarly, here, amortizations recorded on the companies' books in 2008 and 2009 properly are subject to the filed rate for the bandwidth calculation proceedings in 2009 and 2010, notwithstanding that those amortizations arose from state regulatory deferrals of purchased power costs in 2005. Rehearing Order PP 20, 29, JA 23, 28.

Louisiana cites *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 579-580 (D.C. Cir. 1990), and *Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944, 950 (D.C. Cir. 1979), in an effort to liken the

bandwidth remedy to a formula rate recovering actual fuel costs through deferred billing. Brief at 34-36. The bandwidth remedy -- which confronts "the unusual problem" of evaluating production cost disparities among operating companies at year end -- is not comparable to a typical formula rate. *La. Pub. Serv. Comm'n*, 866 F.3d at 430. As the Commission found as to *Transwestern* (which also applies to *Public Service* although it was not cited to the Commission on rehearing), the ultimate question is whether the tariff provides notice to ratepayers that prior unrecovered amounts can be collected in current rates. Rehearing Order P 30, JA 28; *see also Transw.*, 897 F.2d at 579-580 (discussing notice); *Pub. Serv.*, 600 F.2d at 950-954 (interpreting notice provided by the tariff). Here, all parties including Louisiana were on notice and agreed that the bandwidth remedy calculation in 2009, based on 2008 data, would be governed by the 2009 Tariff. Rehearing Order P 30, JA 28.

Louisiana makes a second retroactive ratemaking argument, citing this Court's 2017 decision in *Louisiana Public Service Commission*, 866 F.3d 426. Brief at 36-37. Louisiana contends that the 2009 Tariff, effective May 31, 2009, could only apply prospectively to

costs going forward, and therefore could not apply to costs incurred in 2008 or the first five months (January-May) of 2009. *Id.* at 36-37. Although Louisiana was aware of this Court's 2017 decision when it sought rehearing of the Compliance Order in June of 2019, it did not raise this argument. *See* Louisiana's Request for Rehearing at 22-23, R. 1221, JA 1351-52 (arguing only that it was retroactive ratemaking to apply the 2009 Tariff to amortizations resulting from a 2005 deferral). Louisiana's rehearing request in fact stated that the 2009 Settlement, and therefore the 2009 Tariff arising from that Settlement, "unambiguously applies to costs and deferrals going forward, beginning in the 2008 test year used for the 2009 Bandwidth Calculation." *Id.* at 6, JA 1335.

As this argument was not raised on rehearing to the Commission, the Court lacks jurisdiction to consider it. Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b); *see, e.g.*, *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (strictly construing jurisdictional requirement); *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (same).

The Commission has in other proceedings rejected Louisiana's claim that Entergy's revisions to the bandwidth tariff filed under Federal Power Act section 205, 16 U.S.C. § 824d, could not take effect until future calendar years. *See Entergy Servs., Inc.*, 119 FERC ¶ 61,190 P 19 (2007), *on reh'g*, 121 FERC ¶ 61,126 P 12 (2007); *Entergy Servs., Inc.*, 120 FERC ¶ 61,089 P 11 (2007), *on reh'g*, 122 FERC ¶ 61,059 PP 14-18 (2008); *Entergy Servs., Inc.*, 128 FERC ¶ 61,091 n.14 (2007). In *Entergy Services*, 119 FERC ¶ 61,190 P 1, the Commission accepted amendments to the bandwidth tariff proposed on March 30, 2007, to be effective May 30, 2007, which were then applied in the May 2007 bandwidth payment calculation proceeding based on 2006 cost data. Louisiana argued that -- to be effective prospectively -- the 2007 tariff revision could only be applied to future costs incurred in 2008, which would be the basis for the May 2009 bandwidth calculation proceeding. *See id*. P 13.

The Commission, however, found that Federal Power Act section 205, 16 U.S.C. § 824d, gives public utilities the statutory right to amend their rates and to propose that, absent waiver, the amendments be made effective after 60 days' notice. *Id*. P 19. Entergy made its filing

consistent with section 205 of the Federal Power Act, and the Commission properly made it effective after 60 days' notice on May 30, 2007. *Id.*; *see also, e.g., La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1299 (D.C. Cir. 2014) (section 205 affords utilities seeking to raise their rates "nearly immediate relief"); *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 952 (D.C. Cir. 1983) (under Federal Power Act section 205(d), utility-initiated rate change takes effect immediately after the sixty-day notice period).

D. Federal Power Act Section 309 Is Not Properly Raised In This Compliance Proceeding And, In Any Event, Does Not Authorize The Commission To Disregard A Final Filed Rate.

As this Court has recognized and affirmed, the Commission exercised its remedial authority in Federal Power Act section 309, 16 U.S.C. § 825h, to remedy the delay in effectuating the bandwidth remedy by moving the effective date of the remedy from January 1, 2006 to June 1, 2005. *See La. Pub. Serv. Comm'n*, 866 F.3d at 428, 431 (FERC advanced the bandwidth remedy to June 1, 2005 "consistent with [its] ample authority to remedy its own errors after being reversed in court."). Entergy was required to pay interest on bandwidth payments based on the 2005 period. *La. Pub. Serv. Comm'n*, 146 FERC

¶ 61,153 P 30. This Court also affirmed, over Louisiana's objections, FERC's application to the June-December 2005 period of the filed bandwidth formula rate added to the System Agreement in 2006. *La. Pub. Serv. Comm'n*, 866 F.3d at 431. The Court concluded that "any severe production cost disparities that post-date June 2005 have been accounted for with Bandwidth Payments, and we agree with FERC that there was nothing left for it to resolve on remand." *Id.* Accordingly, the Court denied Louisiana's petition "as to the application of the Bandwidth Remedy to the 2005 period." *Id.*

Here, Louisiana argues that the Commission abused its discretion in failing to act further under Federal Power Act section 309 to override the applicable filed rate, the 2009 Tariff, in calculating the 2009 and 2010 bandwidth payments. Brief at 37-43. In Louisiana's view, this additional relief is required for the delay in effectuating the bandwidth remedy beginning in 2005 and is warranted because (1) application of the 2009 Tariff is unjust and unreasonable and (2) the 2009 Tariff would have been different had the 2005 bandwidth calculation proceeding not been delayed. *Id.* at 38-43. The Commission reasonably rejected this argument.

1. Louisiana's Challenges To The 2009 Tariff Are Beyond The Scope Of This Compliance Proceeding.

As discussed, the 2009 Tariff, effective on May 31, 2009, was approved in a final order, never appealed, that amended the bandwidth formula rate applicable in the 2009 and 2010 bandwidth calculation proceedings. *Entergy Servs.*, 128 FERC ¶ 61,069 P 1, JA 1355. That bandwidth formula rate, as amended, is the filed rate, which explicitly excludes amortization associated with prior period deferrals from the bandwidth calculation. Rehearing Order PP 18-19, JA 22-23; Compliance Order P 27, JA 12. Moreover, the 2018 Accounting Order -- also a final order, never appealed -- required that the ordered accounting adjustments be "reflected in rates under the filed formula." Compliance Order P 29, JA 12 (quoting 2018 Accounting Order P 121, JA 778); Rehearing Order P 21, JA 23. Entergy's compliance filing complied with both these directives. Compliance Order P 29, JA 12; Rehearing Order P 26, JA 26.

"In a compliance proceeding, the Commission considers only whether the filing complies with the underlying order." Compliance Order P 29, JA 12 (citing *ISO New England Inc.*, 133 FERC ¶ 61,013

P 22 (2010)); Rehearing Order P 26, JA 26. Louisiana's attempts to avoid the explicit language of the filed tariff are outside the limited scope of this compliance proceeding. Rehearing Order P 26, JA 26; Compliance Order P 29, JA 12. This Court has recognized that -- once Entergy's bandwidth formula rate is approved -- the Commission reviews Entergy's annual bandwidth calculations "only for compliance with the rate rule." *La. Pub. Serv. Comm'n*, 606 F. Appx. at 4 (quoting *ChevronTexaco Expl. & Prod. Co. v. FERC*, 387 F.3d 892, 896 (D.C. Cir. 2004)). In approving a rate rule to be followed later by annual calculations according to that rule, the Commission "effectively bifurcate[s] its inquiry into the reasonableness of the resulting rates." *ChevronTexaco*, 387 F.3d at 896. When the Commission initially approves the rate rule, the Commission determines that it will produce results that are "just and reasonable" within the meaning of the statute. *Id*. Thereafter, the Commission properly reviews the annual filings "only for compliance with the rate rule in its tariff." *Id*.

When the annual filing is calculated in accordance with the rate rule in the tariff, the Commission must accept the filing "despite any perceived flaws in the rate rule." *Id*. at 896-897 (affirming Commission

orders accepting an annual rate filing notwithstanding the Commission's determination that the underlying tariff rate rule was not producing "just and reasonable" results). Thus, Louisiana cannot challenge bandwidth formula inputs in compliance proceedings once the formula becomes the filed rate. *La. Pub. Serv. Comm'n*, 606 F. App'x at 5. Here, the Commission reasonably rejected Louisiana's efforts to have the Commission find the filed rate unreasonable in this review of Entergy's bandwidth remedy calculations. Rehearing Order PP 19, 26, JA 22, 26; Compliance Order P 29, JA 12.

2. Federal Power Act Section 309 Does Not Authorize The Commission To Set Aside The Filed Rate Here.

Section 309, 16 U.S.C. § 825h, does not authorize the Commission to set aside the filed rate here (Brief at 37-43). Rehearing Order P 27, JA 27; Compliance Order P 29, JA 12. As the Commission found, section 309 authorizes the Commission to issue orders "to carry out the provisions of this [Act]." Rehearing Order P 27 n.63, JA 27. Thus, while section 309 vests the Commission with broad remedial authority, that authority does not permit the Commission to contravene statutory limitations. *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C.

Cir. 2017) (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967)); *Verso Corp. v. FERC*, 898 F.3d 1, 11-12 (D.C. Cir. 2018). The filed rate doctrine is a fundamental statutory limitation. *Old Dominion*, 892 F.3d at 1227; *Verso*, 898 F.3d at 11 (requiring that section 309 be "read in harmony" with the filed rate doctrine).

Louisiana points to cases finding that the Commission possesses authority to set rates retroactively to address legal error. Brief at 40-42. But the cited cases arise under the notice exception to the filed rate doctrine. *See W. Deptford*, 766 F.3d at 22 (citing *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299-300 (D.C. Cir. 2001); *W. Resources, Inc. v. FERC*, 72 F.3d 147, 151 (D.C. Cir. 1995); *Pub. Utils. Comm'n v. FERC*, 988 F.2d 154, 163-166 (D.C. Cir. 1993); and *Nat. Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075-77 (D.C. Cir. 1992)).

The "filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service." *Id.* (quoting *Nat. Gas Clearinghouse,* 965 F.2d at 1075); *see also*, *e.g.*, *Canadian Ass'n*, 254 F.3d at 299 (D.C. Cir. 2001) ("ongoing

litigation and the absence of a final, non-appealable order" put shippers on notice they may have to pay a different rate); *Nat. Gas Clearinghouse*, 965 F.2d at 1075 (pipeline had challenged Commission-ordered rate); *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) (Brief at 41) (erroneous valuations were contested); *Xcel Energy Servs., Inc. v. FERC*, 815 F.3d 947, 956 (D.C. Cir. 2016) (Brief at 40-41) (distinguishing error correction where orders are still under review from a rate schedule that "has been approved and taken effect in a final order."); *Pub. Utils. Comm'n*, 988 F.2d at 164-166 (Brief at 41) (pipeline had appealed tariff exclusivity condition); *TNA Merchant*, 857 F.3d at 361 (Brief at 41) (recoupment of refunds while acting on remand of refund orders).

Thus, the filed rate doctrine does not bar retroactive relief "where [the Commission's] order, *which never became final*, has been overturned by a reviewing court." *United Gas Imp. Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) (emphasis added) (Brief at 41-42). Here, in contrast, there was no litigation and no court decision finding the 2009 Tariff to be unlawful. To the contrary, the 2009 Tariff was accepted in a final Commission order that was not appealed; all parties

including Louisiana supported the Tariff. Rehearing Order P 30, JA 28. Entergy was therefore required to adhere to the 2009 Tariff. *Id*. P 27, JA 27. While the Commission has authority to correct legal error when a court invalidates the set rate as unlawful, *Old Dominion*, 892 F.3d at 1227, that authority does not extend to overturning a final approved rate for equitable reasons. "The filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations." *Id*. at 1230. The Commission thus reasonably rejected the argument that it could excuse failure to comply with the filed formula rate under section 309. Rehearing Order P 27, JA 27; Compliance Order P 29, JA 12.

Even if section 309 relief were not barred by the filed rate doctrine, the Commission was not persuaded that it should exercise its remedial discretion in these circumstances. Rehearing Order P 27, JA 27; *see also, e.g., Exxon*, 182 F.3d at 49 (finding FERC has discretion in determining the remedy for legal error). The Commission's exercise of remedial discretion is based upon weighing the relevant equities. Rehearing Order P 27, JA 27 (citing *Xcel Energy Servs*., 815 F.3d at

955). On the one hand, the Commission recognized that, when the 2009 Tariff was introduced, the parties may not have anticipated that the bandwidth calculation based on 2005 data would impact bandwidth test years governed by the 2009 Tariff. *Id.*

On the other hand, the parties did not lack notice of the 2009 Tariff. *Id.* Nor could the Commission presume what the 2009 Tariff would have provided had the 2018 Accounting Order proceeding been conducted at an earlier date. *Id.* *See* Brief at 38, 43 (arguing that, if the bandwidth calculation proceeding on 2005 costs were not delayed, the 2009 Tariff would have been different). As discussed above, *see supra* pp. 10-11, the 2009 Settlement that gave rise to Entergy's 2009 Tariff proposal was a complex settlement that resolved eight separate contested issues among all the parties to Entergy's 2008 bandwidth calculation proceeding. Unlike proceedings where the Commission could make a utility's requested rate effective retroactively to cure legal error in disallowing the rate, *see, e.g., Natural Gas Clearinghouse*, 965 F.2d at 1074-1075, it would be speculative to attempt to put the parties in the position they would have occupied with regard to that complex settlement in the event that this compliance proceeding had occurred

earlier (Brief at 42-43). Rehearing Order P 27, JA 27. As this Court has explained, *see Exxon*, 182 F.3d at 49, the Commission is not required to provide a remedy for legal error "if the other considerations properly within its ambit counsel otherwise."

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review upheld.

Respectfully submitted,

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CHRONOLOGY OF RELEVANT PROCEEDINGS

2008 — This Court affirms the bandwidth remedy but remands the January 1, 2006 commencement date because the Commission found Entergy rates unjust and unreasonable on June 1, 2005. *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 383 (D.C. Cir. 2008).

2009 — The Commission accepts Entergy's tariff amendment (the 2009 Tariff) excluding amortization of previously deferred costs from the bandwidth calculation. *Entergy Servs., Inc.*, 128 FERC ¶ 61,069 (2009).

2011 — The Commission advances the bandwidth remedy effective date to from January 1, 2006 to June 1, 2005 and requires calculations for 2005. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,047 (2011), *on reh'g*, 146 FERC ¶ 61,152 (2014).

2017 — This Court affirms advancing the bandwidth remedy effective date to June 1, 2005. *La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426 (D.C. Cir. 2017).

2018 — The 2018 Accounting Order requires that Entergy make accounting adjustments for 2005 and subsequent bandwidth years "under the filed formula" to the extent the adjustments affect bandwidth payments. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 163 FERC ¶ 61,116 (2018).

2019 — The challenged orders accept Entergy filings in compliance with the 2018 Accounting Order that exclude amortizations from previously deferred costs from the 2009 and 2010 bandwidth calculations (based on 2008 and 2009 data). *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 167 FERC ¶ 61,186, *reh'g denied*, 169 FERC ¶ 61,247 (2019).

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word, in 14-point Century Schoolbook) and contains 9857 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

/s/ *Lona T. Perry*
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September 8, 2020

ADDENDUM
STATUTES AND REGULATIONS

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STATUTES **PAGE**

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under

any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds

individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on 60th day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before 60th day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 825g. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 10, 1920, ch. 285, pt. III, § 308, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 10, 1920, ch. 285, pt. III, § 309, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

COMMISSION REVIEW

Pub. L. 99–495, § 4(c), Oct. 16, 1986, 100 Stat. 1248, provided that: ''In order to ensure that the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.], as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act [16 U.S.C. 825h], review all provisions of that Act [16 U.S.C. 791a et seq.] requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as meaning 'working days', rather than 'calendar days' unless calendar days is specified in such Act for such action.''

§ 825i. Appointment of officers and employees; compensation

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 10, 1920, ch. 285, pt. III, § 310, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attor-neys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employ-ees of the United States'' have been omitted as obsolete and superseded.

Such appointments are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provi-sions of the 1949 Act, and section 5103 of Title 5 author-izes the Office of Personnel Management to determine the applicability to specific positions and employees.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, §311, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided

in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

§ 131.80 FERC Form No. 556, Certification of qualifying facility (QF) status for a small power production or cogeneration facility.

(a) *Who must file.* Any person seeking to certify a facility as a qualifying facility pursuant to sections 3(17) or 3(18) of the Federal Power Act, 16 U.S.C. 796(3)(17), (3)(18), unless otherwise exempted or granted a waiver by Commission rule or order pursuant to §292.203(d), must complete and file the Form of Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility, FERC Form No. 556. Every Form of Certification of Qualifying Status must be submitted on the FERC Form No. 556 then in effect and must be prepared in accordance with the instructions incorporated in that form.

(b) *Availability of FERC Form No. 556.* The currently effective FERC Form No. 556 shall be made available for download from the Commission's Web site.

(c) *How to file a FERC Form No. 556.* All applicants must file their FERC Forms No. 556 electronically via the Commission's eFiling Web site.

[Order 732, 75 FR 15965, Mar. 30, 2010]

PART 141—STATEMENTS AND REPORTS (SCHEDULES)

Sec.

AUTHORITY: 15 U.S.C. 79; 15 U.S.C. 717–717z; 16 U.S.C. 791a–828c, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 141.1 FERC Form No. 1, Annual report of Major electric utilities, licensees and others.

(a) *Prescription.* The Form of Annual Report for Major electric utilities, licensees and others, designated herein as FERC Form No. 1, is prescribed for the reporting year 1981 and each year thereafter.

(b) *Filing requirements*—(1) *Who must file*—(i) *Generally.* Each Major and each Nonoperating (formerly designated as Major) electric utility (as defined in part 101 of Subchapter C of this chapter) and each licensee as defined in section 3 of the Federal Power Act (16 U.S.C. 796), including any agency, authority or other legal entity or instrumentality engaged in generation, transmission, distribution, or sale of electric energy, however produced, throughout the United States and its possessions, having sales or transmission service equal to Major as defined above, must prepare and file electronically with the Commission the FERC Form 1 pursuant to the General Instructions as provided in that form.

(ii) *Exceptions.* This report form is not prescribed for any agency, authority or instrumentality of the United States, nor is it prescribed for municipalities as defined in section 3 of the Federal Power Act; (*i.e.*, a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power).

(2) *When to file and what to file.* (i) The annual report for the year ending December 31, 2004, must be filed on April 25, 2005.

(ii) The annual report for each year thereafter must be filed on April 18.

(iii) This report must be filed with the Federal Energy Regulatory Commission as prescribed in §385.2011 of this chapter and as indicated in the General Instructions set out in this form, and must be properly completed and verified. Filing on electronic media

pursuant to §385.2011 of this chapter is required.

[Order 200, 47 FR 1280, Jan. 12, 1982, as amended by Order 390, 49 FR 32515, Aug. 14, 1984; Order 574, 60 FR 1718, Jan. 5, 1995; Order 626, 67 FR 36096, May 23, 2002; 69 FR 9043, Feb. 26, 2004; Order No. 694, 72 FR 20723, Apr. 26, 2007; 73 FR 58736, Oct. 7, 2008]

§141.2 FERC Form No. 1–F, Annual report for Nonmajor public utilities and licensees.

(a) *Prescription*. The form of Annual Report for Nonmajor Public Utilities and Licensees, designated herein as FERC Form No. 1–F, is prescribed for the year 1980 and each year thereafter.

(b) *Filing Requirements*—(1) *Who Must File*—(i) *Generally*. Each Nonmajor and each Nonoperating (formerly designated as Nonmajor) public utility and licensee as defined by the Federal Power Act, which is considered Nonmajor as defined in Part 101 of this chapter, shall prepare and file with the Commission an original and conformed copies of FERC Form No. 1–F pursuant to the General Instructions set out in that form.

(ii) *Exceptions*. FERC Form No. 1–F is not prescribed for any municipality as defined in Section 3 of the Federal Power Act, i.e., a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

(2) *When to file*. (i) The annual report for the year ending December 31, 2004, must be filed on April 25, 2005.

(ii) The annual report for each year thereafter must be filed on April 18.

[Order 101, 45 FR 60899, Sept. 15, 1980, as amended by Order 390, 49 FR 32515, Aug. 14, 1984; 50 FR 5744, Feb. 12, 1985; 69 FR 9043, Feb. 26, 2004; Order No. 694, 72 FR 20723, Apr. 26, 2007]

§141.14 Form No. 80, Licensed Hydropower Development Recreation Report.

The form of the report, Licensed Hydropower Development Recreation Report, designated as FERC Form No. 80, for use by licensees in reporting information with respect to existing and potential recreational use at developments within projects under major and minor license, is approved and prescribed for use as provided in §8.11 of this chapter.

[46 FR 50059, Oct. 9, 1981]

§141.15 Annual Conveyance Report.

If a licensee of a hydropower project is required by its license to file with the Commission an annual report of conveyances of easements or rights-of-way across, or leases of, project lands, the report must be filed only if such a conveyance or lease of project lands has occurred in the previous year.

[Order 540, 57 FR 21738, May 22, 1992]

§141.51 FERC Form No. 714, Annual Electric Balancing Authority Area and Planning Area Report.

(a) *Who must file*. (1) Any electric utility, as defined by section 3(4) of the Public Utility Regulatory Policies Act, 16 U.S.C. 2602, operating a balancing authority area, and any group of electric utilities, which by way of contractual arrangements operates as a single balancing authority area, must complete and file the applicable schedules in FERC Form No. 714 with the Federal Energy Regulatory Commission.

(2) Any electric utility, or group of electric utilities that constitutes a planning area and that has a peak load greater than 200 megawatts (MW) based on net energy for load for the reporting year, must complete applicable schedules in FERC Form No. 714.

(b) *When to file*. FERC Form No. 714 must be filed on or before each June 1 for the preceding calendar year.

(c) *What to file*. FERC Form No. 714, Annual Electric Balancing Authority Area and Planning Area Report, must be filed with the Federal Energy Regulatory Commission as prescribed in §385.2011 of this chapter and as indicated in the General Instructions set out in this form.

[58 FR 52436, Oct. 8, 1993 as amended by Order No. 20723, 72 FR 20725, Apr. 26, 2007]

EFFECTIVE DATE NOTE: At 58 FR 52436, Oct. 8, 1993, §141.51 was revised. The section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

Louisiana Public Service Commission v. FERC,
D.C. Cir. No. 20-1024

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 8th day of September 2020, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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/s/ Lona Perry
Lona Perry
Deputy Solicitor

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