153 FERC ¶ 61,184
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc. Docket No. ER10-2001-004

OPINION NO. 523-A

ORDER DENYING REHEARING

(Issued November 19, 2015)

1. In this order, the Commission addresses a request filed by the Louisiana Public Service Commission (Louisiana Commission) for rehearing of Opinion No. 523.[1] In Opinion No. 523, the Commission affirmed the determinations of the Presiding Administrative Law Judge (Presiding Judge) in an initial decision addressing the justness and reasonableness of Entergy Services, Inc.'s (Entergy) proposed depreciation rates (Depreciation Rates) for Entergy Arkansas, Inc. (Entergy Arkansas).[2] As discussed more fully below, we deny the Louisiana Commission's request for rehearing.

I. Background

2. A detailed recitation, including but not limited to, the history of the Entergy System, Testimony, Facilities at Issue, and Depreciation Principles at issue in this case is set forth in Opinion No. 523 and will not be repeated here.[3] As relevant to the Louisiana Commission's rehearing request, the Entergy System Agreement (System Agreement)[4] provides for, among other things, joint planning, construction, and operation of the Entergy Operating Companies' (Operating Companies)[5] facilities and maintains a

[1] *Entergy Servs., Inc.*, 142 FERC ¶ 61,022 (2013) (Opinion No. 523).

[2] *Entergy Servs., Inc.*, 136 FERC ¶ 63,015 (2011) (Initial Decision).

[3] Opinion No. 523, 142 FERC ¶ 61,022 at PP 2-34.

[4] *Id.* PP 2-13 (describing the System Agreement).

[5] The six Operating Companies are: Entergy Arkansas, Inc.; Entergy Louisiana, L.L.C. (Entergy Louisiana); Entergy Mississippi, Inc. (Entergy Mississippi); Entergy

coordinated power pool among the Operating Companies. The System Agreement contains seven Service Schedules, of which three (MSS-1, MSS-3, and MSS-4) are relevant here.

3. Service Schedule MSS-1 concerns equalization of generation reserves and related ownership costs among the Operating Companies. Under Service Schedule MSS-1, an Operating Company with excess generation receives an equalization payment from another Operating Company that has insufficient generation to serve its load. Service Schedule MSS-4 concerns unit power purchases between Operating Companies and the sale of power purchased by another Operating Company.[6]

4. Service Schedule MSS-3 includes the bandwidth formula. In Opinion No. 480, the Commission found that rough production cost equalization on the Entergy System had been disrupted and therefore accepted a numerical "bandwidth" of +/- 11 percent of the Entergy System average production cost to maintain the rough equalization of production costs among the Operating Companies.[7] The Commission also required Entergy to make annual bandwidth implementation filings to determine any necessary

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New Orleans, Inc.; Entergy Texas, Inc. (Entergy Texas); and Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana). Over the past few years several Operating Companies have withdrawn or filed notices to withdraw from the System Agreement. Specifically, Entergy Arkansas withdrew from the System Agreement effective December 18, 2013; Entergy Mississippi filed notice of withdrawal effective November 7, 2015; Entergy Texas filed notice of withdrawal effective October 18, 2018; and Entergy Louisiana and Entergy Gulf States Louisiana filed notices of withdrawal effective February 14, 2019. On August 14, 2015 in Docket No. ER14-75-000, Entergy filed an offer of settlement to resolve all outstanding issues among the Settling Parties in pending dockets concerning the required notice period for an Operating Company to terminate its participation in the System Agreement. The Settlement provides for the System Agreement to terminate, effective August 31, 2016, if the Settlement is approved by the Commission and retail regulators. On October 1, 2015, Entergy Gulf States Louisiana and Entergy Louisiana combined substantially all of their respective assets and liabilities into a single successor public utility operating company, Entergy Louisiana Power, LLC, which then changed its name to Entergy Louisiana, LLC. *See Entergy Gulf States Louisiana, L.L.C.*, 151 FERC ¶ 62,018 (2015).

[6] Service Schedule MSS-4 § 40.02.

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

bandwidth payments among the Operating Companies. In compliance with Opinion Nos. 480 and 480-A, Entergy included in Service Schedule MSS-3 at section 30.12 the formula for implementing the rough production cost equalization bandwidth remedy (bandwidth formula). Service Schedule MSS-3 also contains provisions governing the exchange and pricing of energy among the Operating Companies.

5. Currently, under Service Schedules MSS-1, MSS-3, and MSS-4 the definitions of depreciation components call for input of the amount reported in the relevant depreciation accounts on each Operating Companies' FERC Form No. 1. However, Service Schedules MSS-3 and MSS-4 differ from Service Schedule MSS-1 in that the definitions of the depreciation expense variables in Service Schedules MSS-3 and MSS-4 refer to depreciation rates approved by retail regulators and contain an "unless" clause. The definition of depreciation expense in section 10.06 of Service Schedule MSS-1 provides:

> D = The amount of depreciation for the preceding year as reported on page 429 of the Company FERC Form No. 1 report as related to Intermediate Generating Units and associated equipment required to connect generating equipment to the transmission system.

In contrast, the definition of depreciation and amortization expense in section 30.12 of Service Schedule MSS-3 for one type of plant investment provides (emphasis added):

> DEXN = Depreciation and Amortization Expense associated with the plant investment in PPXN as recorded in FERC Accounts 403, 404, and 406, as approved by Retail Regulators *unless the jurisdiction for determining the depreciation rate is vested in the FERC under otherwise applicable law.*

Similarly, in section 40.05 of Service Schedule MSS-4, the depreciation expense variable is described as follows (emphasis added):

> Plus any Depreciation Expense associated with the plant investment in Designated Generating Unit referred to in [s]ection 40.04 items (a) and (b) (as recorded in Account 403) and Decommissioning Expense, as approved by Retail Regulators, directly assigned to the Designated Generating Unit, if applicable (DGUDE) *unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the FERC under otherwise applicable law*.

This language was first approved by the Commission as part of a settlement agreement that revised aspects of Service Schedule MSS-4[8] and was subsequently included by Entergy in the Service Schedule MSS-3 bandwidth formula.

6. On July 27, 2010, pursuant to section 205 of the Federal Power Act (FPA),[9] Entergy filed proposed Depreciation Rates, which were approved for retail use by the Arkansas Public Service Commission (Arkansas Commission) on behalf of Entergy Arkansas, for use in its wholesale formula rates, including Service Schedules MSS-1 and MSS-4 and the bandwidth formula in Service Schedule MSS-3. On September 22, 2010, the Commission accepted Entergy's proposed Depreciation Rates for filing, suspended them for a nominal period, to be effective September 27, 2010, subject to refund.[10] The Commission also established hearing and settlement judge procedures.

7. On November 10, 2010, the Chief Judge issued an order granting a motion to sever, for the purpose of hearing procedures, the proposed production Depreciation Rates for use in Service Schedules MSS-1, MSS-3, and MSS-4 of the System Agreement from the ongoing settlement proceedings. On March 1, 2011, a partial settlement (Settlement) on the application of Entergy Arkansas' non-production (transmission, distribution, and general) depreciation rates was approved by the Commission.[11]

8. The Settlement provided that all of the non-production (transmission, distribution and general) depreciation rates applicable to the Open Access Transmission Tariff, Entergy Arkansas' wholesale formula rates, and Service Schedule MSS-2 of the System Agreement would be the as-filed Depreciation Rates contained in Entergy Arkansas' July 27, 2010 filing in this proceeding. The Settlement did not include a resolution of the production Depreciation Rates applicable to Service Schedules MSS-1, MSS-3, and MSS-4 of the System Agreement.[12]

9. On September 23, 2011, the Presiding Judge issued the Initial Decision addressing Entergy Arkansas' Depreciation Rates for use in Service Schedules MSS-1, MSS-3, and

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[8] *See* Entergy Offer of Settlement, Docket No. ER03-753-000 (Aug. 13, 2004); *Entergy Servs., Inc.*, 111 FERC ¶ 61,035 (2005) (conditionally approving contested settlement).

[9] 16 U.S.C. § 824d (2012).

[10] *Entergy Servs., Inc.*, 132 FERC ¶ 61,252 (2010) (Hearing Order).

[11] *Entergy Servs., Inc.*, 134 FERC ¶ 61,152 (2011).

[12] *Id*. P 2 n.2.

MSS-4 as they relate to Entergy Arkansas' production units.[13] A number of different types of production plants are included in the schedules filed for Entergy Arkansas' Depreciation Rates.[14] The Initial Decision focused on the service life and dismantlement issues with respect to the steam production units.[15] The Initial Decision also addressed issues specific to the two units of the Arkansas Nuclear One Facility (Arkansas Nuclear One or ANO), referred to as ANO-1 and ANO-2 – and the two units of the Ouachita Generating Facility (Ouachita).

10. In the Initial Decision, the Presiding Judge rejected the Louisiana Commission's arguments that Entergy's depreciation evidence is based on hearsay and should be accorded no weight in this proceeding. The Presiding Judge found that Entergy's depreciation evidence was wholly relevant and probative and therefore accorded it great weight in the deliberative process. The Presiding Judge also concluded that Entergy's Depreciation Rates should be calculated: (1) assuming a 30-year service life for the Ouachita units;[16] (2) with the inclusion of the steam generator replacements in the interim retirement histories for ANO-2, but not for ANO-1; (3) using the assumed net salvage amounts estimated for Entergy's production units;[17] and (4) using an assumed three percent escalation factor for proposed dismantlement costs to the expected retirement dates estimated for Entergy Arkansas' production units.

11. In Opinion No. 523, the Commission affirmed the determinations of the Presiding Judge in the Initial Decision. Specifically, the Commission affirmed the Presiding Judge's determinations regarding hearsay and expert opinions; the 30-year service life for Ouachita; the inclusion of steam generator replacements in the interim retirement histories for ANO-2, but not for ANO-1; the use of assumed net salvage amounts; and the three percent escalation factor included in dismantlement costs. In addition, the Commission clarified depreciation precedent and accounting and ratemaking treatment

[13] Initial Decision, 136 FERC ¶ 63,015.

[14] *See* Ex. EAI-8 at 3 for Nuclear Production Plant (Arkansas Nuclear One (ANO-1) and Arkansas Nuclear Two (ANO-2)); Ex. EAI-8 at 5 for Other Production Plants (Ouachita Generating Facility); and Ex. EAI-8 at 1-3 for Steam Production Plant Facilities listed at Ex. EAI-8 at 1-3.

[15] The steam production facilities at issue include: Couch Unit 1, Couch Unit 2, Lake Catherine Unit 1, Lake Catherine Unit 2, Lake Catherine Unit 3, Lake Catherine Unit 4, Ritchie Unit 1, Lynch Unit 1, Lynch Unit 2, Lynch Unit 3, Moses Unit 1, Moses Unit 2, Independence Unit 1, White Bluff Unit 1, and White Bluff Unit 2.

[16] Initial Decision, 136 FERC ¶ 63,015 at P 140.

[17] *Id.* P 165.

under Service Schedule MSS-3. In particular, the Commission reiterated its statement made in Opinion No. 519[18] that Opinion No. 514 clarified that the definitions of the bandwidth formula depreciation variables require depreciation rates approved by retail regulators to be reflected in calculations implementing the bandwidth formula.[19] The Commission also noted that the Commission's policy on changes in depreciation in formula rates established in Order No. 618[20] does not apply to the bandwidth formula. The Commission reiterated that Entergy need not submit to the Commission FPA section 205 filings seeking approval for use of revised depreciation rates adopted by any of Entergy's retail regulators in the bandwidth formula in Service Schedule MSS-3.[21] Accordingly, the Commission concluded that the findings it made in Opinion No. 523 with respect to the issues raised on exception pertained to filed Depreciation Rates as they apply for use in Service Schedules MSS-1 and MSS-4.[22]

II. Rehearing Request

12. In its request for rehearing, the Louisiana Commission's contends that the Commission erred in Opinion No. 523 by: (1) failing to require Entergy to use depreciation expense found just and reasonable in Opinion No. 523 for Commission accounting purposes, "as opposed to unjust and unreasonable depreciation expense adopted in a retail rate settlement;" (2) failing to require Entergy to use depreciation expense found just and reasonable in this proceeding in all its Commission-jurisdictional

[18] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107 (2012) (Opinion No. 519).

[19] *Id*. P 196.

[20] *Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104 (2000). In Order No. 618, the Commission established general rules for depreciation accounting and determined that utilities no longer needed to seek Commission approval for changes in depreciation rates for accounting purposes. Instead, changes in depreciation rates would be reviewed in section 205 or 206 proceedings involving proposals to change prices for jurisdictional service in order to reflect changes in depreciation rates. However, where a utility has a formula rate that references the FERC depreciation accounts as inputs, it must file under section 205 when it changes its depreciation rates for accounting purposes in order to receive approval to reflect the change in depreciation rates in the prices it charges pursuant to the formula rate. Therefore, the Commission generally requires that changes in depreciation accounting must be reviewed and approved under sections 205 before a utility can reflect such changes in rates.

[21] *Id*. P 198.

[22] *Id*.

tariffs; (3) failing to explain conflicting orders regarding Entergy's depreciation practices; and (4) relying on "evidence from an individual who never filed testimony, and never appeared for cross-examination…along with expert testimony that did not address the relevant depreciation issue."[23]

III. Discussion

A. The Commission's Jurisdiction Over Entergy's Depreciation Practices

1. Rehearing Request

13. The Louisiana Commission alleges that in Opinion No. 523 and related orders, the Commission inappropriately divested itself of federal jurisdiction over Entergy's depreciation practices. According to the Louisiana Commission, in Opinion No. 523 the Commission acknowledges that its rules concerning the bandwidth formula "involve multiple turn-rounds in policy through 'clarifications' and reversals of prior rulings."[24] The Louisiana Commission alleges that two central errors exist in this series of rulings: (1) the Commission exercises no jurisdiction over Entergy's depreciation accounting and has ceded control of that accounting to state regulators through the bandwidth formula;[25] and (2) the Commission fails to reconcile its service life holding for ANO-1 and its instruction that Entergy should use a different service life for depreciation accounting and the bandwidth formula.[26]

14. The Louisiana Commission also argues that "[t]he Commission's decisions regarding Entergy's depreciation accounting and the [bandwidth formula] reflect inexplicable self-reversals that impermissibly delegate the Commission's jurisdiction" and that Opinion No. 523 "expands the scope of regulatory abdication, without explanation."[27] The Louisiana Commission reasons that if Entergy may change depreciation rates in a FERC tariff without an FPA section 205 filing each time a retail regulator changes the rate, and must include the bandwidth depreciation rate in its

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[23] Request for Rehearing at 1.

[24] *Id*. at 3.

[25] In its rehearing request, the Louisiana Commission refers to the bandwidth formula as the "bandwidth tariff." We will assume this is a clerical error and refer to the bandwidth formula, as is relevant in this proceeding.

[26] *Id*. at 3-4.

[27] *Id*. at 4.

depreciation accounts and the FERC Form No. 1, the Commission's jurisdiction over Entergy's depreciation practices is eviscerated.

15. According to the Louisiana Commission, the Commission does not explain how its ruling that the ANO-1 depreciation rate must be modified can be reconciled with the use of the rejected rate in the bandwidth formula. Noting that in Opinion No. 523 the Commission stated "its depreciation rulings 'apply for use in Service Schedules MSS-1 and MSS-4,' but not MSS-3," the Louisiana Commission argues that "[t]he revised depreciation rate is the only depreciation rate prescribed by the Commission and the [FPA] requires the utility to use it for accounting."[28] The Louisiana Commission argues that Opinion No. 523 effectively instructs Entergy to disregard the requirement of the statute.[29]

16. In addition, the Louisiana Commission states that sections 301 and 302 of the FPA[30] provide the Commission with the authority to establish a Uniform System of Accounts for utility accounting and to prescribe the depreciation rates used for that accounting and that once that authority is exercised, that authority is exclusive to the Commission.[31] The Louisiana Commission contends that the Commission exercised that statutory authority in Order No. 618[32] establishing the standard for recording depreciation, which is now incorporated in the Uniform System of Accounts as General Instruction 22. The Louisiana Commission states that this standard for recording depreciation requires that asset investment be allocated in (1) "a systematic and rational manner" and (2) "over the service life of the property"[33] and that service lives of depreciable property must be supported by "engineering, economic, or other depreciation studies."[34] The Louisiana Commission states that the Commission has required that a utility must make an FPA section 205 filing in order to change depreciation in Commission-approved rates, and that the Commission selected this approach as its means of monitoring utility depreciation practices and enforcing its rule. According to the Louisiana Commission, "the courts have rejected the argument that a conflicting state

[28] *Id*. at 6 (citing Opinion No. 523, 142 FERC ¶ 61,022 at P 195).

[29] *Id*. at 7.

[30] 16 U.S.C. §§ 825, 825a.

[31] Request for Rehearing at 10 (citing 16 U.S.C. §§ 825, 825a).

[32] *Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104.

[33] Request for Rehearing at 10 (citing 18 C.F.R. pt. 101, Gen'l Instr. 22(A)).

[34] *Id*. at 10-11 (citing 18 C.F.R. pt. 101, Gen'l Instr. 22(B)).

accounting practice can limit the ability of [the Commission] to prescribe *uniform* accounting for utilities."[35]

17. The Louisiana Commission states that pursuant to the Commission's authority over accounting and depreciation, and in a case filed pursuant to Order No. 618, the Commission now directs the use of a state-set rate for accounting and a single Commission-approved tariff that is different from the rate the Commission prescribed for other Commission-approved tariffs. The Louisiana Commission argues that this action conflicts directly with the plain requirements of the statute, and that the Commission should reexamine its decision and require Entergy to comply with the prescribed rate for accounting and in all of its Commission-approved tariffs.[36] The Louisiana Commission argues that the Commission needs to reconsider its depreciation rulings in the context of its overall depreciation policy.

2. Commission Determination

18. We affirm the findings of Opinion No. 523 and deny the Louisiana Commission's request for rehearing on the issue of the Commission's jurisdiction over Entergy's depreciation practices.

19. The Commission's determinations in Opinion No. 523 do not constitute an abdication or delegation of the Commission's jurisdiction over Entergy's depreciation practices as the Louisiana Commission alleges. The Louisiana Commission points to the series of Commission orders addressing the depreciation component of the bandwidth formula to support its contention that Commission's decisions "reflect inexplicable self-reversals that impermissibly delegate the Commission's jurisdiction."[37] However, in a recent opinion denying in part and dismissing in part the Louisiana Commission's petition for review of five Commission orders addressing the bandwidth formula, including Opinion No. 514, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) rejected this very contention. Ruling on the Louisiana Commission's argument that the Commission's "reversal of field without a persuasive explanation is arbitrary"[38] the court stated:

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[35] *Id.* at 11 (citing *Ark. Power & Light Co. v. Fed. Power Comm'n*, 185 F.2d 751 (D.C. Cir. 1950)).

[36] *Id*. at 11.

[37] Request for Rehearing at 3-5.

[38] *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 at 555 (5th Cir. 2014).

> [The Commission] changed its interpretation in light of its gained experience conducting annual bandwidth proceedings, explained its new interpretation of the System Agreement, and consistently has interpreted the System Agreement after the change: "[T]hese statements were made prior to final Commission action on the first annual bandwidth filing and thus did not benefit from experience in addressing these annual bandwidth filings." Opinion No. 514, 137 FERC ¶ 61,029 at P 48 (internal quotation marks omitted). "Here, [FERC] offered a reasoned explanation for its approach; no more is required."[39] *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1245 (D.C. Cir. 2014).

20. Accordingly, the court held that the Commission's earlier change of interpretation in light of its gained experience with the bandwidth proceedings was reasoned and not arbitrary.[40]

21. Furthermore, the Commission has not determined that it will exercise no jurisdiction over Entergy's depreciation accounting nor does it cede control of depreciation accounting to state regulators. With regard to depreciation under the bandwidth formula, the Commission repeatedly exercised its authority over the depreciation variables to the bandwidth formula in many orders and opinions concerning the formula.[41] As the Commission noted in Opinion No. 523, in Opinion No. 514 the

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[39] *Id.*

[40] *Id.* at 552.

[41] *See, e.g., Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010), *order on reh'g*, Opinion No. 505-A, 139 FERC ¶ 61,103 (2012), *order on compliance*, 139 FERC ¶ 61,104 (2012), *order on reh'g*, 145 FERC ¶ 61,046 (2013), *aff'd sub nom. La. Pub. Serv. Comm'n v. FERC*, 606 Fed.Appx. 1 (D.C. Cir. 2015) (addressing orders in the first annual bandwidth filing proceeding holding that the bandwidth formula mandates the use of retail regulator-approved depreciation rates); *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 (2009), *order on reh'g*, 137 FERC ¶ 61,030, at P 2 (2011), *order on reh'g*, 142 FERC ¶ 61,012 (2013), *aff'd sub nom. La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014) (denying complaint seeking to modify bandwidth formula language) (*La. Pub. Serv. Comm'n*); *Entergy Servs., Inc.*, 130 FERC ¶ 61,170 (2010) (removing depreciation issue from third bandwidth proceeding) (Order Denying Interlocutory Appeal); *Entergy Servs., Inc.*, Opinion No. 514, 137 FERC ¶ 61,029, at P 49 (2011), *order on reh'g*, Opinion No. 514-A, 142 FERC ¶ 61,013 (2013), (order on second bandwidth filing holding that depreciation rates approved by retail regulators are required to be reflected in the bandwidth formula), *aff'd sub nom. La. Pub. Serv. Comm'n*, 761 F.3d 540; Opinion No. 523, 142 FERC ¶ 61,022, at P 198 & n.398 (2013) (finding that Entergy is not required to file updates to Entergy Arkansas' Service Schedule MSS-3 depreciation rates to reflect changes by state regulators); *Entergy Servs., Inc.*, Opinion No. 526, 143 FERC ¶ 61,116, at P 30 (2013)

Commission addressed arguments on whether the definitions of the depreciation variables allowed the Commission to substitute its own depreciation expenses for those approved by retail regulators. The Commission explained that references to the Commission's jurisdiction in the definitions of the depreciation variables refer to depreciation expenses charged to traditional wholesale customers that were approved by the Commission, rather than being a reference to the Commission substituting its own depreciation expenses in the bandwidth proceedings for those otherwise determined by retail regulators that have been adopted for use in the bandwidth formula.[42] Thus, the definitions of the depreciation variables were interpreted so that, for purposes of the bandwidth formula, depreciation rates approved by retail regulators are required to be reflected in calculations implementing the bandwidth formula. As noted, the Fifth Circuit ruled that "there is no unlawful subdelegation in this case because [the Commission] exercised its role when it initially reviewed and accepted the bandwidth formula incorporating the state agencies' depreciation rates."[43]

22. We also disagree with the assertion that the Commission's finding that the ANO-1 depreciation rate must be modified cannot be reconciled with the Commission's findings regarding the depreciation variables in the bandwidth formula. Nor are the Commission's findings inconsistent with Order No. 618 and the requirements of the FPA. The Louisiana Commission asserts that "the revised [D]epreciation [R]ate" (i.e., the rate resulting from the Commission's determinations in Opinion No. 523) is the "only depreciation rate prescribed by the Commission and the [FPA] requires the utility to use it for accounting."[44] As discussed and affirmed below,[45] the Commission's determinations in Opinion No. 523 apply only to Service Schedules MSS-1 and MSS-4 but do not apply to Service Schedule MSS-3. However, the Commission has already found that "to the extent that the approved bandwidth depreciation variables require the use of depreciation rates approved by retail regulators, those depreciation rates *are* the Commission-approved depreciation rate for bandwidth formula purposes."[46] When

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(finding that Entergy is not required to file updates to Entergy Texas' Service Schedule MSS-3 depreciation rates to reflect changes by state regulators).

[42] Opinion No. 523, 142 FERC ¶ 61,022 at P 180 (citing Opinion No. 514, 137 FERC ¶ 61,029 at PP 48-49).

[43] *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 at 552.

[44] Request for Rehearing at 6 (citing Opinion No. 523, 142 FERC ¶ 61,022 at P 195).

[45] *See* section III. B *infra*.

[46] Opinion No. 519, 139 FERC ¶ 61,107 at P 113.

Entergy first proposed the production cost formula in compliance with Commission Opinion Nos. 480 and 480-A, neither the Louisiana Commission nor any other party objected to the definitions for the depreciation components which explicitly were tied to the accounting approved by the retail regulator having jurisdiction over the Operating Company.[47] Accordingly, the depreciation rates applicable to the bandwidth formula are prescribed by the Commission and the fact that those rates may be different from those that apply to Service Schedules MSS-1 and MSS-4 do not make them inconsistent with Order No. 618 and the FPA.

23. The Louisiana Commission may disagree with the findings and determinations the Commission made when it exercised its jurisdiction with respect to the reasonableness of the depreciation inputs, but the Commission has not abdicated or delegated its jurisdiction. Rather, the Commission exercised its jurisdiction in a manner that was appropriate to accomplish a just and reasonable result consistent with the FPA. Accordingly, the request for rehearing on the issue of delegation of authority is denied.

B. Applicability of Opinion No. 523's Findings to Service Schedules MSS-1, MSS-3, and MSS-4

1. Rehearing Request

24. The Louisiana Commission asserts that Opinion No. 523 provides no coherent basis for distinguishing among Service Schedules MSS-1, MSS-4 and MSS-3. The Louisiana Commission contends that the Commission effectively approved incorporating charges approved by retail regulators into the bandwidth formula without notice and without the filing of any support for the change for Commission accounting and for Service Schedule MSS-3.[48] The Louisiana Commission argues that all three service schedules are Commission-filed tariffs subject to the Commission's exclusive jurisdiction and all three utilize data reported on Entergy's accounts and in the FERC Form 1 reports of the Operating Companies. The Louisiana Commission also argues that the depreciation language in Service Schedules MSS-3 and MSS-4 is similar but the Commission does not explain how ambiguous language in the bandwidth formula can upset the Commission's entire depreciation policy and elevate retail over wholesale jurisdiction.[49] According to the Louisiana Commission, conclusory references to prior holdings are inadequate because this proceeding involves the practical application of

[47] *See* Service Schedule MSS-3 § 30.12; *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095 (2007) (2007 Compliance Order); *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006) (2006 Compliance Order).

[48] Request for Rehearing at 12.

[49] *Id*. at 12 (citing Opinion No. 514, 137 FERC ¶ 61,029 at P 54).

those rulings, which previously was unclear.[50] The Louisiana Commission states that in Opinion No. 523 the Commission determines that the retail regulator-approved depreciation rates used in the bandwidth formula are the approved rates for accounting, relying on Opinion No. 519.[51] The Louisiana Commission contends that this holding means that when the Commission approved Entergy's compliance filing in Docket No. EL01-88 (Opinion No. 480), it intended to repeal Order No. 618 insofar as it applied to Entergy and to pre-approve whatever depreciation rates retail regulators would ever adopt for bandwidth ratemaking and Entergy's depreciation accounting. However, according to the Louisiana Commission, the 2007 Compliance Order makes no mention of any such intent, nor that Entergy requested the repeal of Order No. 618.[52] The Louisiana Commission argues that, "had the Commission approved such a drastic departure from policy in the proceeding addressing compliance with Order No. 480, it presumably would have known it when it issued Opinion No. 505, [the Order Denying Interlocutory Appeal], and [*Arkansas Commission v.* Entergy]."[53]

25. The Louisiana Commission argues that the reasonable interpretation of the language in both Service Schedules MSS-3 and MSS-4 is that retail regulator approved depreciation rates may be used as long as they conform with Commission ratemaking and depreciation policy.[54] According to the Louisiana Commission, if a retail depreciation rate is inconsistent with Commission policy, then the Commission must exercise its authority to set the correct depreciation rate for Commission accounting and ratemaking and this reasoned interpretation should apply equally to the two service schedules.[55]

26. The Louisiana Commission also contends that Opinion No. 514 reversed all of the Commission's prior rulings regarding the language in the bandwidth formula, holding that the reference to retail regulators would be "rendered meaningless" if the Commission could substitute its own determinations for those of retail regulators for the bandwidth calculation.[56] The Louisiana Commission argues, however, that since virtually identical language is used in Service Schedule MSS-4, the Commission's exercise of jurisdiction

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[50] *Id*. at 12-13.

[51] *Id*. at 13 (citing Opinion No. 523, 142 FERC ¶ 61,022 at P 197).

[52] *Id.* (citing *Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2007)).

[53] *Id*.

[54] *Id*. at 15.

[55] *Id*.

[56] *Id*. at 16 (citing Opinion No. 514, 137 FERC ¶ 61,029, at P 54 (2011)).

there would also be inappropriate under that reasoning, even though the plant exclusively provides wholesale service.

27. In addition, the Louisiana Commission argues that Opinion No. 523 creates an inherent conflict in depreciation policy for Service Schedule MSS-4. The Louisiana Commission states that Service Schedule MSS-4 addresses resources that are devoted exclusively to wholesale service through Commission-regulated power purchase agreements and that the Arkansas Commission allocates the portion of plant devoted to wholesale service out of the retail rate base and exercises no regulatory authority over that plant. But, according to the Louisiana Commission, Service Schedule MSS-4, like Service Schedule MSS-3, provides for the use of depreciation expense "as approved by Retail Regulators" and recorded in Account 403.[57] The Louisiana Commission argues that the Commission determined that the depreciation expense set by the retail regulator for ANO-1 is not correct for Service Schedule MSS-4, but then it fails to explain how the tariff language means one thing for the Service Schedule MSS-3 bandwidth formula and another for Service Schedule MSS-4. And if it does not, the Louisiana Commission states, the Commission fails to explain why a retail regulator should set depreciation rates for exclusively wholesale service.[58]

28. The Louisiana Commission also argues that most of the production plant included in the bandwidth tariff is also included in the retail rate base. The Louisiana Commission explains that retail regulators often include all utility plant in rate base and simply credit revenues and costs from wholesale transactions against the revenue requirement. The Louisiana Commission adds that Service Schedule MSS-1 includes the costs of all intermediate generating units owned by the Operating Companies, most of which is dedicated to retail service.[59]

29. Next, the Louisiana Commission argues that in Opinion No. 523 the Commission reveals for the first time its understanding of what it means to approve the use of "blended" depreciation rates.[60] The Louisiana Commission contends that the Commission failed to explain why it thinks the bandwidth formula is a "retail

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[57] *Id*. at 14 (citing Ex. LC-35 at 83).

[58] *Id.*

[59] *Id*. at 18.

[60] *Id*. at 17 (citing Opinion No. 523, 142 FERC ¶ 61,022 at P 197 ("The blended rate approach refers to a blended state-federal rate, i.e., the bandwidth formula's (section 30.12 of Service Schedule MSS-3) use of state-established depreciation rates for retail transactions and Commission-established depreciation rates for wholesale transactions.")).

transaction," or why the bandwidth tariff differs from other Commission-jurisdictional tariffs.[61] The Louisiana Commission argues that Opinion No. 523 fails to explain the departure from *Ohio Edison Company*,[62] and the specific rejection of "blended" rate accounting in *MidAmerican Energy Company.*[63]

30. The Louisiana Commission argues that the specific approval of "blended" depreciation rates for FERC accounting conflicts with precedent. According to the Louisiana Commission, in *MidAmerican*, the Commission rejected a proposal by Southern Company that would have limited the scope of Commission depreciation policy to "the extent that the underlying capital is dedicated to jurisdictional service."[64] The Louisiana Commission also states that the Commission's requirement that all utilities file all changes in depreciation rates, absent the issuance of a Commission rule governing depreciation, was reversed in *Alabama Power*. The Louisiana Commission states that Order No. 618 adopted that rule so that the Commission could exercise its full authority over depreciation accounting.[65] The Louisiana Commission argues that Entergy made its filing pursuant to Order No. 618, which the Louisiana Commission states provided the method by which the Commission monitors and regulates depreciation accounting. According to the Louisiana Commission, "[t]he Commission now has established a depreciation rate for ANO-1 that differs from the rate established by the retail regulator."[66]

31. The Louisiana Commission also argues that the approval of the use of retail depreciation rates for accounting when they differ from Commission-prescribed rates also conflicts with *Arkansas Power & Light Company v. Federal Power Commission*.[67] The

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[61] *Id*.

[62] 84 FERC ¶ 61,157, at 61,861 (1998) (*Ohio Edison*) (finding that the amounts booked to FERC depreciation accounts should reflect Commission-approved depreciation rates and differences between those rates and state-approved depreciation rates should be recorded as regulatory assets and regulatory liabilities).

[63] 81 FERC ¶ 61,081 (1997) (*MidAmerican*), *rev'd on other grounds, Ala. Power Co. v. FERC*, 160 F.3d 7 (D.C. Cir. 1998) (*Alabama Power*).

[64] Request for Rehearing at 18 (citing *MidAmerican*, 81 FERC ¶ 61,081 at P 61,330).

[65] *Id*. at 18 (citing 18 C.F.R. pt. 101, Gen'l Instr. 22).

[66] *Id*. at 15-16.

[67] 185 F.2d 751 (D.C. Cir. 1950) (*Arkansas Power*).

Louisiana Commission states that in *Arkansas Power* the United States Court of Appeals for the District of Columbia Circuit held that the FPA does not permit states to dictate Commission accounting. Yet, the Louisiana Commission contends, the Commission now permits state regulators to do just that.[68] The Louisiana Commission states that the failure to explain the departure from Commission policy and precedent is arbitrary and capricious and recommends that the Commission reconsider its decision.[69]

2. Commission Determination

32. We deny rehearing. Many of the Louisiana Commission's various assertions amount to claims that the Commission improperly removed from this proceeding consideration of the depreciation variables applicable to the bandwidth formula in Service Schedule MSS-3 or that the different treatment of the depreciation variables in Service Schedules MSS-1, MSS-3, and MSS-4 is unexplained.

33. We find to be without merit the Louisiana Commission's claim that applying the holdings of Opinion No. 523 to Service Schedule MSS-1 and MSS-4, but not Service Schedule MSS-3 denied the Louisiana Commission notice of the resolution of the depreciation variable issue applicable to the bandwidth formula. Indeed, the Louisiana Commission initiated a challenge to the depreciation variables under Service Schedule MSS-3 by filing its March 31, 2010 complaint in Docket No. EL10-55-000 in which it sought " to change the depreciation and decommissioning data and rates included in the Entergy rough production cost equalization bandwidth formula set forth in Service Schedule MSS-3 to the System Agreement."[70] After the filing of testimony and the convening of a hearing on the Louisiana Commission complaint, the Commission issued Opinion No. 519, in which it reiterated that Opinion No. 514 clarified that the definitions of the bandwidth formula depreciation variables require depreciation rates approved by retail regulators to be reflected in calculations implementing the bandwidth formula. The Commission found that the Louisiana Commission had not met its burden under section 206 of the FPA to show that section 30.12 of Service Schedule MSS-3 of the System Agreement, which provides for the use of wholesale and retail depreciation expenses, is unjust and unreasonable or unduly discriminatory or preferential because it includes depreciation variables which mandate the use of depreciation rates reported in the FERC Form No. 1 and which reflect, in part, state regulator-approved depreciation rates that the Commission adopted for use in the bandwidth formula, and, in part, depreciation rates

[68] *Id*. at 18-19.

[69] *Id*. at 19 (citing *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999)).

[70] *La. Pub. Serv. Comm'n v. Entergy Corp., et al.*, 132 FERC ¶ 61,003, at P 1 (2010).

that were approved by the Commission for rates for service to traditional wholesale customers.[71] Accordingly, contrary to the Louisiana Commission's assertions, the Commission did not effectively approve incorporating charges approved by retail regulators into the bandwidth formula without notice and without the filing of any support. The ultimate resolution of the Louisiana Commission's complaint was a finding that the existing retail-regulator approved depreciation variables included in the bandwidth formula are the filed-rate and had not been shown to be unjust and unreasonable**.**

34. We also disagree with the Louisiana Commission's interpretation of the Commission's determination in Opinion No. 519 that the use of retail-regulator approved depreciation rates used in the bandwidth formula means that when the Commission approved Entergy's compliance filing in Docket No. EL01-88 the Commission meant to repeal Order No. 618 insofar as it applied to Entergy. As the Commission found in Opinion No. 519:

> In light of this interpretation of the depreciation variables in Opinion No. 514, it is unnecessary for Entergy to make a section 205 filing in order to seek approval to include revised depreciation rates adopted by any of its retail regulators in the bandwidth formula (*i.e., the Commission's policy on changes in depreciation in formula rates established in Order No. 618 does not apply to the bandwidth formula*) and the Commission reverses statements to the contrary in Opinion No. 505 and the Order Denying Interlocutory Appeal.[72]

Accordingly, despite the Louisiana Commission's arguments to the contrary, rather than a repeal of Order No. 618 or a departure from policy, Order No. 618 does not apply to the bandwidth formula, which roughly equalizes total production costs among the Entergy Operating Companies.

35. With regard to the Louisiana Commission's arguments that Opinion No. 523 lacks a coherent basis for distinguishing between Service Schedules MSS-1 and MSS-4 and Service Schedule MSS-3, we note that such distinction was unnecessary when the Commission issued Opinion No. 523 because, as discussed above the depreciation variables under Service Schedule MSS-3 were already addressed in Opinion No. 519. Nonetheless, even though the Louisiana Commission is correct that the Service Schedules MSS-1, MSS-3, and MSS-4 are all Commission-jurisdictional and utilize FERC Form No. 1 data; that alone does not mean that different depreciation accounting methods may not be used in each Service Schedule.

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[71] Opinion No. 519, 139 FERC ¶ 61,107.

[72] Opinion No. 519, 139 FERC ¶ 61,107 at P 26 (emphasis added).

36. First, as noted, the "unless" clause is not contained in Service Schedule MSS-1. With regard to Service Schedules MSS-3 and MSS-4, while they contain similar references to retail-regulatory approved depreciation rates, the language in each schedule must be interpreted in context of that particular schedule. When the Commission found that rough production cost equalization on the Entergy System had been disrupted, it accepted a numerical "bandwidth" of +/- 11 percent of the Entergy System average production cost to maintain the rough equalization of production costs among the Operating Companies as a remedy. Accordingly, the Commission accepted section 30.12 of Service Schedule MSS-3 containing the bandwidth formula as a means to achieve rough equalization of production costs among the affiliated operating companies. Conversely, section 40.01 of Service Schedule MSS-4 (Unit Power Purchase) states that "the purpose of Service Schedule MSS-4 is to provide the basis for making a unit power purchase between [Operating] Companies and/or the sale of power purchased by another [Operating] Company."[73] Section 40.03 of Service Schedule MSS-4 provides for a Capability Payment from an Operating Company making the purchase from a Designated Generating Unit[74] based on a cost of service that identifies the investment and expenses in accounts related to that particular Designated Generating Unit, including depreciation expenses and rate base effects of depreciation. Accordingly, while the bandwidth formula is a means of ensuring rough production cost equalizes total production costs among the Entergy Operating Companies for service to retail customers and wholesale customers, Service Schedule MSS-4 sets rates for sales to traditional wholesale customers.

37. Furthermore, we acknowledge that our interpretation of the "unless" clause in the depreciation variables contained in Service Schedule MSS-4 arguably renders meaningless the reference to retail regulators in the language in the definition of those variables. However, we find that the language in the depreciation variables in each Service Schedule need not, and in fact should not, be interpreted to have the same meaning. In the context of the bandwidth formula in Service Schedule MSS-3, the Commission in Opinion No. 514 interpreted the "unless" language in a way that gave meaning to all the terms of the language, and that was reasonable in the context of the bandwidth formula—i.e., a means of ensuring rough equalization of *total* production costs, both costs of serving retail customers and costs of traditional wholesale sales, among the Entergy Operating Companies.[75] However, because Service Schedule MSS-4

[73] Service Schedule MSS-4 § 40.02.

[74] Under Service Schedule MSS-4 § 40.02, a Designated Generating Unit is defined as "any generating unit from which the unit power purchase is made under [s]ection 40.01 that is mutually agreed upon by the purchaser and the seller."

[75] For purposes of the bandwidth formula, the Commission interpreted:

sets rates only for traditional wholesale sales, ascribing the same meaning to the reference to depreciation rates approved by retail regulators and the "unless" language in Service Schedule MSS-4 would create circularity and be unworkable. Instead, because Service Schedule MSS-4 sets rates only for traditional wholesale sales, we interpret the "unless" language in the depreciation variable in that schedule as providing that the Commission's depreciation policies always apply in the context of Service Schedule MSS-4.[76] We therefore will not ascribe the Opinion No. 514 interpretation, which was made in the context of the bandwidth formula, to Service Schedule MSS-4, which sets rates for sales to traditional wholesale customers and instead affirm that the Commission's policy in Order No. 618 applies to Service Schedule MSS-4.

C. Exclusion of Louisiana Commission's Offer of Proof

1. Rehearing Request

38. The Louisiana Commission argues that the Commission's failure to examine the exclusion of evidence related to Entergy's accounting is arbitrary and denies due process to the Louisiana Commission.[77] The Louisiana Commission states that prior to the hearing in this matter, the Presiding Judge struck on procedural grounds portions of Louisiana Commission witness Kollen's cross-answering testimony and the entirety of Louisiana Commission witness King's cross-answering testimony, both of which addressed Entergy's proposal to reflect Commission-prescribed depreciation rates only

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> [T]he 'unless' clause, while ambiguous, as establishing that some of the actual depreciation expenses recorded and reflected in the bandwidth formula may include depreciation expenses charged to traditional wholesale customers that were approved by the Commission and not the retail regulators, rather than as an acknowledgement of the possibility that in a filing implementing the bandwidth remedy the Commission will require Entergy to input depreciation expenses other than the expenses already approved for inclusion in the bandwidth formula as approved by retail regulators and recorded in FERC Accounts 403 and 404. The Commission further noted that it is well established that the Commission has exclusive jurisdiction over the bandwidth formula, and, thus, if the "unless" clause was intended to refer to the Commission's exclusive jurisdiction over the bandwidth formula, that clause would always apply and the remaining language of the definition would be rendered meaningless. Opinion No. 514-A, 142 FERC ¶ 61,013 at P 16.

[76] As noted above, the "unless" language was first approved by the Commission as part of a settlement agreement that revised aspects of Service Schedule MSS-4. *See supra* P 6, n.8.

[77] Request for Rehearing at 19.

for the depreciation expense related to the portion of plant assigned to "wholesale" in Entergy Arkansas' most recent retail rate case.[78] The Louisiana Commission states that the Presiding Judge later ruled that the "May 17 Order removed all blended depreciation rate-related matters from this proceeding,"[79] and on June 13, 2011, the Presiding Judge denied the Louisiana Commission's request to reconsider his ruling.[80] The Louisiana Commission states that Opinion No. 523 does not address the propriety of the Presiding Judge's ruling. Instead, the Louisiana Commission states that it characterizes the Presiding Judge's determination as dispositive, thus cutting off any right of appeal.[81]

39. The Louisiana Commission contends that this ruling inappropriately denied it procedural review and that its offer of proof consists of the evidence that the Presiding Judge struck when he excluded the blended rate issues from the proceeding. The Louisiana Commission states that an offer of proof is the means by which a party preserves the right to obtain review of an evidentiary ruling.[82] The Louisiana Commission states that its exception addressed the May 17 Order and explains that an exception to an initial decision is the method by which a party obtains administrative review of the initial decision and relevant interlocutory orders.[83] The Louisiana Commission states that the Commission allows interlocutory appeals only in exceptional circumstances, but in this proceeding apparently adopts a rule that the only means of appeal is through the interlocutory procedure. The Louisiana Commission argues that this rule would promote administrative inefficiency and unduly burden the Commission.[84]

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[78] *Id.* (citing *Entergy Serv., Inc.*, Orders Denying and Granting Motions to Strike and Denying Motion to Limit Relitigation of Issues, Docket No. ER10-2001-001, May 17, 2011 (unpublished) (May 17 Order)).

[79] *Id*. (citing *Entergy Serv., Inc.*, Order Providing Clarification, Docket No. ER10-2001-001, May 24, 2011 (unpublished) (May 24 Order)).

[80] *Id*. (citing *Entergy Servs., Inc.*, Order Denying Motion for Reconsideration, Docket No. ER10-2001-001, June 13, 2011 (unpublished)).

[81] *Id*. (citing Opinion No. 523, 142 FERC ¶ 61,022 at P 60 ("[t]he Presiding Judge had already ruled in the May 17 Order that all blended depreciation rate-related matters are removed from this proceeding.")).

[82] *Id*. P 20 (citing Fed. R. Evid. 103(A)(2)).

[83] *Id*. (citing 18 C.F.R. § 385.711).

[84] *Id*. (citing 18 C.F.R. § 385.714).

40. The Louisiana Commission argues that its evidence is clearly relevant. Noting that the "blended" accounting issue is discussed in paragraphs 195-198 of Opinion No. 523, the Louisiana Commission contends that excluding evidence that addresses Entergy's application of its own "blended" rate theory precludes a ruling on its propriety and authorizes the utility to make up rules to serve its own objectives. The Louisiana Commission states that this decision should be reconsidered.

2. Commission Determination

41. The Louisiana Commission argues that the Commission should have examined its witnesses' cross-answering testimony, which the Presiding Judge struck on procedural grounds. The Louisiana Commission points to paragraphs 195-198 of Opinion No. 523 as discussing what it calls the "blended accounting" issue to support its contention that the Commission should have included the struck evidence. We disagree. However, to the extent that the Commission's ruling on the Louisiana Commission's exception on this matter was unclear in Opinion No. 523, or there is some misapprehension of the Commission's findings in the paragraphs the Louisiana Commission cites, we find as discussed below.

42. First, we affirm that the Presiding Judge reasonably struck the Louisiana Commission's late-filed evidence. On May 17, 2011, the Presiding Judge granted Commission Trial staff's motion to strike the entirety of the cross-answering testimony filed by the Arkansas Commission[85] and the Louisiana Commission[86] because it was raised for the first time at a late stage of the proceeding and was determined to be outside the scope of the direct and answering testimony in this protracted proceeding with an acknowledged tendency of the parties to attempt to re-litigate issues. The Presiding Judge issued the May 24 Order in response to the Arkansas Commission's Motion for Clarification, Conditional Motion to Permit Interlocutory Appeal, and Request for Expedited Consideration. The Arkansas Commission requested clarification of the May 17 Order "regarding whether the blended depreciation rate-related issues, including implementation, are subject to litigation in this case, or whether the May 17 Order removed all blended depreciation rate-related matters from this proceeding."[87] In response, the Presiding Judge stated "I clarify the [Arkansas Commission's] question by holding that the May 17 Order removed all blended depreciation rate-related matters from

[85] Ex. LC-34 through Ex. LC-44.

[86] Ex. AC-1 through Ex. AC-14.

[87] May 24 Order, Docket No. ER10-2001-001 at P 1.

this proceeding. *Therefore, no blended depreciation rate-related matters will be considered in the instant case*."[88] The Presiding Judge went on to explain that:

> Judge Dowd resolved the blended depreciation rate issue for MSS-3 in her Docket No. EL10-55 proceeding. *There are remaining blended depreciation rate issues pertaining to MSS-1 and MSS-4 that some parties may wish to address, but these issues are not a part of the instant proceeding as no party timely raised them in their pleadings.* As noted in the May 17 Order, the [Arkansas Commission's attempt to raise these issues occurred too late in the proceeding, which would cause undue prejudice to Staff. I did not reach the question of whether MSS-1 and MSS-4 blended rate issues have already been litigated as I dismissed that issue based on undue prejudice.[89]

43. We find that the Presiding Judge's ruling that Trial Staff would have been prejudiced by a lack of opportunity to respond to the testimony that was untimely filed and ultimately struck to be reasonable and consistent with Commission precedent.[90] The Commission generally disfavors motions to strike testimony and will not strike testimony unless the matters sought to be omitted from the record have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.[91] However, although the Commission does not favor striking testimony, it has done so on procedural grounds where there is prejudice to the parties.[92] Similarly, the Presiding Judge in this proceeding struck the testimony on the grounds of prejudice to a party, finding that this testimony filed too late in the process prejudiced Trial staff because it would foreclose

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[88] *Id*. (emphasis added).

[89] *Id*. P 2. While the May 24 Order states that the Arkansas Commission's "attempt to raise these issues occurred too late in the proceeding", both the Louisiana Commission and the Arkansas Commission submitted late-filed cross-answering testimony. *See supra* P 42.

[90] *Central Hudson Gas & Elec. Corp.*, 92 FERC ¶ 63,004 (2000) (citing *Power Mining, Inc.*, 45 FERC ¶ 61,311, at 61,972 (1988) (setting forth the Commission's test for motions to strike) (*Central Hudson*).

[91] *San Diego Gas & Elec. Co.*, 114 FERC ¶ 61,070, at P 20 (2006) (citing *Central Hudson Gas & Elec. Corp.*, 92 FERC ¶ 63,004 (2000) (quoting the three-part test set forth in *Power Mining, Inc.*, 45 FERC ¶ 61,311, at 61,972 (1988))).

[92] *La. Pub. Serv. Comm'n*, Order Granting Motion to Strike, Docket No. EL09-61-001, at P 2-3 (Aug. 24, 2010).

Trial Staff's opportunity to respond to the Louisiana Commission's blended rate testimony.[93] We agree that Trial Staff would have been prejudiced by a lack of opportunity to respond to this testimony submitted so late in the proceeding and the result would have been an incomplete record. Prejudice to a party satisfies the burden outlined in *Power Mining, Inc.* and *Central Hudson* to strike this testimony and we agree that there was prejudice to Trial Staff on which the Presiding Judge based his determination. Therefore, we find no error in the Presiding Judge's decision to strike this testimony as to Service Schedules MSS-1 and MSS-4.

44. Concerning "blended rate" issues in the bandwidth formula's depreciation variables, as the Commission explained in Opinion No. 523, subsequent to the hearing, Initial Decision, and briefs on and opposing exceptions in this proceeding, the Commission has made a number of clarifications with regard to the bandwidth formula depreciation variables in Service Schedule MSS-3. In Opinion No. 523, the Commission stated that in Opinion No. 519, it had clarified that for purposes of the bandwidth remedy in Service Schedule MSS-3, the definitions of the bandwidth formula depreciation variables require the depreciation rates approved by retail regulators to be reflected in the calculation implementing the bandwidth formula.[94] The Commission noted that:

> Opinion No. 519 addressed the blended rate argument that the Louisiana Commission raised again here. The blended rate approach refers to a blended state-federal rate, *i.e.*, the bandwidth formula's (section 30.12 of Service Schedule MSS-3) use of state-established depreciation rates for retail transactions and Commission-established depreciation rates for wholesale transactions.[95]

45. Further, the Commission reiterated that the 'blended rate' argument that the Louisiana Commission raised again in this proceeding was given due consideration in Opinion No. 519 and rejected.

46. On rehearing, the Louisiana Commission appears to misapprehend the discussion in paragraphs 195-198 of Opinion No. 523. In that section of Opinion No. 523, the Commission was addressing "Depreciation Precedent and Accounting and Ratemaking Treatment under Service Schedule MSS-3." Thus the Commission's statements with regard to "blended rates" were explaining the Commission's findings as to the

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[93] May 17, 2011 Order, Docket No. ER10-2001-001, Orders Denying and Granting Motions to Strike and Denying Motion to Limit Relitigation of Issues at P 14 (May 17, 2011).

[94] Opinion No. 523, 142 FERC ¶ 61,022 at P 195 (citing Opinion No. 519, 139 FERC ¶ 61,107 at P 13).

[95] *Id*. P 196.

depreciation variables in the bandwidth formula in response to arguments on exception and opposing exceptions, which as noted, were filed prior to the issuance of Opinion No. 519, which resolved all issues concerning depreciation under the bandwidth formula. Accordingly, the Commission stated in Opinion No. 523 that "[t]he findings we make in this order with respect to the issues raised on exception pertain to filed depreciation rates as they apply for use in Service Schedules MSS-1 and MSS-4.[96] Notably, because the Commission did not find any error in the Presiding Judge's exclusion of the Louisiana Commission's late-filed evidence, the Commission did not make any findings as to blended rate issues under Service Schedules MSS-1 and MSS-4. As the Presiding Judge concluded, and we affirm, "[t]here are remaining blended depreciation rate issues pertaining to MSS-1 and MSS-4 that some parties may wish to address, but these issues are not a part of the instant proceeding as no party timely raised them in their pleadings."

47. For the reasons discussed above, we affirm the Presiding Judge's exclusion of evidence, and therefore, deny the rehearing request of the Louisiana Commission.

D. Inclusion of Steam Generator Replacements in the Interim Retirement Histories for ANO-1 and ANO-2

1. Rehearing Request

48. In Opinion No. 523, the Commission affirmed the Presiding Judge's decision to include the steam generator replacements in the interim retirement histories for ANO-2, but not for ANO-1.[97] Upon considering the historical evidence, the Presiding Judge noted that in 2000, ANO-2 had run for 20 years prior to replacement of the steam generators and ANO-1 had run for 31 years prior to its replacement in 2005. The new steam generators were replaced with the new Alloy 690, the state of the art metal used in the industry at that time. The Commission agreed with the Presiding Judge that the evidence suggested that there were problems with the new alloy.[98] Specifically, while Alloy 690 is more resistant to stress corrosion cracking, it is softer than Alloy 600 and therefore is more prone to denting and abrasion wear damage. The Commission found that it had not been shown, as argued by the Louisiana Commission, that the new Alloy 690 will result in significant improvement of performance. The Commission agreed with the Presiding Judge that based on these factors and operational and design differences between ANO-1 and ANO-2,[99] one might reasonably expect that with the use of the

[96] *Id.* P 198.

[97] Opinion No. 523, 142 FERC ¶ 61,022 at P 126.

[98] *Id.* P 128 (citing Initial Decision, 136 FERC ¶ 63,015 at P 142).

[99] *Id*. P 129 (citing Initial Decision, 136 FERC¶ 63,015 at P 141). The Commission noted that there are significant differences between ANO-1 and ANO-2 that

improved Alloy 690 tubing, ANO-1 and ANO-2 steam generators could last at least as long as the original generators at each unit, but not necessarily longer, all other usage factors being equal (which the Presiding Judge noted is not the case with the ANO-2 generators, since they have been uprated, potentially reducing their service life to less than the life of the original generators). The Commission stated that Presiding Judge reasonably found that the ANO-2 steam generators may have to be replaced before ANO-2's Nuclear Regulatory Commission (NRC) license expiration in 2038, (i.e., they may not last the total of 38 years necessary to last to the end of the NRC license), but that the ANO-1 steam generators should last to the expiration of ANO-1's NRC license in 2034 (i.e., they will last the total of 29 years necessary to last to the end of the NRC license).[100]

49. The Louisiana Commission argues that the Commission should not have affirmed the Presiding Judge's finding that calculation of the Depreciation Rates should include the steam generator replacements in the interim retirement histories for ANO-2. The Louisiana Commission states that, based on all known information, it is not likely that the steam generators will be replaced again before the end of the service lives of the units. In the case of ANO-1, the Louisiana Commission states that the Presiding Judge correctly modified the study, but he did not do so for ANO-2. Instead, the Louisiana Commission argues the Presiding Judge applied a "certainty" standard to ANO-2 even though that standard is foreign to depreciation analysis.[101] The Louisiana Commission states that in the case of ANO-1 and ANO-2, the study of Gayle Freier (Freier), a staff member with the Arkansas Commission, fails to remove the impact of the steam generator replacements from the historical data, and this rendered the remaining life analysis erroneous. Further, the Louisiana Commission states that Freier's study indicates that she relied on historical interim retirement data to estimate future retirements and determine the remaining life of the investments in that account. The Louisiana Commission states that Freier did not remove the effect of the replacements of the steam generator in 2000 at ANO-2 and again in 2005 at ANO-1, which the Louisiana Commission states introduces an "implicit assumption…that there will be another steam generator replacement during

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justify disparate treatment between the units for depreciation purposes. For example, ANO-1 and ANO-2 are designed differently; ANO-1 is a "once-through steam generator," while ANO-2 is a "recirculating steam generator." Once-through units have 15,000 steam tubes, while recirculating units have only 10,000. Further, recirculating steam generators produce saturated steam, while once-through steam generators produce steam that is heated beyond the saturation point. Recirculating steam generators such as ANO-2 also operate at higher temperatures than do once-through steam generators.

[100] *Id*. P 131.

[101] Request for Rehearing at 25.

the remaining term of the ANO licenses."[102] The Louisiana Commission asserts that this assumption is erroneous because "the retirement of steam generators is an unusual occurrence that is not likely to be repeated during the license lives of these two units."[103]

50. The Louisiana Commission states that although Entergy's witness Brian W. Caldwell (Caldwell) relied on a certainty standard, there was no dispute regarding the principle that significant retirements should be removed from historical retirement data in selecting an interim retirement curve if they are unlikely to recur.[104] The Louisiana Commission states that both of its witnesses, Charles W. King (King) and Lane Kollen (Kollen) testified and supplied support establishing this principle. The Louisiana Commission adds that both Kollen and King presented authoritative support for the concept that historical data reflecting retirements that are unlikely to recur should be removed from the historical retirement activity in determining the average service life. The Louisiana Commission argues that Entergy did not seriously contest the applicability of this principle. The Louisiana Commission states that, based on all relevant information known today, the replacement of the original steam generators, which had a type of tubing referred to as Alloy 600, before the end of their design lives must be viewed as anomalous events.[105]

51. Additionally, the Louisiana Commission states that the design life of the steam generators is 40 years, a period well beyond the end of the license life. The Louisiana Commission also indicates that the design life establishes the minimum likely life of the steam generators. In designing the ANO-1 steam generators to last 40 years, the Louisiana Commission states that the manufacturer's engineers are required to consider all potential life-threatening issues.[106] The Louisiana Commission claims that Entergy witness Timothy G. Mitchell (Mitchell) conceded that the engineers are required to account for potential corrosion and wear. The Louisiana Commission states that Mitchell agreed that the engineers were required "to accommodate all potential known difficulties in achieving that life," and he conceded that the manufacturer provided steam generators that would last 40 years given "everything they knew at the time of delivery." The

[102] *Id*. (citing Ex. LC-24 at 16, 17).

[103] *Id*. at 25-26 (citing Ex. LC-24 at 17).

[104] *Id*. at 26.

[105] *Id*. at 27-28.

[106] *Id*. at 9.

Louisiana Commission states that Mitchell agreed that he and Entergy will try to make the steam generators last longer than the design life.[107]

52. Regarding King's and Kollen's testimonies, the Louisiana Commission argues that Entergy did not attempt to refute the proposition that the steam generators probably will not need to be replaced again during the license lives of the units.[108] Instead, the Louisiana Commission states that Entergy raised a "straw man," asserting that there is no "certainty that the replacement steam generators will not be retired prior to the expiration of the current operating licenses of either unit."[109] The Louisiana Commission states that the straw man "certainty" standard is not the appropriate basis on which to resolve this depreciation issue. The Louisiana Commission argues that Entergy did not provide any authoritative basis for asserting that the standard should be a "certainty." The Louisiana Commission states that Entergy presented the testimony of Mitchell, a nuclear expert, but the Louisiana Commission states that Mitchell never endorsed the proposition that the ANO steam generators are likely to be replaced again during the license lives of the units. Instead, the Louisiana Commission argues, Mitchell cited Entergy testimony in another proceeding that "there can be no complete assurance that Alloy 690 tubing will last 40 years in steam generators."[110]

53. Additionally, the Louisiana Commission argues that industry evidence presented in cross-examination through Entergy witness Mitchell established that the Alloy 690 steam generators installed by the industry are experiencing few, if any, problems requiring significant corrective action, a pattern completely unlike the experience for the Alloy 600 steam generators. Further, the Louisiana Commission states that, with the original technology steam generators, the industry was required to engage in tubing repairs and plugging on a large scale even before the replacement of the steam generators. For Alloy 690 steam generators, in contrast, the Louisiana Commission states there has been a minimal need to repair or replace tubes.[111]

54. Further, the Louisiana Commission states that Entergy witness Mitchell has never said, or heard anyone at Entergy suggest, nor seen an Entergy document suggesting that the replacement steam generators might fail before achieving their 40-year design life.[112]

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[107] *Id*. at 9 (citing Tr. 45, 47-48, and 50).

[108] *Id*. at 28.

[109] *Id*. (citing Ex. EAI-9 at 27).

[110] *Id*. at 28-29 (citing Ex. EAI-23 at 10).

[111] *Id*. at 29-30.

[112] *Id.* at 30 (citing Tr. 52-54).

Additionally, the Louisiana Commission argues that the economic study on which Entergy based its decision to move forward with the steam generator replacement at ANO-1 also assumed that the steam generators will last through the end of the license life.[113] According to the Louisiana Commission, any reliance on the Freier study is inappropriate because no witness testified that her conclusions were reasonable. The Louisiana Commission argues that the Commission should reconsider the reliance on testimony that did not address the relevant issue in resolving the dispute concerning the service life of ANO-1.[114]

55. The Louisiana Commission argues that neither Entergy nor the Arkansas Commission presented any evidence suggesting the steam generators are likely to fail during the life of ANO-1. The Louisiana Commission states that it presented comprehensive historical data published by the Electrical Power Research Institute documenting the vastly improved performance of Alloy 690 steam generators through 22 years of operation compared to original-technology steam generators over a comparable period.[115] The Louisiana Commission states that some tube problems are normal in steam generators, but the Alloy 690 steam generators have experienced very few of these problems.[116] The Louisiana Commission states this is the type of historical data that guides depreciation decisions.[117]

2. Commission Determination

56. The Louisiana Commission reiterates many of the arguments it made in its brief on exceptions in opposing the inclusion of interim retirement histories for the steam generator replacements.[118] Based on the record, in Opinion No. 523 the Commission disagreed with those arguments as to ANO-2, and we continue to find the Louisiana Commission's arguments to be unpersuasive.

57. Entergy Arkansas' proposed Depreciation Rates for ANO-1 and ANO-2 were calculated using certain assumptions including interim retirement curves, reflecting the retirement of ANO-2's steam generators, which were replaced in 2000, and the retirement

[113] *Id.* (citing Tr. 100-01).

[114] *Id*. at 31.

[115] Request for Rehearing at 8 (citing Ex. LC-47 and Ex. LC-52).

[116] *Id*. at 9 (citing Tr. at 80).

[117] *Id*.

[118] *See* Opinion No. 523, 142 FERC ¶ 61,022 at PP 106-111.

of ANO-1's steam generators, which were replaced in 2005. The Presiding Judge found that Entergy had met its burden of showing that Entergy Arkansas' proposed Depreciation Rates should be calculated with the inclusion of the steam generator replacements in the interim retirement histories for ANO-2, but not for ANO-1. In Opinion No. 523, the Commission affirmed the Presiding Judge's decision to include the steam generator replacements in the interim retirement histories for ANO-2, but not for ANO-1.[119]

58. In reaching its determination in Opinion No. 523, the Commission considered the evidence concerning the potential replacements of the steam generators for ANO-1 and ANO-2. In Opinion No. 523 the Commission noted that the Presiding Judge evaluated and applied the guidelines from the National Association of Regulatory Utility Commissioners Depreciation Manual as to whether the steam generator replacements are likely to be recurring events.[120] The evidence did not show that the new Alloy 690 will result in significant improvement in performance but showed that there are problems with the new alloy.[121] Furthermore, the evidence indicated that it is difficult to forecast with any certainty how the new alloy will perform. Last, we agree with Entergy witness Mitchell who testified in this proceeding that a lifetime projection for any of the ANO steam generators is not possible today and it is not possible to know how long the steam generator replacements would last.[122] We find that the Louisiana Commission has presented no new evidence on rehearing that would change that determination and therefore we deny rehearing of this issue.

E. Reliance on Hearsay to Resolve a Disputed Issue

1. Rehearing Request

59. On rehearing the Louisiana Commission argues that "Opinion No. 523 extends the practice permitting hearsay in administrative proceedings beyond acceptable limits."[123] It contends that on the disputed issue concerning the service life of ANO-2, the Louisiana Commission states that the only relevant evidence supporting Entergy's proposal was the

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[119] *Id.* P 126.

[120] *Id.* P 127.

[121] *Id*. P 128 ("[W]hile Alloy 690 is more resistant to stress corrosion cracking, it is softer than Alloy 600 and therefore is more prone to denting and abrasion wear damage.").

[122] *Id*. (citing Ex. EAI-23 at 16).

[123] Request for Rehearing at 21.

study by Gayle Freier, an Arkansas Commission staff member.[124] The Louisiana Commission states that this study is hearsay, and that that no one sponsored her conclusion or testified to its accuracy. Also, the Louisiana Commission states that Entergy filed rebuttal testimony addressing her study's conclusion, but that testimony did not address the relevant issue. Therefore, the Louisiana Commission states that the Commission should reconsider its decision to approve the study's conclusion.[125]

60. In this case, the Louisiana Commission argues, Freier did not appear as a witness. Entergy's witness, Caldwell, did not participate in Freier's study and reviewed it only to determine that the results were not "aberrant." The Louisiana Commission states that Freier's testimony in the retail case before the Arkansas Commission does not discuss the nuclear depreciation issue contested in this case. The Louisiana Commission further states that Freier's conclusions were submitted through the testimony of Entergy witness Caldwell and that Caldwell is in no position to provide answers concerning Freier's assumptions, the data she explicitly relied on, or Freier's methods. Because Freier failed to appear, the Louisiana Commission states that the Commission should not rely on her opinion.[126]

2. Commission Determination

61. The Commission stated in Opinion No. 523 that in an administrative proceeding, the issue is not whether evidence is hearsay, but whether it is probative.[127] Accordingly, evidence should not be excluded from administrative proceedings based solely on its characterization as hearsay. The Commission further reiterated that per Rule 509(a) of the Commission's Rules of Practice and Procedure, the basic test as to the admissibility of evidence is whether the evidence is of the "kind that would affect reasonable and fair minded persons in the conduct of their daily affairs."[128] The Commission in Opinion No. 523 agreed with the determination of the Initial Decision that a witness provided substantial evidence having probative value and of the kind that would affect reasonable and fair minded persons where the witness provided detailed testimony and exhibits that

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[124] *Id*.

[125] *Id*.

[126] *Id*. at 22-23.

[127] Opinion No. 523, 142 FERC ¶ 61,022 at P 37, n.73 (citing *Old Dominion Elec. Coop.*, 119 FERC ¶ 61,253, at 62,426 (2007)).

[128] *Id*. P 55, n.99 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,173, at P 97 (2010) and 18 C.F.R. § 385.509(a)).

showed a thorough knowledge of the case and the proposed methodology.[129] The Commission further agreed that the Louisiana Commission had the opportunity during the hearing to depose Freier regarding her depreciation study and testimony from the retail case.[130] Moreover, although the Louisiana Commission argues that Freier's study should be excluded as hearsay because Freier did not appear at the hearing, the Louisiana Commission contradicted this argument in that it submitted testimony from its witness Jacobs who did not appear at the hearing. The Presiding Judge did not reference witness Jacob's lack of appearance in his discussion; the Presiding Judge determined that the Louisiana Commission witness Kollen's testimony based on Jacob's conclusions should be accorded little weight in the deliberation process because it lacked substance and foundation.[131] Accordingly, we affirm the findings of the Presiding Judge and Opinion No. 523 and deny the rehearing request of the Louisiana Commission.

The Commission orders:

As discussed above, the Louisiana Commission's request for rehearing is hereby denied.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[129] *Id.* Further, the Commission stated that, "[w]hile he might not have independently verified every data point used in determining Midwest ISO [Transmission Owner's] lost revenues, administrative proceedings do not impose such a requirement." *Id.* P 98.

[130] *Id.* P 8.

[131] In determining that Freier used informed judgment, the Presiding Judge found that the record reflects that Freier toured and examined the facilities and it was the totality of the information that she gathered that led to her conclusions. Initial Decision, 136 FERC ¶ 63,015 at P 153.