

153 FERC ¶ 61,304  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

Docket No. EL10-65-004

v.

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

ORDER DENYING REHEARING

(Issued December 17, 2015)

1. On December 18, 2014, the Commission issued an Order Denying Rehearing and Granting Motion to Proceed with Hearing and Settlement Judge Procedures.<sup>1</sup> In this order, the Commission denies requests for rehearing of the 2014 Hearing Order, as discussed below.

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<sup>1</sup> *La. Pub. Serv. Comm'n v. Entergy Corp.*, 149 FERC ¶ 61,245 (2014) (2014 Hearing Order).

## I. Background

### A. The Bandwidth Formula

2. The Entergy<sup>2</sup> system has operated for over 50 years under the Entergy System Agreement (System Agreement), which acts as an interconnection and pooling agreement, providing for the joint planning, construction, and operation of the Entergy Operating Companies' facilities. In Opinion No. 480, the Commission found that "rough production cost equalization on the Entergy system had been disrupted."<sup>3</sup> The Commission imposed a "bandwidth remedy" to help keep the Entergy system in rough production cost equalization.<sup>4</sup> The bandwidth formula is included in Service Schedule MSS-3 of the System Agreement. The Commission also required that annual bandwidth filings be made to determine the disparities<sup>5</sup> in the production costs for each Entergy Operating Company and, based upon the quantities, determine the payments and receipts for each Entergy Operating Company consistent with the bandwidth formula.

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<sup>2</sup> Entergy refers to Entergy Corporation and its subsidiaries: Entergy Services, Inc., and six public utility operating companies: Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc. (Entergy Mississippi), Entergy New Orleans, Inc., and Entergy Texas, Inc. (collectively, Entergy Operating Companies). Entergy Arkansas withdrew from the System Agreement effective December 18, 2013, and Entergy Mississippi withdrew from the System Agreement effective November 7, 2015.

<sup>3</sup> *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 136 (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 sub nom. La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008). A detailed history of Entergy's rough production cost equalization under the System Agreement can be found in Opinion No. 480.

<sup>4</sup> Opinion No. 480, 111 FERC ¶ 61,311 at P 44.

<sup>5</sup> "Disparity" means the ratio of actual production costs to system average production costs expressed in terms of the divergence from 100 percent.

**B. Waterford 3 Nuclear Power Plant (Waterford 3) and Accumulated Deferred Income Tax (ADIT)**

3. Before 1989, Entergy's Waterford 3 plant was 100 percent owned by Entergy Louisiana. In 1989, Entergy Louisiana entered into a sale-leaseback transaction involving a 9.3 percent interest in Waterford 3 (Waterford 3 Sale-Leaseback).<sup>6</sup> The transaction, which was intended to help Entergy Louisiana reduce its debt costs associated with the plant, involved a simultaneous sale of a 9.3 percent interest in Waterford 3 from Entergy Louisiana to an owner-trustee for \$353.6 million, and a lease of that same interest back to Entergy Louisiana. For tax purposes, Entergy Louisiana used accelerated tax depreciation for Waterford 3 prior to the sale-leaseback. As a consequence, the tax basis of the 9.3 percent interest subject to the Waterford 3 Sale-Leaseback was lower than its \$353.6 million sales price. This produced a taxable gain to Entergy Louisiana of approximately \$240 million. For accounting purposes, the Waterford 3 Sale-Leaseback was not treated as a sale and subsequent leaseback, but instead treated as a financing transaction similar to traditional debt financing. As a result, the 9.3 percent interest that was subject to the Waterford 3 Sale-Leaseback continued to be recorded as part of Entergy Louisiana's production facilities as a capital lease. Because no sale was deemed to have occurred for accounting purposes, the 9.3 percent interest was recorded at its pre-Waterford 3 Sale-Leaseback book value of \$220 million. The difference between the \$353.6 million selling price and the \$220 million book value was not treated as a book gain. Instead, the entire \$353.6 million selling price was recorded as long-term debt in Account 224 (Other Long-Term Debt).<sup>7</sup>

4. The accumulated deferred income tax (ADIT) accounts reflect the deferred tax consequences of transactions and events recorded on the company books.<sup>8</sup> In the case of

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<sup>6</sup> See *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 515-A, 153 FERC ¶ 61,019, at P 3 (2015).

<sup>7</sup> *Id.* P 4.

<sup>8</sup> The rate base in the bandwidth formula is adjusted by the ADIT amounts recorded in FERC Accounts 190, Accumulated Deferred Income Taxes; 281, Accumulated Deferred Income Taxes-Accelerated Amortization Property; and 282, Accumulated Deferred Income Taxes-Other Property (as reduced by amounts not generally and properly includable for FERC cost of service purposes, including, but not limited to, SFAS 109 ADIT amounts and ADIT amounts arising from retail ratemaking decisions). There are four categories of ADIT recognized in the Uniform System of Accounts in four separate accounts, and only three of these categories of ADIT are used

(continued...)

the Waterford 3 Sale-Leaseback, Entergy Louisiana incurred a tax liability in 1989 associated with its \$240 million taxable gain. However, because the transaction was not treated as a sale for accounting purposes, the tax liability was not recorded on Entergy Louisiana's books at that time as a tax liability, but instead it was recorded as a tax asset in Account 190 as ADIT.<sup>9</sup> The bandwidth formula in Service Schedule MSS-3 functionalizes a portion of the ADIT recorded in each Entergy Operating Company's books to the production function using plant ratios.

## II. Procedural History

5. This proceeding arises out of a complaint filed on May 5, 2010 by the Louisiana Public Service Commission (Louisiana Commission) against Entergy Corporation, Entergy Services, Inc., and the Entergy Operating Companies pursuant to sections 206 and 306 of the Federal Power Act (FPA).<sup>10</sup> In its complaint, the Louisiana Commission raised numerous issues related to the bandwidth formula, seeking to change the bandwidth formula, effective no later than the fourth bandwidth filing and for future annual bandwidth filings.

6. On May 27, 2010, in Docket No. ER10-1350-000, Entergy made its fourth annual bandwidth filing based on calendar year 2009 production costs for the Entergy System. On July 23, 2010, the Commission issued an order accepting Entergy's proposed rates for filing, suspending them for a nominal period, to become effective June 1, 2010, subject to refund, and establishing hearing and settlement judge procedures.<sup>11</sup> In the Fourth Bandwidth Hearing Order, the Commission included a list of issues described as issues that the Louisiana Commission acknowledged were pending in other proceedings before the Commission,<sup>12</sup> as well a list of other issues described as issues that the Louisiana Commission claimed were not pending. The Commission directed the Presiding Judge

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in the bandwidth formula. Only two of the three categories, those reflected in Account 190 and Account 282, materially affect the bandwidth calculation. *See id.* n.12.

<sup>9</sup> *Id.* P 4.

<sup>10</sup> 16 U.S.C. §§ 824d, 825e (2012).

<sup>11</sup> *Entergy Servs., Inc.*, 132 FERC ¶ 61,065 (2010) (Fourth Bandwidth Hearing Order).

<sup>12</sup> *Id.* P 25 (listing 14 issues, the seventh being "ADIT Associated with Waterford 3 Capital Lease Amounts").

not to allow re-litigation of issues that were the subject of other proceedings before the Commission.<sup>13</sup>

7. On August 4, 2010, the Commission set four of the issues raised by the Louisiana Commission in the instant proceeding for hearing and settlement judge procedures: (1) inclusion of Waterford 3 ADIT in the bandwidth formula (Waterford 3 ADIT issue); (2) direct assignment to production, rather than functionalizing, of all directly assignable ADIT costs (ADIT direct assignment issue); (3) exclusion of interruptible load from the cost allocators in the bandwidth formula; and (4) inclusion of Spindletop Regulatory Asset (Spindletop) capital lease accounting costs in the bandwidth formula.<sup>14</sup> Because matters related to these four issues were pending before the Commission in other dockets, the Commission ordered the hearing and settlement judge procedures to be held in abeyance pending the outcome of the other related pending proceedings and further Commission orders.<sup>15</sup>

8. Specifically, for the Waterford 3 ADIT issue, the Commission held the hearing and settlement judge procedures in abeyance pending the outcome of the second bandwidth proceeding in Docket No. ER08-1056; for the ADIT direct assignment issue, the Commission held these procedures in abeyance pending the outcome of the Louisiana Commission's complaint on the functionalization of Waterford 3 account 190 in Docket No. EL09-50; for the interruptible load issue, it held the procedures in abeyance pending the outcome of the proceedings in the Louisiana Commission's complaint on the interruptible load issue (and another issue) in Docket No. EL07-52 and the third bandwidth proceeding in Docket No. ER09-1224; and for the Spindletop capital lease issue, the Commission held those procedures in abeyance pending the outcome of the Louisiana Commission's complaint on the Spindletop capital lease issue in Docket No. EL08-51-002.<sup>16</sup>

9. The Commission stated that, once it had acted to address any of these issues in these other proceedings, the Louisiana Commission should file with the Commission motions with respect to each issue to indicate whether it wants the Commission to

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<sup>13</sup> *Id.* P 26.

<sup>14</sup> *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 132 FERC ¶ 61,104, at P 38 (2010) (2010 Hearing Order). Spindletop is a gas storage facility that provides services to customers in Texas and Louisiana.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

reinstate the hearing and settlement judge procedures or whether the issue has been resolved in the other proceeding and therefore such procedures would no longer be needed.<sup>17</sup> The Commission stated that parties could file answers to those motions, and the Commission would issue further orders.<sup>18</sup> The Commission also set the refund effective date as May 5, 2010, the date the complaint was filed in this docket.<sup>19</sup>

10. On September 3, 2010, the Louisiana Commission filed a timely request for rehearing of the 2010 Hearing Order. On December 2, 2011, the Louisiana Commission filed the Motion to Proceed, asking the Commission to reinstitute hearing and settlement judge procedures for the Waterford 3 ADIT issue and the ADIT direct assignment issue.<sup>20</sup> In the Motion to Proceed, the Louisiana Commission added that the interruptible load issue was not yet ripe to proceed, and that the Spindletop capital lease issue had been rendered provisionally moot by the Commission's determinations in Opinion No. 509, in the proceeding on the Louisiana Commission's complaint in Docket No. EL08-51-002, pending rehearing.<sup>21</sup> Entergy and the Arkansas Commission filed timely answers to the Motion to Proceed. The Louisiana Commission filed a motion for permission to reply and reply to those answers.

### **2014 Hearing Order**

11. On December 18, 2014, the Commission issued the 2014 Hearing Order, which denied the Louisiana Commission's request for rehearing of the 2010 Hearing Order.<sup>22</sup> As to the four issues that had been held in abeyance, the Commission dismissed the

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<sup>17</sup> *Id.* P 39.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* P 40.

<sup>20</sup> Motion to Proceed at 2-5.

<sup>21</sup> *Id.* at 6-7 (citing *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 509, 132 FERC ¶ 61,253 (2010)). Rehearing of Opinion No. 509 was subsequently denied in *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,101 (2012).

<sup>22</sup> 2014 Hearing Order, 149 FERC ¶ 61,245 at PP 18-19. Also on December 18, 2014, the Commission issued an order consolidating this complaint proceeding with the fifth, sixth, seventh, and eighth annual bandwidth proceedings, leaving it to the Presiding Judge "to ensure that no participant relitigates matters that the Commission has already determined." *Entergy Servs., Inc.*, 149 FERC ¶ 61,244, at P 36 (2014).

Spindletop capital lease issue because it found that the Commission's determinations in Opinion No. 509 rendered this issue moot.<sup>23</sup> With respect to the interruptible load issue, the Commission directed the Louisiana Commission to inform the Chief Judge within 30 days of the issuance of the 2014 Hearing Order as to whether it wanted to pursue litigation of this matter.<sup>24</sup>

12. With respect to the Waterford 3 ADIT issue and the ADIT direct assignment issue, the Commission found that "there are no developments since issuance of the [2010] Hearing Order that would persuade us to change our decision to institute hearing and settlement judge procedures for these issues, and so we direct that the hearing and settlement judge procedures proceed."<sup>25</sup>

13. The Commission rejected the contentions of Entergy and the Arkansas Commission that the Waterford 3 ADIT issue should be dismissed from the Louisiana Commission's complaint proceeding. Specifically, with respect to the Waterford 3 ADIT issue, the Commission stated that:

While the Louisiana Commission has raised this issue in multiple proceedings, and while the Commission has addressed the inclusion of Waterford 3 ADIT costs in the bandwidth formula for the first two years of the bandwidth remedy in Docket Nos. ER07-956 and ER08-1056, whether these costs should be included in the bandwidth for later periods has not been determined.

We find that the doctrines of *res judicata* and collateral estoppel do not bar the Louisiana Commission's claims with respect to this issue. Notably, while the Commission cited *res judicata* in Opinion No. 514 as barring reconsideration of holdings in Docket No. ER07-956, on rehearing, the Commission limited its rejection of the Louisiana Commission's Waterford 3 ADIT challenge to the stipulation filed by the parties to not relitigate that issue in the Docket No. ER08-1056 (second bandwidth year) proceeding. We find that the stipulation among the parties, which is limited to the second bandwidth year

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<sup>23</sup> 2014 Hearing Order, 149 FERC ¶ 61,245 at P 54.

<sup>24</sup> *Id.* P 53. On January 6, 2015, the Louisiana Commission notified the Chief Judge that it intended to pursue litigation of the interruptible load issue. Notice on Behalf of the Louisiana Commission, Docket Nos. EL10-65-001, -002 (filed Jan. 6, 2015).

<sup>25</sup> *Id.* P 49.

proceeding, but not subsequent years, does not preclude challenges to the inclusion of Waterford 3 ADIT costs in the bandwidth formula.<sup>[26]</sup>

14. As to the ADIT direct assignment issue, the Commission found that:

[T]he Docket No. EL09-50 proceeding, which primarily concerned assignment of a single ADIT item, does not contain preclusive claim or issue findings applicable to the issue in the Louisiana Commission's complaint seeking to assign ADIT on a much wider basis. Indeed, our order in Docket No. ER09-1224-003 specifically noted that the instant docket was the proceeding in which the Louisiana Commission should pursue that claim. Entergy and the Arkansas Commission will have an opportunity to pursue their arguments as to the merits of the Louisiana Commission's claims in the reinstated proceeding.<sup>[27]</sup>

15. On January 20, 2015, the Louisiana Commission and Entergy each filed timely requests for rehearing. On February 13, 2015, the Louisiana Commission filed a motion to answer and an answer to Entergy's request for rehearing.

## II. Discussion

### A. Procedural Matters

16. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2015), prohibits an answer to a request for rehearing. Accordingly, we deny the Louisiana Commission's motion to answer and reject the Louisiana Commission's answer to Entergy's rehearing request.

### B. Substantive Matters

#### 1. Louisiana Commission's Request for Rehearing

17. The Louisiana Commission argues that the Commission erred to the extent that circumstances may cause its ruling on the Waterford 3 ADIT issue to be effective only after the 2010 annual bandwidth filing year, that its ruling switches the burden of proof to the Louisiana Commission, and that it limits the effective refund period for any potential

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<sup>26</sup> *Id.* PP 50-51 (citation omitted).

<sup>27</sup> *Id.* P 52 (citation omitted).

remedy to the 15-month refund period of section 206 of the FPA.<sup>28</sup> The Louisiana Commission states that in the 2014 Hearing Order, the Commission found that the Waterford 3 ADIT issue should be heard in and not dismissed from this complaint proceeding because, while the Commission had addressed the inclusion of the Waterford 3 ADIT costs in the bandwidth formula for the first two annual bandwidth proceedings, the Commission had not addressed whether those costs should be included in the bandwidth proceedings for later periods.<sup>29</sup>

18. The Louisiana Commission explains that it initiated this proceeding on May 5, 2010, seeking review of the costs included in the bandwidth formula (including Waterford 3 ADIT) to be effective no later than the fourth bandwidth proceeding and for future bandwidth dockets.<sup>30</sup> The Louisiana Commission adds that it also subsequently raised this issue in the fourth bandwidth proceeding in Docket No. ER10-1350, where it included filed testimony addressing the Waterford 3 ADIT issue.<sup>31</sup> The Louisiana Commission states that the Presiding Judge in that proceeding struck the Louisiana Commission's testimony related to that issue based on a ruling that the Commission had barred litigation (or, rather, re-litigation) of the Waterford 3 ADIT issue.<sup>32</sup> The Louisiana Commission states that the Presiding Judge's decision is currently pending before the Commission on exceptions to the initial decision in the fourth bandwidth proceeding. The Louisiana Commission states that the Commission's decision in the 2014 Hearing Order "makes it clear" that the Presiding Judge's exclusion of the Waterford 3 ADIT issue and testimony from the fourth bandwidth proceeding was in error.<sup>33</sup> The Louisiana Commission states that, as a result, the issue could have been properly litigated in the fourth bandwidth proceeding, and the Commission will have the opportunity to address that issue on exceptions in that proceeding.<sup>34</sup>

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<sup>28</sup> Louisiana Commission Rehearing Request at 2.

<sup>29</sup> *Id.* at 3 (citing 2014 Hearing Order, 149 FERC ¶ 61,245 at P 50).

<sup>30</sup> *Id.* at 3.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

19. The Louisiana Commission argues that, if the issue had been litigated in the fourth bandwidth proceeding, which is an FPA section 205 proceeding, Entergy would have borne the burden under section 205 of the FPA<sup>35</sup> to demonstrate that its exclusion of the ADIT related to the Waterford 3 Sale-Leaseback was just and reasonable.<sup>36</sup> The Louisiana Commission argues that, had the issue been litigated in the FPA section 205 proceeding, the remedy for the improper exclusion of these amounts would have been a refund for the entire time that the unjust and unreasonable rate had been in effect, back to the effective date of the FPA section 205 filing.<sup>37</sup> According to the Louisiana Commission, if the issue had been decided in the section 205 proceeding, the Commission's ruling would apply in subsequent proceedings, without limitation, as there is no 15-month refund limitation for filings made under section 205 of the FPA.<sup>38</sup>

20. The Louisiana Commission argues that it should not lose the benefits of section 205 of the FPA if the Commission determines that the Waterford 3 ADIT issue should be considered in this proceeding rather than in the fourth bandwidth proceeding, Docket No. ER10-1350.<sup>39</sup> The Louisiana Commission states that it filed the complaint in this proceeding prior to the date when Entergy submitted the fourth bandwidth filing and prior to that filing's effective date. The Louisiana Commission states that in the 2010 Hearing Order, the Commission ruled that the refund effective date would be the date the complaint was filed, May 5, 2010.<sup>40</sup> The Louisiana Commission argues that, as a result, whether the Waterford 3 ADIT issue is considered in this docket or in the fourth bandwidth proceeding, any inclusion of the Waterford 3 ADIT should be effective for 2010 forward (i.e., for the fourth bandwidth proceeding, filed in 2010 using 2009 data).<sup>41</sup>

21. The Louisiana Commission argues that, to the extent that the 2014 Hearing Order switches the burden of proof to the Louisiana Commission and limits any refund to the

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<sup>35</sup> 16 U.S.C. § 824d (2012).

<sup>36</sup> Louisiana Commission Rehearing Request at 3-4.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (citing 2010 Hearing Order, 132 FERC ¶ 61,104).

<sup>41</sup> *Id.*

15-month period of section 206 of the FPA,<sup>42</sup> it is also unjust and unreasonable and should be reversed on rehearing.<sup>43</sup> The Louisiana Commission asserts that, if the Waterford 3 ADIT issue had been properly heard in the fourth bandwidth proceeding, Entergy would have had the burden to justify the exclusion of the Waterford 3 ADIT amounts, and there would have been no time limits on the refunds due. The Louisiana Commission states that it is challenging whether the ADIT inputs, which exclude the Waterford 3 ADIT, are consistent with the bandwidth formula and just and reasonable. The Louisiana Commission argues that it should not be denied the FPA section 205 rights it would have been entitled to if the Commission had considered this issue in the FPA section 205 proceeding on the fourth bandwidth filing, where the Louisiana Commission properly raised this issue.<sup>44</sup>

22. The Louisiana Commission adds that, to the extent that the 2014 Hearing Order attempts to limit the refund effective period in this FPA section 206 proceeding to the 15-month period set forth in section 206 of the FPA, such a limitation is unjust and unreasonable and violates the FPA and applicable precedent.<sup>45</sup> The Louisiana Commission asserts that the issue of whether Waterford 3 ADIT is able to be included in the bandwidth formula is a matter of compliance with the bandwidth formula; it does not require a change in the formula.<sup>46</sup> The Louisiana Commission contends that these issues are properly raised in the annual bandwidth proceedings.

### **Commission Determination**

23. We deny the Louisiana Commission's request for rehearing. First, we address which party appropriately bears the burden of proof in this proceeding. The Louisiana Commission filed the FPA section 206 complaint that initiated this proceeding, including raising the issue of whether Waterford 3 ADIT should be included in the bandwidth

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<sup>42</sup> 16 U.S.C. § 824e (2012).

<sup>43</sup> Louisiana Commission Rehearing Request at 4.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 5.

<sup>46</sup> *Id.*

formula. Section 206 of the FPA provides that the complainant bears the burden of proof in an FPA section 206 proceeding.<sup>47</sup> The fact that the Louisiana Commission subsequently raised the same issue in an FPA section 205 proceeding does not provide the Commission with authority to shift the burden in this FPA section 206 proceeding. Furthermore, concerning whether the Commission should consider the Waterford 3 ADIT issue in this FPA section 206 proceeding, which the Louisiana Commission itself initiated, or in the later-filed FPA section 205 proceeding addressing Entergy's fourth annual bandwidth filing, the Commission has discretion to decide where and when to resolve an issue.<sup>48</sup> The Commission has no authority to override Congress' decision, as memorialized in the statute, to require the complainant to bear the burden of proof. That said, insofar as the Louisiana Commission is challenging Entergy's application of the formula, i.e., the inputs to the formula, and not the formula itself, as a general matter, in the first instance, Entergy bears the burden of implementing its formula correctly.<sup>49</sup>

24. Next, we address the appropriate refund period if the Commission ultimately determines that the Louisiana Commission has met its burden in this proceeding to prove that the bandwidth formula is not just and reasonable because it does not include

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<sup>47</sup> 16 U.S.C. § 824e(b) ("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"); *see also Ala. Power Co. v. FERC*, 993 F.2d 155, 157 (D.C. Cir. 1993) (citing *Seminole Elec. Coop., Inc.*, 32 FERC ¶ 63,087, at 65,334 (1985)).

<sup>48</sup> *See, e.g., Stowers Oil and Gas Co.*, 26 FERC ¶ 61,001, at 61,001 (1984) ("It is within the Commission's purview to determine how best to allocate its resources for the most efficient resolution of matters before it."); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1252 (D.C. Cir. 1983).

<sup>49</sup> *See, e.g., American Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306, at P 36 & nn.52-53 (2008) (AEP) (stating that the utility continues to bear the ultimate burden of proof that it has properly implemented the rate formula and the resultant rate is just and reasonable; any party challenging the rate formula itself bears the burden of proof) (AEP). We note that the bandwidth formula differs from most formula rates at the Commission insofar as its inputs are subject to approval via an annual section 205 filing. The presumption that prior inputs are correct, shifting the burden of proof to those disputing them, only applies where the Commission has approved the specific inputs in a section 205 proceeding and not as a general matter for formula rate inputs. *See Entergy Servs. Inc.*, 153 FERC ¶ 61,303, at P 29 n.52 (2015).

Waterford 3 ADIT. We conclude that, if it is determined through the hearing process that the annual bandwidth inputs should be corrected to include Waterford 3 ADIT, Waterford ADIT should be included prospectively from the effective date of the fourth bandwidth proceeding, June 1, 2010.<sup>50</sup> The 15-month limitation on refunds is a limitation on refunds in the section 206 proceeding,<sup>51</sup> but it does not preclude correcting an input to the production costs formula calculation.<sup>52</sup> Accordingly, if, via this section 206 proceeding, it is determined that Waterford 3 ADIT is ADIT that is generally and properly includable for cost-of-service purposes in the bandwidth formula,<sup>53</sup> Waterford 3 ADIT should be included in the bandwidth formula prospectively from the effective date of the fourth bandwidth proceeding, effective for every ensuing bandwidth filing. Accordingly, we deny the Louisiana Commission's request for rehearing.

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<sup>50</sup> We note that Entergy's bandwidth filings are effective annually on June 1<sup>st</sup> of the year after the test-year of the data submitted in the annual proceeding, e.g., June 1, 2010 is the effective date for the 2009 test-year data submitted in the fourth bandwidth filing. Given that the refund effective date for this FPA section 206 proceeding, May 5, 2010, precedes the effective date for the fourth bandwidth proceeding, June 1, 2010, we are not precluded from applying the outcome of the Waterford 3 ADIT issue in this proceeding prospectively from the effective date of the fourth bandwidth proceeding.

<sup>51</sup> At the conclusion of a section 206 proceeding, "the Commission may order refunds of any amounts paid" during the first 15 months following the refund effective date "in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force." 16 U.S.C. § 824e(b); *see also La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1299 (D.C. Cir. 2014).

<sup>52</sup> *Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,012, at P 27 (2013) ("[C]ommission has held that it may order refunds for past periods where a utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate."). *See also AEP*, 124 FERC ¶ 61,306 at P 35 ("The Commission's long-standing precedent is that, under formula rates, parties have the right to challenge the inputs to or the implementation of the formula at whatever time they discover errors in the inputs to or implementation of the formula.").

<sup>53</sup> As noted, the rate base in the bandwidth formula is adjusted by the ADIT amounts recorded in FERC Accounts 190, 281 and 282 (as reduced by amounts not generally and properly includable for FERC cost of service purposes, including, but not limited to, SFAS 109 ADIT amounts and ADIT amounts arising from retail ratemaking decisions). *See supra* note 7.

## 2. Entergy's Request for Rehearing

25. Entergy argues that, in reinstating the evidentiary hearing concerning Waterford 3 ADIT, the Commission failed to recognize that there are dockets other than the two cited in the 2014 Hearing Order that considered and resolved the Louisiana Commission's claim for including Waterford 3 ADIT in the bandwidth formula. Entergy acknowledges that the Commission's analysis considered orders issued in connection with the first and second bandwidth proceedings, Docket Nos. ER07-956 and ER08-1056, respectively. Entergy argues, however, that the Commission failed to consider substantive determinations in the fourth bandwidth case, Docket No. ER10-1350, related to whether the issue had been litigated previously.

26. Entergy contends that the fourth annual bandwidth proceeding considered the issue of whether *res judicata* and collateral estoppel were applicable to the issue of "[w]hether [Entergy] properly excluded the Waterford 3 capital lease from the bandwidth formula in its bandwidth filing for the 2009 test year."<sup>54</sup> According to Entergy, a determination was made that the principles were applicable to the Waterford 3 ADIT issue and therefore the issue should be dismissed. Entergy states that in acting on the parties' motion to lift the stay in the fourth annual bandwidth proceeding, the Presiding Judge determined:

Issue 4 (Waterford 3 Capital Lease ADIT): This issue has already been decided by the Commission in Docket Nos. ER07-956 and ER08-1056. In these proceedings the Commission determined that [Entergy] properly excluded Waterford 3 Capital Lease ADIT from the bandwidth formula. Pursuant to the Commission's order initiating this hearing, the parties cannot re-litigate this issue given that it has already been decided by the Commission. Accordingly, it is hereby dismissed.<sup>[55]</sup>

27. Entergy states that in opposing the Louisiana Commission's request for clarification of the Presiding Judge's determination in the fourth bandwidth proceeding, Entergy argued that "the Commission quite clearly found in Opinion Nos. 514 and 514-A that the issue of Waterford 3 Capital Lease ADIT has been litigated and decided on its merits in Docket No. ER07-956."<sup>56</sup> In opposing the request for clarification, Entergy

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<sup>54</sup> Entergy Rehearing Request at 11.

<sup>55</sup> *Id.* at 11-12 (citing *Entergy Servs., Inc.*, Order Lifting Stay, Docket No. ER10-1350, at P 7 (issued Oct. 18, 2013)).

<sup>56</sup> *Id.* at 12-13 & n.29.

also argued that “[t]he Waterford 3 Capital Lease ADIT that the [Louisiana Commission] wishes to relitigate is the same ADIT resulting from the same capital lease at issue in Docket No. ER07-956.”<sup>57</sup> Entergy states that the Presiding Judge agreed with Entergy that the issue was not to be litigated yet again.<sup>58</sup>

28. Entergy adds that, in the complaint proceeding in Docket No. EL09-50, cited by the Commission in the 2014 Hearing Order, the Commission already fully considered and rejected the Louisiana Commission’s claims that the bandwidth formula is unjust, unreasonable, unduly discriminatory or preferential in functionalizing Waterford 3 ADIT to production using plant ratios, and that the bandwidth formula should be revised to directly assign the Waterford 3 ADIT to production.<sup>59</sup> Entergy contends that the Commission’s findings in Opinion No. 515 (issued in Docket No. EL09-50) render the issue of inclusion and direct assignment of the Waterford 3 ADIT in the bandwidth formula moot in the instant proceeding.<sup>60</sup> Entergy states that in Opinion No. 515 the Commission upheld the initial decision in its entirety, including a finding, as described in Opinion No. 515, that “[t]he record also confirms it would not be feasible to directly assign every ADIT sub-account that would have to be directly assigned to avoid making an unjust, unreasonable, unduly discriminatory or preferential revision to Service Schedule MSS-3.”<sup>61</sup> Entergy argues that the finding that it would not be feasible or appropriate to directly assign every item of ADIT represents another *res judicata* bar to re-litigating the Louisiana Commission’s direct assignment claim.<sup>62</sup>

29. Entergy concludes that the Louisiana Commission’s Waterford 3 ADIT and Waterford 3 ADIT direct assignment claims are barred by *res judicata* because the claim

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<sup>57</sup> *Id.* at 13 n.9 (quoting Entergy Servs., Inc., Response to Louisiana Commission Motion, Docket No. ER10-1350-001, at 8-9 (filed Dec. 12, 2013)).

<sup>58</sup> *Id.* at 12-13 (citing *Entergy Servs., Inc.*, Order Granting in Part and Denying in Part Motion of the Louisiana Public Service Commission, Docket No. ER10-1350, at PP 29-31 (issued Dec. 20, 2013)).

<sup>59</sup> *Id.* at 4.

<sup>60</sup> *Id.* at 4, 13-14 (citing *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, Opinion No. 515, 137 FERC ¶ 61,070 (2011), *order on reh’g*, Opinion No. 515-A, 153 FERC ¶ 61,109).

<sup>61</sup> *Id.* at 13 (quoting Opinion No. 515, 137 FERC ¶ 61,070 at P 39).

<sup>62</sup> *Id.* at 13-14.

that any Waterford 3 ADIT should be included in the bandwidth is barred by the Commission's ruling in Opinion Nos. 505 and 514, and this Commission's ruling in Opinion No. 515 with regard to the Louisiana Commission's claim that all items of ADIT should be directly assigned. Entergy argues that, to the extent the Commission does not grant rehearing of its request for rehearing, it seeks clarification that consideration of the Waterford 3 ADIT issue is only applicable to those annual bandwidth proceedings that have been removed from abeyance and consolidated with the instant docket, specifically the fifth, sixth, seventh, and eighth bandwidth proceedings.<sup>63</sup>

### **Commission Determination**

30. We deny Entergy's request for rehearing. Although Entergy contends that the Louisiana Commission's Waterford 3 ADIT and Waterford 3 ADIT direct assignment claims are barred by *res judicata*, Entergy misconstrues the Commission's determination in prior orders.

31. First, as the Commission stated in the 2014 Hearing Order, while the Commission cited *res judicata* in Opinion No. 514 as barring reconsideration of holdings in Docket No. ER07-956 (first bandwidth proceeding), on rehearing the Commission limited its rejection of the Louisiana Commission's Waterford 3 ADIT challenge to the stipulation filed by the parties to not re-litigate that issue in the Docket No. ER08-1056 (second bandwidth) proceeding.<sup>64</sup> Accordingly, the stipulation among the parties, which is limited to the second bandwidth proceeding bandwidth proceedings, does not preclude the Louisiana Commission's Waterford 3 ADIT complaint in this proceeding.

32. In addition, Entergy argues that in the fourth bandwidth proceeding in Docket No. ER10-1350, "a determination was made" that the consideration of whether Waterford 3 ADIT should be included in the bandwidth calculation was barred by "the principles of *res judicata* and collateral estoppel" and so "the issue was dismissed."<sup>65</sup> We disagree. Entergy overlooks the fact that the Presiding Judge reconsidered his dismissal of the Waterford 3 ADIT issues and changed the basis for not considering Waterford 3 ADIT

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<sup>63</sup> *Id.* at 4, 14-15.

<sup>64</sup> 2014 Hearing Order, 149 FERC ¶ 61,245 at P 51; *see also Entergy Servs., Inc.*, Opinion No. 514-A, 142 FERC ¶ 61,013, at PP 23-27 (2013).

<sup>65</sup> *Id.* at 11.

issues in the fourth bandwidth proceeding.<sup>66</sup> In the Fourth Bandwidth Hearing Order, the Commission explicitly directed the Presiding Judge “to not allow re-litigation of issues that are the subject of other proceedings pending before the Commission.”<sup>67</sup> The Louisiana Commission’s complaint in this proceeding, which was filed on May 5, 2010, was pending before the Commission when the Fourth Bandwidth Hearing Order was issued on July 23, 2010. Thus, consistent with the Commission’s directive, upon reconsideration, the Presiding Judge decided not to hold a hearing on the Waterford 3 ADIT issue because it was already pending before the Commission.<sup>68</sup> Issues that are pending before the Commission are still “live” issues and not *res judicata*. Accordingly, except for the Commission’s rejection of the Louisiana Commission’s Waterford 3 ADIT challenge based on the parties’ stipulation to not re-litigate that issue in the second

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<sup>66</sup> See *Entergy Servs., Inc.*, Order Granting In Part And Denying In Part Motion of the Louisiana Public Service Commission, Docket No. ER10-1350-001, at PP 26-32 (Dec. 20, 2013).

<sup>67</sup> The Commission stated:

[t]he Louisiana Commission also raises issues in its protest that it claims have not been raised in other proceedings. We make no finding on whether these issues may also be pending in other proceedings, but we direct the Presiding Judge to not allow re-litigation of issues that are the subject of other proceedings pending before the Commission. The hearing in this proceeding should be limited to whether Entergy’s actual calendar year 2009 formula inputs were correctly applied in the bandwidth calculation.

Fourth Bandwidth Hearing Order, 132 FERC ¶ 61,065 at P 26 (citation omitted).

<sup>68</sup> *Entergy Servs., Inc.*, Order Granting In Part And Denying In Part Motion of the Louisiana Public Service Commission, Docket No. ER10-1350-001, at P 31 (stating that in the Fourth Bandwidth Hearing Order, the Commission “pointed specifically” to issues that the Louisiana Commission raised in this proceeding that are already pending in other proceedings, including Waterford 3 ADIT, and directed that these issues are not to be re-litigated here). See also Fourth Bandwidth Hearing Order, 132 FERC ¶ 61,065 at P 25 (“The Louisiana Commission raises issues concerning Entergy’s 2010 Bandwidth Calculation that it acknowledges are pending in other proceedings, including Docket Nos. ER07-956-000, EL08-52-000, ER08-1056-000 and ER09-1224. These issues include . . . (7) ADIT associated with Waterford 3 Capital Lease Amounts; (8) other ADIT amounts . . .”).

bandwidth proceeding, the Commission has not made a determination that the Waterford 3 ADIT was barred by the principles of *res judicata* and collateral estoppel.

33. As noted above, the Presiding Judge's decision not to consider the Waterford 3 ADIT issue in the fourth bandwidth proceeding in Docket No. ER10-1350 was raised in an exception filed by the Louisiana Commission in that docket. Subsequent to the Presiding Judge's issuance of the initial decision in the fourth bandwidth proceeding, however, the Commission issued the 2014 Hearing Order lifting the abeyance and setting for hearing in the instant proceeding the issue of whether ADIT should be included in the bandwidth formula.<sup>69</sup> Accordingly, as discussed above, if it is determined through the hearing process that the bandwidth formula should include Waterford 3 ADIT, Waterford 3 ADIT should be included prospectively from the effective date of the fourth bandwidth proceeding, June 1, 2010, which, as noted above, post-dates the May 5, 2010 refund effective date in the FPA section 206 proceeding.<sup>70</sup>

34. We also disagree with Entergy's contention that the Commission already fully considered and rejected the Louisiana Commission's claims concerning Waterford 3 ADIT and ADIT direct assignment in the complaint proceeding in Docket No. EL09-50.<sup>71</sup> Entergy conflates the two complaint proceedings. As the Commission explained in the 2014 Hearing Order, the Docket No. EL09-50 complaint proceeding concerned direct assignment of a *single* ADIT item, namely Waterford 3 ADIT.<sup>72</sup> In Opinion No. 515, in Docket No. EL09-50, the Commission affirmed that it would be inappropriate to directly assign Waterford 3 ADIT to the production function without determining whether other ADIT could also be directly assigned.<sup>73</sup> In contrast, the Louisiana Commission's

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<sup>69</sup> We note that, in the order on initial decision in the fourth bandwidth proceeding, which is being issued concurrently with this order, the Commission takes administrative notice of the fact that that the Waterford ADIT issue was set for hearing in Docket No. EL10-65-000. *Entergy Servs. Inc.*, 153 FERC ¶ 61,303 at P 19. Accordingly, the Commission does not consider the Waterford 3 ADIT issue in that proceeding. *Id.*

<sup>70</sup> 2014 Hearing Order, 149 FERC ¶ 61,245 at P 49. *See supra* P 23 and note 48 (citing *Stowers Oil and Gas Co.*, 26 FERC ¶ 61,001 at 61,001 and *Entergy Servs., Inc.*, 145 FERC ¶ 61,047, at P 16 n.37 (2013) (noting that this issue would be decided in this proceeding)).

<sup>71</sup> Entergy Rehearing at 4.

<sup>72</sup> 2014 Hearing Order, 149 FERC ¶ 61,245 at P 52.

<sup>73</sup> Opinion No. 515, 137 FERC ¶ 61,070 at PP 33, 72.

complaint in the instant proceeding seeks to directly assign not only Waterford 3 ADIT but all directly assignable ADIT on a wider basis to production or other functions.<sup>74</sup> Indeed, the Louisiana Commission expressly initiated the instant complaint proceeding seeking comprehensive inclusion of all ADIT in the bandwidth formula in response to the initial decision in Docket No. EL09-50, in which the Presiding Judge expressed concern with “cherry-picking” a single component of ADIT, Waterford 3 ADIT.<sup>75</sup>

35. In its rehearing request, Entergy’s quotation from Opinion No. 515 is taken out of context.<sup>76</sup> While the quotation states that it would not be feasible to directly assign all directly assignable ADIT in the bandwidth formula, this quote is an excerpt from the Commission’s summary of the initial decision.<sup>77</sup> The Commission did not adopt this finding in Opinion No. 515. Rather, when the Louisiana Commission attempted in its brief on exceptions to provide calculations and analysis of additional sub-accounts for direct assignment, the Commission rejected the Louisiana Commission’s analysis on the procedural grounds that the information was “being raised for the first time in the [Louisiana Commission’s]

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<sup>74</sup> See Complaint of the Louisiana Public Service Commission, Docket No. EL10-65-000, at 4 (filed May 5, 2010).

<sup>75</sup> See *id.* The Louisiana Commission stated the following in its Docket No. EL10-65-000 complaint:

In Docket No. EL09-50, the Initial Decision ruled that even though the tariff functionalizes only a portion of the Waterford 3 Sale-Leaseback ADIT to production when this ADIT is 100 percent production related, the [Louisiana Commission] could not obtain a more accurate direct assignment unless it requested the direct assignment of all ADIT subaccounts that can be identified with particular functions. Initial Decision, *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 131 FERC ¶ 63,009 (2010). Thus, the [Louisiana Commission] seeks the direct assignment of these ADIT subaccounts that can be assigned to particular functions and tariff modifications necessary to fairly accomplish this objective.

*Id.* at 3-4.

<sup>76</sup> See *supra* P 29 & note 61 (quoting Opinion No. 515, 137 FERC ¶ 61,070 at P 39).

<sup>77</sup> See Opinion No. 515, 137 FERC ¶ 61,070 at PP 36-42 (summarizing initial decision).

brief on exceptions.”<sup>78</sup> The Commission reaffirmed this rejection on rehearing, in Opinion No. 515-A.<sup>79</sup>

36. We note that in Opinion No. 515-A the Commission also rejected the Louisiana Commission’s approach on substantive grounds. The Commission explained that the analysis the Louisiana Commission presented in its brief on exceptions consisted of examining various ADIT sub-accounts mentioned by witnesses during the course of the proceeding and attempting to show that those amounts do not offset the impact of allocating the Waterford 3 ADIT to the production function.<sup>80</sup> The Commission determined that the Louisiana Commission’s analysis attempted to cherry-pick one component of ADIT for special treatment without taking into account the other sub-accounts. Accordingly, the Commission held that the Louisiana Commission’s analysis was “inconsistent with the functionalization of ADIT in the aggregate, as required by the Bandwidth Formula, and falls short of the comprehensive analysis of the ADIT sub-accounts required by the Commission in Opinion No. 515.”<sup>81</sup> The Commission did not address in the Docket No. EL09-50 proceeding the issue of the direct assignment of all ADIT sub-accounts that can be assigned to a particular function.

37. Consequently, we conclude that the Commission’s orders in the Docket No. EL09-50 complaint proceeding do not contain preclusive findings applicable to the Louisiana Commission’s complaint in this proceeding. Indeed, in its order in the third bandwidth proceeding, Docket No. ER09-1224-003, the Commission noted that the instant Docket No. EL10-65 proceeding is the one in which the Louisiana Commission should pursue this claim.<sup>82</sup> Entergy and other parties will have an opportunity to raise their arguments challenging the merits of the Louisiana Commission’s claim in the reinstated hearing proceeding.

38. Moreover, we decline to grant the clarification that Entergy seeks and limit the scope of the decision of the results of this proceeding only to the bandwidth proceedings consolidated with this proceeding (i.e., the fifth, sixth, seventh, and eighth bandwidth proceedings). As explained above, we have determined that the scope of the decision on

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<sup>78</sup> *Id.* P 76.

<sup>79</sup> Opinion No. 515-A, 153 FERC ¶ 61,109 at P 44.

<sup>80</sup> *Id.* P 46.

<sup>81</sup> *Id.*

<sup>82</sup> *Entergy Servs., Inc.*, 145 FERC ¶ 61,047 at P 16 n.37.

Waterford 3 ADIT applies prospectively from the fourth bandwidth proceeding onward, i.e., from the June 1, 2010 effective date of the fourth bandwidth proceeding and to each succeeding bandwidth proceeding thereafter.<sup>83</sup> Accordingly, we deny Entergy's request for rehearing.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>83</sup> See *supra* PP 24, 33.