

156 FERC ¶ 61,196  
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. ER10-1350-005

ORDER ON REHEARING AND CLARIFICATION

(Issued September 22, 2016)

1. In a December 17, 2015 order,<sup>1</sup> the Commission affirmed in part and rejected in part an Initial Decision<sup>2</sup> involving the fourth annual bandwidth (Fourth Bandwidth) filing, covering calendar year 2009, which Entergy Services, Inc. (Entergy) submitted on behalf of the Entergy Operating Companies.<sup>3</sup> In this order, we grant in part and deny in part rehearing and provide clarification. In addition, we direct submission of a compliance filing, including interest on all refunds, within 60 days of issuance of this order.

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<sup>1</sup> *Entergy Servs., Inc.*, Opinion No. 545, 153 FERC ¶ 61,303 (2015) (Opinion No. 545).

<sup>2</sup> *Entergy Servs., Inc.*, 148 FERC ¶ 63,015 (2014) (Initial Decision). In the Initial Decision, the presiding administrative law judge (Presiding Judge) addressed the standard of review and four issues raised by the Louisiana Commission. For the list of issues, *see infra* note 11.

<sup>3</sup> The Operating Companies involved in this proceeding are: Entergy Arkansas, Inc. (Entergy Arkansas); Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana); Entergy Louisiana, Inc. (Entergy Louisiana); Entergy Mississippi, Inc. (Entergy Mississippi); Entergy New Orleans, Inc. (Entergy New Orleans); and Entergy Texas, Inc. (Entergy Texas).

**TABLE OF CONTENTS**

	<u>Paragraph Numbers</u>
I. Background.....	2
II. Procedural Matter .....	6
III. Discussion.....	7
A. Burden of Proof .....	8
1. Background.....	8
2. Rehearing Request.....	14
3. Commission Determination.....	16
B. Entergy Arkansas Fuel Inventory Accounting .....	37
1. Background.....	37
2. Louisiana Commission Rehearing Request.....	44
3. Commission Determination.....	45
C. Contra-Securitized Asset ADIT .....	64
1. Background.....	64
2. Rehearing Requests .....	79
3. Commission Determination.....	86
D. Casualty Loss ADIT .....	105
1. Background.....	105
2. Rehearing Request.....	106
E. Waterford 3 Sale/Leaseback: Treatment of Lease as a Financing.....	116
1. Background.....	116
2. Rehearing Request.....	120
F. Waterford 3 Amortization June 1, 2005 Through December 31, 2005 .....	147
1. Entergy’s Rehearing Request .....	147
2. Commission Determination.....	150
G. Interest on Refunds .....	151

## I. Background<sup>4</sup>

2. This proceeding is part of a long history of litigation<sup>5</sup> over the allocation of the production costs of electric power plants among the Entergy Operating Companies under the Entergy System Agreement (System Agreement).<sup>6</sup> Relevant to the rehearing requests, the System Agreement allows the Entergy Operating Companies to plan, construct, and operate their generation and transmission facilities as a single, integrated electric system (Entergy System). In 2005, in Opinion No. 480,<sup>7</sup> the Commission determined that production costs across the multistate Entergy System were not roughly equal and thus were unduly discriminatory. Consequently, the Commission imposed a remedy that would reallocate costs that deviated from an established “bandwidth” around the system average, as determined in annual proceedings.<sup>8</sup> The Commission also

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<sup>4</sup> For a detailed recitation of the procedural history of this proceeding, *see* Opinion No. 545, 153 FERC ¶ 61,303 at PP 7-16.

<sup>5</sup> As the Presiding Judge quipped, “[m]ore heat than light has emerged over the decades out of Entergy Corporation’s long pursuit of ‘rough production cost equalization’ among the Operating Companies of its electric system.” Initial Decision, 148 FERC ¶ 63,015 at P 1. For background on the Entergy Corporation and its subsidiaries, the Entergy System Agreement and the bandwidth proceedings, *see generally id.* PP 1-12.

<sup>6</sup> The System Agreement is a tariff that, among other things, allocates production costs on the Entergy System. A version of this System Agreement has governed the Entergy System since 1951. *See id.* P 1 (citations omitted).

<sup>7</sup> *See La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 44, *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), *order on remand*, 137 FERC ¶ 61,047, *order dismissing reh’g*, 137 FERC ¶ 61,048 (2011), *order on reh’g*, 146 FERC ¶ 61,152, *order rejecting compliance filing*, 146 FERC ¶ 61,153 (2014), *order on compliance*, 151 FERC ¶ 61,112 (2015).

<sup>8</sup> *See* Opinion No. 480, 111 FERC ¶ 61,311 at P 144 (“Based on this historical data, we conclude that a bandwidth remedy of +/-11 percent allowing for a maximum of a 22 percent spread of production costs between Operating Companies on an annual basis, is just and reasonable and will help keep the Entergy System in rough production cost equalization.”); *see also La. Pub. Serv. Comm’n v. FERC*, 761 F.3d 540, 544 (D.C. Cir. 2014).

required Entergy to make annual bandwidth filings to determine any necessary bandwidth payments among the Entergy Operating Companies.

3. In its compliance filing implementing the directives of Opinion Nos. 480 and 480-A, Entergy included, and the Commission accepted, the formula for implementing the rough production cost equalization bandwidth remedy (bandwidth formula) in Service Schedule MSS-3 to the System Agreement.<sup>9</sup> The purpose of the bandwidth formula is to determine whether the actual production costs of the Operating Companies were roughly equal in a given year, and to reallocate those costs if they were not. Accordingly, on May 27, 2010, as revised on September 21, 2010, Entergy submitted its Fourth Bandwidth filing pursuant to Service Schedule MSS-3 of the System Agreement and to section 205 of the Federal Power Act (FPA).<sup>10</sup>

4. In the Initial Decision, the Presiding Judge addressed the burden of proof and four specific issues that were ultimately addressed at hearing.<sup>11</sup> Opinion No. 545, as a preliminary matter, affirmed the Presiding Judge's allocation of the burden of proof.<sup>12</sup> Next, the Commission affirmed the Presiding Judge's finding that Entergy did not properly include the fuel inventory balance from FERC Form No. 1 as an input to the bandwidth formula for the 2009 test year. However, the Commission affirmed, with modification, the use of only one of the Presiding Judge's two remedies. Second, the Commission affirmed the Presiding Judge's finding that Entergy's accounting entries to

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<sup>9</sup> *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 at P 36, *order on reh'g and compliance*, 119 FERC ¶ 61,095.

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

<sup>11</sup> Initial Decision, 148 FERC ¶ 63,015 at P 30. These four issues are: (1) whether the data input into the Entergy Arkansas "Fuel Input" (FI) variable of the formula is devised correctly; (2) whether data that was moved from one (non-bandwidth formula account) to another account that is included in the bandwidth formula's "Accumulated Deferred Income Taxes" (ADIT) variable was properly moved; (3) whether the retail regulator-approved depreciation rate that the bandwidth formula calls for was properly used to populate the depreciation inputs to the depreciation components of certain variables in the formula; and (4) whether line items in sub-accounts for "contra-securitization" that may be a component of the ADIT variable of several Operating Companies should be included in or excluded from the ADIT variable. *Id.* P 37. The Presiding Judge emphasized that this examination does not involve changing the bandwidth formula itself. *Id.*

<sup>12</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 19.

move casualty loss Accumulated Deferred Income Taxes (ADIT)<sup>13</sup> from Account 283, Accumulated Deferred Income Taxes – Other, to Account 282, Accumulated Deferred Income Taxes – Other Property, constituted a transfer for which prior Commission approval was required. Nevertheless, the Commission agreed with the Presiding Judge that no remedy was needed to rectify the lack of pre-approval. Third, the Commission affirmed the Presiding Judge’s finding that there was error in the accounting for the amortization period for the sale and leaseback of the Waterford 3 nuclear power plant (Waterford 3). Fourth, the Commission agreed in part with the Presiding Judge that Entergy should be required to include an entry in the bandwidth calculation for contra-securitization ADIT<sup>14</sup> related to storm restoration costs. Contrary to the Presiding Judge’s finding, however, the Commission required inclusion of all contra-securitization ADIT in the bandwidth formula.<sup>15</sup> Finally, the Commission upheld the Presiding Judge’s denial of reconsideration of his earlier ruling to exclude the Waterford 3 capital lease ADIT issue from this proceeding.<sup>16</sup>

5. On January 19, 2016, the Arkansas Public Service Commission (Arkansas Commission), the Louisiana Public Service Commission (Louisiana Commission), and Entergy Services, Inc. (Entergy) filed requests for rehearing. On February 20, 2016, the Louisiana Commission filed a motion to reply and reply to the requests for rehearing filed by Entergy and the Arkansas Commission.

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<sup>13</sup> The “ADIT” variable of the bandwidth formula is defined in section 30.12 of Schedule MSS-3 to the System Agreement. For the text of the definition of the ADIT variable, *see infra* note 133.

<sup>14</sup> The issue of “contra-securitization ADIT” evolved from the application over time of a rule in the bandwidth formula that defines the “ADIT” variable of the formula. For further explanation and discussion of this issue, *see infra* PP 64-104.

<sup>15</sup> *See* Opinion No. 545, 153 FERC ¶ 61,303 at P 17.

<sup>16</sup> *Id.* P 18. In addition, the Commission took administrative notice of the fact that this issue was set for hearing in Docket No. EL10-65-000. *Id.* P 18 & n.33 (citing *La. Pub. Serv. Comm’n v. Entergy Corp.*, 132 FERC ¶ 61,104, at P 38 (2010); *La. Pub. Serv. Comm’n v. Entergy Corp.*, 149 FERC ¶ 61,245, at P 49 (2014); and *La. Pub. Serv. Comm’n v. Entergy Corp.*, 149 FERC ¶ 61,244, at P 36 (2014)).

## **II. Procedural Matter**

6. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.<sup>17</sup> Therefore, we will reject the Louisiana Commission's answer.

## **III. Discussion**

7. In this order, we grant in part and deny in part rehearing. Specifically, we deny rehearing, except for the contra-securitization ADIT issue, as discussed below. In addition, we direct submission of a compliance filing, including interest on all refunds directed in this Fourth Bandwidth proceeding, within 60 days of issuance of this order. We clarify that no retroactive modification to the bandwidth formula is required and we also clarify the refund period for refunds associated with the Waterford 3 sale/leaseback.

### **A. Burden of Proof**

#### **1. Background**

8. This proceeding involves implementation of the Entergy bandwidth formula rate – a formula rate used to determine whether production costs across the Entergy system are roughly equal. Where formula rates are concerned, the formula is the filed rate. Typically, a utility with a formula rate only files its formula rate and modifications to the formula under section 205 of the FPA. The resulting charges, and the inputs and calculations underlying those charges, are not filed with the Commission under section 205, and thus are never submitted or accepted as part of the filed rate. The bandwidth formula, however, is unique. Not only is the bandwidth formula on file as the filed rate, but each year Entergy also files under section 205 the actual bandwidth payments and receipts calculated and charged/credited pursuant to the bandwidth formula. Once accepted, they become part of the filed rate.

9. The annual bandwidth filing does not involve a change to the formula rate. As with the implementation of any formula rate, the central issue in Entergy's annual section 205 bandwidth filing is whether the resulting charges are calculated consistent with the requirements of the formula rate (i.e., the filed rate). Entergy, like a utility in a typical annual formula rate update, bears the burden of demonstrating that it has implemented its bandwidth formula consistent with the requirements of the bandwidth formula.

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<sup>17</sup> 18 C.F.R. § 385.713(d)(2) (2016).

10. In the Fourth Bandwidth filing, Entergy, in most cases, used the methods, practices and sources of data to determine the inputs<sup>18</sup> to the bandwidth formula variables that Entergy had used, and the Commission had accepted under section 205 of the FPA, in prior annual bandwidth formula implementation proceedings.<sup>19</sup> In some cases, however, Entergy, or the Louisiana Commission, or Trial Staff sought to change the previously-accepted method, practice or source of data that Energy had used to implement the bandwidth formula inputs in prior years.<sup>20</sup> As the Presiding Judge emphasized, the debate over the appropriate inputs does not involve changing the bandwidth formula itself.<sup>21</sup> Nevertheless, such proposed changes to the method, practice or source of data used to populate the inputs of the bandwidth formula rate raise burden of proof issues that are unique to the Entergy bandwidth proceedings. Accordingly, the Presiding Judge found it necessary to parse the requisite burden of proof that each party must bear in this proceeding.<sup>22</sup>

11. The Presiding Judge stated that, “[i]n general, a party filing a rate adjustment with the Commission under section 205 bears the burden of showing that the adjustment is

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<sup>18</sup> The term “inputs” refers to data input into the variables of the bandwidth formula for an annual update, including the source of data underlying those inputs, such as accounts in the Uniform System of Accounts and Workpaper No. 3.1.1, and any other methods or practices for determining or calculating the values of the inputs.

<sup>19</sup> See Initial Decision, 148 FERC ¶ 63,015 at P 40.

<sup>20</sup> We note that, when the Presiding Judge and the Commission in Opinion No. 545 speak of “continuation of an existing input,” they are referring to efforts to continue use of the method, practice and source of data to determine the input to a variable to the bandwidth formula that had been used, and accepted by the Commission, in prior annual bandwidth implementation proceedings. When the Presiding Judge and the Commission in Opinion No. 545 speak of efforts to change “continuation of an existing input,” or to change “an existing input,” they are referring to efforts to change, i.e., deviate from, the method, practice and source of data to determine the input to a variable to the bandwidth formula that had been used, and accepted by the Commission, in prior annual bandwidth implementation proceedings.

<sup>21</sup> See Initial Decision, 148 FERC ¶ 63,015 at P 37. See also *id.* P 33 and P 39 (explaining what challenges may be made in an annual bandwidth implementation proceeding and the scope of data review).

<sup>22</sup> *Id.* P 40.

lawful.”<sup>23</sup> The Presiding Judge found that the filing party, Entergy, “has the burden of proving the accuracy, prudence and justness and reasonableness of its proposed annual inputs to the bandwidth formula” in the Fourth Bandwidth filing.<sup>24</sup> In addition, the Presiding Judge determined that, based on the Administrative Procedure Act (APA),<sup>25</sup> a challenger to Entergy’s continuation of existing inputs from prior annual bandwidth proceedings has the dual burden of proving that: (1) the existing rate is unjust and unreasonable; and (2) its proposed alternative is just and reasonable.<sup>26</sup> The Presiding Judge added that “Entergy bears no burden of proving that any bandwidth input or procedure that it intends to continue without change is just and reasonable, even in the face of alternative proposals by other parties.<sup>27</sup> Rather, “the burden of promoting a change to the *status quo* . . . rests entirely on the challenger of the *status quo*.”<sup>28</sup>

12. In Opinion No. 545, the Commission affirmed the Presiding Judge’s allocation of the burden of proof, finding it to be in accordance with Commission precedent.<sup>29</sup> Noting that Entergy submits annual bandwidth filings pursuant to section 205 of the FPA, the Commission stated that, under section 205, “the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility.”<sup>30</sup> The

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<sup>23</sup> *Id.* P 41 & n.70 (citing *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993)).

<sup>24</sup> *Id.* P 41.

<sup>25</sup> 5 U.S.C. § 556(d) (2012).

<sup>26</sup> Initial Decision, 148 FERC ¶ 63,015 at PP 41-43. The Presiding Judge explained that the reason for this dual burden is that, when other parties to the bandwidth proceeding propose alternative formula inputs of their own, they are subject to section 556 of the Administrative Procedure Act, which imposes the burden of proof on “the proponent of a rule or order.” *Id.* P 42 & n.72 (citing 5 U.S.C. § 556(d) (2012) and *Pub. Serv. Co. of N.H.*, 6 FERC ¶ 61,299, at 61,710 (1979)).

<sup>27</sup> *Id.* P 43 & n.74 (quoting *City of Winnfield, La. v. FERC*, 744 F.2d 871, 877 (D.C. Cir. 1984) (“The statutory obligation of the utility . . . is not to prove the continued reasonableness of *unchanged* rates or *unchanged* attributes of its rate structure.”)).

<sup>28</sup> *Id.* P 43.

<sup>29</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 27.

<sup>30</sup> *Id.* P 27 & n.48 (citing 16 U.S.C. § 824d(e)).

Commission also affirmed the Presiding Judge's finding that, when other parties to the bandwidth proceeding propose alternative formula inputs of their own, they bear the dual burden of showing that the existing input is unjust and unreasonable and that their proposed input is just and reasonable.<sup>31</sup>

13. The Commission rejected the Louisiana Commission's contention that the Presiding Judge's findings on the burden of proof were conflicting. The Commission explained that Entergy's burden of proof under section 205 and a challenger's burden under the APA apply to two different situations.<sup>32</sup> In the first situation, if any party were to challenge any of Entergy's proposed bandwidth inputs, including the source of data supporting the input, Entergy would have the burden of proof to demonstrate that its proposed input is just and reasonable.<sup>33</sup> In contrast, in the second situation, where Entergy is continuing a specific input or methodology from a previous bandwidth filing, any party proposing a different bandwidth input or bandwidth methodology for use in the bandwidth calculation would bear the burden of proof.<sup>34</sup> The Commission pointed out that the bandwidth formula differs from most formula rates because its inputs are subject to approval through an annual section 205 filing.<sup>35</sup> The Commission explained that "[t]he 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."<sup>36</sup>

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<sup>31</sup> *Id.* P 28 (stating that proponents of alternative input(s) bear the dual burden of proving that: "(1) the existing inputs produce a rate that is unjust, unreasonable, unduly discriminatory, or preferential; and (2) the proposed alternative will produce a just and reasonable rate."). The Presiding Judge (and Commission) noted that challengers to an existing rate, however, are not required to propose an alternative rate and prove it is just and reasonable. *See* Initial Decision, 148 FERC ¶ 63,015 at P 42 & n.73 (citing *FirstEnergy Serv. Corp. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014)).

<sup>32</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 29.

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

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

<sup>35</sup> *Id.* P 29 n.52.

<sup>36</sup> *Id.*

## 2. Rehearing Request

14. On rehearing, the Louisiana Commission contends that the Commission improperly shifted the burden of proof to state commissions and others who challenge aspects of the bandwidth formula inputs.<sup>37</sup> The Louisiana Commission argues that assigning the burden of proof to the challenger of an existing input, i.e., an input that has been continued from a previous bandwidth proceeding: (1) conflicts with precedent regarding assignment of the burden of proof in FPA section 205 proceedings; (2) incorrectly relies on the burden of proof language in the APA, when there is an explicit and directly applicable reference to the burden of proof standard in section 205 of the FPA; and (3) is inconsistent with the procedural schedule in this proceeding, therefore rendering the trial process unfair to the Louisiana Commission and any other party who bears the burden of proof under the standard articulated in Opinion No. 545.<sup>38</sup>

15. In particular, the Louisiana Commission objects that the Commission assigned the burden of proof to the Louisiana Commission to disprove the correctness of the fuel inventory accounting alternative proposed by *Trial Staff*.<sup>39</sup> Additionally, the Louisiana Commission singles out the Commission's statement that a party opposing an input "that is being continued from a previous bandwidth filing" should have the burden of proof in contesting that input.<sup>40</sup> The Louisiana Commission states that the bandwidth formula is a formula rate and formula rate inputs "are not 'carried over,' they *change* every year."<sup>41</sup> The Louisiana Commission posits that an input source that is not contested in one proceeding should be open to contest in the next proceeding and the utility should retain its statutory burden of proof.

## 3. Commission Determination

16. As explained below, we reaffirm that the Presiding Judge properly assigned the burden of proof, consistent with the FPA, Commission, and court precedent.

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<sup>37</sup> Louisiana Commission Rehearing Request at 2, 9.

<sup>38</sup> *Id.* at 8.

<sup>39</sup> *Id.* (citing Opinion No. 545, 153 FERC ¶ 61,303 at P 39).

<sup>40</sup> *Id.* at 3 (quoting Opinion No. 545 at P 29).

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

a. **Burden of Proof Is Consistent With FPA and Precedent**

17. First, Opinion No. 545 is consistent with the FPA, as well as Commission and court precedent. Entergy's tariff requires that annual bandwidth filings be filed under section 205 of the FPA.<sup>42</sup> The allocation of the burden of proof in a section 205 proceeding is "well-established," with the public utility bearing the burden to justify a rate increase.<sup>43</sup> This proceeding, however, does not involve a wholesale rate increase or a change in the bandwidth formula, but rather implementation of the bandwidth formula. Accordingly, in Opinion No. 545, the Commission affirmed that "Entergy bears the burden of proving the accuracy, prudence, and justness and reasonableness of its proposed annual inputs to the bandwidth formula for test year 2009."<sup>44</sup> No party disputes this. The dispute arises from the Presiding Judge's finding that, when other parties to the bandwidth proceeding propose alternative formula inputs of their own to the methods, practices or sources of data that Entergy has used to implement the formula in prior years, they bear the burden of proving that: (1) the continuation of the existing inputs (i.e., the method, practice or source of data that Entergy used and the Commission accepted in a prior bandwidth implementation proceeding) produce a rate that is unjust, unreasonable, unduly discriminatory, or preferential; and (2) the proposed alternative method, practice or source of data for the input to the bandwidth formula variable will produce a just and reasonable rate.<sup>45</sup>

18. While conceding that it is consistent with the FPA to assign the intervenor the burden of proving that its proposed alternative is just and reasonable, the Louisiana Commission nevertheless argues that the assignment of the dual burden violates the FPA and is inconsistent with the pro-consumer purpose of the FPA.<sup>46</sup> The Louisiana Commission argues that this process will shift the burden of proof to formula rate

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<sup>42</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 29 n.52; Initial Decision, 148 FERC ¶ 63,015 at PP 33, 39.

<sup>43</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 27 & n.48 (citing 16 U.S.C. § 824d(e) (2012)).

<sup>44</sup> *Id.* P 28 n.51 (citing Initial Decision, 148 FERC ¶ 63,015 at P 4). We note that "proposed inputs" refers to proposed changes to the method, practice or source of data that Entergy has used to implement the bandwidth formula in prior annual filings, which the Commission has already accepted.

<sup>45</sup> *Id.* P 28.

<sup>46</sup> Rehearing Request at 11.

challengers in almost every case because, practically speaking, a challenger rarely challenges a rate without proposing an alternative.<sup>47</sup> The Louisiana Commission points out that, for example, for every issue in this proceeding, a challenger provided an alternative input to Entergy's input, and thus, it argues that the burden shifted away from the utility to the challenger.<sup>48</sup>

19. We disagree. It is well-settled that even in an FPA section 205 proceeding, a protestor seeking a *change* in an existing rate has the dual burden, under section 206 of the FPA, of adducing substantial evidence to support a finding that: (1) the existing rate is unjust, unreasonable, or unduly discriminatory, or preferential; *and* (2) the proposed change will produce a just and reasonable result.<sup>49</sup>

20. Here, if Entergy were to propose, under section 205 of the FPA, a change to an existing input (i.e., method, practice or source of data) to the bandwidth formula, such as, for example, proposing to include, for the first time, a new source of ADIT for the ADIT input variable in the bandwidth formula, then Entergy would have the burden to show that inclusion of the new source of ADIT for the ADIT input variable to the bandwidth formula is just and reasonable and not unduly discriminatory or preferential. Entergy would have the burden regardless of whether or not a party challenges the proposed input.

21. When Entergy is continuing a specific method, practice or source of data used to input the variables to the bandwidth formula that the Commission already accepted in a previous bandwidth filing, any party challenging that input and proposing a different input bears the burden of proof with respect to its different proposed input.<sup>50</sup> As the Commission explained, the presumption that prior inputs are correct – which shifts the

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<sup>47</sup> *Id.* at 2-3.

<sup>48</sup> *Id.* at 9-10.

<sup>49</sup> See, e.g., *New Dominion Energy Coop.*, 118 FERC ¶ 63,024, at PP 48-55 (2007), *aff'd in pertinent part*, Opinion No. 499, 122 FERC ¶ 61,174, at PP 60-68 (2008); see also *Pub. Serv. Comm'n of N.Y. v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980) (“the [statutory] emphasis is on making the petitioner justify the changes in rates, not the constant elements”); *ANR Pipeline Co. v. FERC*, 771 F.2d 501, 521 (D.C. Cir. 1985) (same).

<sup>50</sup> We reiterate that when discussing the burden on the challenger of an unchanged component of an existing rate in this proceeding, the focus is on the unchanged method, practice or source of data used to input the unchanged formula rate.

burden of proof to entities disputing prior inputs – “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.”<sup>51</sup>

22. We reiterate that the bandwidth formula is not a typical formula rate. Unlike most formula rates, annual bandwidth filings are made pursuant to section 205 of the FPA. This means that, in contrast to a formula rate in which the utility updates the charge monthly or annually as its costs change – and without moving pursuant to section 205 of the FPA – the Commission accepts an Entergy bandwidth filing only after determining, consistent with its obligation to protect consumers, that it is just and reasonable.<sup>52</sup> The pertinent bandwidth inputs then become part of the existing filed rate for that year, and the baseline from which changes to the input method, practice or source of data are measured in subsequent years.<sup>53</sup> Thus, requiring the challenger of an existing input, i.e., previously-approved input method, practice or source of data, to carry the burden of proof is not inconsistent with the pro-consumer purpose of the FPA.

23. Noting that the “Bandwidth Formula inputs change every year, they are not carried over from a previous filing,” the Louisiana Commission asserts that “[i]f an input has not been challenged previously and the FERC has never addressed it, there is no reason to relieve the utility of its normal burden of proof”<sup>54</sup> under the FPA. We disagree.

24. The Louisiana Commission is correct that the dollar amount of each of the bandwidth formula rate inputs will usually differ each year, but that does not mean that the input itself has changed, so long as it is populated by the same *method, practice* or *source* of data used in prior years. For example, if the Second Bandwidth filing used

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<sup>51</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 30 n.52. As to the Louisiana Commission’s contention that, as a practical matter, the “new” assignment of the burden of proof “effectively eviscerates the utility’s burden” in section 205 cases, the Commission already thoroughly addressed this issue in Opinion No. 545. *Id.* P 30.

<sup>52</sup> See *Xcel Energy Servs.*, 815 F.3d 947, 952 (D.C. Cir. 2016) (“It is long-established that the ‘primary aim of the [FPA] is the protection of consumers from excessive rates and charges.’”) (citations omitted).

<sup>53</sup> See Initial Decision, 148 FERC ¶ 63,015 at P 45 (“The bandwidth transfer payments and receipts determined through the use of whichever inputs from these parties are deemed in this proceeding to be proper will thereby be the lawful rate for the 2010 Bandwidth Filing.”).

<sup>54</sup> Louisiana Commission Rehearing Request at 12.

accounts A, B and C as the source of data for a particular input, and the Third Bandwidth filing also used accounts A, B and C as the source of data for that particular input, then Entergy has continued this particular input in the Third Bandwidth filing from the Second Bandwidth filing. And again, the presumption of correctness only applies where the Commission has previously approved the specific input (i.e., the method, practice or source of data for the specific input) in a prior section 205 proceeding.<sup>55</sup>

25. The Louisiana Commission contends that imposing the burden on a challenger to show that continuation of pre-approved input methods, practice or sources of data are unjust and unreasonable conflicts with Commission prudence precedent in which “[t]he Commission presumes that a utility’s expenditures are prudent in the absence of a challenge casting ‘serious doubt’ on such prudence. Once serious doubt is created, the burden of proof shifts to the utility to demonstrate that the expenditure in question was prudent.”<sup>56</sup>

26. We are not persuaded by this argument, which blurs distinctions between the various burdens (i.e., the burden of proof, the burden of production, and the burden of persuasion) associated with making and rebutting a *prima facie* case, in general, and the rebuttable presumption that applies to prudence challenges, in particular.<sup>57</sup> These standards work in tandem and are not mutually exclusive. Moreover, they are consistent with the burden of proof affirmed in Opinion No. 545.

27. Prudence – or rather the lack thereof – is one of the reasons why a cost may be excluded from recovery to prevent a rate from being unjust and unreasonable. A prudence challenge is limited to addressing the specific issue of whether an expense was prudently incurred, and so the shifting burden in prudence challenges is unique to that type of challenge. Under long-standing precedent, to make rate cases manageable, at the outset, the utility has no burden to prove the prudence of its expenditures when it seeks to recover those expenditures through a proposed rate increase.<sup>58</sup> Rather, management will be presumed to have acted prudently. The presumption of prudence, however, can be

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<sup>55</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 30 n.52.

<sup>56</sup> Louisiana Commission Rehearing Request at 8 (quoting Opinion No. 545, 153 FERC ¶ 61,303 at P 27) (citations omitted).

<sup>57</sup> See *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, at 263 (1994) (noting historic confusion among burden of proof and burden of persuasion).

<sup>58</sup> E.g., *Min. Power & Light Co.*, 11 FERC ¶ 61,312, at 61,644 (1980) (disallowing losses associated with pollution control facilities because of utility's imprudent behavior).

rebutted if any party produces evidence that creates “a serious doubt as to the prudence of the expenditure.”<sup>59</sup> Once such doubt is raised, the presumption dissolves, and the burden shifts to the utility to produce specific evidence to justify the prudence of the expense.<sup>60</sup>

28. Thus, contrary to the Louisiana Commission’s contention, precedent recognizing the shifting burden for prudence challenges does not conflict with the burden of proof in Opinion No. 545. In a prudence case, the utility has to justify its cost as prudent when the challenge is raised for the first time. Prudence precedent does not address previously-approved methods, practices or sources of data used to implement a formula rate. Also, as this proceeding does not involve prudence challenges, the shifting burden unique to prudence precedent does not apply here.

29. We agree with the Louisiana Commission that, in general, inputs to a formula rate can be challenged at any time.<sup>61</sup> But again, the bandwidth formula is not a typical formula rate. Annual bandwidth filings are made pursuant to section 205 of the FPA and,

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<sup>59</sup> *Anaheim v. FERC*, 669 F.2d 799, 809 (D.C. Cir.1981); *see also PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,197, at P 29 & n.21 (2012) (“While PSE&G is correct that it does not have to establish the prudence of an expenditure in its case-in-chief, this presumption of prudence can be rebutted at hearing whenever another party ‘creates serious doubts as to the prudence of an expenditure.’”) (internal quotations omitted).

<sup>60</sup> *Anaheim v. FERC*, 669 F.2d at 809; *PJM*, 140 FERC ¶ 61,197 at P 29 (the “ultimate burden of proof” rests on the utility seeking to recover 100 percent of prudently-incurred expenses for plant abandoned for reasons outside of utility’s control).

<sup>61</sup> *E.g., Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306, at P 35 (2008) (recognizing long-standing precedent that parties have the right to challenge inputs or implementation of the formula whenever error discovered); *N. Car. Elec. Membership Corp. v. CP&L*, 57 FERC ¶ 61,332, at 62,065 (1991) (rejecting utility’s effort to limit review period to prior twelve months); *Yankee Atomic Elec. Co.*, 60 FERC ¶ 61,316, at 62,096-97 (1992) (investigating prudence of decision to shut down nuclear plant in connection with utility’s proposed rates; requiring protestor to file a complaint under section 206 of the FPA if it wished to challenge allegedly imprudent costs that were passed through the nuclear facility’s existing rate).

when accepted by the Commission, they become part of the existing filed rate for that year, and the baseline from which changes are measured, in subsequent years.<sup>62</sup>

30. Nor do the cases that the Louisiana Commission relies on to support its position warrant a different result. Cases such as *Virginia Electric and Power Company*,<sup>63</sup> *Public Service Electric and Gas Co.*,<sup>64</sup> and *American Electric Power Service Corporation*,<sup>65</sup> are not on point because, in contrast to Entergy's annual bandwidth implementation filings, the annual formula rate updates at issue in those cases are not made pursuant to section 205 of the FPA.<sup>66</sup> Thus, in contrast to the circumstances here, challengers to proposed updates in *VEPCO*, *PSEG* and *AEP* would never be in a position to contest the continuation of inputs that had already been accepted in a prior section 205 filing.

31. As to the Louisiana Commission's quote from *Missouri River Energy Services and Midwest Independent Transmission System Operator, Inc.*<sup>67</sup> – “where the filing utility's input to an unchanged formula rate is challenged, the burden of proof rests with the

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<sup>62</sup> See Initial Decision, 148 FERC ¶ 63,015 at P 45 (“The bandwidth transfer payments and receipts determined through the use of whichever inputs from these parties are deemed in this proceeding to be proper will thereby be the lawful rate for the 2010 Bandwidth Filing.”).

<sup>63</sup> 123 FERC ¶ 61,098 (2008) (*VEPCO*).

<sup>64</sup> 124 FERC ¶ 61,303, at P 17 (2008) (*PSE&G*).

<sup>65</sup> 124 FERC ¶ 61,306, at P 36 (2008) (*AEP*).

<sup>66</sup> See *VEPCO*, 123 FERC ¶ 61,098 at P 31 (denying request to require *VEPCO* to make an annual section 205 filing containing its annual update and true-up adjustment “[b]ecause the data contained in these processes is not the rate; it is merely an input into the formula, which is the rate.”); *PSE&G*, 124 FERC ¶ 61,303 at P 5 (proposing a formula rate to minimize the burden to the company and customers associated with FPA section 205 filings); *AEP*, 124 FERC ¶ 61,306 at P 1 (filing to “establish formula rates that would be automatically adjusted each year based on changes to *AEP*'s costs as reported annually in the FERC Form No. 1, without contemporaneous requests for approval under section 205 of the FPA.”); see also *Midwest Independent Transmission System Operator, Inc.*, 139 FERC ¶ 61,127, at P 9 (2012) (noting that formula rate updates typically do not require FPA section 205 filings).

<sup>67</sup> 130 FERC ¶ 63,014, at P 80 (2010) (*MRES*).

utility”<sup>68</sup> – the Louisiana Commission disregards the context of this quotation. This proceeding concerned Missouri River Energy Services’ (MRES) proposed revisions to the Attachment O Cash Flow Template to the Midwest Independent Transmission System Operator, Inc. (MISO) tariff, in the event that MRES were to join MISO. MRES’ filing provided illustrative 2008 data to show how it proposed to populate the variables in the Attachment O formula to compute its annual transmission revenue requirement (ATTR) if it were to become a MISO transmission owner.<sup>69</sup> MRES proposed to use particular methodologies to populate the variables in the Attachment O formula, but it did not propose to change the formula. Parties challenged MRES’ proposed inputs and input methodologies, which affected the resulting ATTR computation, but not the formula itself. Because this was the first time MRES endeavored to populate the formula, the presiding judge labeled these “entirely new practices” for MRES. He therefore placed the burden on MRES to defend its proposed input methodologies “as the party with access to the necessary information.”<sup>70</sup> Because the MRES proceeding involved the utility’s newly proposed inputs and input methodologies, it does not address the burden of proof with respect to the continuation of an existing input to a formula rate that was filed under section 205. It is therefore distinguishable from the situation, here, where Entergy is continuing to use the same sources of data for the input that it had used in prior years.

**b. Reliance On the APA Was Appropriate**

32. The Louisiana Commission argues that the Presiding Judge erred in relying on the APA to shift the burden of proof to formula rate input challengers. The Louisiana Commission contends that the APA can only supply the burden of proof when the directly applicable statutory regime, here, the FPA, is silent on the issue. The Louisiana Commission insists that, since section 205 of the FPA specifies the applicable burden of proof, the APA does not apply and certainly does not control over the FPA.<sup>71</sup>

33. We disagree. Section 556(d) of the APA states: “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”<sup>72</sup> Section 205 provides

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<sup>68</sup> Louisiana Commission Rehearing Request at 13.

<sup>69</sup> *MRES*, 130 FERC ¶ 63,014 at P 78.

<sup>70</sup> *Id.* P 89 & n.135.

<sup>71</sup> Louisiana Commission Rehearing Request at 14-16.

<sup>72</sup> 5 U.S.C. § 556(d) (2012).

that “the burden of proof to show that the *increased* rate or charge is just and reasonable shall be on the public utility.”<sup>73</sup> Section 205 does not expressly address the burden of proof when a challenger, and not the utility, seeks to change the previously-approved method, practice or source of data for implementing the formula rate inputs (i.e., “existing inputs”). Because the FPA does not “provide otherwise,” the Presiding Judge reasonably looked to the APA to find that a party challenging the continuation of such an existing input bears the burden of proof. Likewise, a party proposing an alternative formula input of its own, as “the proponent of a rule or order,” also has the burden of proof.<sup>74</sup> As the Presiding Judge explained, “[i]n each case, the party who proposes any new input or input methodology to use in the bandwidth formula calculation bears the burden of proving that it is just and reasonable.”<sup>75</sup> Thus, the allocation of the burden of proof in section 556(d) of the APA is consistent with section 205 of the FPA and Opinion No. 545.

34. Contrary to the Louisiana Commission’s contention, we continue to find that *PSNH*, which the Presiding Judge relied on, does not mandate a different result. In *PSNH*, the Commission explained that it is appropriate to rely on the APA to allocate the burden of proof where the FPA does not address the issue. Thus, the APA could supply the burden of proof in proceedings under section 206, as that provision “contains no reference to burden of proof.”<sup>76</sup> Nor does *Hi-Tech Furnace Systems Inc. v. FCC*<sup>77</sup> support the Louisiana Commission’s position.<sup>78</sup> Again, while section 205 of the FPA

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<sup>73</sup> 16 U.S.C. § 824d(e) (emphasis added).

<sup>74</sup> Initial Decision, 148 FERC ¶ 63,015 at P 42 & n.72 (citing 5 U.S.C. § 556(d); *Pub. Serv. Co. of N.H.*, 6 FERC ¶ 61,299 (1979) (*PSNH*)).

<sup>75</sup> *Id.* P 45. The Presiding Judge acknowledged that a party need not propose an alternative, but if an alternative is proposed, then the proponent has the burden to show that it is just and reasonable. *Id.* at P 42 n.73.

<sup>76</sup> *PSNH*, 6 FERC ¶ 61,299 at 61,710. Section 206(a), though, does provide that when the Commission takes action pursuant to section 206 it must “find” that the rate being challenged is “unjust, unreasonable, [or] unduly discriminatory or preferential” and then the Commission “shall” determine the “just and reasonable” rate to be thereafter observed and in force. 16 U.S.C. § 824e(a) (2012).

<sup>77</sup> 224 F.3d 781 (D.C. Cir. 2000) (*High-Tech*).

<sup>78</sup> Louisiana Commission Rehearing Request at 16.

provides the burden of proof when a utility files a rate increase, it is silent on the burden of proof when a utility proposes to continue, unchanged, a previously approved method, practice or source of data for determining inputs to a formula rate. Thus, here, as in *Hi-Tech*, “the allocation is consistent with [the APA], which takes into account the distinction between statutory provisions that do and do not mention the burden of proof.”<sup>79</sup>

**c. The Louisiana Commission Received a Fair Hearing**

35. Third, the Louisiana Commission argues that the allocation of the burden of proof in Opinion No. 545 is inconsistent with the procedural schedule and renders the hearing process unfair to the Louisiana Commission.<sup>80</sup> The Louisiana Commission states that Entergy was permitted to file testimony both first and last and was the only party allowed to file rebuttal testimony. According to the Louisiana Commission, the parties agreed to this procedural schedule based on the understanding that Entergy had the burden of proof under FPA section 205. The Louisiana Commission objects that in its final, rebuttal round of testimony, Entergy ultimately claimed that it did not bear the burden of proof on the issues raised in this case. The Louisiana Commission argues that Opinion No. 545 “accords Entergy a significant evidentiary advantage, while erecting an unusual evidentiary hurdle for the Louisiana Commission.”<sup>81</sup> The Louisiana Commission argues that Entergy possesses the inherent advantage of having exclusive access and control over the data included in the section 205 filing and that this advantage is compounded by a procedure that permits Entergy to rebut the evidence that the Louisiana Commission presented in the final round of testimony. The Louisiana Commission asserts that it was unfair for the Louisiana Commission to be assigned the evidentiary burden without being allowed to respond to the evidence filed by the utility, and the Louisiana Commission points out that, indeed, the Louisiana Commission lost on the major issues in this case.

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<sup>79</sup> *Hi-Tech*, 224 F.3d 787.

<sup>80</sup> Louisiana Commission Rehearing Request at 17-18 (citing *NorthWestern Corp.*, 140 FERC ¶ 63,023, at PP 78-80 (2012); *BP Pipelines (Alaska), Inc.*, Order on Burden of Proof, Docket No. IS09-348-004 (May 1, 2012); *El Paso Nat. Gas Co.*, 3 FERC ¶ 63,019 (1978); *Conn. Yankee Atomic Power Co.*, 84 FERC ¶ 63,009, at 65,094 (1998)).

<sup>81</sup> *Id.* at 18.

36. We agree with the Louisiana Commission that it is customary to allow the party with the burden of proof to have the last word, i.e., to file rebuttal testimony.<sup>82</sup> However, this custom is not immutable, and we disagree that the hearing process provided in this proceeding was unfair to the Louisiana Commission.<sup>83</sup> The Louisiana Commission has not presented evidence to persuade us that allowing Entergy to submit one final round of rebuttal so tainted the years-long hearing process that the Louisiana Commission did not receive due process. The Louisiana Commission filed multiple pre- and post-hearing briefs, multiple rounds of testimony, discovery, participated in the trial, filed briefs on exceptions to the Initial Decision and a request for rehearing. The Louisiana Commission does not reveal what more it would have said if it had had yet one more bite at the proverbial evidentiary apple. The fact that the Louisiana Commission generally did not prevail on its challenges to the Fourth Bandwidth filing is not proof of prejudice or indicative that one more round of pleadings was needed to ensure a fair trial; it is simply evidence that the Louisiana Commission, which had fair opportunity to present its case, was not persuasive.

## **B. Entergy Arkansas Fuel Inventory Accounting**

### **1. Background**

37. “FI” is the “fuel inventory” variable of the bandwidth formula.<sup>84</sup> The inputs for the fuel inventory variable are derived from each Operating Company’s data that is recorded in Account 151 Fuel Stock (Major only), which covers the book cost of fuel on hand.<sup>85</sup>

38. Entergy Arkansas is a co-owner (with other Operating Companies) and the operator of the Independence and White Bluff coal-fired generating units. Because Entergy Arkansas purchases and owns all of the coal used at those facilities, 100 percent of the coal inventory for those facilities is recorded in Account 151 on the books of Entergy Arkansas. Co-owners of those units periodically provide advances to Entergy

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<sup>82</sup> *BP Pipelines (Alaska), Inc.*, 146 FERC ¶ 63,019, at P 114 ((citing *Iroquois Gas Trans. Sys.*, 79 FERC ¶ 63,020, at 65,192 (1997) (“the party with the burden of proof has ‘the customary right of final rebuttal’”)).

<sup>83</sup> We conclude that, at most, this was “harmless error.” 5 U.S.C. § 706 (2012).

<sup>84</sup> Initial Decision, 148 FERC ¶ 63,015 at P 59 & n.112 (citing Ex. S-103 at 20 (bandwidth formula calculation, schedule A-4, line 75) (Nichols)).

<sup>85</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 32.

Arkansas to pay for their portion of the fuel costs, which Entergy records as a credit to Account 151, lowering Entergy Arkansas' share of the fuel inventory.<sup>86</sup>

39. Because Entergy records co-owner advances in Account 151 at various times during the year, at any given point in time, the account balances in this account do not necessarily correspond to the share of the fuel that is owned by each co-owner. Consequently, when populating the fuel inventory input of the bandwidth formula, Entergy adjusted the Account 151 value reported in Entergy Arkansas' 2009 FERC Form No. 1 to eliminate timing differences, so that the input reflected only Entergy Arkansas' percentage ownership share of the fuel inventory. Specifically, in Workpaper No. 3.1.1 of the bandwidth formula calculation, Entergy Arkansas: (1) removed co-owners' advances (credits) from Entergy Arkansas' Account 151 balance to determine the total amount of fuel inventory for all co-owners; and (2) applied its co-owner percentage to the total fuel inventory balance for each co-owned plant to determine Entergy Arkansas' cost for fuel inventory. Entergy states that it used this method to determine the fuel inventory input in all previous annual bandwidth proceedings, as well as in this Fourth Bandwidth proceeding.<sup>87</sup>

40. At hearing, the Louisiana Commission argued that Service Schedule MSS-3 does not authorize Entergy's adjustment to fuel inventory.<sup>88</sup> The Louisiana Commission also asserted that in Exhibit Nos. ETR-26 and ETR-28, the exhibits that formed the basis for the bandwidth remedy in Opinion No. 480, co-owner advances were not removed from the Account 151 input, but rather ownership percentages were applied to the unadjusted balance.<sup>89</sup> Trial Staff also contended that Entergy did not use the proper fuel inventory figure in the bandwidth formula.<sup>90</sup> Unlike the Louisiana Commission, however, Trial Staff thought that the balance reported in the FERC Form No. 1 for Account 151 was not an accurate representation of Entergy Arkansas' fuel inventory and that it should be corrected to account properly for the timing differences between coal inventory changes and co-owner advances entered into Account 151. Trial Staff proposed that the timing differences could be resolved by requiring Entergy to make corrective entries and refile

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* P 33 & n.62 (citing Tr. at 165:15-16 (Peters)); *see also* Entergy Initial Br. at 6.

<sup>88</sup> Initial Decision, 148 FERC ¶ 63,015 at P 48.

<sup>89</sup> *Id.* P 49.

<sup>90</sup> *See id.* PP 54-59.

its 2009 FERC Form No. 1, through either of two suggested alternative methodologies that did not require a separate workpaper.<sup>91</sup> Trial Staff's expert witness, Nicholas, asserted that Entergy should account only for its fuel stock inventory in Account 151 and co-owner advances should be treated in a different account.<sup>92</sup>

41. The Presiding Judge found that Entergy's method for correcting inputs from Account 151 was unjust and unreasonable.<sup>93</sup> The Presiding Judge noted that Trial Staff and the Louisiana Commission agree that Entergy's adjustment of the Account 151 value reported in its 2009 FERC Form No. 1 violates the bandwidth formula and conflicts with the Commission's ruling in Opinion No. 518.<sup>94</sup> The Presiding Judge also found, however, that the Louisiana Commission produced no evidence to corroborate its assertion that the method in Exhibit Nos. ETR-26 and ETR-28 did not remove co-owner advances.<sup>95</sup> The Presiding Judge approved use of either of Trial Staff's proposed alternatives to Entergy's method, as modified by Entergy's recommendation to substitute Account 253 for Account 186. The Presiding Judge found that each method would simplify the calculation of the bandwidth formula and allow for the elimination of Workpaper No. 3.1.1,<sup>96</sup> while also causing the bandwidth formula to reflect only Entergy Arkansas' share of the coal inventory. Notably, the Presiding Judge found that "the burden of proving that [Entergy Arkansas'] long-standing methodology is erroneous rests with the [Louisiana Commission] as the challenger of the *status quo*."<sup>97</sup>

42. In Opinion No. 545, the Commission affirmed the Presiding Judge's finding that Entergy erred by adjusting the Account 151 amounts reflected in FERC Form No. 1.<sup>98</sup>

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<sup>91</sup> *Id.* P 57 & n.110 (citing Ex. S-103 at 23-24 (Nichols)).

<sup>92</sup> *See id.* P 73 & n.149 (citing Ex. S-103 at 22:11-24:4 (Nicholas Dir. and Ans. Test.)).

<sup>93</sup> *Id.* P 87.

<sup>94</sup> *Id.* P 71 & n.143 (citing *Entergy Serv., Inc.*, Opinion No. 518, 139 FERC ¶ 61,105 (2012) (Opinion No. 518), *order on reh'g*, 145 FERC ¶ 61,047 (2013) (Third Bandwidth Rehearing and Clarification Order)).

<sup>95</sup> *Id.* P 65 & n.131.

<sup>96</sup> *Id.* P 87.

<sup>97</sup> *Id.* P 82.

<sup>98</sup> *Id.* P 51.

The Commission explained that, pursuant to Note 1 of MSS-3, FERC Form No. 1 data should be used unless such data is unavailable and, in this case, FERC Form No. 1 data for Account 151 is available and should be used.<sup>99</sup> The Commission also found that Entergy Arkansas' accounting for advances from co-owners and co-ownership interests in fuel inventory is not in accordance with the Uniform System of Accounts, the Commission's regulations for fuel inventory accounting.<sup>100</sup>

43. In order to address this error, the Commission directed Entergy to implement a revised version of one of Trial Staff's proposed remedies. Specifically, the Commission directed Entergy Arkansas to: (1) record co-owner advances for fuel inventory purchases as a debit to Account 131, Cash, and a credit to Account 253 when paid by co-owners; (2) record 100 percent of the fuel inventory purchases as a debit to Account 151 and a credit to Account 131 (or the appropriate accounts payable account); and (3) record the co-ownership interests in fuel inventory purchases as a debit to Account 253 and a credit to Account 151.<sup>101</sup>

## **2. Louisiana Commission Rehearing Request**

44. On rehearing, the Louisiana Commission asserts that, in adopting Trial Staff's proposed alternative, the Commission failed to adhere to the burden of proof standard articulated in Opinion No. 545 and imposed "an alternative fuel inventory accounting methodology that will permit Entergy to earn a return on cost-free capital in violation of Commission precedent."<sup>102</sup> The Louisiana Commission also asserts a violation of double-book accounting.

## **3. Commission Determination**

### **a. Burden of Proof**

45. We deny rehearing. With respect to the burden of proof issue, the Louisiana Commission states that the Initial Decision "found that 'because either of Trial Staff's

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* P 52.

<sup>101</sup> *Id.* P 53.

<sup>102</sup> Louisiana Commission Rehearing Request at 4 (citing *ARCO Pipe Line Co.*, 52 FERC ¶ 61,055, at 61,238 (1990) (*ARCO*); *Endicott Pipeline Co.*, 55 FERC ¶ 63,028 (1991) (*EPC*)).

alternative methods result in the same outcome as Entergy's existing method, *the Louisiana Commission has the burden of demonstrating that they are erroneous.*”<sup>103</sup> The Louisiana Commission contends that it was not its burden to show that Trial Staff's alternative was erroneous, since the Louisiana Commission advocated the use of Entergy's original accounting without either the adjustment Entergy made in its filing (which the Louisiana Commission argues violates the bandwidth formula) or Trial Staff's proposed alternative (which the Louisiana Commission contends violates Commission precedent on cost-free capital and accounting rules).

46. We disagree. First, we clarify that the above-quoted statement – “because either of Trial Staff's alternative methods result in the same outcome as Entergy's existing method, *the Louisiana Commission has the burden of demonstrating that they are erroneous*” – was made in Opinion No. 545, not the Initial Decision.<sup>104</sup> It was intended to paraphrase the Presiding Judge's ruling that “[t]he burden of proving Entergy Arkansas' long-standing methodology is erroneous rests with the [Louisiana Commission] as the challenger of the *status quo*, not with Entergy[,]” and related holdings.<sup>105</sup> The Presiding Judge correctly assigned the burden of proof and the statement in Opinion No. 545, when read in context, also correctly assigns the burden of proof.

47. Entergy was continuing to use a method for calculating the Entergy Arkansas fuel inventory input that it had used in previous bandwidth filings. Therefore, challengers of the existing methodology – Trial Staff and the Louisiana Commission – had the burden to show that: (1) Entergy's existing method of calculating the fuel inventory input is unjust and unreasonable; and (2) the just and reasonableness of their respective proposed alternative method(s).

48. As to the appropriate remedy for Entergy's violation, Entergy and Trial Staff agreed that the amount of Entergy Arkansas fuel inventory in Account 151 should reflect only Entergy Arkansas' percentage ownership of the (co-owned) fuel inventory. Trial Staff's alternatives (and the modified version of one of the alternatives, which the Commission affirmed in Opinion No. 545) aimed to achieve the same substantive

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<sup>103</sup> Louisiana Commission Rehearing Request at 19 (quoting Opinion No. 545, 153 FERC ¶ 61,303 at P 39).

<sup>104</sup> See Opinion No. 545, 153 FERC ¶ 61,303 at P 39 & n.70 (citing Initial Decision, 148 FERC ¶ 63,015 at P 82).

<sup>105</sup> Initial Decision, 148 FERC ¶ 63,015 at P 82.

outcome as Entergy's existing method, but to do so without violating the bandwidth formula or the Uniform System of Accounts.

49. In stark contrast, the Louisiana Commission sought an outcome that is *substantively* different from Entergy's existing method. While the Louisiana Commission supported what it calls "use of Entergy's original accounting"<sup>106</sup> – i.e., carryover of the amounts in Account 151, without any adjustment – that is a misnomer, since Entergy never used this method. The Louisiana Commission's proposed alternative method did not take into account the timing differences between coal inventory changes and co-owner advances in order to ensure that only Entergy Arkansas' percentage ownership of the fuel inventory is reflected in Account 151.

50. Thus, while both Trial Staff and the Louisiana Commission challenged Entergy's existing method for calculating the fuel inventory input, the Louisiana Commission was the only party challenging the justness and reasonableness of the *substantive* outcome of Entergy's existing method. Thus, the Louisiana Commission had the burden to show that it was inappropriate for Entergy to reflect Entergy Arkansas' actual percentage of ownership of fuel inventory in Account 151. Accordingly, the Commission explained that "because either of Trial Staff's alternative methods result in the same outcome as Entergy's existing method, the Louisiana Commission has the burden of demonstrating that they are erroneous."<sup>107</sup>

51. Moreover, the Louisiana Commission places too much weight on that single phrase of Opinion No. 545, taken out of context. Not only did the Presiding Judge independently evaluate Trial Staff's alternatives,<sup>108</sup> but the Commission did as well. In Opinion No. 545, the Commission rejected one of Trial Staff's alternatives and amended the other. This evaluation was based on the Commission's analysis of Trial Staff's proposed accounting methods, as supported by its testimony and briefs. Thus, the Commission, in effect, correctly assigned Trial Staff the burden of proving that its alternative fuel inventory input methodologies were just and reasonable (which Trial Staff, in fact, did). This assignment of the burden of proof – requiring the challenger of the existing methodology to show that the existing methodology is unjust and

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<sup>106</sup> See Louisiana Commission Rehearing Request at 21.

<sup>107</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 39 (citing Initial Decision, 148 FERC ¶ 63,015 at P 82).

<sup>108</sup> See Initial Decision, 148 FERC ¶ 63,015 at PP 71-87.

unreasonable and that its alternative proposed methodology is just and reasonable – is the correct assignment of the burden of proof.

**b. Cost-Free Capital**

52. The Louisiana Commission argues that Trial Staff failed to establish that its alternatives would produce a just and reasonable rate. The Louisiana Commission explains that removing co-owner advances from Account 151, as proposed by Trial Staff, would allow Account 151, a rate base account, to reflect non-investor capital in rate base.<sup>109</sup> The Louisiana Commission explains that, pursuant to the bandwidth formula and standard ratemaking, the fuel inventory balance is included in rate base. As a rate base item, it is supposed to represent Entergy Arkansas' investment responsibility for fuel. The Louisiana Commission states that rate base is the investment that the utility must finance, and is used as the base on which a return is calculated at the fair rate of return. Because Entergy Arkansas receives the co-owner advances to finance the cost of the co-owner's share of the coal, the advances are non-Entergy Arkansas' supplied capital. The Louisiana Commission states that co-owner advances thus must be reflected in Account 151 to reflect Entergy Arkansas' actual carrying charge responsibility and to ensure calculation of a fair and accurate return requirement for Entergy Arkansas.<sup>110</sup> According to the Louisiana Commission, the accounting methodology approved by Opinion No. 545 produces an overstatement of actual cost responsibility for Entergy Arkansas and violates the Commission's longstanding rule against regulated utilities earning a return from ratepayers on cost-free capital.<sup>111</sup>

53. We disagree. As explained in Opinion No. 545:

In both Trial Staff alternatives and the accounting directed above [P 53 of Opinion No. 545], co-owner advances are excluded from Account 151 and the bandwidth formula calculation. Thus inclusion of the co-owner advances in the bandwidth formula calculation would require modification of the bandwidth formula itself, and as we have repeatedly stated,

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<sup>109</sup> Louisiana Commission Rehearing Request at 20.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 20-21 (citing *ARCO*, 52 FERC ¶ 61,055 at 61,238; *EPC*, 55 FERC ¶ 63,028, 1991 FERC LEXIS 1273 at \*69).

modifications of the bandwidth formula are outside the scope of the annual bandwidth implementation proceedings.<sup>112</sup>

54. We continue to disagree with the Louisiana Commission's contention that Entergy should record joint owners' advances to fuel inventory as a credit in Account 151. Under the method adopted in Opinion No. 545, Account 151 would include the entirety of the coal inventory as a debit and the co-owners' percentage ownership as a credit. Netting the debit and credits in Account 151 would appropriately reflect only Entergy Arkansas' proportionate share of fuel inventory costs on the books of Entergy Arkansas.<sup>113</sup>

55. The instructions to Account 151 do not address the accounting treatment for cash advances received from joint owners.<sup>114</sup> The Commission reasonably required, therefore, that when joint owners advance money, the advance be recorded in Account 253,<sup>115</sup> in order to reflect, accurately, Entergy Arkansas' proportionate share of fuel inventory in Account 151, in a way that is consistent with the bandwidth formula.

56. Additionally, the credit balances recorded in Account 253 reflect funds that are only temporarily available until used for fuel purchases. Because the time period between receipt of these funds and use of these funds to pay for fuel is relatively short, these funds do not constitute the same type of "cost-free capital" that has caused the Commission concern in the past.<sup>116</sup> The Louisiana Commission has not provided evidence that, in any individual year, much less over longer periods, the amounts in Account 253, if included in the bandwidth formula and the bandwidth calculation, would impact bandwidth payments.<sup>117</sup>

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<sup>112</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 55.

<sup>113</sup> See, e.g., Trial Staff Br. Opposing Exceptions at 13 (evaluating different accounting method that achieves the same end result).

<sup>114</sup> See 18 C.F.R. pt. 101, Account 151 (2016).

<sup>115</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 53.

<sup>116</sup> See *Regulations Implementing Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes*, Order No. 144, FERC Stats. & Regs. ¶ 30,254, at 31,539 (1981).

<sup>117</sup> Additionally, the Louisiana Commission's cost-free capital argument focuses on times when co-owners' advances are truly advances, paid ahead of schedule. There

(continued ...)

57. Finally, the cases that the Louisiana Commission cites to support its position<sup>118</sup> do not mandate a different result. These cases involve ADIT, which pertains to the timing differences between the periods in which transactions affect taxable income and the periods in which they enter into the determination of accounting (book) income.<sup>119</sup> These cases are not directly on point because the ADIT time-frame, that is, the time between the utility's receipt of customer funds and payment of taxes, is much longer (usually at least five years and, in the case of Waterford 3, for example, 60 years), and therefore these cases do not indicate how to treat relatively short-term or temporary access to funds in Account 253.

58. In sum, we conclude that, on balance, it is preferable to allow potential access to short-term, cost-free funds in Account 253 than to inaccurately account for fuel cost inventory in Account 151, as the Louisiana Commission advocates. Accordingly, we affirm the method approved in Opinion No. 545, which is consistent with the bandwidth formula.

**c. Double-Entry Accounting**

59. We disagree with the Louisiana Commission's contention that Trial Staff's alternative accounting method would violate the rules of double-entry accounting and the Uniform System of Accounts' requirement that Account 151 contain the book value of fuel on hand.<sup>120</sup>

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may also be times, however, when a co-owner's payment is late, and Entergy Arkansas is advancing a co-owner's share of fuel expenses.

<sup>118</sup> Louisiana Commission Rehearing Request at 20-21 (citing *ARCO*, 52 FERC ¶ 61,055 at 61,238; *EPC*, 55 FERC ¶ 63,028).

<sup>119</sup> See 18 C.F.R. pt. 101, Gen. Instr. 18 (2016). In each case cited, the Commission required the utility to credit its deferred taxes against its rate base to ensure that the utility would not earn a return on "cost-free capital." In other words, the utility would not earn a return on the greater amount of money available to the utility (with no additional expense on the utility's part – hence "cost-free") because the utility deferred payment of the tax liability that it would ultimately have to pay. See *EPC*, 55 FERC ¶ 63,028 at 65,154-55; *ARCO*, 52 FERC ¶ 63,028 at 61,238.

<sup>120</sup> Louisiana Commission Rehearing Request at 21 (citing Opinion No. 545, 153 FERC ¶ 61,303 at P 54).

60. The accounting directed in Opinion No. 545 is consistent with the rules of double-entry accounting and the Uniform System of Accounts.<sup>121</sup> Account 151 states: “This account shall include the book cost of fuel on hand.” Instruction 1 of the five instructions for Account 151 states that the book cost of fuel on hand includes the “[i]nvoice price of fuel less any cash or other discounts” provided by the fuel seller.<sup>122</sup> The instructions do not state that cash advances must be included in Account 151.

61. To illustrate how the double-entry accounting rules work, we will provide a few examples. If, hypothetically, Entergy Arkansas has a 25 percent ownership share of White Bluffs and the co-owners own the remaining 75 percent share of White Bluffs; Entergy Arkansas purchases \$100 worth of coal; co-owners advance \$30, the accounting would be as follows under the Commission’s approach: (1) Entergy Arkansas would record the \$30 co-owner advances for fuel inventory purchases as a debit to Account 131, Cash, and a credit to Account 253 when paid by co-owners; (2) Entergy would record \$100 as a debit to Account 151 (and a credit to Account 131 or the appropriate accounts payable account); and (3) Entergy would record the 75 percent co-ownership interests and a related \$75 in fuel inventory purchases as a debit to Account 253 and a credit to Account 151. The accounting would result in 100 percent of the costs of fuel purchases being recorded in Account 151 as a debit of \$100. This \$100 would then be netted against credits to Account 151 for the value of co-owner purchases (\$75). Accordingly, Entergy Arkansas’ balances in Account 151 would properly state its book cost of fuel on hand, which is \$25. Since, in our hypothetical, Entergy Arkansas has a 25 percent ownership in the plant and it paid \$100 for total fuel costs, its book cost of fuel on hand is \$25. Stated another way, its proportionate share of fuel inventory is 25 percent of \$100, or \$25.

62. In the second example, again assuming Entergy Arkansas has a 25 percent interest in White Bluffs, Entergy Arkansas purchases \$100 worth of fuel inventory and the co-owners provide \$100 cash advance. Under the Commission’s approach, Entergy Arkansas’ book cost of fuel would still be \$25, since its proportionate share of fuel inventory is 25 percent of \$100, or \$25. Under the Louisiana Commission’s proposed approach, however, Entergy Arkansas’ \$100 purchase would be recorded as a debit and the co-owners’ cash advance would be recorded as a credit, both in Account 151. Netting debits and credits in Account 151 under the method the Louisiana Commission advocates would result in \$0, making it seem as if the “book cost of fuel on hand” is \$0, when in fact that is not the case. Conversely, under the Commission’s approach, Entergy

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<sup>121</sup> See Opinion No. 545, 153 FERC ¶ 61,303 at P 54.

<sup>122</sup> 18 C.F.R. pt. 101, Account 151, Instruction 1 (2016).

Arkansas' \$25 book cost of fuel is accurately reflected in Account 151, and differences between the amounts of cash advances and the co-ownership interest in the fuel inventory are handled through the debits and credits recorded in Account 253.

63. Double-entry accounting requires that a journal entry have accounts with amounts recorded as debits along with amounts recorded in accounts as credits. The sum of the amounts recorded as debits must equal the sum of the amounts recorded as credits. The Commission's decision regarding Entergy's accounting for fuel inventory and co-owners' advances meets the double-entry accounting requirement and it adheres to the instructions contained in Account 151.

### C. Contra-Securitized Asset ADIT

#### 1. Background

64. Between 2005 and 2008, certain Entergy Operating Companies incurred substantial costs due to hurricane damage.<sup>123</sup> The Operating Companies had both pre-storm casualty losses (casualty losses) and post-storm damage costs (storm costs), but only storm costs were financed through securitization.<sup>124</sup> Securitization is a financing vehicle through which assets are financed by the proceeds of bonds issued by a non-affiliated third-party entity, rather than financed by the utility.<sup>125</sup>

65. Entergy recorded capital investments that were made to restore its system after a storm in Account 101 (Electric plant in service).<sup>126</sup> Since Entergy did not finance the capital investments that were securitized, the value of the securitized asset was offset by an equal contra-securitized asset (also referred to as a "contra-asset")<sup>127</sup> recorded in a

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<sup>123</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 161.

<sup>124</sup> *Id.*; see also Entergy Rehearing Request at 6.

<sup>125</sup> See Entergy Rehearing Request at 6. See also Initial Decision, 148 FERC ¶ 63,015 at P 245 & n.543 ("A securitization, in general terms, is a financial transaction in which 'an owner of a pool of receivables conveys them, directly or through an intermediary, to a trust or other legal entity, which in turn issues securities backed by those assets.'") (citing James M. Peaslee and David Z. Nirenberg, *Taxation of Securitization Transactions* 1 (3d ed. 2001)).

<sup>126</sup> Entergy Rehearing Request at 6.

<sup>127</sup> According to Entergy witness Mr. Roberts, "[t]he contra-asset is not really an asset. It's an entry to remove the asset." Tr. at 235:2-3 (Roberts Cross).

sub-account of Account 101.<sup>128</sup> The contra-secritized asset was created to zero out the costs of the securitized asset because it would be inappropriate for the utility to charge its customers for expenses that the utility did not itself incur.<sup>129</sup> Through the creation of the contra-secritized asset, the securitized asset was effectively removed from the Operating Company's rate base before the bandwidth formula calculation was made, and the value of the securitized asset was "zeroed out" for bandwidth calculation purposes.<sup>130</sup>

66. Consistent with this aim of effectively removing the securitized asset from the rate base and the bandwidth calculation, contra-accounts were created to offset or zero out the Accumulated Depreciation in Account 108 and the Depreciation Expense in Account 403 that are associated with the securitized asset.<sup>131</sup> The contra-entries to Accounts 101, 108 and 403 ensure that storm restoration property that is financed by securitization is netted from rate base for bandwidth purposes.<sup>132</sup>

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<sup>128</sup> Entergy Rehearing Request at 6.

<sup>129</sup> As Entergy witness Mr. Louiselle explained:

When [storm] costs are securitized those costs are not included in the "cost of service." Rather, the storm costs are effectively sold to another entity that thereby acquires the right to recover those costs. Consequently, those costs and related tax effects are not includable in the cost of service.

Initial Decision, 148 FERC ¶ 63,015 at P 246 & n.544 (citing Ex. ESI-29 at 13:10-115 from Docket No. ER09-1224 (Loiselle Final Test.) (Mar. 23, 2010)).

<sup>130</sup> As Entergy witness Mr. Peters explained at trial, "[i]f costs are recorded in Account 101 and then securitized and a contra-asset set up for the amount that is securitized, for bandwidth purposes, the net effect would be zero in rate base." Tr. at 15:9-12 (Peters Cross).

<sup>131</sup> See Initial Decision, 148 FERC ¶ 63,015 at P 249. "[I]nstead of directly removing [the storm costs] from their accounting books when the underlying assets were transferred to the special purpose entity for securitization purposes, the [Operating] Companies left the costs on their accounting books and 'zeroed them out' by creating offsetting 'contra' accounting entries." *Id.* P 248 & n.547 (citing Ex. LC-101 at 19:17-19) (Kollen Dir. and Ans. Test.).

<sup>132</sup> *Id.* P 257; Entergy Initial Post-Hearing Br. at 35.

67. Both the securitized asset and the contra-securitized asset have associated accumulated deferred income taxes, or ADIT.<sup>133</sup> As Entergy explained, “the tax” associated with the difference between book income and income per the tax return is recorded as a deferred tax expense and is reflected on the company’s balance sheet as ADIT.<sup>134</sup> According to Entergy, any asset or contra-asset that creates a difference between book income and income per the tax return will give rise to a deferred tax expense that is accumulated on the balance sheet as ADIT. The ADIT associated with the contra-assets is contra-securitized asset ADIT (also called “contra-securitization ADIT”).<sup>135</sup>

68. While Entergy included a “relatively small” amount of securitized asset ADIT in the Fourth Bandwidth calculation, it did not include any contra-securitized asset

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<sup>133</sup> The ADIT variable of the bandwidth formula is defined in section 30.12 of Service Schedule MSS-3 to the System Agreement as follows:

ADIT=Net Accumulated Deferred Income Taxes (ADIT) 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 depreciation*) plus Accumulated Deferred Investment Tax Credit – 3% portion only recorded in FERC Account 255.

Initial Decision, 148 FERC ¶ 63,015 at P 234 & n.521 (citing Ex. ESI-107 at 53 (System Agreement, section 30.12, definition of “ADIT”)).

<sup>134</sup> Ex. ESI-125 at 2:2-22 and 3:1-6 (Roberts Rebuttal). *See also* Ex. ESI-124 at 3:5-16 (explaining that book income differs from taxable income primarily because of timing differences).

<sup>135</sup> According to Entergy, casualty loss ADIT arising from storm costs is associated with the investment on the Operating Company’s books at the time of the storm, whereas contra-securitization ADIT entries arising from storm costs are associated with costs that were incurred after the storm, and thus constitute different types of costs that do not offset the casualty loss ADIT. Initial Decision, 148 FERC ¶ 63,015 at P 25 & n.555 (citing Entergy Initial Br. at 33; Ex. ESI-113 at 4:18-5:13).

ADIT.<sup>136</sup> Entergy explained that, while the securitized asset and the contra-securitized asset zero each other out, the securitized asset ADIT and contra-securitized asset ADIT do not zero each other out.<sup>137</sup> Entergy, which created the contra-securitized asset and calculated the ADIT, stated that the ADIT associated with the contra-securitized asset is not meant to equal the amount of ADIT associated with the securitized asset.<sup>138</sup> Entergy explained that the two sets of ADIT result from the tax/book income difference for each of the two respective categories of assets. Entergy stated that the ADIT associated with the contra-securitized asset does not equal, offset, or zero out the ADIT associated with the securitized asset because the tax basis, which impacts the ADIT calculation, is not the same for the securitized asset and the contra-securitized asset.<sup>139</sup> According to Entergy, the tax basis for the securitized asset is the value of the

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<sup>136</sup> Entergy Rehearing Request at 7. The Presiding Judge explained the rate implications of ADIT:

As a general rule, the deferral of payment of income taxes that are nevertheless collected currently from ratepayers tends to free up a company's current capital for financial use. For that reason, rate formulas usually subtract accumulated deferred income tax liability from rate base in order to lower the debt service costs that ratepayers would otherwise bear. Conversely, in the years that deferred tax liabilities finally get paid, the payments are added to rate base as that capital is depleted.

Initial Decision, 148 FERC ¶ 63,015 at P 236.

<sup>137</sup> Entergy Initial Post-Hearing Br. at 36; Entergy Rehearing Request at 9.

<sup>138</sup> Entergy Rehearing Request at 8.

<sup>139</sup> *Id.* at 9. The record evidence indicated that the ADIT amounts associated with securitized assets and included in the Fourth bandwidth filing were approximately \$8.6 million for Entergy Gulf States Louisiana, \$68.4 million for Entergy Louisiana, and \$41.6 million for Entergy Texas. *See* Ex. LC-160, LC-161, and LC-162; *see also* Initial Decision, 148 FERC ¶ 63,015 at P 266. In contrast, the ADIT associated with the contra-assets, which had been excluded from the bandwidth calculation, was \$25.9 million for Entergy Gulf States Louisiana, \$120.9 million for Entergy Louisiana, and \$102.9 million for Entergy Texas. Trial Staff Br. on Exceptions at 17; Ex. ESI-130 at Workpaper Nos. 4.2.4, 4.3.3, and 4.6.3. These figures show that the ADIT associated with the contra-securitized assets is larger than the ADIT associated with the securitized assets by a factor of approximately two or three, depending on the Operating Company.

physical plant that was securitized, whereas the basis for the contra-securitized asset is zero, as it cost Entergy nothing to create the contra-asset.<sup>140</sup>

69. The Louisiana Commission expressed a different view on how contra-securitized asset ADIT was or should be calculated. According to the Louisiana Commission, Entergy starts with the securitized asset ADIT and then creates a contra-securitized asset ADIT that negates the securitized asset ADIT, so that these two sets of assets net to zero in the bandwidth calculation.<sup>141</sup> The Louisiana Commission's view differs from Entergy's explanation of how it calculated contra-securitized asset ADIT, which was to calculate the ADIT for the securitized asset and the ADIT for the contra-securitized asset independently, using the respective tax basis for each of the two categories of assets.

70. The Louisiana Commission and Trial Staff (at the post-hearing stage), advocated including contra-securitized asset ADIT in the bandwidth calculation. Entergy and the Arkansas Commission opposed including it.

71. The Presiding Judge stated that Entergy's exclusion of contra-securitization ADIT from the bandwidth formula was the *status quo* for the past three annual bandwidth proceedings. Consequently, he found that Entergy did not bear any burden of proving the continued exclusion of contra-securitization ADIT. Rather, he found that the Louisiana Commission and Trial Staff had the burden to show that Entergy's existing practice of excluding contra-securitization ADIT from the bandwidth calculation is unjust and unreasonable, and that including it in whole or in part would be just and reasonable.<sup>142</sup>

72. The Presiding Judge stated that the Louisiana Commission's and Trial Staff's positions are that either: (a) contra-securitization ADIT must be included in the bandwidth calculation to offset ADIT that is also included in the calculation but has been securitized; or (b) securitization ADIT should not be included in the bandwidth at all.<sup>143</sup> He stated that Entergy's position is that it should not be required to include an entry for

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<sup>140</sup> As Entergy witness Mr. Roberts explained, "[t]he contra-asset is not really an asset. It's an entry to remove the asset." Tr. at 235:2-3 (Roberts Cross).

<sup>141</sup> Initial Decision, 148 FERC ¶ 63,015 at PP 248-249; Ex. LC-101 at 19:20-23 (Kollen Dir. and Ans. Test.).

<sup>142</sup> Initial Decision, 148 FERC ¶ 63,015 at P 256.

<sup>143</sup> *Id.* P 257.

contra-securitization ADIT in the bandwidth formula to offset “liberalized depreciation<sup>144]</sup> ADIT on assets that were financed by securitization.”<sup>145</sup>

73. The Presiding Judge endeavored to sort out both sides’ “tortured thinking” on ADIT by parsing the phrase “contra-securitization ADIT” into its component parts, as each side sees it.<sup>146</sup> He stated that, according to Entergy, the entries for contra-securitization ADIT are “ADIT computations on *contra [asset] entries* that were input to Entergy’s accounts in order to zero out *securitized assets* as a way to effectively remove

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<sup>144</sup> The Presiding Judge stated: “‘Liberalized depreciation’ represents the difference between accelerated depreciation that is taken for tax purposes and straight-line depreciation that is charged to ratepayers.” *Id.* P 253 & n.558 (citing Tr. at 233:8-24 (Roberts)); *see also* Opinion No. 545, 153 FERC ¶ 61,303 at P 187 & n.277. The use of the term “liberalized depreciation” introduces confusion into an already complicated debate. It is unclear whether securitized asset ADIT is liberalized depreciation ADIT. The Presiding Judge concluded that it is. Initial Decision, 148 FERC ¶ 63,015 at PP 255, 259 and 265; Opinion No. 545, 153 FERC ¶ 61,303 at P 187 (“The Presiding Judge stated that all ADIT associated with securitized assets is liberalized depreciation ADIT.”). The Commission was not so sanguine. The Commission faulted Entergy for failing to sufficiently define its use of the term, *see* Opinion No. 545, 153 FERC ¶ 61,303 at P 187, while acknowledging that Entergy witness Mr. Peters stated that liberalized depreciation is a sub-account of Account 282 (Accumulated deferred income taxes – Other property). *Id.* P 187 & n.278 (citing Tr. at 151:11-13). In any event, it appears that the phrase “liberalized depreciation ADIT on assets that were financed by securitization” is at least a subset of, if not completely synonymous with, “securitized asset ADIT.” *Id.* PP 187-188. To avoid confusion, we will use the term securitized asset ADIT where possible.

<sup>145</sup> Initial Decision, 148 FERC ¶ 63,015 at P 223. Before raising the liberalized depreciation argument, the Louisiana Commission originally proposed that contra-securitization ADIT should be included in the bandwidth formula to offset casualty loss ADIT. Entergy argued that this would be a mistake because, while both casualty loss ADIT and contra-securitization ADIT are related to storm costs, the casualty loss ADIT arose from investments that were already on Entergy’s books when the storm hit, and never securitized, whereas the post-storm costs were securitized and thus not on Entergy’s books. *Id.* P 222. At the post-hearing briefing stage of the proceeding, the Louisiana Commission switched from casualty loss to liberalized depreciation as the basis of its rationale for including contra-securitization ADIT in the bandwidth calculation. *Id.* P 253.

<sup>146</sup> *Id.* P 262.

them from the books.”<sup>147</sup> He contrasted this characterization with that of the Louisiana Commission and Trial Staff, which viewed these entries as “*contra* computations on ADIT entries that are derived from *securitized* assets that have been removed from the books by the application of yet other *contra* entries.”<sup>148</sup>

74. The Presiding Judge stated that, under Entergy’s “spin,” “*contra* entries are artificial constructs; they represent no real cost.”<sup>149</sup> The Presiding Judge then found it a mystery why Entergy would calculate tax on *contra* entries at all, much less deferred tax.<sup>150</sup> He also observed that Entergy does not suggest that its ratepayers should be saddled with paying these additional costs by including them in the bandwidth calculation.<sup>151</sup>

75. Turning to the Louisiana Commission and Trial Staff, the Presiding Judge stated that under their “spin,” securitized assets are not artificial constructs; they are real, tangible assets.<sup>152</sup> He highlighted that, according to Entergy, the securitized assets have been zeroed out on the books. Therefore, he reasoned, no ADIT generated by the securitized assets should remain on the books. Nevertheless, he noted, Entergy included securitized asset ADIT in the bandwidth calculation for three of its Operating Companies. The Presiding Judge found Entergy’s explanation for this contradiction – the fact that the securitized assets are zeroed out on Entergy’s books but securitized asset ADIT is not – “opaque at best.”<sup>153</sup> Having reached a logical impasse, the Presiding Judge turned to the language of the bandwidth formula for guidance:

At the end of the day, the only dispositive criterion for including or excluding an ADIT item from the bandwidth calculation is whether the ADIT item is “generally and properly includable for FERC cost of service purposes.”[citation omitted] The [Louisiana Commission] and [Trial] Staff

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<sup>147</sup> *Id.* P 263.

<sup>148</sup> *Id.* P 262.

<sup>149</sup> *Id.* P 263.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* P 264.

<sup>153</sup> *Id.*

have shown that Entergy's own methodology requires ADIT generated by securitized assets, including the liberalized depreciation ADIT entries, to be "zeroed out" by contra entries. Hence, liberalized depreciation ADIT entries for securitized assets are not "generally and properly includible" in the bandwidth calculation. The just and reasonable solution, then, is to offset those liberalized depreciation ADIT inputs from Account 282111 by equal contra inputs that are deducted from "contra-securitization – Federal" ADIT in Account 282475 of each Company, and to include the contra-amount in the bandwidth calculation for the 2009 test year. [citation omitted]

Of course, the total amount of contra-securitization ADIT that must be moved into the bandwidth calculation of each affected Operating Company does not turn out to be the entirety of the amount in Account 282475. *Only enough contra-ADIT to offset the liberalized depreciation ADIT that is now in the bandwidth calculation must be transferred into the bandwidth calculation for each affected Operating Company.* Accordingly, \$8,566,189 for [Entergy Gulf States Louisiana], \$68,434,702 for [Entergy Louisiana], and \$41,624,310 for [Entergy Texas] are all that are needed in order to offset [citation omitted] their respective ADIT amounts in Account 282111 that are included in the bandwidth calculation, and those amounts should be correspondingly deducted [citation omitted] from the contra-securitization ADIT amounts in Account 282475 that are not included in the bandwidth calculation for each Operating Company.<sup>154]</sup>

76. In Opinion No. 545, the Commission affirmed the Presiding Judge's finding that contra-securitization ADIT should be included in the bandwidth formula calculation. However, the Commission rejected the Presiding Judge's determination that the contra-securitization ADIT should be limited to liberalized depreciation.<sup>155</sup> Highlighting the

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<sup>154</sup> *Id.* P 266 (emphasis in original).

<sup>155</sup> The Commission explained that, similar to accelerated depreciation, liberalized depreciation is a method of depreciation that creates different amounts for tax and book purposes. Opinion No. 545, 153 FERC ¶ 61,303 at P 188 & n.279 (citing 18 C.F.R. § 35.13(17)(i) (2015)). The Commission explained that accelerated depreciation is a component of Account 282, which reflects all differences between the period in which revenue and expense transactions affect taxable income and the period in which they enter into the determination of pretax accounting income. *Id.* The Commission stated that Entergy does not sufficiently define "liberalized depreciation" in the Fourth Bandwidth filing. The Commission determined that it "may or may not be associated with the securitized assets for which there is ADIT, as evidence[d] by the much larger

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lack of a clarity surrounding the relationship between liberalized depreciation and securitized asset ADIT, the Commission concluded that “liberalized depreciation is irrelevant to determining the appropriate amount of contra-securitization to include in the bandwidth formula calculation in order to zero out the securitized ADIT.”<sup>156</sup> Instead, the Commission found that Entergy should include all contra-securitization ADIT in the bandwidth calculation.<sup>157</sup>

77. The Commission noted Entergy’s contention that the inclusion of contra-securitization ADIT beyond the amount equal to the liberalized depreciation is inappropriate because “the costs that gave rise to the Contra-Securitization ADIT are the securitized assets that were zeroed out from the bandwidth calculation.”<sup>158</sup> The Commission found, however, that without removing the underlying securitization ADIT, which Entergy proposed to do post-hearing but had not done in the Fourth Bandwidth

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total amount of liberalized depreciation in subaccounts 282.111 and 282.116 than contra-securitization in subaccounts 282.475 and 282.276.” *Id.* P 188 & n.280 (citing Entergy Workpaper Nos. 4.2.4, 4.3.3, 4.4.3, and 4.6.3). The Commission added that Trial Staff pointed out that the amount of liberalized depreciation associated with securitized assets is not necessarily the entirety of the ADIT associated with securitized assets. *Id.* P 188 & n.281 (citing Trial Staff Br. on Exceptions at 15-16). Accordingly, the Commission determined that “liberalized depreciation is irrelevant to determining the appropriate amount of contra-securitization to include in the bandwidth formula calculation in order to zero out the securitized ADIT.” *Id.* Consequently, the Commission disagreed with the Presiding Judge’s conclusion that the bandwidth formula calculation should contain contra-securitization ADIT equal to the amount of liberalized depreciation for securitized assets. *Id.*

<sup>156</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 188.

<sup>157</sup> *Id.* P 186. In contrast to the confusion surrounding liberalized depreciation, the Commission stated that Entergy Workpaper Nos. 4.1.4, 4.2.4, 4.3.3, 4.6.3 and 4.8.1 show the components of Account 282, including, where it is present, all contra-securitization ADIT, for each Operating Company. *Id.* P 189. Since no party contested the accuracy of these workpapers or that these amounts correspond to ADIT associated with contra-securitized assets, the Commission therefore found that “contra-securitization in these workpapers should be included in the bandwidth formula to remove all the contra-securitization ADIT balances associated with securitized assets[.]” *Id.*

<sup>158</sup> *Id.* P 190 & n.282 (quoting Entergy Br. Opposing Exceptions at 34).

filing, such zeroing out can only occur through inclusion of all corresponding contra-securitization ADIT.<sup>159</sup>

78. The Commission noted also Trial Staff's opposition to Entergy's proposed exclusion of liberalized depreciation ADIT (securitized asset ADIT) and the corresponding contra-securitization ADIT from the bandwidth formula calculation. Trial Staff had argued that such inclusion is necessary in order to comply with section 30.12 of Service Schedule MSS-3, which requires that the bandwidth formula input for ADIT be computed as amounts recorded in FERC Accounts 190, 281, and 282, as reduced by amounts not generally and properly includable for FERC cost of service purposes.<sup>160</sup> The Commission agreed with Trial Staff that:

[R]emoving securitized assets from ADIT accounts would cause those accounts to be incongruous with other elements of the formula for which securitized assets are zeroed out with contra-securitization. To consistently apply Entergy's proposal would require comprehensively removing all securitized elements and corresponding contra-securitization from the bandwidth formula calculation, which is beyond the scope of this proceeding.<sup>[161]</sup>

## 2. Rehearing Requests

79. Entergy and the Arkansas Commission seek rehearing of the Commission's determination on contra-securitized asset ADIT. Entergy asks the Commission to affirm the Presiding Judge's remedy.<sup>162</sup> The Arkansas Commission asks the Commission to either: (1) affirm the Presiding Judge's remedy; or (2) approve Entergy's alternative proposal, raised in Entergy's post-hearing brief on exceptions, i.e., to remove all securitized asset ADIT and contra-securitized asset ADIT from the bandwidth calculation.

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<sup>159</sup> *Id.* PP 189-190.

<sup>160</sup> *Id.* P 191.

<sup>161</sup> *Id.*

<sup>162</sup> The Presiding Judge recommended limiting the amount of contra-securitized asset ADIT (contra-securitization ADIT) included in the bandwidth formula calculation to the amount needed to zero out the securitized asset ADIT (liberalized depreciation ADIT associated with the securitized asset).

80. Entergy asserts that the Commission's means of removing the ADIT associated with securitized storm costs (securitized assets) from the bandwidth calculation will not achieve the Commission's intent that the securitized assets be "zeroed out." Instead, inclusion of the entire amount of contra-securitization ADIT (a negative amount) in the bandwidth calculation will result in the creation of more than \$130 million of rate base associated with securitization within the bandwidth calculation.<sup>163</sup> Entergy asserts that the contra-securitization ADIT in excess of the securitized asset ADIT is not generally and properly includable in cost of service, and that Opinion No. 545 does not achieve the intended result of excluding from the bandwidth calculation the amounts associated with securitization.

81. The Arkansas Commission contends that the Commission erred: (1) in rejecting the Presiding Judge's determination that the contra-securitization ADIT should be limited to the amount of securitized asset ADIT;<sup>164</sup> (2) in rejecting Entergy's alternative proposed exclusion of all ADIT related to securitized asset ADIT and contra-securitized asset ADIT, "given that [these categories of ADIT] are not generally and properly includable for FERC cost of service purposes" in the bandwidth calculation;<sup>165</sup> and (3) that it was arbitrary and capricious for the Commission to allow securitized costs to be included in the bandwidth calculation, when it found otherwise in Opinion No. 545, i.e., that securitized costs should be removed or zeroed out of the bandwidth formula calculation.<sup>166</sup>

82. The Arkansas Commission asserts that the Commission failed to explain a major inconsistency in Opinion No. 545: In Opinion No. 545, the Commission stated that "[a]ll parties agree that securitized costs (e.g., the securitized assets, the associated accumulated depreciation and depreciation expense, and the related tax effects) should be removed or zeroed out from the bandwidth calculation,"<sup>167</sup> and that "no party argues that ADIT associated with securitized amounts should remain in or not be zeroed out in the bandwidth formula."<sup>168</sup> However, the Arkansas Commission asserts, the end result of

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<sup>163</sup> Entergy Rehearing Request at 1, 4, 5-11.

<sup>164</sup> Arkansas Commission Rehearing Request at 2.

<sup>165</sup> *Id.* at 3.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 6 (quoting Opinion No. 545, 153 FERC ¶ 61,303 at P 161).

<sup>168</sup> *Id.* (citing Opinion No. 545, 153 FERC ¶ 61,303 at P 186).

Opinion No. 545 does the exact opposite: Opinion No. 545 fails to zero out or negate the amount of contra-securitization ADIT that is included in the bandwidth calculation. Instead, Opinion No. 545 results in including ADIT amounts associated with securitized costs in the bandwidth calculation. The Arkansas Commission states that the Commission has no explanation for this inconsistency, which is arbitrary and capricious.<sup>169</sup>

83. Next, the Arkansas Commission highlights the Commission's statement in Opinion No. 545 that

liberalized depreciation is *irrelevant* to determining the appropriate amount of contra-securitization to include in the bandwidth formula calculation in order to zero out the securitized ADIT. We thus disagree with the Presiding Judge's conclusion that the bandwidth formula calculation should contain contra-securitization ADIT equal to the amount of liberalized depreciation for securitized assets.<sup>170</sup>

84. The Arkansas Commission faults the Commission for failing to explain why liberalized depreciation is irrelevant to determining the appropriate amount of contra-securitized asset ADIT to zero out the securitized asset ADIT, given the Commission's contrary statements (in paragraphs 161 and 186 of Opinion No. 545) that securitized asset ADIT should be zeroed out of the bandwidth formula.

85. The Arkansas Commission points out that, while Entergy does not disagree with the result reached in paragraph 270 of the Initial Decision (the Presiding Judge's remedy), Entergy has also proposed, alternatively, that the Presiding Judge's recommendation be modified to exclude all ADIT amounts, both securitized and contra-securitized, rather than include securitization ADIT and enough of the contra-securitization amount to offset it exactly (with a net result of zero).<sup>171</sup> The Arkansas Commission highlights the fact that the Commission dismissed Entergy's proposal to exclude from the bandwidth calculation *all* liberalized depreciation ADIT (securitized asset ADIT) *and* the corresponding contra-securitization ADIT as beyond the scope of this proceeding.<sup>172</sup> The Arkansas Commission states that the Commission does not find

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<sup>169</sup> *Id.* (citing *Council of the City of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012)).

<sup>170</sup> *Id.* (citing Opinion No. 545, 153 FERC ¶ 61,303 at P 188) (emphasis added).

<sup>171</sup> *Id.* at 7 (citing Entergy Br. on Exceptions at 3).

<sup>172</sup> *Id.* at 8 (quoting Opinion No. 545, 153 FERC ¶ 61,303 at P 191).

that Entergy's proposal is wrong, but rather that this stage in the proceeding is not the right time and place to evaluate it. The Arkansas Commission argues that the Commission overlooks the fact that no change in the bandwidth formula is required to implement Entergy's proposal, and that the bandwidth formula does allow the Commission to exclude ADIT that is not generally and properly includable for FERC cost of service purposes. Thus, the Arkansas Commission argues, Entergy's proposed solution is not beyond the scope of this proceeding.<sup>173</sup>

### 3. Commission Determination

86. We grant rehearing and require Entergy to remove both securitized asset ADIT and contra-securitized asset ADIT (also called contra-securitization ADIT, as noted above) from the bandwidth calculation. Upon reconsideration, we conclude that securitized asset ADIT and contra-securitized asset ADIT are not "properly includable for FERC cost of service purposes," per the bandwidth formula,<sup>174</sup> and thus must be removed from the bandwidth calculation, as explained below.

87. The securitized assets, which were financed by a third-party, are not includable in Entergy's cost of service or in the bandwidth formula because it would be unreasonable to require Entergy's customers to pay for costs that Entergy did not incur.<sup>175</sup> As the Commission pointed out in Opinion No. 545, "[a]ll parties agree that securitized costs (e.g., the securitized assets, the associated accumulated depreciation and depreciation expense, *and the related tax effects*) should be removed or zeroed out from the bandwidth formula calculation."<sup>176</sup> Furthermore, the Commission stated that "[n]o party argues that ADIT associated with securitized amounts should remain in or not be zeroed out in the bandwidth formula calculation."<sup>177</sup> The question is how to remove these securitized assets, including associated ADIT, from the bandwidth calculation.

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<sup>173</sup> *Id.* at 8-9.

<sup>174</sup> Section 30.12 of Service Schedule MSS-3 to the System Agreement. *See supra* note 133 for text of the ADIT input variable to the bandwidth formula.

<sup>175</sup> *See La. Pub. Serv. Comm'n v. FERC*, 771 F.3d 903, 919 & n.12 (5<sup>th</sup> Cir. 2014) (recognizing that securitized costs are not includable in the cost of service).

<sup>176</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 161 (emphasis added). "Related tax effects" refers to ADIT and liberalized depreciation.

<sup>177</sup> *Id.*

88. To remove the securitized assets from the Operating Companies' rate base and thus zero out the securitized asset for the purpose of the bandwidth calculation, Entergy recorded contra-securitized assets in a sub-account of Account 101 that was equal to the value of the securitized asset.<sup>178</sup> When these accounts are netted, the net result is zero; there are no securitized assets (or contra-securitized assets) in the rate base or the bandwidth formula. This is uncontroversial.

89. The disagreement arises over the treatment of the ADIT associated with the securitized assets and the contra-securitized assets, and whether this ADIT should be included in the bandwidth calculation. Unlike securitized assets and contra-securitized assets, securitized asset ADIT and contra-securitized asset ADIT do not mathematically net to zero and thus do not cancel each other out. Rather, the contra-securitization ADIT recorded on the Operating Companies' books is roughly two to three times larger than the securitized asset ADIT amounts,<sup>179</sup> depending on the Operating Company.

90. The Louisiana Commission claims that contra-securitization ADIT was created to "remove" ADIT from the Operating Companies' books.<sup>180</sup> Entergy, which created the contra-securitized asset and calculated the ADIT, counters that contra-securitized asset ADIT was not created to remove securitized asset ADIT, but rather is the result of the tax/book basis difference of the contra-asset.<sup>181</sup> According to Entergy, it did not create a contra-securitized asset ADIT entry to zero out the securitized asset ADIT, but rather it calculated the ADIT for the securitized asset and the ADIT for the contra-securitized asset independently, based on each of these assets' respective tax bases. Entergy explains that the contra-securitized asset ADIT is larger than the securitized asset ADIT amounts

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<sup>178</sup> *Id.*

<sup>179</sup> Exs. LC-160, LC-161 and LC-162; Ex. 130 at Workpaper Nos. 4.2.4, 4.3.3 and 4.6.3. *See also* Entergy Rehearing Request at 9; Trial Staff Br. on Exceptions at 17; Louisiana Commission Pre-Trial Br. at 20. *See supra* note 139.

<sup>180</sup> *See* Initial Decision, 148 FERC ¶ 63,015 at P 249 & n.549 (citing Tr. at 243:2-13 (Roberts)).

<sup>181</sup> As Entergy explains, the tax associated with the difference between book income and income per the tax return is recorded as deferred tax expense and is reflected on the balance sheet of a company as ADIT. Any entry to Account 101 that creates a tax/book basis difference will create ADIT. This includes a contra-asset entry in Account 101. Entergy Rehearing Request at 6, 8-9.

because the tax basis of the securitized asset is not the same as the tax basis of the contra-securitized asset.<sup>182</sup>

91. As noted above, Entergy claims that the tax basis of the contra-securitized asset is zero because Entergy created the contra-securitized asset and it cost nothing to create it.<sup>183</sup> In contrast, the basis of the securitized asset ADIT is the basis of the physical plant assets that were securitized, i.e., the basis of the property underlying the bonds that were issued by a non-affiliated third-party to finance Entergy's post-hurricane construction efforts.

92. The upshot of the difference between the securitized asset's tax basis (physical plant) and the contra-securitized asset's tax basis (zero), is that Entergy recorded on its books higher numbers for contra-securitized asset ADIT than securitized asset ADIT. Consequently, the deferred tax benefit associated with the securitized asset – the securitized asset ADIT – is not zeroed out of the bandwidth calculation.

93. As the amounts in the relevant accounts were not themselves challenged at hearing, and only the treatment of the accounts for bandwidth formula calculation purposes was challenged, the record does not reveal whether the amount that Entergy included in the contra-securitized asset account is "correct" for either tax or ratemaking accounting purposes.

94. Additionally, while Entergy explains why the contra-securitized asset ADIT does not zero out the securitized asset ADIT in Operating Company accounts, this explanation does not answer the question of whether or not it is appropriate to include contra-securitized asset ADIT in the bandwidth calculation.

95. The Presiding Judge tried to resolve this problem by requiring inclusion in the bandwidth calculation of "only enough" contra-securitized asset ADIT to offset the

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<sup>182</sup> See Entergy Initial Post-Hearing Br. at 36.

<sup>183</sup> See *id.*; see also Entergy Rehearing Request at 9 ("The tax basis for the contra-assets is zero – it cost the Operating Companies nothing to create a contra-asset."). In hindsight, since Entergy "invented" the contra-asset, it would have been easier for all parties involved in this proceeding if Entergy "invented" a contra-asset basis that would result in the contra-securitized asset ADIT zeroing out the securitized asset ADIT. Entergy did not do so, however.

amount of liberalized depreciation ADIT associated with securitized asset.<sup>184</sup> He reasoned that, pursuant to the bandwidth formula, the only dispositive criterion for including or excluding ADIT from the bandwidth calculation is whether the ADIT item is “generally and properly includable for FERC cost of service purposes.”<sup>185</sup> The Presiding Judge found that the Louisiana Commission and Trial Staff had shown that Entergy’s method “requires ADIT generated by a securitized asset, including the liberalized depreciation ADIT entries, to be ‘zeroed out’ by contra-entries.”<sup>186</sup> The Presiding Judge concluded that the just and reasonable solution is to offset those securitized asset ADIT amounts (which he called “liberalized deprecation ADIT entries for securitized assets”) by equal contra-securitized asset ADIT amounts in the bandwidth calculation.<sup>187</sup>

96. Because Entergy included the securitized asset ADIT in the bandwidth calculation, the Presiding Judge reasonably required Entergy to include the comparable amount of contra-securitized asset ADIT in the bandwidth calculation, in an effort to zero out the securitized asset ADIT. This left an amount of contra-securitized asset ADIT remaining on the Operating Companies’ books. This is problematic because the bandwidth formula requires the ADIT in various specified accounts to be included in the bandwidth calculation, provided that the ADIT is generally and properly includable for cost of service purposes.<sup>188</sup> On its face, the language of the ADIT component in the bandwidth formula does not explicitly provide for including portions, rather than the entire amount, of ADIT costs associated with particular assets in the various specified accounts. Nor does the bandwidth formula specify what is properly includable for FERC cost of service purposes.

97. In Opinion No. 545, the Commission grappled with the problem of the excess amount in the contra-securitized asset ADIT account (as compared with the securitized

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<sup>184</sup> Initial Decision, 148 FERC ¶ 63,015 at P 265. Using simpler terminology, the Presiding Judge required inclusion of the amount of contra-securitized asset ADIT that was needed to zero out the securitized asset ADIT.

<sup>185</sup> *Id.* P 265 & n.579.

<sup>186</sup> *Id.* P 265.

<sup>187</sup> *Id.* PP 265-266.

<sup>188</sup> Specifically, section 30.12 of Service Schedule MSS-3 to the System Agreement requires that the bandwidth input for ADIT be computed using amounts recorded in FERC Accounts 190, 281, and 282, as reduced by amounts not generally and properly includable for FERC cost of service purposes.

ADIT account) by focusing on the accounts specified in the bandwidth formula (section 30.12 of MSS-3).<sup>189</sup> The Commission honed in on the fact that Entergy had included the securitized asset ADIT in the bandwidth calculation, but not the contra-securitized asset ADIT, and that this was a departure from the way Entergy handled other contra accounts. In light of the fact that the bandwidth formula does not clearly allow inclusions of partial amounts from the accounts specified in the formula, and the fact that Entergy had included the securitized asset ADIT in the bandwidth calculation, the Commission required Entergy to include all of the securitized and contra-securitized asset ADIT amounts in the bandwidth calculation.<sup>190</sup> In so doing, the Commission was requiring Entergy to adhere to consistent use of a contra-accounting approach in order to remove expenses related to the securitized asset, including ADIT, from the bandwidth calculation.

98. In its post-hearing briefs, Entergy proposed an alternative remedy of removing both the securitized asset ADIT and the contra-securitized asset ADIT from the bandwidth calculation.<sup>191</sup> The Commission, in Opinion No. 545, rejected this proposal

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<sup>189</sup> See Opinion No. 545, 153 FERC ¶ 61,303 at P 191. The Commission also acknowledged the lack of clarity associated with the meaning of “liberalized depreciation” and its relationship to securitized asset ADIT. *Id.* P 187 (“Such arguments indicate that liberalized depreciation ADIT is only part of the ADIT associated with securitize assets”) and P 187 & n.278 (“Entergy has not sufficiently defined its use of the term liberalized depreciation although Entergy witness Peters states that liberalized depreciation is a sub-account of 282.”) (citing Tr. at 151:11-13).

The Commission disagreed with the Presiding Judge’s conclusion that the bandwidth formula calculation should include contra-securitized asset ADIT equal to the amount of liberalized depreciation for securitized assets. It reached this conclusion at least in part because it agreed with Trial Staff that the amount of liberalized depreciation associated with the securitized assets is not necessarily the entirety of the securitized asset ADIT. Opinion No. 545, 153 FERC ¶ 61,303 at P 188. On that basis, even if the Presiding Judge’s solution was consistent with the bandwidth formula, “liberalized depreciation” was not a good yardstick because the securitized asset ADIT and contra-securitized asset ADIT amounts would not zero out.

<sup>190</sup> *Id.* P 190. In so doing, the Commission was, in effect, requiring Entergy to adhere to a consistent use of a contra-accounting approach in order to remove expenses related to the securitized asset, including ADIT, from the bandwidth calculation.

<sup>191</sup> Entergy Br. on Exceptions at 15-16 (“Entergy respectfully request that the Commission reject the more complicated procedure of offsetting liberalized depreciation

(continued ...)

because: (1) Entergy had included the securitized asset ADIT in the Fourth Bandwidth filing;<sup>192</sup> and (2) the Commission was concerned that removing securitized assets from ADIT accounts would be incongruous with other elements of the formula in which securitized assets are zeroed out by contra-securitized assets.<sup>193</sup> The Commission reasoned that “to consistently apply Entergy’s proposal would require *comprehensively removing all securitized elements and contra-securitization from the bandwidth formula calculation, which is beyond the scope of this proceeding.*”<sup>194</sup> The Commission viewed Entergy’s proposal as impacting not just ADIT in Account 282, but also securitized asset-related electric plant in Account 101, accumulated depreciation in Account 108, and depreciation expenses in Account 403.

99. On rehearing, Entergy and the Arkansas Commission object to the Commission’s directive in Opinion No. 545 to include both securitized asset ADIT and contra-securitized asset ADIT in the bandwidth calculation. These parties point out the inconsistency in the parties’ and the Commission’s aim of excluding costs related to securitized assets from the bandwidth calculation, and the fact that Opinion No. 545 results in including over \$130 million worth of contra-securitized asset ADIT in rate base for bandwidth calculation purposes.<sup>195</sup> The Arkansas Commission states that inclusion of contra-securitized asset ADIT amounts as inputs to this bandwidth calculation will increase Entergy Arkansas’ bandwidth payments because Entergy Arkansas has no contra-securitized asset ADIT, whereas other bandwidth payments recipients (Entergy Gulf States Louisiana, Energy Louisiana and Entergy Texas) do have contra-securitized asset ADIT.<sup>196</sup>

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ADIT on securitized assets with an equal amount of contra-securitization ADIT in favor of just finding that liberalized depreciation ADIT associated with securitized assets is simply not includable in the Bandwidth calculation.”); Entergy Br. Opposing Exceptions at 33-34.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* P 191.

<sup>194</sup> *Id.* (emphasis added).

<sup>195</sup> Entergy Rehearing Request at 4 (“more than \$130 of rate base”); 9 (“more than \$134 million of ADIT associated with securitization”).

<sup>196</sup> Arkansas Commission Rehearing Request at 9.

100. Upon reconsideration, we grant rehearing. As noted above, everyone agrees that securitized assets and their related costs do not belong in the bandwidth calculation.<sup>197</sup> Because the securitized asset is not includable in the utility's cost of service, neither the securitized asset ADIT nor the contra-securitized asset ADIT should be included in the bandwidth calculation. The question is *how* to remove the securitized asset-related ADIT from the bandwidth calculation. In general, contra assets are created to zero out assets, such as securitized assets, that do not belong in rate base because the utility did not pay for them, in order to preclude charging the costs of those assets to the utility's customers. Here, however, the contra-securitized asset ADIT does not zero or otherwise cancel out the securitized asset ADIT in the bandwidth calculation. After netting securitized asset ADIT and contra-securitized asset ADIT, over \$130 million worth of rate base associated with securitization is left within the bandwidth calculation. Accordingly, we recognize that Opinion No. 545's directive to include the securitized asset ADIT and the contra-securitized asset ADIT in the bandwidth calculation does not achieve the appropriate outcome for ratemaking purposes because it does not result in removing the ADIT related to the securitized asset, i.e., the contra-securitized asset ADIT, from the bandwidth calculation.

101. Having re-examined this issue, we conclude that the fairest and simplest approach to use to remove the securitized asset-related ADIT from the bandwidth calculation would be to adopt Entergy's post-hearing proposal and require Entergy to exclude from the bandwidth calculation both: (1) securitized asset ADIT; and (2) contra-securitized asset ADIT. Our rationale is that, because the securitized asset is not includable in the cost of service or the bandwidth calculation, the ADIT related to the asset should also not be included in the bandwidth calculation.<sup>198</sup> The bandwidth formula requires inclusion in the bandwidth calculation of net ADIT in accounts 191, 281 and 282 "*as reduced by amounts not generally and properly includable for FERC cost of service purposes.*" Because the securitized asset is not includable for cost of service purposes, the securitized asset ADIT and contra-securitized asset ADIT associated with securitized asset also do not belong in Entergy's cost of service or the bandwidth calculation. Regardless of what the proper amount of contra-securitized asset ADIT should be,<sup>199</sup> under the method

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<sup>197</sup> See *supra* P 87 and accompanying footnotes.

<sup>198</sup> Section 30.12 of MSS-3; see also Initial Decision, 148 FERC ¶ 63,015 at P 265; Opinion No. 518, 139 FERC ¶ 61,105 at P 85; *Entergy Servs., Inc.*, Opinion No. 514, 137 FERC ¶ 61,029, at P 117 n.193 (2011) (Opinion No. 514), *reh'g denied*, 142 FERC ¶ 61,013 (2013); Opinion No. 505, 130 FERC ¶ 61,023 at P 233.

<sup>199</sup> As noted above, the amount that Entergy included in the contra-securitized asset account was not contested during the hearing.

Entergy originally used to calculate the contra-securitized asset ADIT that is recorded on Operating Companies' books for 2009, the contra-accounting approach, in this instance, does not, in fact, achieve the result it was intended to achieve, i.e., to zero out the securitized asset ADIT from the bandwidth calculation. In contrast, Entergy's post-hearing proposal of excluding both the securitized asset ADIT and the contra-securitized asset ADIT does achieve that intended result.

102. The Commission previously determined that Entergy's proposal to remove both the securitized asset ADIT and the contra-securitized asset ADIT from the bandwidth calculation was beyond the scope of this proceeding.<sup>200</sup> This is because the Commission understood Entergy's proposal to require a sweeping change in the way securitized assets are treated in the bandwidth calculation, affecting Accounts 101, 108 and 403, as well as the ADIT in Account 282 and Workpaper Nos. 4.1.4, 4.2.4, 4.3.3, 4.4.3, 4.6.3 and 4.8.1, which is the issue that is squarely before us for consideration in this proceeding. The use of contra-accounting, in general, was not an issue set for hearing. Upon re-examination, we realize that Entergy's proposal can be narrowly tailored to the ADIT accounts alone. While the Commission would generally prefer that Entergy use a consistent approach to removing securitized asset-related expenses from the bandwidth calculation, i.e., use the contra-accounting method consistently for all relevant expenses and accounts, we conclude that it is reasonable to allow an exception for the treatment of securitized asset ADIT, since the contra-accounting method, as implemented by Entergy, here, does not achieve the overall desired outcome of eliminating securitized asset ADIT from the bandwidth calculation.

103. We also find that excluding both securitized asset ADIT and contra-securitized asset ADIT from the bandwidth calculation is consistent with the language of the bandwidth formula, which only allows inclusion in the bandwidth calculation of ADIT that is "generally and properly includable for FERC cost of service purposes."<sup>201</sup> Since, as explained above, the securitized asset is not properly includable for cost of service purposes, the ADIT associated with the securitized asset is also not properly includable for ratemaking purposes, and should be removed.

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<sup>200</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 191.

<sup>201</sup> Section 30.12 of MSS-3 (requiring inclusion of net ADIT in accounts 190, 281 and 282 . . . . *as reduced by amounts not generally and properly includable for FERC cost of service purposes*) (emphasis added). See *supra* note 133 for text of the ADIT variable.

104. Accordingly, we grant rehearing and direct Entergy to file, within 60 days of the date of this order, a compliance filing with a revised bandwidth calculation for the 2009 test year that excludes both: (1) the securitized asset ADIT in Account 282; and (2) the amounts of contra-securitized ADIT for each Operating Company shown on Entergy Workpaper Nos. 4.1.4, 4.2.4, 4.3.3, 4.4.3, 4.6.3, and 4.8.1.

**D. Casualty Loss ADIT**

**1. Background**

105. In Opinion No. 545, the Commission affirmed the Presiding Judge’s finding that Entergy’s entries to move casualty loss ADIT from Account No. 283 to Account 282 constituted a transfer for which prior Commission approval was required.<sup>202</sup> The Commission nevertheless agreed with the Presiding Judge that, despite the lack of pre-approval, which violated the Uniform System of Accounts, it was appropriate to include casualty loss ADIT as an eligible bandwidth formula input.<sup>203</sup>

**2. Rehearing Request**

106. On rehearing, the Louisiana Commission raises two main issues: (1) the Commission relied on an incorrect description of casualty losses when it included casualty loss ADIT in the bandwidth calculation in Opinion No. 518 and that decision should be reconsidered in light of the evidence in this case; and (2) the casualty losses result almost entirely from damage to transmission and distribution assets and, under Commission precedent, should be included in the bandwidth calculation.<sup>204</sup>

**a. New Evidence**

107. In Opinion No. 518, the Commission held that “to the extent that storm damage costs are included in expense accounts that are included in the bandwidth formula,’ the

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<sup>202</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 77 & n.123 (citing Account 283, Accumulated Deferred Income Taxes – Other, 18 C.F.R. Part 101 (2015)) (“It shall not transfer the balance in the account or any portion thereof to retained earnings or to any other account or make any use thereof except as provided in the text of this account without prior approval of the Commission . . .”).

<sup>203</sup> *Id.* PP 80-81.

<sup>204</sup> Louisiana Commission Rehearing Request at 1, 4-5, 17-22.

associated ADIT should be included.”<sup>205</sup> On rehearing of Opinion No. 518, the Commission held that all casualty loss ADIT should be included “because the expenses associated with the casualty loss are directly attributable to storm damage costs, which are costs that were recorded in accounts included in the bandwidth formula.”<sup>206</sup>

108. The Louisiana Commission states that, in this Fourth Bandwidth proceeding, Entergy’s expert on ADIT revealed that casualty losses are not expenses included in FERC accounts, but rather result from a tax calculation of the diminishment in fair market value of utility assets (after incurring storm damage).<sup>207</sup>

109. The Louisiana Commission states that this testimony contradicts the representations that the Commission relied on in Opinion No. 518. The Louisiana contends that the Commission should revisit its determinations in Opinion No. 518 and exclude casualty loss ADIT from bandwidth formula calculation.

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<sup>205</sup> Opinion No. 518, 139 FERC ¶ 61,105 at P 88. Stated another way, Opinion No. 518 ruled that casualty loss ADIT recorded in Account 282 is to be included in the bandwidth formula “to the extent that storm damage costs are included in expense accounts that are included in the bandwidth formula.” *Id.* at 28 (citing Opinion No. 518, 139 FERC ¶ 61,105 at P 88).

<sup>206</sup> Third Bandwidth Order on Rehearing and Clarification, 145 FERC ¶ 61,047 at P 25.

<sup>207</sup> Louisiana Commission Rehearing Request at 4-5, 25-28. The Louisiana Commission states that: (1) Entergy witness Mr. Peters testified that the casualty loss ADIT is associated with “the investment on the Operating Company’s books at the time of the storm” and not storm-related expenses booked to FERC account, *id.* at 25 (quoting ESI-13 at 7); (2) Entergy witness Mr. Roberts testified that “casualty loss . . . represents tax deductions for property damaged by a hurricane[.]” *id.* at 25 (citing ESI-34 at 10); (3) Mr. Roberts conceded that the casualty loss tax deduction is a calculation of how much the preexisting property lost in value as a result of the storm, *id.* at 27 (citing Tr. at 220); (4) Mr. Roberts conceded that the casualty loss ADIT results from a “tax loss, not a book loss . . . there’s a different basis in plant for tax purposes than there is for book purposes once depreciation is started . . . the casualty loss deductions relate to a change in that tax basis, not to a change in the book basis[.]” *id.* at 27 (citing Tr. at 229).

### **Commission Determination**

110. We deny rehearing. At the outset we note that, in the September 18, 2013 joint motion<sup>208</sup> to lift the stay and establish a procedural schedule in this proceeding, the Louisiana Commission, the Arkansas Commission, Entergy and Trial Staff stipulated that the Commission's decision on rehearing of Opinion No. 518 will control the question of whether the same allocation methodology that Entergy Services used for including net operating loss ADIT in the bandwidth formula should be used for including casualty loss ADIT in the bandwidth formula.<sup>209</sup> The Louisiana Commission's current argument attempts to vitiate this stipulation by raising these arguments on rehearing. The Commission's determination in Opinion No. 518 to include casualty loss ADIT in the ADIT variable to the bandwidth calculation has been upheld by the United States Court of Appeals for Fifth Circuit and will not be reconsidered at this late date.<sup>210</sup>

111. In any event, the alleged "new evidence" does not warrant revisiting the Commission's determination. As the Presiding Judge explained that, contrary to the Louisiana Commission's assertion, the testimony of Entergy's witness Bunting in the Third Bandwidth proceeding and Entergy's witness Roberts in this Fourth Bandwidth proceeding do not conflict.<sup>211</sup>

112. Nor is there any actual conflict here between the Louisiana Commission's "new evidence"—and prior rulings, because the Commission already recognized that the includability of casualty loss ADIT in the bandwidth calculation is contingent on casualty losses (or rather the storm costs on which the casualty losses are based) being included in

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<sup>208</sup> Joint Motion of the Active Parties to Lift Stay and Establish Procedural Schedule (Sept. 18, 2013). The "Active Parties" are the Louisiana Commission, the Arizona Commission and Entergy Services.

<sup>209</sup> *Id.* at 2 ("As to issue Number 2, the Active Parties and Staff agree to stipulate that the methodology that [Entergy] used for including Net Operating Loss ADIT in the bandwidth formula should be used for including casualty loss ADIT in the bandwidth formula.").

<sup>210</sup> *La. Pub. Serv. Comm'n v. FERC*, 771 F.3d 903 at 918-919.

<sup>211</sup> *See* Initial Decision, 148 FERC ¶ 63,015 at P 188.

bandwidth eligible accounts.<sup>212</sup> As the Commission stated on rehearing of Opinion No. 518:

In Opinion No. 505, the Commission found that *to the extent that storm damage costs are included in expense accounts that are included in the bandwidth formula (production storm damage expense)*, ADIT for net operating loss carry-forwards associated with storm damages should also be included. For these reasons, both the ADIT related to the calculated net operating loss carry-forward balance recorded in Account No. 190 and the casualty loss ADIT recorded in Account No. 282 are to be included.<sup>213</sup>

113. Moreover, the Court declared that “[s]torm damage costs included in bandwidth eligible accounts are includable for cost-of-service purposes.”<sup>214</sup> It also affirmed that “[c]asualty loss ADIT amounts are directly attributable to storm damages.”<sup>215</sup> Therefore,

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<sup>212</sup> As the Court pointed out, in the Third Bandwidth proceeding, neither the Louisiana Commission nor Entergy disputed that casualty loss is the result of storm damages and that Mr. Louiselle’s testimony supported this conclusion. *La. Pub. Serv. Comm’n v. FERC*, 771 F.3d at 918 (citing Third Bandwidth Rehearing and Clarification Order, 145 FERC ¶ 61,047 at P 24). In *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at P 234 (2010), the Commission agreed with the Louisiana Commission and determined that storm damage costs resulting from hurricanes Katrina and Rita amortized in bandwidth eligible expense accounts are included in the Commission’s cost-of service rate and must be included in the bandwidth calculation. *Id.* (noting that storm damage costs related to storm damage losses from hurricanes Katrina and Rita are recorded in Account 182.3 and must be amortized to the appropriate functional operation and maintenance accounts as the costs are recovered in rates; and, “[t]o the extent that storm damage costs are amortized to expense accounts included in the bandwidth calculation (production storm damage expense), such costs are included in a Commission cost of service rate”).

<sup>213</sup> Third Bandwidth Rehearing and Clarification Order, 145 FERC ¶ 61,047 at P 18 & n.40; *see also* Opinion No. 518, 139 FERC ¶ 61,105 at P 88 (storm damage costs included in bandwidth eligible accounts are includable for cost-of service purposes) (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 234).

<sup>214</sup> *La. Pub. Serv. Comm’n v. FERC*, 771 F.3d at 918 (citing Opinion No. 518, 139 FERC ¶ 61,105 at P 188).

<sup>215</sup> *Id.* (citing Third Bandwidth Rehearing and Clarification Order, 145 FERC ¶ 61,047 at P 24).

the Court held that “because casualty loss ADIT was recorded in a bandwidth eligible account and was generally and properly includable for cost-of-service purposes, FERC reasonably concluded that the System Agreement required its inclusion in the bandwidth calculation.”<sup>216</sup>

**b. Prior Ruling**

114. As to the second issue, the Louisiana Commission asserts that in an order on a contested settlement involving modification of the bandwidth formula, the Commission made an independent finding that storm cost accruals should be excluded from the bandwidth calculation because storm costs are almost entirely unrelated to the production function.<sup>217</sup> The Louisiana Commission states that there is no dispute in this case that casualty losses result from damage to property caused by storms, the same storms for which accruals are recorded in Account 924.<sup>218</sup> The Louisiana Commission states that, under the Commission’s most specific precedent, casualty loss ADIT consists of non-production losses and including it in the bandwidth calculation is unreasonable and unfair.

**Commission Determination**

115. The Fifth Circuit has already rejected this argument. The Court noted that the Contested Settlement Order is of no precedential effect because it merely approved a settlement.<sup>219</sup> The Fifth Circuit also explained that the Louisiana Commission’s assertion that the treatment of casualty loss ADIT in Opinion No. 518 conflicts with the earlier rule “is selective, if not disingenuous . . . [because], ‘to the extent that FERC’s initial treatment of storm-related costs varies from its current treatment of them, [the Louisiana Commission]’ *itself brought this change by challenging the exclusion of such costs in the first bandwidth proceeding.*”<sup>220</sup> Thus, the Commission and, indeed, the Court have already addressed this issue. Having failed to show any new evidence or change of

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<sup>216</sup> *Id.* at 918 & n.11.

<sup>217</sup> Louisiana Commission Rehearing Request at 5 (citing *Entergy Servs., Inc.*, 128 FERC ¶ 61,275 (2009) (Contested Settlement Order)).

<sup>218</sup> *Id.*

<sup>219</sup> *La. Pub. Serv. Comm’n v. FERC*, 771 F.3d at 918.

<sup>220</sup> *Id.*

circumstance that could justify revisiting this determination, the Louisiana Commission is precluded from raising it, yet again, here.

**E. Waterford 3 Sale/Leaseback: Treatment of Lease as a Financing**

**1. Background**

116. Waterford 3 is a 1,158 MW nuclear power plant operated by Entergy Louisiana. Located in Taft, Louisiana, it was placed in commercial operation in 1985.<sup>221</sup> In 1989, the predecessor to Entergy Louisiana entered into an agreement to sell and leaseback a 9.3 percent interest in Waterford 3.<sup>222</sup> Consequently, Entergy Louisiana owns 90.7 percent of the facility (Waterford 3 Owned Plant) and leases back the remaining 9.3 percent (Waterford 3 Leased Plant).<sup>223</sup> The Waterford 3 lease runs for 27.5 years, terminating in 2017.<sup>224</sup> In 1984, the Nuclear Regulatory Commission (NRC) licensed the plant for a period of 40 years, and it is eligible for a 20-year extension at the end of that period.<sup>225</sup>

117. From the time Waterford 3 was placed in service, Entergy Louisiana (or its predecessor) depreciated the Waterford 3 Owned Plant over the 40-year term of the plant's NRC license.<sup>226</sup> In 1992, the Chief Accountant of the Commission informed Entergy Louisiana in an audit report (1992 FERC Audit Report) that the Waterford 3 Leased Plant should also be depreciated over the 40-year NRC license term rather than amortized over the 27.5-year term of the lease.<sup>227</sup> In 2005, the Louisiana Commission instructed Entergy Louisiana for retail ratemaking purposes to amortize the Waterford 3

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<sup>221</sup> *Id.* P 140 & n.317 (citing Ex. ESI-108 at 8:4-6 (Kenny Dir. Test.)).

<sup>222</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 84.

<sup>223</sup> Initial Decision, 148 FERC ¶ 63,015 at P 140.

<sup>224</sup> *Id.* P 142 & n.319 (citing Ex. LC-101 at 5:20-34, 6:13-15 (Kollen Dir. and Ans. Test.)).

<sup>225</sup> *Id.* P 142 & n.320 (citing Ex. LC-110 at 20).

<sup>226</sup> *Id.* P 144. As the Presiding Judge noted, the parties occasionally speak of “depreciating” the Waterford 3 plant over the period of the NRC license period and “amortizing” the leased portion of the plant over the leased term. *Id.* P 144 & n.325.

<sup>227</sup> *Id.* P 144 & n.324 (citing Ex. ESI-109).

Owned Plant and Leased Plant over the 40-year NRC license term and its 20-year extension, for a total of 60 years.<sup>228</sup>

118. In Opinion No. 545, the Commission affirmed the Presiding Judge's finding that Entergy Louisiana's use of a 27.5-year amortization period (based on the initial term of the lease) rather than the estimated service life of the facility (originally 40 years, later extended to 60 years), violated Commission and Louisiana Commission precedent.<sup>229</sup> Noting that it is "undisputed that in 2005, the Louisiana Commission approved depreciation rates for the entire Waterford 3 plant based on an estimated life of 60 years," the Commission affirmed the Presiding Judge's finding that the components within the bandwidth formula that use the amortization period require use of the retail regulator-approved service life.<sup>230</sup> Thus, the Commission affirmed that Entergy Louisiana made an accounting error in 2005 when it reverted to using the initial 27.5-year lease term to compute the Waterford 3 Leased Plant amortization expense, and continued this error through 2009.<sup>231</sup>

119. The Commission rejected the Louisiana Commission's contention that the Waterford 3 sale/leaseback should be treated as a capital lease rather than a financing transaction. The Commission explained that, while this transaction involved the sale of property by Entergy Louisiana and a lease of the property back to Energy Louisiana, this transaction was entered into with a financial institution.<sup>232</sup> The Commission determined that the Waterford 3 sale/leaseback was "clearly a financing transaction rather than a capital lease because Entergy Louisiana retained substantially all of the benefits and risks incident to the ownership of the property as it continues to take 100 percent of the plant's output, continues to operate 100 percent of the plant and continues to fund and be responsible for 100 percent of the future decommissioning of the plant."<sup>233</sup>

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<sup>228</sup> *Id.* P 145 & n.326 (citing ESI-108 (Kenney Dir. Test.); Ex. ESI-110 (Louisiana Commission Order No. U-20925, May 25, 2005)).

<sup>229</sup> Initial Decision, 148 FERC ¶ 63,015 at P 142.

<sup>230</sup> *Id.* P 143.

<sup>231</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 143.

<sup>232</sup> *Id.* P 144 & n.217 (citing Ex. No. LC-169), noting that the financial institution is the First National Bank of Commerce as Owner Trustee under Trust Agreement No. 1.

<sup>233</sup> *Id.* P 144.

## 2. Request for Rehearing

120. On rehearing, the Louisiana Commission contends that the Waterford 3 Leased Plant was correctly depreciated from 2005-2009 using a 27.5-year amortization period and that it is appropriate to treat the Waterford 3 sale/leaseback as a capital lease for FERC accounting purposes, rather than a financing transaction. The Louisiana Commission asserts that Opinion No. 545: (1) fails to reconcile the Waterford 3 sale/leaseback accounting with Order No. 390<sup>234</sup> and the Commission's normal ratemaking treatment of sale/leasebacks; (2) ensures a discriminatory result because it treats the Waterford 3 sale/leaseback transaction differently for ratemaking purposes than all other sale/leasebacks; and (3) overlooks the fact that the Entergy accounting memorandum (Accounting Memorandum) it describes as "confused unintelligible, unreliable, and untrustworthy," was the basis for Entergy's change in accounting. We deny rehearing as explained below.

### a. Order No. 390

121. The Louisiana Commission objects to the Commission's determination in Opinion No. 545 that the Waterford 3 sale/leaseback was a financing transaction pursuant to Financial Accounting Standards (FAS) 98, and not a lease for FERC accounting purposes.<sup>235</sup> As a result of this determination, the Commission required Waterford 3 to be depreciated or amortized over the 60-year service life of Waterford 3, rather than the 27.5-year period of the lease. The Louisiana Commission contends that the Commission never adopted the relevant FAS standard and that it should instead rely on its own accounting rules for leases, established in Order No. 390. That order, issued in 1984, coordinated the Commission's rules for lease accounting with the then-existing Financial Accounting Standards Board (FASB) pronouncements, which required treating all leases as either capital leases or operating leases, and provided that a capital lease, such as the Waterford 3 sale/leaseback, should be amortized over the life of the lease.

122. The Louisiana Commission states that Opinion No. 545 relies on the Presiding Judge's determination that the Louisiana Commission, in 1989, instructed Entergy Louisiana "not to amortize the Waterford 3 leased plant as if it were a capital lease."<sup>236</sup>

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<sup>234</sup> *Revisions to Pub. Util. and Nat. Gas. Co. Classification Criteria, Uniform Systems of Accounts, Form Nos. 1, 1-F, 2 and 2-A and Related Regulations*, Order No. 390, FERC Stats. & Regs. ¶ 30,586 (1984) (Order No. 390).

<sup>235</sup> Louisiana Commission Rehearing Request at 43.

<sup>236</sup> *Id.* (quoting Opinion No. 545, 153 FERC ¶ 61,303 at P 147).

The Louisiana Commission argues that it has issued no such instruction. The Louisiana Commission states that, in approving the sale/leaseback, the Louisiana Commission retained the option of treating it for ratemaking as if the plant were still owned by Entergy Louisiana; it states that it directed no accounting treatment of the asset and made no attempt to prescribe FERC accounting. The Louisiana Commission states that its conditions do not contain any directions for accounting, much less FERC accounting, and, in any event, cannot control FERC accounting.

123. The Louisiana Commission adds that Opinion No. 545 also relies on the 1992 FERC Audit Report, which accepted Entergy's accounting for the sale/leaseback as a "financing" and proceeded to the conclusion that the amortization of the asset would not change because of a "method of financing."<sup>237</sup> The Louisiana Commission argues that the Commission still permitted expensing the entire book value over the lease life, although it required that the difference between amortization over the lease life and service life be recorded as "additional interest costs," instead of "amortization expense."<sup>238</sup> The Louisiana Commission states that the 1992 FERC Audit Report did not mention the Commission's rules regarding lease accounting, the requirements of Order No. 390, or the inconsistency between Commission requirements and those in FAS 98.

124. The Louisiana Commission asserts that the Commission's accounting rules for leases are incorporated into General Instructions 19 and 20 of the Uniform System of Accounts, which were adopted in Order No. 390.<sup>239</sup> Louisiana Commission states that Order No. 390 required expensing a capital lease by the end of the lease term. The Louisiana Commission argues that Account 404 requires amortization of a sale/leaseback over the "period of its benefit to the utility," which the Louisiana Commission argues is the lease term.<sup>240</sup> The Louisiana Commission adds that, also contrary to a recommendation in the 1992 FERC Audit Report, FAS 71 provided that "generally accepted accounting principles do not require all interest or amortization of leased assets to be classified as separate items in an income statement."<sup>241</sup>

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<sup>237</sup> *Id.* at 43-44 (quoting Ex. S-11 at 9).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 35 (citing 18 C.F.R. pt. 101, Gen. Instrs. 19 and 20).

<sup>240</sup> *Id.* at 44-45 (citing 18 C.F.R. pt. 101, Account 404).

<sup>241</sup> *Id.* at 45 (quoting Motion to Lodge, Attach. 4 at 17, ¶ 43).

125. The Louisiana Commission argues that, to the extent the Commission's accounting rules, i.e., the Uniform System of Accounts, conflict with FAS pronouncements, the Uniform System of Accounts controls.<sup>242</sup>

### **Commission Determination**

126. We deny rehearing. The Louisiana Commission provides an extensive survey of past and existing Commission policy regarding capital and operating leases. However, we see no conflict between Order No. 390 (or any other Commission precedent) and treating the Waterford 3 sale/leaseback as a financing transaction. Simply stated, Order No. 390 does not address the bandwidth formula.

127. The bandwidth formula is a formula rate with defined inputs to that formula rate. As the Presiding Judge and the Commission noted, the components within the bandwidth formula that use the amortization period, the Nuclear Accumulated Provision for Depreciation and Amortization and Nuclear Depreciation and Amortization Expense variables, require the use of the retail regulator-approved service life.<sup>243</sup> At hearing, it was undisputed that, in 2005, the Louisiana Commission instructed Entergy Louisiana for retail ratemaking purposes to amortize the Waterford 3 Owned Plant and Leased Plant over the 40-year term of the plant's NRC license and its 20-year extension period, a total of 60 years.<sup>244</sup>

128. While the Louisiana Commission now points to conditions in its approval of the Waterford 3 sale/leaseback in 1989, it cannot dispute that in 2005, the Louisiana Commission subsequently required use of a 60-year amortization period for the entire Waterford 3 plant. In the relevant order, the Louisiana Commission noted that the appropriate life of the Waterford 3 nuclear unit for depreciation purposes has been "vigorously litigated."<sup>245</sup> And, pursuant to the Louisiana Commission's 2005 order,

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<sup>242</sup> *Id.* at 45.

<sup>243</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 143; Initial Decision, 148 FERC ¶ 63,015 at P 164 & n.363 (citing Ex. ESI-107 at 53 (definition of the "NAD" variable), 55 (definition of the "NDE" variable)).

<sup>244</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 143 ("[I]t is undisputed that in 2005 the Louisiana Commission approved depreciation rates for the entire Waterford 3 plant based on an estimated life of 60 years"); *see also* Initial Decision, 148 FERC ¶ 63,015 at P 145 & n.326 (citing ESI-108 at 9:14-20 (Kenney Dir. Test.); Ex. ESI-110 (Louisiana Commission Order No. U-20925, May 25, 2005)).

<sup>245</sup> *See* Ex. ESI-110 at 3.

Entergy Louisiana began to depreciate the Waterford 3 plant based on a 60-year estimated service life. Therefore, as the Initial Decision correctly found and Opinion No. 545 affirmed, the amortization expense for the Waterford 3 Leased Plant used in the bandwidth calculation should be based on the 60-year estimated service life of the Waterford plant that the Louisiana Commission approved. Accordingly, the refinanced portion of the Waterford 3 plant, i.e., the Waterford 3 Leased Plant, is properly amortized to Account 404 over the 60-year expected life of Waterford 3.<sup>246</sup>

129. Use of the 60-year, retail regulator-approved service life for Waterford 3 Leased Plant is also consistent with recent precedent. Throughout the bandwidth proceedings, the Louisiana Commission has repeatedly argued for different depreciation periods. As the Commission points out in Opinion No. 545, the Commission has consistently rejected those arguments and explained that the bandwidth formula requires use of the retail regulator-approved depreciation rates.<sup>247</sup> For example, in response to the Louisiana Commission's contention in the Second Bandwidth proceeding that use of the retail regulator depreciation policy rather than the Commission depreciation policy was improper delegation of jurisdiction over depreciation expenses to retail regulators,<sup>248</sup> the Commission explained:

The formula mandates the use of depreciation rates reported in the FERC Form 1, reflecting, in part, state regulatory approved depreciation rates, which the Commission has adopted for use in the bandwidth formula. Therefore, in this bandwidth proceeding, in order to calculate a just and reasonable rate, Entergy was required to use the state regulator approved depreciation expense as filed in the FERC Form 1.<sup>249</sup>

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<sup>246</sup> Initial Decision, 148 FERC ¶ 63,015 at P 269.

<sup>247</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 148 & n.222 (citing prior orders).

<sup>248</sup> Opinion No. 514, 137 FERC ¶ 61,029 at P 42, *order on reh'g*, Order No. 514-A, 142 FERC ¶ 61,013 (2013).

<sup>249</sup> *Id.* P 49; *see also* Opinion No. 505, 130 FERC ¶ 61,023 at P 170 (rejecting contention that depreciation should be based on NRC license life rather than amounts recorded on FERC Form No. 1); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107, at P 15 (2012) (Opinion No. 519) (denying request to change the provisions of the bandwidth formula that bases depreciation expenses upon depreciation rates approved by retail regulators).

The United States Court of Appeals for the Fifth Circuit Court (Fifth Circuit) upheld this determination.<sup>250</sup>

130. Similarly, in the first bandwidth proceeding, the Louisiana Commission argued that nuclear depreciation should be based on the NRC license life, consistent with what the Louisiana Commission believed to be Commission policy. In Opinion No. 505, the Commission rejected this argument, holding that, within the context of the bandwidth formula rate, the amounts reported on the FERC Form [No.] 1 control.<sup>251</sup>

131. In arguing, yet again, that federal policy – in this case, that the Commission’s Order No. 390 favoring amortization of a lease over the life of a lease – should replace the retail regulator-approved service life, the Louisiana Commission is seeking to change the bandwidth formula itself. As the Commission has repeatedly stated, it is not appropriate to seek to change the bandwidth formula itself during an annual bandwidth implementation proceeding, such as this Fourth Bandwidth proceeding.<sup>252</sup>

132. Finally, contrary to the Louisiana Commission’s premise, Order No. 390 is not the definitive “last word” on how the Commission must treat leases for purposes of depreciation.<sup>253</sup> We note that, subsequent to the issuance of Order No. 390, with full knowledge of General Instructions 19 and 20, in the 1992 FERC Audit Report, the Chief Accountant determined that use of the 27.5-year lease-life as the depreciation period for Waterford 3 Leased Plant was an error.<sup>254</sup> The Chief Accountant determined that,

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<sup>250</sup> *La. Pub. Serv. Comm’n v. FERC*, 761 F.3d 540, 551-55 (5<sup>th</sup> Cir. 2014).

<sup>251</sup> Opinion No. 505, 130 FERC ¶ 61,023 at P 170.

<sup>252</sup> *See, e.g., id.* P 55, Opinion No. 505, 130 FERC ¶ 61,023 at P 172.

<sup>253</sup> *See* Louisiana Commission Rehearing Request at 45. The Louisiana Commission overstates the ruling of Order No. 390. In Order No. 390, the Commission declined to adopt future FAS pronouncements *per se*. The Commission nevertheless signaled that it would consider them on a case-by-case basis. Accordingly, it was appropriate for the Commission to consider FAS 98 when evaluating its treatment of the Waterford 3 sale/leaseback.

<sup>254</sup> Ex. ESI-109 at 9-10. The Chief Accountant explained that:

There was no change in the estimated service life of the facility as a result of the sale/leaseback. Further, the above-cited definition of depreciation does not indicate that a method of financing should alter the depreciation rate. The

instead, the Waterford 3 sale/leaseback is properly accounted for as a financing and must be amortized over the remaining estimated service life of the facility (which, at that time, was 40 years).

133. Accordingly, we are not persuaded that Order No. 390 requires us to grant rehearing.

**b. Discrimination**

134. The Louisiana Commission contends that Opinion No. 545's treatment of the Waterford 3 Leased Plant is discriminatory and unreasonable because it ensures that it will not be amortized at the end of the lease life. According to the Louisiana Commission, the Commission's general ratemaking policy for leases, including sale/leasebacks, allows the lessee to include the *lease payments* in the cost of service.<sup>255</sup> The Louisiana Commission states that this approach ensures that the lessee will recover the entire principal amount of the financing over the life of the lease. The Louisiana Commission states that "[a]ccounting should follow ratemaking, so the Commission's accounting should permit expensing a sale/leaseback over the life of the lease."<sup>256</sup>

135. The Louisiana Commission states that the recovery of lease payments associated with the Grand Gulf sale/leaseback was treated as a rent expense. The Louisiana Commission states that this ratemaking treatment allows for the recovery of all principal over the life of the lease. The Louisiana Commission states that Entergy treated the Grand Gulf sale/leaseback as a financing, just as it treated the Waterford 3 sale/leaseback. But, in the case of the Grand Gulf sale/leaseback, the entire amount of principal is reflected in cost of service over the life of the lease. The Louisiana Commission argues that the only way to achieve equivalent treatment in the bandwidth calculation is to amortize the asset over the life of the lease or to include both the amortization and the interest in the bandwidth calculation with interest calculated to ensure the full expensing of the asset over the term of the lease.

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Commission has consistently held that a utility should accrue depreciation over the service life of a facility.

*Id.* at 10.

<sup>255</sup> Louisiana Commission Rehearing Request at 45 (citing Order No. 390).

<sup>256</sup> *Id.* at 45.

136. The Louisiana Commission highlights the Commission's statement in Opinion No. 545 that the Presiding Judge was correct in declaring "there is no justification for perpetuating Entergy's mistake by calling the Waterford 3 Leased Plant Excess Amortization 'interest' and billing ratepayers for it."<sup>257</sup> The Louisiana Commission argues that the 1992 FERC Audit Report, on which the Presiding Judge and Commission rely, instructed Entergy Louisiana to book the excess amortization as interest. The Louisiana Commission adds that the bandwidth formula instructs that the imbedded cost of capital should be included in the bandwidth calculation.

137. The Louisiana Commission contends that, as the Commission recognized in Order No. 390, the typical treatment of any lease, including a sale/leaseback, for ratemaking purposes, is to exclude the sale/leaseback from the rate base, but allow all lease payments to be expensed as part of the cost of service. The Louisiana Commission states that the Commission's accounting rules are intended in part to support its ratemaking requirements. The Louisiana Commission argues that, if a sale/leaseback is treated as a "financing," it is not recorded as a lease at all, but remains in accounts for owned plant. The Louisiana Commission contends that, if a lease were treated as if it did not exist for Commission accounting purposes, it could undermine the ratemaking treatment because the lease would be eliminated for FERC reporting.<sup>258</sup>

138. The Louisiana Commission adds that treating a sale/leaseback as a "financing" would render the utility's accounts incongruous.<sup>259</sup> The sale/leaseback would remain in Account 101, but other accounts would reflect lease accounting. The Louisiana Commission asserts that ADIT related to the sale/leaseback transaction, the lease payments (versus amortization), and amounts booked as "additional interest," are all included in FERC accounts. Also, the Louisiana Commission claims, the proceeds of the transaction were used to refinance debt, producing new, lower-cost debt of about \$340 million on the books, with a term equivalent to the lease life. The Louisiana Commission argues that these entries make sense only if the sale/leaseback is treated as a (capital) lease. If the sale had never occurred, there would be no ADIT and there would be no new debt. The Louisiana Commission contends that, if "financing accounting" is used, the

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<sup>257</sup> *Id.* at 46 (quoting Opinion No. 545, 153 FERC ¶ 61,303 at P 160).

<sup>258</sup> *Id.* at 48.

<sup>259</sup> *Id.*

underlying transaction causing these effects would be treated as if it never occurred, producing an anomalous accounting picture.<sup>260</sup>

### **Commission Determination**

139. We deny rehearing. The Presiding Judge and the Commission thoroughly explained why it is appropriate to treat the Waterford 3 Leased Plant as a financing, rather than a lease.<sup>261</sup> Moreover, this is the first time – long after the hearing and briefing have closed and the Presiding Judge and Commission have issued their respective decisions – that the Louisiana Commission has asserted that the Grand Gulf sale/leaseback is treated like a lease (and it makes this assertion without providing any citations that could verify this contention).<sup>262</sup> Assuming for the sake of argument that the factual representation regarding Grand Gulf is correct, the Louisiana Commission fails to establish why it is *unduly* discriminatory<sup>263</sup> for the Commission to follow the dictates of the 2005 FERC Audit Report and the 2005 Louisiana Commission order and treat the Waterford 3 Leased Plant as a financing, requiring amortization of the lease over a 60-year period. Apart from asserting that both Grand Gulf and Waterford 3 involve leases, the Louisiana Commission does not explain how Grand Gulf and Waterford 3 are similarly situated. Moreover, the record indicates that these plants and their respective

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<sup>260</sup> Louisiana Commission Rehearing Request at 49.

<sup>261</sup> See Initial Decision, 148 FERC ¶ 63,015 at PP 192-215; Opinion No. 545, 153 FERC ¶ 61,303 at PP 142-145, PP 147-148.

<sup>262</sup> We note that the Louisiana Commission briefly mentions Grand Gulf in its Post-Hearing Brief at 26 (stating that the Commission rejected the Louisiana Commission’s “attempt to have it use an assumed license extension for Entergy’s Grand Gulf nuclear unit in 2008”). However, the brief and accompanying citation, *La. Pub. Serv. Comm’n v. System Energy Resources, Inc.*, 124 FERC ¶ 61,003 (2008), refer to use of a 40-year service life, based on Grand Gulf’s NRC operating license, for the depreciation and decommissioning rates reflected in formula rates. *Id.* PP 1, 4. There is no mention of a depreciation period that is commensurate with the duration of a lease.

<sup>263</sup> 16 U.S.C. § 824d(b) (2012) (prohibiting “unreasonable difference in rates” or “undue preference or advantage”); see also *Cities of Bethany, et al. v. FERC*, 727 F.2d 1131, 1138-39 (D.C. Cir. 1984) (not unduly discriminatory to treat categories of customers with dissimilar characteristics differently).

leases are not similarly situated.<sup>264</sup> The Waterford 3 Leased Plant is unique in that it is a relatively small percentage of the Waterford 3 plant, and the Chief Accountant and the Louisiana Commission already weighed in, over a decade ago, on how the plant should be depreciated and the lease amortized. Indeed, as the Commission affirmed, based on the record that was developed in this proceeding, Entergy Louisiana retained substantially all the benefits and risks incident to the ownership of the Waterford 3 Leased Plant, as it continues to operate 100 percent of the plant and continues to fund and be responsible for 100 percent of the future decommissioning of the plant.<sup>265</sup> Therefore, regardless whether the Grand Gulf sale/leaseback is treated as a lease, it is appropriate to treat the Waterford 3 Leased Plant as a financing transaction.

140. As to the Louisiana Commission's request to include interest allegedly related to the sale/leaseback, the Presiding Judge thoroughly addressed that issue.<sup>266</sup> The Presiding Judge found that the 1992 FERC Audit Report did not require such recording of interest,<sup>267</sup> and he further explained why it would be inappropriate to treat the excess amortization (that arises from using the shorter 27.5-year amortization period instead of the 60-year amortization) as interest:

A sale/leaseback transaction is, purely speaking, a sale and a lease. It is only imputed to be a financing transaction comparable to a mortgage loan. [citation omitted]. Since it is a sale and a lease, it does not use terms like "interest" and "principal." Instead, it uses terms like "purchase price" and "rent." As a result the amount of "interest" to impute to a sale/leaseback as if it were a "financing transaction" can never by anything other than an estimate. [citation omitted]<sup>[268]</sup>

141. The Presiding Judge found that the Louisiana Commission's suggested modification – including excess amortization in the CM variable to the formula – would perpetuate Entergy's mistake by calling it "interest" and billing ratepayers for it. He said

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<sup>264</sup> Differences in rates are justified when they are predicated on differences in facts. *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2012); *St. Michaels Utils. Comm'n v. FPC*, 377 F.2d 912, 915 (4<sup>th</sup> Cir. 1967); *Frankfort v. FERC*, 678 F.2d 699, 706 (7<sup>th</sup> Cir. 1982).

<sup>265</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 144.

<sup>266</sup> See Initial Decision, 148 FERC ¶ 63,015 at PP 193-206.

<sup>267</sup> *Id.* P 196.

<sup>268</sup> *Id.* P 204; see also *id.* PP 204-206 for additional reasoning on this issue.

that calling the mistake interest is just calling the erroneous overcharge something else – and declined to “put lipstick on a pig.”<sup>269</sup> The Commission affirmed.<sup>270</sup> The Louisiana Commission provides no persuasive reason to reverse this determination.

142. The Louisiana Commission’s contention that treating the Waterford 3 Leased Plant like a financing transaction is tantamount to treating it as if the lease did not exist for Commission accounting and reporting purposes, misses the point. The point of treating the lease as a financing transaction is to essentially disregard the capital lease for ratemaking purposes because, as the Commission explained, and we reiterate, “Entergy Louisiana retained substantially all the benefits and risks incident to ownership of the property.”<sup>271</sup>

143. The Louisiana Commission similarly contends that treating the Waterford 3 sale/leaseback as a financing transaction would render the utility’s accounts incongruous because other accounts, including ADIT, include expenses related to the lease. Even if this is true – again, this is an issue that the Louisiana Commission raises for the first time on rehearing and thus it is not fleshed out in the record – the Louisiana Commission does not explain why such accounting either violates the FPA, the Commission’s regulations or, more importantly, yields an unjust and unreasonable result under the bandwidth formula.

**c. Accounting Memorandum**

144. The Louisiana Commission asserts that the Commission erred in approving the change in accounting for Waterford 3, given that Entergy relied on the Accounting Memorandum as the basis to change its accounting for the amortization of the sale/leaseback (i.e., to use a 60-year period for the 2009 test year).<sup>272</sup> The Louisiana Commission insists that the Commission needs to explain how it can uphold an accounting determination that was based on an Accounting Memorandum that the Commission dismisses as “confused, unintelligible, unreliable, and untrustworthy.”<sup>273</sup>

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<sup>269</sup> *Id.* P 206 & n.56 (“To put it plainly, “you can put lipstick on a pig; it’s still a pig.””) (quoting Tr. at 126:1-612:24).

<sup>270</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 160.

<sup>271</sup> *Id.* P 144.

<sup>272</sup> Louisiana Commission Rehearing Request at 7, 49.

<sup>273</sup> *Id.* at 4, 49 (citing Opinion No. 545, 153 FERC ¶ 61,303 at P 146).

The Louisiana Commission argues that the Commission's approval of the correction to the 2009 accounting books based on the Accounting Memorandum "undermine[s] the standards for professional accounting determinations under the Uniform System of Accounts."<sup>274</sup>

### **Commission Determination**

145. We deny rehearing because the Commission did not affirm the 60-year depreciation period for Waterford 3 based on the Accounting Memorandum. Even if, as the Louisiana Commission asserts, the Accounting Memorandum was the source of Entergy's discovery of its Waterford 3 amortization/depreciation error, the Accounting Memorandum was not the basis for the determination that the appropriate depreciation period for Waterford 3 is 60 years.

146. Rather, the Presiding Judge required Entergy to use a 60-year depreciation period for Waterford 3 based on a Louisiana Commission order, Commission precedent on depreciation, as well as the bandwidth formula itself and related precedent.<sup>275</sup> In Opinion No. 545, the Commission affirmed the Presiding Judge's holding that Entergy erred in using the 27.5 year amortization period for Waterford 3 Leased Plant, also based on Louisiana Commission and Commission precedent regarding depreciation, the bandwidth formula, and cases construing the bandwidth formula.<sup>276</sup> Therefore, contrary to the Louisiana Commission's contention, the Accounting Memorandum is irrelevant to the finding the Entergy erred in using a 27.5 year amortization period for Waterford 3 Leased Plant.

#### **F. Waterford 3 Amortization June 1, 2005 through December 31, 2005**

##### **1. Entergy's Rehearing Request**

147. Entergy seeks clarification that the Commission's directive to Entergy to revise and resubmit its FERC Form No. 1s was not intended to retroactively amend the bandwidth formula.<sup>277</sup> Entergy asserts that the bandwidth formula ordered by the

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<sup>274</sup> *Id.* at 50.

<sup>275</sup> *See* Initial Decision, 148 FERC ¶ 63,015 at PP 163-164, 215 & nn.471-172.

<sup>276</sup> *See* Opinion No. 545, 153 FERC ¶ 61,303 at PP 142-143, PP 147-148.  
*See also id.* P 142 & n.222.

<sup>277</sup> *See id.* at 11-13.

Commission to be utilized for the period June 1, 2005 through December 31, 2005 did not include property under capital lease in the definition of nuclear production plant, nor did it include amortization related to Waterford 3 Leased Plant in Accumulated Amortization or Amortization expense. Accordingly, Entergy asks the Commission to clarify that, by directing Entergy to refile its Form No. 1 for 2005 to reflect the appropriate amortization period for the Waterford 3 Leased Plant and by ordering the recalculation of bandwidth formula for test year 2005, the Commission is not retroactively changing the bandwidth formula used for June 1, 2005 through December 31, 2005.

148. Entergy asserts that, in ordering the implementation of the bandwidth formula on June 1, 2005 and directing the filing of bandwidth payments and receipts for the seven-month period of June 1, 2005 through December 31, 2005, the Presiding Judge did not consider directives in prior orders. In prior orders, the Commission directed that “[c]alculations must be based on the bandwidth formula accepted in Docket Nos. EL01-88-004 and EL0[1]-88-006.”<sup>278</sup> According to Entergy, the bandwidth formula accepted in those orders did not include property under capital lease in the definition of nuclear production plant; thus, the Waterford 3 Leased Plant could not be included in the calculation of total production costs. Entergy highlights paragraph 190 of the Initial Decision, which notes that “[t]he amendment to the bandwidth formula that added the Waterford 3 Leased Plant provisions became effective May 30, 2007 [279]” and “was implemented in the First Bandwidth Proceeding in 2007 for test year 2006.”<sup>280</sup>

149. Entergy points out that the Commission in Opinion No. 545 stated that “[t]o the extent that the 2005 and 2006 bandwidth formula calculations included amortization of the Waterford 3 capital lease, such amortization should be based on the appropriate

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<sup>278</sup> *Id.* at 12. See *La. Pub. Serv. Comm’n v. FERC*, 137 FERC ¶ 61,047, at P 34 n.41, (2011) (“Calculations must be based on the bandwidth formula accepted in Docket Nos. EL01-88-004 and EL0[1]-88-006.”) (citing *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 and *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095).

<sup>279</sup> Entergy Rehearing Request at 12 & n.29 (citing Initial Decision, 148 FERC ¶ 63,015 at P 190 & n.419 (citing *Entergy Servs., Inc.*, 119 FERC ¶ 61,193, at P 16 (2007))). Entergy notes that this is in evidence at Ex. LC-158. *Id.* at 12 n.29.

<sup>280</sup> *Id.* at 12 & n.30 (citing Initial Decision, 148 FERC ¶ 63,015 at P 190 & n.420 (citing Entergy, Cover Letter to Filing, Docket No. ER07-956-000, at 1 (filed May 29, 2007) (First Bandwidth Filing))).

depreciation rates.”<sup>281</sup> Entergy asserts that the 2005 bandwidth formula calculation properly did not include amortization of the Waterford 3 capital lease and that, as a consequence, the Commission should clarify that it did not intend to modify or change the bandwidth formula to be used for the period June 1, 2005 through December 31, 2005 to include the Waterford 3 Leased Plant in the calculation of total production costs.

## **2. Commission Determination**

150. We grant Entergy’s requested clarification. In Opinion No. 545, the Commission stated that “[t]o the extent that the 2005 and 2006 bandwidth formula calculations included amortization of the Waterford 3 capital lease, such amortization should be based on the appropriate depreciation rates.”<sup>282</sup> As Entergy points out, the bandwidth formula in effect from June 1, 2005 through December 31, 2005 did not include amortization for the Waterford 3 capital lease.<sup>283</sup> Therefore, because the bandwidth formula in effect from June 1, 2005 through December 31, 2005 did not include amortization of the Waterford 3 capital lease in the bandwidth formula, there is no need to recalculate amortization based on the appropriate depreciation rates for that seven-month period. This is the meaning of “to the extent that,” i.e., “insofar as” the bandwidth formula included amortization of the Waterford 3 capital lease, such amortization should be based on the appropriate depreciation rates. Thus we clarify that the directive for Entergy to revise and resubmit its FERC Form No. 1s for 2005-2009 was not intended to amend the bandwidth formula retroactively.

### **G. Interest on Refunds**

151. In Opinion No. 545, the Commission required interest on bandwidth payments associated with the Waterford 3 sale/leaseback.<sup>284</sup> However, the Commission inadvertently did not include a general requirement to calculate interest on all refunds related to bandwidth payments in this proceeding. We correct that mistake here.<sup>285</sup>

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<sup>281</sup> *Id.* at 12 & n.32 (citing Opinion No. 545, 153 FERC ¶ 61,303 at P 57).

<sup>282</sup> *Id.*

<sup>283</sup> *See id.* at 12 & n.29 (citing Initial Decision, 148 FERC ¶ 63,015 at P 190 & n.419 (citing *Entergy Servs., Inc.*, 119 FERC ¶ 61,193 at P 16); *see also* Ex. LC-158.

<sup>284</sup> Opinion No. 545, 153 FERC ¶ 61,303 at P 150.

<sup>285</sup> 16 U.S.C. § 825l(a) (2012) (authorizing the Commission to modify an order “at any time” before the record of a proceeding is filed in the court of appeals).

Given the significant delay since the June 1, 2010 effective date of the bandwidth payments for the Fourth Bandwidth filing,<sup>286</sup> we conclude that interest is necessary in order to ensure full compensation.<sup>287</sup> This determination is also consistent with numerous recent orders regarding interest and the bandwidth formula.<sup>288</sup> Consistent with those orders, we direct that interest be calculated on the payment/receipt amounts for this Fourth Bandwidth proceeding, in accordance with section 35.19a of the Commission's regulations.<sup>289</sup> In addition, Entergy is directed to include a description of the interest calculations in the compliance filing of the revised refund calculations that Entergy is to submit within 60 days of the issuance of this order.

The Commission orders:

(A) The requests for rehearing are granted in part and denied in part, as discussed in the body of this order.

(B) Entergy's request for clarification is granted, as discussed in the body of this order.

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<sup>286</sup> *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 132 FERC ¶ 61,065, at Ordering Paragraph (A) (2010).

<sup>287</sup> *See Andarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999) (“[T]he Commission's general policy, in effect for many years, requires interest to be paid on various kinds of overcharges.”).

<sup>288</sup> *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,152, at P 42 (2014), *reh'g denied*, 153 FERC ¶ 61,034, at P 13 (2015) (requiring interest on recalculated bandwidth payment and receipt amounts for seven-month period from June 1, 2005 through December 31, 2005); *Entergy Servs., Inc.*, 139 FERC ¶ 61,104 at Ordering Paragraph (C) (2012), *reh'g denied*, 145 FERC ¶ 61,046, at P 8 (2013) (requiring interest on bandwidth payments in the First Bandwidth proceeding due to the passage of time); *Entergy Servs., Inc.*, 142 FERC ¶ 61,011, at P 21 (2013), *reh'g denied*, 148 FERC ¶ 61,087, at P 14 (2014) (requiring interest on bandwidth payments in the Second Bandwidth proceeding due to the passage of time).

<sup>289</sup> 18 C.F.R. § 35.19a (2016).

(C) Entergy is directed to submit a compliance filing within sixty (60) days of the issuance of this order, revising refunds and calculating interest on all refunds related to bandwidth payments in this Fourth Bandwidth proceeding, 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.