

142 FERC ¶ 61,013
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Entergy Services, Inc.

Docket No. ER08-1056-004

OPINION NO. 514-A
ORDER DENYING REHEARING

(Issued January 3, 2013)

1. This case is before the Commission on rehearing to an opinion¹ issued on October 7, 2011, and involves rates filed by Entergy Services, Inc. (Entergy)² on behalf of the Entergy operating companies (Operating Companies)³ pursuant to Service Schedule MSS-3 of the Entergy System Agreement (System Agreement), implementing the Commission's bandwidth remedy based on calendar year 2007 data as provided for in

¹ *Entergy Services, Inc.*, Opinion No. 514, 137 FERC ¶ 61,029 (2011).

² Entergy is a wholly-owned subsidiary of Entergy Corporation that provides operating services to six operating companies (Operating Companies). Entergy Corporation is a public utility holding company that provides electric service through the Operating Companies.

³ At the time the Commission issued Opinion Nos. 480 and 480-A, the Operating Companies were Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Louisiana, Inc. (Entergy Louisiana), Entergy Mississippi, Inc. (Entergy Mississippi), Entergy New Orleans, Inc. (Entergy New Orleans), and Entergy Gulf States, Inc. (Entergy Gulf States). At the end of 2007, Entergy Gulf States was split into Entergy Texas, Inc. (Entergy Texas) and Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana). Accordingly, the Operating Companies involved with this proceeding are Entergy Arkansas, Entergy Gulf States Louisiana, Entergy Louisiana, Entergy Mississippi, Entergy New Orleans and Entergy Texas.

Opinion Nos. 480 and 480-A.⁴ On September 10, 2009, an initial decision⁵ was issued in this proceeding, which was affirmed in part and reversed in part in Opinion No. 514. In this order, as discussed below, we deny the requests for rehearing.

I. Background

2. In Opinion No. 514, the Commission affirmed the Presiding Judge's findings that: (1) Entergy's adjustment to the long-term debt and common equity components of Entergy Louisiana's capital structure to reflect the "reversal of the Vidalia capital transaction" was appropriate; (2) there should not be an adjustment to Entergy Louisiana's Variable Production Costs to reflect the re-pricing of the Evangeline Gas Sales Contract costs at the retail level; and (3) the Commission has jurisdiction to approve Entergy's allocation of Entergy Gulf States' disparity payments between Entergy Texas and Entergy Gulf States Louisiana, the successors of Entergy Gulf States. However, the Commission reversed the Presiding Judge's findings that: (1) the Commission should use updated depreciation studies to determine inputs for the bandwidth formula; (2) Entergy should not have excluded certain Accumulated Deferred Income Tax (ADIT) amounts, related to the Waterford 3 sale-leaseback, from the bandwidth calculation; and (3) Entergy used an appropriate methodology to allocate bandwidth receipts among Entergy Texas and Entergy Gulf States Louisiana.⁶

3. The Louisiana Public Service Commission (Louisiana Commission) and the East Texas Cooperatives request rehearing of Opinion No. 514. The Louisiana Commission argues, among other things, that the Commission should reverse its ruling requiring use of depreciation expenses as contained in the FERC Form 1 in the bandwidth formula, that the Commission should reverse its ruling that required the exclusion of certain production-related ADIT in the bandwidth calculation, and that the Commission failed to provide for a correct reversal of the Vidalia capital transaction. East Texas Cooperatives argues that the Commission failed to provide a reasoned basis for its determination that Entergy's methodology for allocating bandwidth payments to Entergy

⁴ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *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*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047 (2011), *order dismissing reh'g*, 137 FERC ¶ 61,048 (2011).

⁵ *Entergy Services, Inc.*, 128 FERC ¶ 63,015 (2009) (Initial Decision).

⁶ Opinion No. 514, 137 FERC ¶ 61,029 at P 10.

Gulf States Louisiana's wholesale customers is unjust and unreasonable. As discussed below, the requests for rehearing are denied.

II. Discussion

A. Depreciation

1. Opinion No. 514

4. In Opinion No. 514, the Commission reversed the Presiding Judge's findings that Entergy's depreciation expense may be unjust and unreasonable and that Entergy must submit updated depreciation studies for use in the 2008 bandwidth calculation.⁷ The Commission noted that in order to comply with Opinion Nos. 480 and 480-A, Entergy submitted a compliance filing that added several new sections to Service Schedule MSS-3 of the System Agreement to implement rough production cost equalization among the Operating Companies. One of these sections was section 30.12 (Actual Production Cost) that sets forth the formula for calculating actual production cost for the Operating Companies, which is based on the methodology in Entergy's Exhibit Nos. ETR-26 and ETR-28 in that proceeding. The Commission explained that a component of this formula is the variable DEXN that is defined as:

DEXN = Depreciation and Amortization Expense associated with the plant investment in [Production Plant in Service] PPXN as recorded in FERC Accounts 403, 404 and 406 as approved by Retail Regulators unless the jurisdiction for determining the depreciation rate is vested in the FERC under otherwise applicable law.⁸

5. The Commission explained that the formula rate mandates the use of depreciation rates reported in the FERC Form 1, reflecting, in part, state regulator approved depreciation rates, which the Commission has adopted for use in the bandwidth formula.

⁷ Opinion No. 514, 137 FERC ¶ 61,029 at P 46.

⁸ Ex. ESI-3 at 57. Another variable relevant to arguments on rehearing raised by the parties is ADXN, which is defined as: Accumulated Provision for Depreciation and Amortization associated with [Production Plant in Service excluding Nuclear Plant] PPXN and [Coal Mining Equipment] CME above, as recorded in FERC Accounts 108 and 111, excluding ARO associated with PPXN and CMN, if any, consistent with the accounting relating to SFAS 143 approved by the retail regulator having jurisdiction over the Company, unless the FERC determines otherwise). Ex. ESI-3 at 53.

The Commission further explained that the issue for the Commission in Opinion No. 514 was whether Entergy had correctly implemented the just and reasonable bandwidth formula, which involved ensuring that Entergy has used the correct FERC Form 1 data in the formula.

6. In response to the Louisiana Commission's reliance on the portion of the definition of DEXN that states "unless the jurisdiction for determining the depreciation rate is vested in the FERC under otherwise applicable law" to argue that this authorizes Entergy to use depreciation expense inputs other than those approved by retail regulators and recorded on its books, the Commission disagreed. It found that this argument ignored the first part of the definition of DEXN contained in the filed and accepted rate: "Depreciation and Amortization Expense associated with the plant investment in [Production Plant in Service] PPXN as recorded in FERC Accounts 403 and 404, as approved by Retail Regulators." The Commission found that the amounts recorded in Accounts 403 and 404 are the actual depreciation expenses approved by regulators, whether retail or wholesale, and required to be used in the bandwidth formula. Thus, the Commission interpreted the "unless" clause, while ambiguous, as establishing that some of the actual depreciation expenses recorded and reflected in the bandwidth formula may include depreciation expenses charged to traditional wholesale customers that were approved by the Commission and not the retail regulators, rather than as an acknowledgement of the possibility that in a filing implementing the bandwidth remedy the Commission will require Entergy to input depreciation expenses other than the expenses already approved for inclusion in the bandwidth formula as approved by retail regulators and recorded in FERC Accounts 403 and 404.⁹ It noted that it is well established that the Commission has exclusive jurisdiction over the bandwidth formula, and, thus, if the "unless" clause was intended to refer to the Commission's exclusive jurisdiction over the bandwidth formula, that clause would always apply and the remaining language of the definition would be rendered meaningless.

7. The Commission disagreed with the Presiding Judge that his ruling did not challenge a component of the bandwidth formula, and instead only challenged "the input for that component."¹⁰ The Commission ruled that replacing state approved depreciation expense inputs required for use by the bandwidth formula with reconstructed inputs would explicitly alter the depreciation component of the bandwidth formula.

⁹ Opinion No. 514, 137 FERC ¶ 61,029 at P 54.

¹⁰ *Id.* P 51.

8. The Commission also disagreed with arguments that allowing use of state-approved depreciation expenses was a delegation of the Commission's jurisdiction, ruling instead that the fact that the Commission utilizes inputs that may have been determined at the state level does not represent a delegation of authority. The Commission noted that it had previously approved Entergy's compliance filings implementing the bandwidth formula, which include the use of actual depreciation expenses as approved by the relevant state commissions, as just and reasonable. The Commission ruled that if any party wants to change the depreciation rates used in that formula, it must seek a modification to the bandwidth formula in a Federal Power Act (FPA) section 205 or 206 filing.

2. Request for Rehearing

9. The Louisiana Commission argues that the Commission reversed its prior determinations without a valid explanation. It contends that in *Arkansas Public Service Comm'n v. Entergy Corp.*,¹¹ the Commission held that language in the tariff must be construed to permit the Commission to ensure the reasonableness of depreciation expenses. Additionally, the Louisiana Commission contends that in Opinion No. 505, the Commission ruled that the depreciation provisions in Service Schedule MSS-3 do give the Commission authority to adjust depreciation rates.¹²

10. The Louisiana Commission notes that the Commission asserted that a reading of the "unless" clause in the depreciation variables that would permit adjustment to the depreciation expense would read out the language referring to retail regulators. The Louisiana Commission argues that the Commission's argument in this regard failed to recognize that a reasonable depreciation rate approved by a retail regulator which does not conflict with Commission depreciation policy could be used in the bandwidth calculation.¹³ The Louisiana Commission maintains that the Commission's interpretation of depreciation variables conflicts with its own interpretation principles. It argues that the Commission reads the "retail regulators" language as eliminating all Commission authority over depreciation for the bandwidth calculation, even though the "unless" language refers to the Commission's authority. Additionally, according to the Louisiana Commission, the new interpretation is devoid of explanation for the "unless" clause language, particularly that related to the accumulated provision for depreciation. The

¹¹ *Arkansas Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020, at P 25 (2009) (*Arkansas Commission v. Entergy*), order on reh'g, 137 FERC ¶ 61,030 (2011).

¹² Louisiana Commission Request for Rehearing at 6 (citing *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 at P 172 (2010)).

¹³ *Id.* at 6.

Louisiana Commission argues that most troubling is the Commission's decision to interpret depreciation variables to prevent the adjustment of rates to ensure they are just and reasonable. It argues that that approach constitutes an abdication of regulatory authority.¹⁴

11. Second, the Louisiana Commission also argues that the Commission's determination that depreciation expense is not an input to the formula lacks rational explanation. It contends that Opinion No. 514 determined that depreciation expense is not an "input" but a "component of the bandwidth."¹⁵ The Louisiana Commission contends that the Commission stated this finding as a conclusion, without explanation. The Louisiana Commission adds that this ruling overrules *Arkansas Commission v. Entergy*, which determined that the depreciation expenses are "inputs."¹⁶ The Louisiana Commission contends that the depreciation expense is not fixed in the bandwidth, but instead varies year to year as investment amounts and reserve balances change. It contends that this is the fundamental difference between an "input" – the expense itself – and the formula provision that describes the type of expense to include.

12. Third, the Louisiana Commission asserts that the Commission's depreciation ruling in Opinion No. 514 is arbitrary because it will cause irreparable harm. The Louisiana Commission explains that because the Commission determined that a change to depreciation expenses can only be accomplished through a section 205 or 206 filing, such a change in the formula would operate prospectively. It contends that this would cause irreparable injury, because the Commission previously dismissed a Louisiana Commission complaint regarding depreciation on the ground that the issue was being addressed in the bandwidth proceedings.¹⁷

13. Finally, the Louisiana Commission argues that the Commission failed to provide justification for delegating wholesale ratemaking authority to retail regulators. The Louisiana Commission contends that Service Schedule MSS-3 permits retail decisions to control "unless the jurisdiction for determining the depreciation and/or decommissioning rate is vested in the FERC under otherwise applicable law" or "unless the FERC determines otherwise."¹⁸ The Louisiana Commission explains that in this tariff provision

¹⁴ *Id.* at 7.

¹⁵ *Id.* (citing Opinion No. 514, 137 FERC ¶ 61,029 at P 51).

¹⁶ *Id.* at 8 (citing *Arkansas Commission v. Entergy*, 128 FERC ¶ 61,020 at P 25).

¹⁷ *Id.* (citing *La. Pub. Serv. Comm'n v. Entergy Services, Inc.*, 124 FERC ¶ 61,010 (2008)).

¹⁸ Louisiana Commission Request for Rehearing at 9 (citing Ex. ESI-3 at 54, 55).

jurisdiction is vested in the Commission, and the Commission's jurisdiction displaces states' jurisdiction. The Louisiana Commission further argues that the FPA directs the Commission to correct classifications that are unjust, unreasonable and unduly discriminatory.

14. The Louisiana Commission further argues that even if Service Schedule MSS-3 was intended to delegate authority over depreciation to retail regulators, the Commission has held that its authority cannot be delegated. It contends that in *Entergy Services, Inc.*,¹⁹ the Commission rejected a request from Entergy that the Commission accept prudence decisions made by state regulators. The Louisiana Commission notes that the Commission stated that "the Commission's ratemaking obligations cannot be delegated to a state commission ... Likewise, the Commission cannot delegate to jurisdictional utilities its obligation to ensure the justness and reasonableness of jurisdictional rates."²⁰ The Louisiana Commission adds that the courts have also determined that power vested in a federal agency by Congress may not be delegated to state agencies.²¹ The Louisiana Commission adds that the Commission's rationale for accepting retail regulator-approved depreciation rates is conclusory rather than reasoned decision making.²²

3. Commission Determination

15. We deny the Louisiana Commission's request for rehearing on depreciation. We disagree with the Louisiana Commission's claim that the Commission reversed its prior determinations, including its determination in *Arkansas Commission v. Entergy*, without a valid explanation. In Opinion No. 514, the Commission fully explained the basis for its determination that challenges to the reasonableness of components of the bandwidth formula must be made through either a section 205 or 206 proceeding, noting that it has explained its reasoning in more recent orders.²³ Specifically, the Commission acknowledged that it had made statements in orders issued prior to the first annual bandwidth filing that could be interpreted to suggest that parties had the opportunity to

¹⁹ *Entergy Services, Inc.*, 120 FERC ¶ 61,020 (2007).

²⁰ Louisiana Commission Request for Rehearing at 9 (citing *Entergy Services, Inc.*, 120 FERC ¶ 61,020 at P 28).

²¹ *Id.* at 10 (citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)).

²² *Id.*

²³ Opinion No. 514, 137 FERC ¶ 61,029 at P 48. *See also Entergy Services, Inc.*, Opinion No. 505-A, 139 FERC ¶ 61,103 at P 50 (2012).

challenge the reasonableness of inputs in the bandwidth proceedings.²⁴ However, the Commission explained that these statements “were made prior to final Commission action on the first annual bandwidth filing and thus did not benefit from experience in addressing these annual bandwidth filings.”²⁵

16. The Louisiana Commission contends that Opinion No. 514 is inconsistent with language in *Arkansas Commission v. Entergy* with regard to the Commission’s ability to ensure the justness and reasonableness of depreciation expenses. However, the Commission in its rehearing of that order clarified that:

[the statement in *Arkansas Commission v. Entergy*] that ‘the authority to determine the payments under the bandwidth necessarily must include the ability to examine the inputs used to calculate the bandwidth, including nuclear depreciation, decommissioning expenses, and accumulated provision for depreciation and amortization’ . . . was not intended to suggest that the justness and reasonableness of the various inputs to the bandwidth formula was open to challenge in the bandwidth proceedings. Instead, that language was intended to mean that each input in the bandwidth formula should be examined to make sure that the correct data was used in determining the bandwidth payments. Thus, if parties believe that Entergy has inputted data from the wrong parts of FERC Form No. 1 in its bandwidth formula, or that the data used was incorrectly calculated, such objections are properly raised in the bandwidth proceeding. If parties believe that the methodology in Service Schedule MSS-3 with respect to depreciation expenses should be changed, they should file a separate section 206 complaint (or, in the case of Entergy, a section 205 filing).²⁶

In addition, the Commission explained in an order on rehearing in the fourth bandwidth proceeding:

[i]n determining whether Entergy has properly implemented the bandwidth formula using the required data inputs in a bandwidth filing, parties in a bandwidth implementation proceeding may challenge: (1) whether the inputs were calculated consistent with the formula and the applicable

²⁴ Opinion No. 514, 137 FERC ¶ 61,029 at P 53 (citing *Entergy Services, Inc.*, 130 FERC ¶ 61,170 at P 20 (2010)).

²⁵ *Id.* (citing *Entergy Services, Inc.*, 130 FERC ¶ 61,170 at P 20).

²⁶ *Arkansas Pub. Serv. Comm’n v. Entergy Corp.*, 137 FERC ¶ 61,030 at P 23 (2011). *See also* Opinion No. 505, 130 FERC ¶ 61,023 at P 172.

accounting rules; (2) conformance with retail regulatory approvals to the extent the formula requires use of values approved by retail regulators; and (3) in instances where there are details omitted from the accepted Service Schedule MSS-3 formula, with the underlying details included in the methodology used in Exhibit Nos. ETR-26 and ETR-28.²⁷

The Commission also explained that parties may challenge the prudence of cost inputs to the bandwidth formula in the annual bandwidth proceedings.²⁸ Thus, the Commission has thoroughly and repeatedly explained how and when parties may challenge a component of the bandwidth formula. The Commission has also previously responded to the Louisiana Commission's arguments regarding the "unless" clause. As we explained in Opinion No. 514, the Commission interpreted the "unless" clause, while ambiguous, as establishing that some of the actual depreciation expenses recorded and reflected in the bandwidth formula may include depreciation expenses charged to traditional wholesale customers that were approved by the Commission and not the retail regulators, rather than as an acknowledgment of the possibility that in a filing implementing the bandwidth remedy the Commission will require Entergy to input depreciation expenses other than the expenses already approved for inclusion in the bandwidth formula as approved by retail regulators and recorded in FERC Accounts 403 and 404. The Commission further noted that it is well established that the Commission has exclusive jurisdiction over the bandwidth formula, and, thus, if the "unless" clause was intended to refer to the Commission's exclusive jurisdiction over the bandwidth formula, that clause would always apply and the remaining language of the definition would be rendered meaningless.²⁹ We accordingly reject the Louisiana Commission's arguments that the Commission's interpretation of the "unless" clause eliminates Commission authority over depreciation in the bandwidth calculation.

17. Further, we disagree with the Louisiana Commission's argument that depreciation expense is not a part of the bandwidth formula itself, but rather is an input to the formula. As noted in an order being issued concurrently with this one,³⁰ the Commission found the formula rate contained in Service Schedule MSS-3 to be just and reasonable when it

²⁷ *Entergy Services, Inc.*, 137 FERC ¶ 61,019, at P 13 (2011).

²⁸ *Id.* P 13 & n.22.

²⁹ *See supra* P 6 and Opinion No. 514, 137 FERC ¶ 61,029 at P 54.

³⁰ *Arkansas Public Service Commission v. Entergy Corporation, et al.*, 142 FERC ¶ 61,012 (2012).

accepted that formula as being in compliance with Opinion No. 480.³¹ In Opinion No. 514, the Commission noted that because it has approved the formula, it is the filed rate and under the filed rate doctrine may not be changed absent a section 205 or 206 proceeding.³² With respect to the challenged depreciation and amortization expenses and whether they constitute elements of the bandwidth formula, in Opinion No. 514 the Commission clarified that the bandwidth formula mandates the use of depreciation rates that, in part, reflect state regulator-approved depreciation rates that the Commission has adopted for use in the bandwidth formula. Therefore, in order to calculate a just and reasonable rate, Entergy is required to use the state-regulator-approved depreciation expenses, consistent with the DEXN and ADXN variables as defined above.³³ Therefore, the DEXN and ADXN depreciation variables, which allocate plant costs over time in the bandwidth formula, require that such allocation, in part, reflect the depreciation and amortization rates approved by retail regulators.³⁴ Contrary to arguments made by the Louisiana Commission, this is not an improper delegation to retail regulators. As we noted in Opinion No. 519, the fact that the Commission has accepted a formula that utilizes inputs that may have been determined at the state level does not constitute a delegation of our jurisdiction over depreciation expenses.³⁵ Such specification and incorporation of retail regulator-approved depreciation rates has been reviewed and accepted by the Commission as a just and reasonable element of the bandwidth formula methodology.³⁶ The Louisiana Commission's challenge to this element of the bandwidth formula, therefore, does not represent a challenge to the accurate application of the formula or to the prudence of its inputs, unlike for example, a challenge to whether Entergy has accurately recorded and included the actual depreciation expenses approved by retail regulators or a challenge to the prudence of plant costs being depreciated at the retail regulator-approved depreciation rate and included in plant balances included in rate base. Rather, the Louisiana Commission's challenge constitutes a challenge to the bandwidth formula itself, a rate already approved by the Commission.

³¹ *Louisiana Pub. Serv. Comm'n v. Entergy Serv., Inc.*, 119 FERC ¶ 61,095, at P 50 (2007).

³² Opinion No. 514, 137 FERC ¶ 61,029 at P 49.

³³ *Supra* P 4 & n.8.

³⁴ *Id.*

³⁵ Opinion No. 519, 139 FERC ¶ 61,107 at P 111 (citing Opinion No. 514, 137 FERC ¶ 61,029 at P 52).

³⁶ *See Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006).

18. In response to the Louisiana Commission's argument that the Commission's action in Opinion No. 514 causes irreparable harm because any relief gained from a section 205 or 206 proceeding could only be granted prospectively, we note that the Louisiana Commission has already filed a section 206 complaint to change elements of the bandwidth formula, including the depreciation variables that require the use of retail regulator-approved depreciation rates. In response to this complaint, the Commission found, based on the record developed in a trial-type evidentiary hearing, that the Louisiana Commission had not met its burden under section 206 of the FPA to show that the depreciation variables in the existing bandwidth formula are unjust and unreasonable or unduly discriminatory or preferential.³⁷

19. With regard to the Louisiana Commission's assertion that the decision in Opinion No. 514 is contrary to *Entergy Services, Inc.*,³⁸ where the Commission rejected an Entergy request that the Commission accept prudence determinations made by state regulators, we find that this assertion is beyond the scope of the issue addressed in this proceeding: implementation of the filed rate for the bandwidth formula that includes depreciation variables that adopt depreciation expenses approved by retail regulators.

B. ADIT

1. Opinion No. 514

20. In Opinion No. 514, the Commission ruled that the exclusion of the ADIT related to the Waterford 3 sale-leaseback from the 2007 bandwidth calculation may not be re-litigated in this proceeding. The Commission noted that the parties entered into a Joint Stipulation agreeing not to re-litigate issues that are the subject of other proceedings, and that the exclusion of ADIT was one of the issues included in the Joint Stipulation. The Commission disagreed with the Louisiana Commission's argument that ADIT relating to Waterford 3 was not litigated in the prior proceeding, finding that the record evidence demonstrates that the Waterford 3 issue was litigated in Docket No. ER07-956-001 and that the Initial Decision in that proceeding explicitly ruled on the Waterford 3 ADIT issue.³⁹ The Commission also found that there was no new evidence or circumstances present in this proceeding that would justify re-litigation and prevent *res judicata* and collateral estoppel from applying.⁴⁰ The Commission found that

³⁷ *Louisiana Public Service Commission v. Entergy Corporation*, Opinion No. 519, 139 FERC ¶ 61,107, at P 121 (2012).

³⁸ *Entergy Services, Inc.*, 120 FERC ¶ 61,020 (2007).

³⁹ Opinion No. 514, 137 FERC ¶ 61,029 at P 117.

⁴⁰ *Id.* P 120.

any alleged new evidence and arguments were available during the Docket No. ER07-956-001 proceeding and could have been raised at that time.⁴¹

2. Request for Rehearing

21. The Louisiana Commission requests rehearing of the Commission's determinations regarding Waterford 3 ADIT in Opinion No. 514. The Louisiana Commission argues that the Commission's ruling is inconsistent with a June 5, 2009 order denying clarification⁴² in this proceeding. It notes that in that order, Entergy sought a ruling that issues that could have been litigated in Docket No. ER07-956-001 could not be litigated here. The Louisiana Commission explains that the Commission denied the request, holding that the policy against re-litigation applies only when an issue has been fully litigated and decided on the merits and there is no new evidence or change in circumstances.⁴³ The Louisiana Commission argues that the Initial Decision determined that there is no way of finding that the Waterford 3 ADIT issue was "decided on the merits" in Docket No. ER07-956-001, because it is not mentioned in the relevant findings. The Louisiana Commission argues that in Docket No. ER07-956-001, the only issue decided was whether Entergy could exclude any ADIT from the bandwidth calculation that was not excluded in Exhibit Nos. ETR-26 and ETR-28. It contends that specific ADIT such as the Waterford 3 ADIT was not discussed.

22. The Louisiana Commission argues that in Opinion No. 514 the Commission did not mention the tariff grounds for the exclusion of Waterford 3 ADIT. The Louisiana Commission contends that the testimony cited to by the Commission argued that Waterford 3 ADIT should be excluded because it is excluded in Louisiana for retail ratemaking.⁴⁴ The Louisiana Commission argues that this ground could not have justified the exclusion, because Opinion No. 514 finds that the retail ratemaking treatment is irrelevant in the bandwidth calculation.⁴⁵ The Louisiana Commission speculates that the Commission confused a retail disallowance with a finding that ADIT arises from a retail ratemaking decision. It explains that a retail ratemaking decision to

⁴¹ *Id.*

⁴² *Entergy Services, Inc.*, 127 FERC ¶ 61,226 (2009) (Order Denying Clarification).

⁴³ Louisiana Commission Request for Rehearing at 11 (citing Order Denying Clarification, 127 FERC ¶ 61,226 at P 10).

⁴⁴ *Id.*

⁴⁵ *Id.* (citing Opinion No. 514, 137 FERC ¶ 61,029 at P 90).

accelerate or defer costs for retail ratemaking may create ADIT that would arise from a retail ratemaking decision. It further explains that this would not be the same thing as excluding the Waterford 3 ADIT, along with all other aspects of the sale-leaseback, and instead recreating the investor-financed rate base for retail ratemaking.

3. Commission Determination

23. The request for rehearing is denied. The Louisiana Commission has provided no new arguments that persuade us that the Waterford 3 ADIT was not covered by the Joint Stipulation. As we explained in Opinion No. 514, the parties and Trial Staff submitted a Joint Stipulation that sets forth an agreement that certain issues that are the subject of other proceedings will not be relitigated in this proceeding. Specifically, section 2(iii) provides that the following issue will not be relitigated here:

Exclusion of the categories of accumulated deferred income tax (“ADIT”) that [Entergy] excluded for the 2006 test year from Account No. 190 in the [b]andwidth calculation.⁴⁶

24. Stipulations among parties are to be given legal effect,⁴⁷ and the Louisiana Commission does not attempt to argue otherwise. The Louisiana Commission explains that the tariff language governing the exclusion of ADIT provides for excluding those items “not generally and properly includable for FERC cost of service purposes, including but not limited to, SFAS 109 ADIT amounts and ADIT amounts arising from retail ratemaking decisions. . . .” However, the Louisiana Commission states, the testimony that Opinion No. 514 cited does not mention the tariff grounds for exclusion, but instead, this testimony argued that the Waterford 3 ADIT should be excluded because it is excluded in Louisiana for retail ratemaking. According to the Louisiana Commission, this ground could not have justified the exclusion under the governing tariff language, because the retail ratemaking treatment assumes the Waterford 3 sale-leaseback never happened, and the bandwidth formula reflects that it did happen. The Louisiana Commission states that the Commission failed to explain how the Waterford 3 ADIT issue could have been decided on a ground that is irrelevant to the bandwidth calculation.

25. We find that while the Initial Decision may have ruled on the exclusion of the Waterford 3 ADIT on an incorrect premise, that is not a sufficient justification to set aside the Joint Stipulation with regard to ADIT. Nothing in the Joint Stipulation permits

⁴⁶ Ex. ESI-58 at 1.

⁴⁷ *Computer Associates International, Inc. v. NLRB*, 282 F.3d 849, 852 (D.C. Cir. 2002).

parties to raise a covered issue simply because they believe that the premise for the prior decision was incorrect. Such an expansive exception would render the Joint Stipulation meaningless because the party that lost in the previous proceeding could always claim that the prior decision was based on an incorrect premise. If the Louisiana Commission believes that there was a problem with the Initial Decision in Docket No. ER07-956-001, then it should have raised the issue on exceptions in that proceeding.

26. Also, despite the Louisiana Commission's arguments to the contrary, nothing in the Order Denying Clarification overrides the parties' agreement contained in the Joint Stipulation. In that order, the Commission addressed Entergy's request for clarification regarding the scope of the hearing in this proceeding applying three principles: *res judicata*, collateral estoppel, and *stare decisis*. With respect to *res judicata* and collateral estoppel, the Commission explained:

The Commission applies *res judicata* and collateral estoppel in appropriate circumstances, and as a matter of policy, relitigation of issues already decided on the merits is not sound administrative practice. However, this policy only applies where the issues presented have been fully litigated and decided on the merits, and no new evidence or new circumstances would justify relitigation.⁴⁸

27. The Commission denied the request for clarification on the grounds that "Entergy does not specify which issues that were litigated and decided in an earlier hearing should be subject to *res judicata* and collateral estoppel."⁴⁹ At the time Entergy filed the request for clarification, the litigation phase of this proceeding had not commenced and did not contain specific facts. Accordingly, the Order Denying Clarification did not have any effect on the enforceability of the Joint Stipulation. The parties were free to agree to litigate or not to litigate certain issues. In this case, the Joint Stipulation was not conditional in any regard. Because the Joint Stipulation prevents the Louisiana Commission's arguments from being considered in this case, we decline to evaluate whether their arguments regarding ADIT would be blocked by *res judicata* and collateral estoppel.

⁴⁸ Order Denying Clarification, 127 FERC ¶ 61,226 at P 10.

⁴⁹ *Id.* P 11.

C. Vidalia

1. Opinion No. 514

28. Vidalia refers to a long-term power purchase contract entered into between Entergy Louisiana and Catalyst Old River Hydroelectric Limited Partnership in 1985. In Opinion No. 480, the Commission rejected the Louisiana Commission's proposal to equalize the high costs of this power contract among all the Operating Companies. Instead, the Commission ruled that the costs of the Vidalia contract should be excluded for purposes of the bandwidth remedy calculation, finding that the Vidalia resource was not a system resource.⁵⁰ The Commission relied, in part, upon a retail ratemaking settlement approved by the Louisiana Commission in 2002 concerning Entergy Louisiana's proposal to seek with the Internal Revenue Service an accelerated deduction of Vidalia purchase power costs that Entergy Louisiana believed it could take over the remaining life of the contract.⁵¹ The fact that the tax benefits from the Vidalia accelerated deduction were being exclusively retained by Entergy Louisiana and flowed, in part, directly to retail ratepayers was one basis for the Commission's conclusion that Vidalia was an Entergy Louisiana-only resource.⁵² The Commission also ruled that none of these Vidalia tax savings were to be shared with other Operating Companies.⁵³ Consequently, when Entergy submitted its April 10, 2006 compliance filing to add the bandwidth formula to Service Schedule MSS-3, Entergy also incorporated an adjustment to reflect the "reversal of the Vidalia capital transaction" in its bandwidth calculation.⁵⁴

29. In Opinion No. 514, the Commission affirmed the Presiding Judge's ruling regarding the reversal of the Vidalia capital transaction. The Commission was not persuaded by the Louisiana Commission's assertions that: (1) Entergy inappropriately added tariff language to the bandwidth calculation without sufficient notice; (2) Entergy did not provide sufficient notice that it was proposing to reverse the Vidalia capital

⁵⁰ Opinion No. 480, 111 FERC ¶ 61,311 at P 182.

⁵¹ *Id.* P 183.

⁵² *Id.* PP 183-184.

⁵³ *Id.*

⁵⁴ "Reversal of the Vidalia capital transaction," as identified in footnote 1 of section 30.12 of Service Schedule MSS-3, refers to adding the long-term debt and common equity reductions made with Entergy Louisiana's share of the Vidalia tax proceeds back into the capital structure for cost-of-service-purposes.

transaction in the bandwidth calculation; and (3) the meaning of the phrase “reversal of the Vidalia capital transaction” is unclear.⁵⁵

2. Request for Rehearing

30. The Louisiana Commission argues that the Commission erred in accepting Entergy’s tariff change regarding the reversal of the Vidalia capital transaction because it violates directives from prior Commission orders. The Louisiana Commission argues that in the compliance order that accepted the bandwidth formula, the Commission stated that future changes to the bandwidth formula would require a section 205 or 206 filing.⁵⁶ The Louisiana Commission contends that in Entergy’s December 2006 compliance filing, Entergy represented that adjustments for the Vidalia capital transaction were consistent with the methodology contained in Exhibit Nos. ETR-26 and ETR-28.⁵⁷ The Louisiana Commission argues that the formula tariff Entergy attached to the filing letter gave no indication that Entergy intended any adjustment to the Entergy Louisiana capital structure.

31. The Louisiana Commission further argues that the Commission erred in finding that Entergy provided sufficient notice that its 2008 bandwidth filing would include adjustments known as the “reversal of the Vidalia capital transaction.” The Louisiana Commission argues that the FPA requires a utility to provide notice that states “plainly” the changes proposed to the rate schedule. It contends that with regard to the Vidalia capital transaction the Commission failed to explain how the Louisiana Commission should have known that there was a capital structure reversal for the Vidalia capital transaction.⁵⁸

32. The Louisiana Commission argues that the “reversal of the Vidalia capital transaction” language could have been referring to the agreement not to use the capital from the Vidalia tax deduction to reduce rate base, rather than to the agreement to maintain the capital structure of Entergy Louisiana. It argues that the tariff only refers to the rate base.

⁵⁵ Opinion No. 514, 137 FERC ¶ 61,029 at P 74.

⁵⁶ Louisiana Commission Request for Rehearing at 14 (citing *Louisiana Pub. Serv. Comm’n v. Entergy Services, Inc.*, 137 FERC ¶ 61,048, at P 69 (2006)).

⁵⁷ Exhibits ETR-26 and ETR-28 are exhibits prepared by Entergy in Docket No. EL01-88-001 (the underlying docket in Opinion Nos. 480 and 480-A) that formed the basis for the bandwidth formula.

⁵⁸ Louisiana Commission Request for Rehearing at 18-19.

33. According to the Louisiana Commission, a Louisiana retail capital structure adjustment for the Vidalia tax transaction that was approved by the Louisiana Commission as part of a rate settlement in 2005 made certain agreed-on imputations to Entergy Louisiana's capital structure, including imputations that reinstated debt into the capital structure from a period near the time of Entergy Louisiana's receipt of Vidalia tax proceeds. The Louisiana Commission argues that this adjustment was not an adjustment to rate base, revenue, or expenses, and was not consistent with Exhibit Nos. ETR-26 and ETR-28.⁵⁹ The Louisiana Commission also argues that the reversal of the Vidalia capital transaction fails to keep the tax benefits of the transaction in Louisiana.

34. The Louisiana Commission argues further that Entergy's filing failed to properly notice the changes in methodology in the compliance filing, which renders the filing void.⁶⁰ The Louisiana Commission contends that there was nothing in Entergy's transmittal letters suggesting that Entergy proposed a change to the capital structure for Entergy Louisiana that was inconsistent with Exhibit Nos. ETR-26 and ETR-28. The Louisiana Commission argues that Entergy "slipped" the change to the Vidalia capital transaction into the tariff without proper notice, and that Entergy should have made a section 205 filing. The Louisiana Commission asserts that the only reversal of a Vidalia capital cost transaction that was consistent with Exhibit Nos. ETR-26 and ETR-28 was the rate base reduction reversal, and that, therefore, a false notice was insufficient to support a capital structure adjustment.⁶¹

35. The Louisiana Commission contends that cases interpreting the filed rate doctrine make it clear that a tariff filed in contravention of legal authority does not become an inviolate filed rate. It argues that in *City of Cleveland*, the court reversed a ruling that a rate filed in contravention of a prior binding agreement became the binding, filed rate.⁶² It further argues that in *East Tennessee*, the D.C. Circuit found that the tariffs should be interpreted as consistent with the regulations absent an explicit approval by the Commission of any conflicting provisions.⁶³ The Louisiana Commission argues that this

⁵⁹ *Id.* at 19-20.

⁶⁰ *Id.* at 21-25.

⁶¹ *Id.* at 25-28.

⁶² *Id.* at 28 (citing *City of Cleveland, Ohio v. FPC*, 525 F.2d 845 (D.C. Cir. 1976) (*City of Cleveland*)).

⁶³ *Id.* (citing *East Tennessee Natural Gas Co. v. FERC*, 631 F.2d 794 (D.C. Cir. 1980) (*East Tennessee*)).

establishes that a deviation cannot be “slipped” by the Commission because the Commission’s apparent belief regarding the meaning of a provision.⁶⁴

36. The Louisiana Commission also argues that the Commission failed to reverse the full capital cost impact of the Vidalia capital transaction and that this rendered its approach arbitrary. The Louisiana Commission contends that the Commission’s decision in Opinion No. 514 imposes the pre-Vidalia tax settlement capital structure that lowers Entergy Louisiana’s costs, but fails to account for the higher debt costs that would have been associated with that previous capital structure.⁶⁵ The Louisiana Commission argues that taking the capital structure benefit of a debt imputation without the higher debt cost of that imputation is unreasonable.⁶⁶ The Louisiana Commission also contends that reversal of the Vidalia capital transaction fails to keep the tax benefits of the transaction in Louisiana.

3. Commission Determination

37. We deny the Louisiana Commission’s request for rehearing. Entergy’s treatment of the Vidalia capital transaction was within the scope of the compliance filing ordered by the Commission pursuant to Order Nos. 480 and 480-A and so did not require a section 205 or 206 filing by Entergy. As we noted, Order No. 480 called for exclusion of the costs of the Vidalia contract for purposes of the bandwidth calculation.

38. The Louisiana Commission argues at length that Entergy “slipped” an unauthorized change past the Commission in its compliance filing and did not provide formal notice to the parties. However, this position is an impermissible collateral attack on the Commission’s orders approving Entergy’s proposed amendments to Service Schedule MSS-3. Entergy’s April 2006 compliance filing contained the proposed “reversal of the Vidalia capital transaction” retail regulatory adjustment, which was noticed and interested parties were given an opportunity to intervene and protest. The Louisiana Commission protested certain provisions of Entergy’s proposed April 2006 compliance filing but not the provisions concerning the reversal of the Vidalia capital transaction. In its December 2006 compliance filing, Entergy proposed several changes to the bandwidth formula, but did not modify the language authorizing the reversal of the Vidalia capital transaction. As we explained in Opinion No. 514, the Louisiana Commission had not one, but two separate opportunities to reject the adjustment as a

⁶⁴ *Id.*

⁶⁵ Louisiana Commission Request for Rehearing at 29-32.

⁶⁶ *Id.* at 32.

material change that required a separate section 205 filing.⁶⁷ The Commission rejected certain provisions of Entergy's compliance filing in response to the Louisiana Commission's protest. However, the Louisiana Commission never protested the "reversal of the Vidalia capital transaction" clause.

39. Further, as the Commission stated in Opinion No. 514, the meaning of the "reversal of the Vidalia capital transaction" should have been understood by the Louisiana Commission.⁶⁸ Indeed, if any of the intervenors should have known what retail regulatory adjustment Entergy's proposed adjustment referred to, it was the Louisiana Commission. Prior to Entergy's November 17, 2006 compliance filing, Entergy Louisiana submitted testimony and an accompanying schedule that described what the reversal of the Vidalia transaction was and that this adjustment was required by the Louisiana Commission-approved Vidalia tax settlement.⁶⁹

40. The Louisiana Commission attempts to argue that the reversal of the "Vidalia capital transaction" could have referred to a retail adjustment to rate base. However, again, this argument is baseless when applied to a highly informed party such as the Louisiana Commission who has dealt with the reversal of the Vidalia capital transaction in several ratemaking proceedings. This language should have a specific meaning to the Louisiana Commission, as the language was used by the Louisiana Commission in its order adopting the Vidalia tax settlement that allowed Entergy Louisiana to maintain its pre-existing capital structure in any rate proceeding for a ten-year period. As part of a rate case subsequent to that order, Entergy Louisiana's capital structure was adjusted in compliance with the Louisiana Commission's order. This adjustment "reversed both debt and common equity related to transactions identified as resulting from the proceeds from the Vidalia Tax Deduction."⁷⁰ In fact, Exhibit No. ESI-59 contains a copy of a 2003 filing made with the Louisiana Commission detailing the reversal of the Vidalia capital transaction. The title on page 18 of that exhibit is captioned in part "Reverse Vidalia Capital Transactions."⁷¹ The Louisiana Commission attached an excerpt of the same worksheet from a later filing to several of its own exhibits.⁷² In other words, the record

⁶⁷ Opinion No. 514, 137 FERC ¶ 61,029 at P 72.

⁶⁸ *Id.* P 74.

⁶⁹ Ex. ESI-59.

⁷⁰ *Id.* at 11.

⁷¹ *Id.* at 18.

⁷² *See, e.g.*, Ex. LC-21 at 2; Ex. LC-75 at 1.

strongly supports our conclusion in Opinion No. 514 that the Louisiana Commission's assertion that the meaning of the phrase "reversal of the Vidalia capital transaction" is unclear is not convincing.⁷³

41. In addition, the cases cited by the Louisiana Commission are not dispositive of our holding here.⁷⁴ *City of Cleveland* involved a contract dispute between a municipality and its wholesale supplier in which the city claimed that the utility had filed a rate with the Commission that did not comport with their agreement. The Commission found that there was no contract and that the issue regarding alleged violation of the ordinance was "a local matter between the City and its officials."⁷⁵

42. On review, the court remanded the case to the Commission because the court found that the Commission erred in accepting a rate that was contrary to both the parties' agreement and the ordinance that authorized the City to enter into the agreement.⁷⁶ However, the *City of Cleveland* case is inapplicable to this proceeding because it involved unique circumstances that are not present here. The dispute in *City of Cleveland* involved a utility's filing that contained rate provisions that were alleged to be contrary to the parties' agreement and contrary to an ordinance that authorized the City to enter into the contract. There is no such claim in this proceeding that Service Schedule MSS-3 and the bandwidth formula contained therein is contrary to any contract or agreement among the parties, nor is there any issue here concerning the authority of any party to enter into the System Agreement. Thus, the Louisiana Commission's reliance on *City of Cleveland* for its statement that "the filed rate doctrine does not insulate rates from review when they are filed in contravention of authority or contract"⁷⁷ is misplaced; the authority and

⁷³ See Opinion No. 514, 137 FERC ¶ 61,029 at P 74. The Commission's finding that the Louisiana Commission had sufficient notice that Entergy was proposing to reverse the Vidalia capital transaction in the bandwidth calculation also was supported by Trial Staff as well as the Presiding Judge in the underlying initial decision. Trial Staff Brief Opposing Exceptions at 43-45; Initial Decision, 128 FERC ¶ 63,015 at PP 274-278.

⁷⁴ The Commission considered and denied similar arguments in Opinion No. 505-A. Opinion No. 505-A, 139 FERC ¶ 61,103 at PP 14-17.

⁷⁵ *City of Cleveland Elec. Illuminating Co.*, Opinion No. 644, 49 FPC 118, 120 (1973).

⁷⁶ *City of Cleveland v. FCC*, 525 F.2d 845 (1975), distinguished, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 n.12 (1981).

⁷⁷ Louisiana Commission Request for Rehearing at 27.

contract issues in *City of Cleveland* bear no relation to the Service Schedule MSS-3 filed rate in this proceeding.

43. Further, in *City of Cleveland* the court held that the considerations underlying the filed rate doctrine are “preservation of the agency’s primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.”⁷⁸ However, in the instant case the Commission was made aware of the changes in the April 2006 and December 2006 Compliance Filings. All parts of the bandwidth formula in Service Schedule MSS-3 were marked in redline because this was the first time the bandwidth formula had been incorporated into Entergy’s tariff. Moreover, as noted above, interested parties, including the Louisiana Commission intervened and filed protests to various aspects of the filing. Therefore, contrary to the Louisiana Commission’s arguments, this case can be distinguished from the *City of Cleveland* case because the Louisiana Commission and all parties were made aware – or should have been aware – of the changes being made to Entergy’s tariff because the changes were made explicit by the definition of the bandwidth formula in Service Schedule MSS-3.⁷⁹

44. Further, the Louisiana Commission’s reliance on *East Tennessee* is similarly misplaced. In *East Tennessee*, the court stated that if the Commission had intended a dramatic policy departure, it would have accompanied its decision with a thorough explanation.⁸⁰ Although the orders accepting the April 2006 and December 2006 Compliance Filings did not contain a discussion of the Vidalia capital transaction, in a protested compliance proceeding such as this one, parties should have been aware of the changes being made to Entergy’s tariff. Further, *East Tennessee* did not involve the lawfulness of a filed rate, as the Louisiana Commission contends, but instead the correct interpretation of a filed rate. The fact that in *East Tennessee* the Commission interpreted filed rates to be consistent with its regulations is not relevant to the Louisiana Commission’s argument that a rate filed and accepted by the Commission may be unlawful. The Louisiana Commission’s arguments, therefore, are merely collateral attacks on the Commission’s orders accepting the compliance filings, and do not support the Louisiana Commission’s argument that the tariff revisions were not explicitly recognized by the Commission and are therefore unlawful.

⁷⁸ *City of Cleveland*, 525 F.2d at 854.

⁷⁹ The Louisiana Commission protested both of the compliance filings and raised numerous issues, including issues beyond those identified in Entergy’s transmittal letters.

⁸⁰ *East Tennessee*, 631 F.2d at 799.

45. In Opinion No. 514, the Commission responded to the Louisiana Commission's argument that Entergy's adjustment does not actually reverse the Vidalia capital transaction, finding that Entergy's proposed adjustment is reasonable and that the Louisiana Commission failed to provide any reasonable alternative.⁸¹ Entergy has reversed the Vidalia capital transaction in exactly the same manner that has been done in Louisiana Commission retail ratemaking. For purposes of the 2008 bandwidth calculation, Entergy reversed the Vidalia capital transaction using the identical method accepted by the Louisiana Commission.⁸² The 2008 bandwidth filing reflects the addition of \$288,502,500 to the long-term debt component of the Entergy Louisiana capital structure and \$240,000,000 to the common equity component of the Entergy Louisiana capital structure.⁸³ In response to the Louisiana Commission arguments that Entergy's adjustment did not reverse the Vidalia capital redemptions because Entergy did not impute the debt rates to the capital that were associated with the add-backs of debt, we reiterate that, while it may be possible to more accurately calculate the impact of the Vidalia capital transaction on Entergy Louisiana's production costs by examining the actual cost of debt that was reduced with the tax benefits associated with the Vidalia purchase, no participant has proffered specific alternative adjustments for reversing the effects of the Vidalia capital transaction for our consideration. In the absence of specific alternative adjustments for reversing the effects of the Vidalia capital transaction for our consideration, we find Entergy's proposed adjustment, which has been previously accepted by the Louisiana Commission for retail ratemaking purposes reflecting its average cost of outstanding debt, to be reasonable.

46. The Commission also addressed the Louisiana Commission's argument that the reversal of the Vidalia capital transaction fails to keep the tax benefits of the transaction in Louisiana. In Opinion No. 514, the Commission quoted Trial Staff witness Sammon as stating that the adjustment "does not involve any impermissible sharing of the Vidalia tax benefits."⁸⁴ As we held in Opinion No. 514, if the Vidalia capital transaction were not reversed, the resulting higher production costs of Entergy Louisiana would directly reduce the bandwidth payments of the other receiving Operating Companies, which would contradict the Commission's prior holdings that costs associated with Vidalia must stay in Louisiana. To reiterate Opinion No. 480, "[t]he [Vidalia] hydroelectric plant was

⁸¹ Opinion No. 514, 137 FERC ¶ 61,029 at P 76.

⁸² Ex. ESI-59, Ex. LC-89, Ex. LC-21, Ex. LC-75.

⁸³ Ex. ESI-4 at 25.

⁸⁴ Opinion No. 514, 137 FERC ¶ 61,029 at P 77 (citing Ex. S-24 at 6).

built to benefit Louisiana and that is where the production costs of the plant should stay.”⁸⁵

D. Allocation of Bandwidth Payments to Entergy Texas and Entergy Gulf States Louisiana

1. Opinion No. 514

47. Entergy used a three-step method for calculating 2007 bandwidth payments for Entergy Texas and Entergy Gulf States Louisiana, the two new operating companies resulting from the split of Entergy Gulf States, Inc. as of January 1, 2008. The first step was determining whether any Operating Company exceeded the +/- 11 percent bandwidth, as required by Service Schedule MSS-3, and if so, how much of a change in production costs would be necessary to bring all the Operating Companies within the +/- 11 percent bandwidth. The next step, according to Entergy, determines the bandwidth payments to be received by Entergy Gulf States Louisiana’s wholesale customers using an energy allocator. In the third step, Entergy calculated the bandwidth payments due to Entergy Texas’s retail customers and Entergy Gulf States Louisiana’s retail customers using an energy allocator for variable production costs and a demand allocator for fixed production costs in the same manner prescribed by section 30.12 of Service Schedule MSS-3.⁸⁶

48. In Opinion No. 514, the Commission reversed the Presiding Judge’s ruling that Entergy’s method for allocating bandwidth payments to Entergy Texas and Entergy Gulf States Louisiana was just and reasonable and consistent with Service Schedule MSS-3. The Commission instead found that Entergy’s proposed second step is inconsistent with Service Schedule MSS-3’s requirement that “fixed production cost” be allocated among Operating Companies using demand and that “variable production cost” be allocated among Operating Companies using an energy allocator, and that Service Schedule MSS-3 does not require a separate carving out of the wholesale requirements customers. The Commission directed Entergy to modify its methodology by eliminating its proposed second step.

2. Request for Rehearing

49. East Texas argues that the Commission erred by determining that Entergy’s methodology for allocating bandwidth payments to Entergy Gulf States Louisiana’s wholesale customers is unjust and unreasonable. It contends that the Commission did not

⁸⁵ *Id.* (citing Opinion No. 480, 111 FERC ¶ 61,311 at P 174).

⁸⁶ *Id.* P 186.

give due weight to evidence supporting Entergy's approach. East Texas states that although the Commission found that Entergy's methodology was inconsistent with Service Schedule MSS-3, the tariff does not address allocation of bandwidth receipts between the wholesale and retail jurisdictions of the same Operating Company. East Texas argues that the allocation of bandwidth receipts to wholesale customers is properly addressed in the context of the bandwidth proceedings. East Texas contends that Entergy was free to develop a reasonable mechanism to allocate bandwidth receipts to Entergy Gulf States Louisiana's wholesale customers to ensure that those customers received their appropriate share of the 2008 bandwidth payments from Entergy Arkansas.⁸⁷ East Texas notes that in the hearing order for the first annual bandwidth proceeding, the Commission stated that parties may address the proper allocation of bandwidth payments and receipts to wholesale customers.⁸⁸

50. East Texas asserts that, in rejecting Entergy's proposal, the Commission failed to consider evidence in the case that Entergy allocated the bandwidth receipts to the Entergy Gulf States Louisiana wholesale customers based on energy because fuel costs were the main cause of the disparities between the Operating Companies, and because the receipts are passed through to wholesale customers through the fuel clauses in their contracts.⁸⁹ East Texas further asserts that the Commission failed to consider that Entergy's proposed methodology produced an equitable result, and that the methodology proposed by the Louisiana Commission would benefit retail customers at the expense of wholesale customers.⁹⁰

51. East Texas states that Entergy's proposed methodology produced the same final disparity for Entergy Gulf States Louisiana's wholesale customers as for Entergy Gulf States Louisiana's and Entergy Texas's retail jurisdictions, as well as for the other Entergy Operating Companies that received bandwidth payments in 2008. East Texas states that evidence in the record showed that the Louisiana Commission's proposed methodology would cause an \$860,000 shift from Entergy Gulf States Louisiana's wholesale customers to the Entergy Gulf States Louisiana's and Entergy Texas's retail jurisdictions, which might cause unequal disparities between Entergy Gulf States Louisiana's wholesale customers and the retail jurisdictions.⁹¹

⁸⁷ East Texas Request for Rehearing at 4-5.

⁸⁸ *Id.* (citing *Entergy Services, Inc.*, 120 FERC ¶ 61,094, at P 17 (2007)).

⁸⁹ *Id.* at 5.

⁹⁰ *Id.*

⁹¹ *Id.*

52. Finally, East Texas notes that while the Commission noted that Trial Staff witness Sammon testified that wholesale requirements customers should not have been carved out, Sammon also testified that he did not believe that Entergy's approach would result in substantial error, and that Entergy's approach produced an equitable result.⁹²

3. Commission Determination

53. The request for rehearing is denied. Although East Texas argues that the Commission did not give sufficient weight to record evidence that Entergy's proposed methodology was just and reasonable, nothing in the record persuades us to reconsider the ruling that Entergy's proposed second step is inconsistent with Service Schedule MSS-3. Although dividing bandwidth receipts that were intended for one Operating Company between two new Operating Companies is an occurrence not contemplated by Service Schedule MSS-3, the Commission relied on record evidence that the method of division should to the extent possible be in accordance with the method contained in Service Schedule MSS-3 itself.⁹³ For example, as Staff witness Sammon explained, Entergy Gulf States' bandwidth receipts should be divided between Entergy Texas and Entergy Gulf States Louisiana in such a manner that Entergy Texas and Entergy Gulf States Louisiana receive the bandwidth receipts they would have received if they and not Entergy Gulf States had existed in 2007.⁹⁴ As the Commission explained in Opinion No. 514, the method of dividing the 2008 bandwidth receipts between Entergy Texas and Entergy Gulf States Louisiana should be comparable to the method that will be used in the succeeding bandwidth proceeding where Entergy Texas and Entergy Gulf States Louisiana will be separate Operating Companies in both the test year and the disbursement year.⁹⁵

54. In allocating Entergy Gulf States' 2008 bandwidth receipts between Entergy Texas and Entergy Gulf States Louisiana, Entergy allocated a portion of Entergy Gulf States' bandwidth receipts to the load of Entergy Gulf States Louisiana's wholesale requirements customers using an energy allocator. This is in contrast to section 30.13, which requires that "fixed production cost" be allocated among the Operating Companies using a demand allocator and that "variable production cost" be allocated using an energy allocator.⁹⁶ East Texas argues that Entergy is allocating part of the bandwidth receipts in

⁹² *Id.* at 6.

⁹³ Staff Initial Brief at 39.

⁹⁴ Ex. S-14 at 42.

⁹⁵ Opinion No. 514, 137 FERC ¶ 61,029 at P 187.

⁹⁶ Ex. ESI-3.

this proceeding using the methodology that reflects contractual requirements between an Operating Company and certain customers, and that the Commission failed to consider this evidence.⁹⁷ However, Service Schedule MSS-3 says nothing about allocating production costs among Operating Companies based on terms and conditions found in contracts between an Operating Company and its wholesale customers.

55. East Texas notes that Sammon also stated that he did not believe that Entergy's approach would result in substantial error.⁹⁸ However, despite the fact that Entergy devised a way to, as Entergy witness Peters stated, "make [its methodology] mathematically come out"⁹⁹ by allocating costs to the wholesale jurisdiction, it does not automatically follow that Entergy's methodology is consistent with Service Schedule MSS-3. The bandwidth formula provides that the "actual production cost ... shall be determined for each Operating Company."¹⁰⁰ The actual production cost is then compared to the Operating Company's share of "System Average Production Cost," calculated as described above in accordance with section 30.13 (i.e., system "fixed production cost" is allocated among the Operating Companies using a demand allocator and system "variable production cost" is allocated using an energy allocator), to determine the company's disparity.¹⁰¹ Payments are allocated so that the positive disparity of any receiving company after reflecting such payments is no less than another receiving company.¹⁰² Entergy's methodology, which allocates bandwidth payments to the load of Entergy Gulf States Louisiana's wholesale requirements customers based on an energy allocator, conflicts with the approach provided for in Service Schedule MSS-3, creating undue discrimination among the Operating Companies.

56. Lastly, East Texas notes that the methodology required by Opinion No. 514 may shift \$860,000 from Entergy Gulf States Louisiana's wholesale customers to Entergy Gulf States Louisiana's and Entergy Texas's retail jurisdictions. However, this is not a reason to grant rehearing. The proper resolution of issues in the annual bandwidth cases frequently involved the shifting of costs. Accordingly, we see no reason why the

⁹⁷ East Texas Request for Rehearing at 5.

⁹⁸ *Id.* at 6.

⁹⁹ Tr. 539 (Peters).

¹⁰⁰ Ex. ESI-3 at 51.

¹⁰¹ *Id.*

¹⁰² *Id.*

potential cost shift suggested by East Texas should persuade us to reconsider the findings in Opinion No. 514.

The Commission orders:

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.