

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 16-1193

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ARKANSAS PUBLIC SERVICE COMMISSION,  
*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**CIRCUIT RULE 28(A)(1) CERTIFICATE AS TO  
PARTIES, RULINGS, AND RELATED CASES**

**A. Parties and Amici**

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner.

**B. Rulings Under Review**

1. Order Establishing Hearing and Settlement Procedures, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, FERC Docket No. EL01-88, 153 FERC ¶ 61,032 (Oct. 15, 2015), R. 27, JA 491; and
2. Order on Rehearing and Clarification, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, FERC Docket No. EL01-88, 155 FERC ¶ 61,118 (Apr. 29, 2016), R. 43, JA 521.

**C. Related Cases**

This case has not previously been before this Court or any other court. Issues raised in this case are related to two previous decisions of this Court concerning the Entergy System Agreement. *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (concerning the Commission's establishment and implementation of the bandwidth remedy under the Entergy System Agreement); *Council of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (concerning operating companies' termination of participation in the Entergy System Agreement). Issues raised in this case also are related to a case that is currently pending before this Court, on remand from the 2008 case. *La. Pub. Serv. Comm'n v. FERC*, Case No. 14-1063 (concerning implementation of the bandwidth remedy beginning in 2005) (oral argument held Dec. 2, 2016).

Other issues related to the bandwidth remedy have been before this Court in *La. Pub. Serv. Comm'n v. FERC*, 606 F. App'x 1 (D.C. Cir. 2015), and before the Fifth Circuit in *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014), and *La. Pub. Serv. Comm'n v. FERC*, 771 F.3d 903 (5th Cir. 2014), *cert. denied*, 135

S. Ct. 2072 (2015). An additional case concerning bandwidth remedy issues is currently pending before this Court. *La. Pub. Serv. Comm'n v. FERC*, Case No. 16-1014 (briefing completed; argument scheduled to be held on April 3, 2017).

/s/ Carol J. Banta

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## GLOSSARY

ALJ	Administrative law judge
Arkansas Commission	Petitioner Arkansas Public Service Commission
Bandwidth Remedy Proceeding	Proceeding on Louisiana’s 2001 complaint, under Federal Power Act section 206, challenging cost allocations in the Entergy System, resulting in the Commission’s requirement of a remedy to roughly equalize production costs
Commission or FERC	Respondent Federal Energy Regulatory Commission
Compliance Order	Order Rejecting Compliance Filing, <i>La. Pub. Serv. Comm’n v. Entergy Servs., Inc.</i> , FERC Docket No. EL01-88, 146 FERC ¶ 61,153 (Feb. 28, 2014), JA 607
Entergy	Entergy Corporation (corporate parent of the Operating Companies) or Entergy Services, Inc. (acting on behalf of Operating Companies)
[Entergy] Operating Company/ies	Individually or collectively, Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Gulf States Louisiana, L.L.C. and Entergy Texas, Inc. (which, prior to 2008, operated as a single entity, Entergy Gulf States, Inc.)
Entergy System or System	Generation and transmission facilities owned and operated by Entergy Operating Companies in Arkansas, Louisiana, Mississippi, and Texas
FPA	Federal Power Act

## GLOSSARY

Hearing Order	Order Establishing Hearing and Settlement Judge Procedures, <i>La. Pub. Serv. Comm'n v. Entergy Servs., Inc.</i> , FERC Docket No. EL01-88, 153 FERC ¶ 61,032 (Oct. 15, 2015), R. 27, JA 491
Louisiana Commission	Intervenor Louisiana Public Service Commission
<i>Louisiana 2008</i>	<i>La. Pub. Serv. Comm'n v. FERC</i> , 522 F.3d 378 (D.C. Cir. 2008) (upholding <i>Opinion Nos. 480</i> and <i>480-A</i> in the Bandwidth Remedy Proceeding)
<i>Opinion No. 480/480-A</i>	<i>La. Pub. Serv. Comm'n v. Entergy Servs., Inc.</i> , Opinion No. 480, 111 FERC ¶ 61,311, <i>on reh'g</i> , Opinion No. 480-A, 113 FERC ¶ 61,282 (2005) (in the Bandwidth Remedy Proceeding), <i>aff'd in part and rev'd in part in Louisiana 2008</i>
Rehearing Order	Order on Rehearing and Clarification, <i>La. Pub. Serv. Comm'n v. Entergy Servs., Inc.</i> , FERC Docket No. EL01-88, 155 FERC ¶ 61,118 (Apr. 29, 2016), R. 43, JA 521
System Agreement	Tariff that acts as an interconnection and pooling agreement for the Entergy System and provides for the joint planning, construction, and operation of new generating capacity

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**COUNTER-STATEMENT OF JURISDICTION**

Petitioner Arkansas Public Service Commission (“Arkansas Commission”) seeks review of orders issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) on a compliance filing that calculated payments under the Commission-directed bandwidth remedy for a seven-month period in 2005. *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 153 FERC ¶ 61,032 (2015) (“Hearing Order”), R. 27, JA 491, *on reh’g and clarification*, 155 FERC ¶ 61,118 (2016) (“Rehearing Order”), R. 43, JA 521.

As set forth more fully in Part I of the Argument, *infra*, although the challenged orders resolved the legal question of the liability of Entergy Arkansas, Inc. for bandwidth payments for 2005, the amount of those payments remains in dispute in ongoing proceedings before the agency. Accordingly, the Commission submits that the Court should decline, on prudential grounds, to consider this appeal at this time. *See, e.g., Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 800 (D.C. Cir. 2006); *Miss. Valley Gas Co. v. FERC*, 68 F.3d 503, 509 (D.C. Cir. 1995).

### **STATEMENT OF THE ISSUE**

In June 2005, the Commission determined that production costs across the multistate Entergy power system were not roughly equal and thus were unduly discriminatory, and imposed a remedy that would reallocate costs that deviated from an established “bandwidth” around the system average. The Commission subsequently approved revisions to Entergy’s tariff to implement the annual calculations and reallocation payments and receipts among the affiliated Entergy Operating Companies to achieve rough equalization of production costs. In 2013, one of the Entergy Operating Companies, Entergy Arkansas, terminated its participation in the System Agreement.

The issue presented for review is whether, assuming jurisdiction, the Commission reasonably determined that Entergy Arkansas remains obligated to

make bandwidth remedy payments for a seven-month period in 2005, notwithstanding its withdrawal from the System Agreement in 2013.

## **STATUTORY AND REGULATORY PROVISIONS**

Pertinent statutes and regulations are contained in the attached Addendum. (A timeline of bandwidth-related filings and orders is attached at the end of this Brief.)

## **STATEMENT OF FACTS**

### **I. STATUTORY AND REGULATORY BACKGROUND**

#### **A. The Federal Power Act**

Section 201 of the Federal Power Act (“FPA”), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates are lawful. In a complaint proceeding, the complainant bears “the burden of proof to show that any rate . . . is unjust, unreasonable, unduly discriminatory, or

preferential . . . .” FPA § 206(b), 16 U.S.C. § 824e(b); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (stating complainant’s burden of proof). If the Commission finds that the burden has been met, it must determine and set the new just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

## **B. The Entergy System and the System Agreement**

The instant case stands against a backdrop of several decades of litigation over the allocation of costs under the Entergy System Agreement.<sup>1</sup> We begin with

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<sup>1</sup> *See Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (filing of 1982 System Agreement); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987) (allocation of nuclear investment costs); *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989) (same, after remand); *City of New Orleans v. FERC*, 67 F.3d 947 (D.C. Cir. 1995) (costs of future replacement capacity after spin-off of generation plants); *La. Pub. Serv. Comm’n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999) (determination of operating companies’ available capability for purposes of cost equalization); *La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) (allocation of capacity costs); *La. Pub. Serv. Comm’n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (same, after remand); *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (reallocation of production costs through bandwidth remedy); *La. Pub. Serv. Comm’n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008) (allocation of generation resources); *La. Pub. Serv. Comm’n v. FERC*, 341 F. App’x 649 (D.C. Cir. 2009) (methodology for bandwidth calculations); *Council of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (withdrawal of certain Operating Companies from System Agreement); *La. Pub. Serv. Comm’n v. FERC*, 761 F.3d 540 (5th Cir. 2014) (second annual bandwidth proceeding), *cert. denied*, 135 S. Ct. 2072 (2015); *La. Pub. Serv. Comm’n v. FERC*, 771 F.3d 903 (5th Cir. 2014) (third annual bandwidth proceeding), *cert. denied*, 135 S. Ct. 2072; *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014) (refunds related to allocation of capacity costs, after remand); *La. Pub. Serv. Comm’n v. FERC*, 606 F. App’x 1 (D.C. Cir. 2015) (first annual bandwidth proceeding); *La. Pub. Serv. Comm’n v. FERC*, No. 14-1063 (D.C. Cir. filed Apr. 22, 2014) (refunds and timing of implementing

an overview of that unusual arrangement. (This Court provided a similar overview of the Entergy System in *Louisiana Public Service Commission v. FERC*, 522 F.3d 378, 383-85 (D.C. Cir. 2008) (“*Louisiana 2008*”).)

The Entergy System comprises six Operating Companies selling electricity in Arkansas, Louisiana, Mississippi, and Texas.<sup>2</sup> *See Louisiana 2008*, 522 F.3d at 383. The Operating Companies are owned by a multistate holding company, Entergy Corporation.<sup>3</sup> *Id.* (What is now the Entergy System originated under Middle South Utilities, Inc., which owned most of the Operating Companies’ predecessors.) At all times relevant to this case, transactions among the Entergy Operating Companies were governed by the System Agreement. *See Miss. Indus.*

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bandwidth remedy, after remand), *pending*. System Agreement disputes twice have been presented to the U.S. Supreme Court. *See Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39 (2003) (preemption of state regulatory jurisdiction as to cost allocation); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988) (same).

<sup>2</sup> For the time period relevant to this appeal, those Operating Companies were: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Louisiana, LLC; Entergy New Orleans, Inc.; and Entergy Gulf States, Inc. (In 2007, Entergy Gulf States, Inc. separated into Entergy Gulf States Louisiana, LLC and Entergy Texas, Inc. *See Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007).)

<sup>3</sup> For purposes of this Brief, “Entergy” refers either to Entergy Corporation, the corporate parent of the Entergy Operating Companies and their affiliates, or to Entergy Services, Inc., a service affiliate that has acted on behalf of the Operating Companies in various FERC proceedings.

*v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987); *Louisiana 2008*, 522 F.3d at 383.

The Entergy System is highly integrated, with the Operating Companies' transmission and generation facilities operated as a single electric system. *See Louisiana 2008*, 522 F.3d at 383; *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 113 FERC ¶ 61,282 at P 8 (2005) ("*Opinion No. 480-A*"), *aff'd in part by Louisiana 2008*; *see generally Louisiana 2008*, 522 F.3d at 394 ("the operating companies are collaborators in the Entergy System functioning for their *mutual benefit*"). For decades, the Entergy System primarily allocated the costs and benefits of new generation resources through a centralized planning process that assigned new resources to individual Operating Companies, on a rotating basis. *See Louisiana 2008*, 522 F.3d at 383-84.

The System Agreement also allocated the costs of imbalances in the cost of facilities used for the mutual benefit of all the Entergy Operating Companies. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) ("[K]eeping excess capacity available for use by all is a benefit shared by the operating companies, and the costs associated with this benefit must be allocated among them."). The System Agreement required that production costs be roughly equal among the Operating Companies. *See Louisiana 2008*, 522 F.3d at 384; *see also Miss. Indus.*, 808 F.2d at 1530 (affirming FERC orders that allocated costs of

nuclear generation investments to operating companies in proportion to demand for system energy). Thus, since the first System Agreement in 1951, the Agreement sought to iron out inequities through “equalization payments.” 808 F.2d at 1530.

Nevertheless, over the history of the System Agreement, the Commission twice (in 1985 and 2005) found that disparities in production costs among the Operating Companies had disrupted the rough equalization required by the System Agreement and resulted in undue discrimination, requiring a Commission-ordered remedy. *See Louisiana 2008*, 522 F.3d at 384, 386 (describing both instances); *id.* at 391-94 (affirming Commission’s 2005 finding of undue discrimination and “bandwidth” remedy for rough equalization of production costs); *Miss. Indus.*, 808 F.2d at 1553-58 (affirming Commission’s 1985 finding of undue discrimination and remedy of reallocating nuclear investment costs).

The bandwidth remedy imposed in 2005 was set forth in the System Agreement at Service Schedule MSS-3. The formula requires Entergy to calculate each Operating Company’s production costs, using figures reported in accordance with the Commission’s annual reporting requirements, to compare those costs. *See La. Pub. Serv. Comm’n v. FERC*, 761 F.3d 540, 544 (5th Cir. 2014); *see also* 18 C.F.R. § 141.1 (requiring large electric utilities to file annual reports in a format specified by the Commission); 18 C.F.R. Part 101 (Uniform System of Accounts

Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act).

In December 2005, Entergy Arkansas gave 96 months' (eight years') notice, as required under the System Agreement, that it would terminate its participation in the System Agreement effective in December 2013. Entergy Mississippi gave notice in November 2007 that it would terminate its participation in November 2015. The Commission subsequently determined that the withdrawing companies were not required to pay exit fees, could keep their generation facilities, and would not be required to continue participating in the bandwidth remedy. *See Entergy Servs., Inc.*, 129 FERC ¶ 61,143 (2009), *reh'g denied*, 134 FERC ¶ 61,075 (2011). This Court affirmed the orders, holding that the Commission reasonably interpreted the Operating Companies' obligations under the System Agreement. *See Council of New Orleans v. FERC*, 692 F.3d 172, 174-77 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013).

The System Agreement and all of its service schedules terminated on August 31, 2016. *See Entergy Arkansas, Inc.*, 153 FERC ¶ 61,347 (2015) (approving settlement agreement to terminate System Agreement). All of the Entergy Operating Companies joined the Midcontinent Independent System Operator. *See* <https://www.ferc.gov/market-oversight/mkt-electric/midwest.asp>.

### **C. The Bandwidth Remedy and Related Proceedings**

The orders challenged on appeal are intertwined with a number of orders issued in other, overlapping proceedings that addressed disputes arising in the annual calculation proceedings and related challenges to the bandwidth formula. For that reason, this Brief necessarily discusses the background and implementation of the bandwidth remedy, and places the orders now on review in the broader context of those interrelated cases. (A timeline of bandwidth-related filings and orders is attached at the end of this Brief, to aid the Court’s understanding of the array of overlapping proceedings.)

#### **1. The Bandwidth Remedy Proceeding**

The bandwidth remedy arose from a complaint filed by the Louisiana Public Service Commission (“Louisiana Commission”), which asserted that the cost allocations among the Entergy Operating Companies had become unjust, unreasonable, and unduly discriminatory. Following a hearing before an administrative law judge, the Commission found that the allocation of production costs among the Entergy Operating Companies was no longer in rough equalization, due to disparate fuel costs, and thus was no longer just and reasonable. *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 111 FERC ¶ 61,311 at PP 28-30 (“*Opinion No. 480*”), *aff’d on reh’g*, *La. Pub. Serv. Comm’n v. FERC*, 113 FERC ¶ 61,282 (2005) (“*Opinion No. 480-A*”). Accordingly, the Commission

adopted a remedy establishing numerical percentage “bandwidths” of +/- 11 percent as the outside bounds by which production costs would be permitted to deviate from the System average, to be remedied through equalization payments among the Operating Companies. *Opinion No. 480* at PP 1, 14, 136, 144. The Commission determined that comparisons of production costs among the Operating Companies should follow the methodology that Entergy had proposed. *Id.* at P 33.

On appeal, this Court held that the Commission had jurisdiction to impose the bandwidth formula and that the remedy was reasonable, supported by substantial evidence, and well within the Commission’s broad remedial discretion. *Louisiana 2008*, 522 F.3d at 383, 391-94. The Court, however, remanded to the Commission on other issues, concerning refunds and, relevant here, timing of implementing the bandwidth remedy. *See id.* at 399-400. *See infra* pp. 14-15 (describing proceedings on remand).

In April 2006, as directed by the Commission in *Opinion No. 480*, Entergy proposed amendments to the System Agreement to implement the bandwidth remedy, which the Commission accepted with modifications in November 2006. Entergy submitted a further compliance filing in December 2006, which the Commission accepted in April 2007. *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006), *on reh’g and compliance*, 119 FERC ¶ 61,095

(2007), *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. July 6, 2009). In those filings, Entergy modified Service Schedule MSS-3 to the System Agreement to add a formula rate methodology to compare production costs among the Entergy Operating Companies and roughly equalize their respective shares of the Entergy System's costs through inter-company payments and receipts. *See* 117 FERC ¶ 61,203 at PP 24-27, 63; 119 FERC ¶ 61,095 at P 48.

## **2. The Annual Bandwidth Proceedings**

***First Bandwidth Proceeding.*** In *Opinion No. 480*, the Commission ruled that the bandwidth remedy would be effective starting with the 2006 calendar year. 111 FERC ¶ 61,311 at P 145. Entergy therefore initiated the First Bandwidth Proceeding in May 2007, filing its calculations of cost disparities and the Operating Companies' respective bandwidth payments or receipts based on production cost data for calendar year 2006. Following a hearing and an initial decision by an ALJ, the Commission ruled on numerous issues in *Entergy Servs., Inc.*, 130 FERC ¶ 61,023 (2010), *on reh'g*, 139 FERC ¶ 61,103 (2012), *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 606 F. App'x 1 (D.C. Cir. 2015).

***Second Bandwidth Proceeding.*** Entergy initiated the Second Bandwidth Proceeding in May 2008. Following a hearing and an initial decision by an ALJ, the Commission again ruled on numerous issues in *Entergy Servs., Inc.*, 137 FERC ¶ 61,029 (2011), *reh'g denied*, 142 FERC ¶ 61,013 (2013), *aff'd*, *La. Pub. Serv.*

*Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015).

***Third Bandwidth Proceeding.*** The Third Bandwidth Proceeding began in May 2009. The Commission again set the matter for hearing before an ALJ; in March 2010, the Commission ruled, on an interlocutory appeal, on the scope of issues in the hearing. *Entergy Servs., Inc.*, 130 FERC ¶ 61,170 (2010). Following the hearing, the Commission affirmed the ALJ's decision on various issues. *Entergy Servs., Inc.*, 139 FERC ¶ 61,105 (2012), *on reh'g*, 145 FERC ¶ 61,047 (2013), *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 771 F.3d 903 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015).

***Fourth Bandwidth Proceeding.*** Entergy initiated the Fourth Bandwidth Proceeding in May 2010. The Commission issued an order setting the matter for hearing, and subsequently ruled on Louisiana's request for rehearing regarding the scope of that proceeding. *Entergy Servs., Inc.*, 132 FERC ¶ 61,065 (2010), *on reh'g*, 137 FERC ¶ 61,019 (2011), *on reh'g and clarification*, 145 FERC ¶ 61,049 (2013). Following a hearing and initial decision by the ALJ, the Commission ruled on various issues in *Entergy Servs., Inc.*, 153 FERC ¶ 61,303 (2015), *on reh'g and clarification*, 156 FERC ¶ 61,196 (2016), *reh'g pending*.

***Later Bandwidth Proceedings.*** The fifth, sixth, seventh, and eighth annual bandwidth proceedings (filed each May in 2011, 2012, 2013, and 2014,

respectively) remain pending before the Commission, which (after holding several proceedings in abeyance pending resolution of the earlier bandwidth proceedings, to prevent relitigation of similar issues) consolidated all four proceedings and set them for hearing and settlement procedures. *See Entergy Servs., Inc.*, 149 FERC ¶ 61,244 at PP 1, 35-36 (2014). Following a hearing, the ALJ issued an initial decision in July 2016. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 156 FERC ¶ 63,017 (2016), *pending on exceptions*. (Entergy Arkansas was not included in the calculations for the eighth bandwidth proceeding, filed in 2014, because of its exit from the System Agreement in December 2013. *See id.* at P 4.) The ninth bandwidth proceeding, filed in May 2015, was resolved by an uncontested settlement. *See Entergy Servs., Inc.*, 156 FERC ¶ 61,091 (2016) (approving settlement). Entergy submitted its tenth and final bandwidth filing in May 2016, which the Commission accepted in July 2016. *See Letter Order, Entergy Services, Inc.*, FERC Docket No. ER16-1806 (July 26, 2016) (noting Entergy's commitment to submit a compliance filing after resolution of other bandwidth-related dockets).

***Complaints.*** In addition to the various annual bandwidth proceedings, the Commission also has addressed bandwidth-related issues in several complaint proceedings under section 206 of the Federal Power Act, 16 U.S.C. § 824e. *See, e.g., Ark. Pub. Serv. Comm'n v. Entergy Corp.*, 128 FERC ¶ 61,020 (2009), *reh'g denied*, 137 FERC ¶ 61,030 (2011), *reh'g denied*, 142 FERC ¶ 61,012 (2013),

*aff'd, Louisiana*, 761 F.3d 540; *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,107 (2012), *reh'g denied*, 153 FERC ¶ 61,188 (2015), *appeal pending*, *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 16-1014 (briefing completed).

### **3. Continuing Litigation Over Implementation of the Bandwidth Remedy for June-December 2005**

As noted *supra* at p. 10, in *Louisiana 2008* this Court remanded certain issues to the Commission for further proceedings. As relevant here, the Court remanded the Commission's determination that the remedy would be effective for calendar year 2006, with equalization payments based on any 2006 disparity beginning in 2007, when the Commission had found that the System Agreement rates were unjust and unreasonable on June 1, 2005. 522 F.3d at 399-400.

On remand, the Commission implemented the bandwidth remedy on June 1, 2005, and directed Entergy to calculate bandwidth payments and receipts for the seven-month period from June 1, 2005 through December 31, 2005 in accordance with the bandwidth formula approved in the 2006/2007 compliance proceeding, and to make any payments and receipts required within 90 days. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,047 at P 34 (2011). On February 28, 2014, the Commission issued a rehearing order that denied the Arkansas Commission's objection to the implementation date and the Louisiana Commission's objection to the method for the 2005 calculations, but granted the Louisiana Commission's request that the bandwidth payments for 2005 include

interest. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,152 at PP 33-40, 42 (2014), *reh'g denied*, 153 FERC ¶ 61,033 (2015) (denying Entergy's March 2014 request for rehearing as to interest payments). The Commission's orders on remand regarding the implementation date and calculations for June-December 2005 are pending on review before this Court in *Louisiana*, Case No. 14-1063.

Also on February 28, 2014, the Commission issued a companion order rejecting the compliance filing that Entergy had submitted to establish the bandwidth payments and receipts for June-December 2005. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,153 (2014) ("Compliance Order"), JA 607. Specifically, the Commission rejected Entergy's calculation methodology (because Entergy had used six months of data, for July-December 2005, to derive the calculation for the seven-month period of June-December 2005) and required a further compliance filing. *See id.* at PP 26-27. The Commission directed Entergy to use actual data to calculate bandwidth payments and receipts for the seven-month period, and to include interest payments on the amounts to be paid. *See id.* at PP 28, 30. Entergy filed a request for rehearing of both of the February 28 orders, objecting to the requirement that it include interest in the calculations. As noted *supra*, the Commission denied rehearing on that issue in an order that is

before the Court in a separate appeal (146 FERC ¶ 61,152, *on appeal in Case No. 14-1063*), and is not challenged in this case.

## **II. THE COMMISSION PROCEEDINGS AND ORDERS NOW ON REVIEW**

### **A. Hearing Order**

Following the rejection of its earlier compliance filing, Entergy submitted a revised compliance filing on April 29, 2014. R. 1, JA 14. Several parties protested the filing, including the Arkansas Commission, which argued that Entergy Arkansas should not be included in the 2005 calculations. Protest and Request for Rejection and Repayment of Funds, R. 14, JA 481.

On October 15, 2015, the Commission issued the Hearing Order. The Commission denied the Arkansas Commission's request to exclude Entergy Arkansas, finding that the Arkansas Commission had failed to seek rehearing of the 2014 Compliance Order. Hearing Order P 19, JA 491. In any event, the Commission rejected the Arkansas Commission's argument on the merits, as any bandwidth payments for 2005 were payments required under the System Agreement for services exchanged during Entergy Arkansas's participation in that Agreement. *Id.* P 20, JA 498-99. The Commission set the compliance filing for a trial-type evidentiary hearing and settlement judge procedures. *Id.* PP 21-23, JA 499.

## **B. Rehearing Order**

The Arkansas Commission filed a timely request for rehearing. R. 31, JA 502. On April 29, 2016, the Commission issued the Rehearing Order, JA 521, reaffirming its determinations that the Arkansas Commission could have sought rehearing of the Compliance Order and that Entergy Arkansas remained obligated to make bandwidth payments for the seven-month period in 2005. *See* Rehearing Order PP 20-26, JA 528-31. This appeal followed.

## **C. The Ongoing FERC Proceeding**

Following the issuance of the Hearing Order, the parties engaged in both settlement discussions and the hearing process; after formal discovery and several rounds of written testimony, the parties reached a partial settlement, which the Commission approved in August 2016, that resolved several issues for the 2005 bandwidth calculations. *See La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 156 FERC ¶ 61,101 (2016). Following a hearing in July 2016, an administrative law judge issued an initial decision in November on the remaining disputed issues for the 2005 calculations. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 157 FERC ¶ 63,018 (2016). Various parties filed briefs on exceptions to the Commission in December 2016, with briefs opposing exceptions due in January 2017; the matter remains pending before the agency. *See* 18 C.F.R. § 385.711 (filing and Commission review of briefs following on ALJ's initial decision).

## SUMMARY OF ARGUMENT

This case presents one more in a continuing series of disputes over the rough equalization of production costs across the multistate Entergy System. In previous orders — upheld, in large part, on appeal — the Commission established the bandwidth remedy and approved Entergy’s revisions to its tariff to implement the requisite formula for calculating and comparing costs. While affirming the creation of the bandwidth remedy in *Louisiana 2008*, however, the Court remanded the dispute as to the timing of the remedy’s implementation. In the orders on review here, arising from a compliance filing to set bandwidth calculations for a seven-month period in 2005, the Commission appropriately determined that Entergy Arkansas, despite having terminated its participation in the Entergy System Agreement in 2013, remained obligated to make bandwidth payments for 2005.

First, however, the Court should deny review on prudential grounds. The orders challenged here resolved only Entergy Arkansas’s liability for the 2005 bandwidth payments; they do not address the amount of that liability. That issue remains the subject of ongoing, vigorous litigation before the Commission. Until the Commission concludes its consideration of the 2005 bandwidth calculation disputes, Entergy Arkansas’s liability for payments lacks the finality and/or ripeness to warrant immediate judicial review.

Assuming jurisdiction, the Commission reasonably determined that Entergy Arkansas's obligation to make bandwidth payments for 2005 did not vanish when Entergy Arkansas terminated its participation in the System Agreement in 2013. The Commission considered the terms of the System Agreement, the benefits and obligations of participation in the Agreement, and principles of contractual obligations and Commission policy in the context of the extensive litigation concerning the System Agreement — and especially the bandwidth remedy. The Commission appropriately concluded that, having received the benefits of its participation in the System Agreement for several decades, until the day of its exit, Entergy Arkansas could not escape its corresponding obligations for the same period merely because the amounts of those obligations had not yet been finally determined at the time of its withdrawal.

## **ARGUMENT**

### **I. THE COURT SHOULD DECLINE TO REVIEW THE CHALLENGED ORDERS BECAUSE FURTHER AGENCY PROCEEDINGS CONCERNING THE 2005 BANDWIDTH PAYMENTS REMAIN ONGOING**

The Arkansas Commission anticipates (Br. 25-28) an argument that the Commission is not pursuing on appeal. The Commission does not contend that the Arkansas Commission is jurisdictionally barred, under Federal Power Act § 313(b), 16 U.S.C. § 825l(b), from challenging Entergy Arkansas's bandwidth obligation because it failed to seek rehearing of the Compliance Order, rejecting

Entergy's previous calculations, in 2014. The Arkansas Commission could have requested rehearing of the Compliance Order — as Entergy sought rehearing on the Commission's ruling that the 2005 bandwidth payments must include interest — and should have recognized that Entergy Arkansas would continue to be included in the “ongoing proceeding establishing the obligations of parties with regard to the seven-month period at issue in 2005.” Rehearing Order P 20, JA 528; *see also* Hearing Order P 19, JA 498 (“There was no uncertainty.”). Nevertheless, the 2014 Compliance Order did not explicitly address the issue presented on review — Entergy Arkansas's pre-withdrawal liability — at that time.

The Commission does, however, submit that judicial review is not appropriate at this interim stage of the proceedings. On rehearing, the Commission clarified that its decision resolving “the legal question” of Entergy Arkansas's obligation to make bandwidth payments for 2005 constituted final agency action. Rehearing Order P 27, JA 531. But the amount of that obligation remains in dispute in ongoing agency proceedings. Following a partial settlement of some issues (which the Arkansas Commission joined) and a trial-type evidentiary hearing on the remaining issues (in which the Arkansas Commission participated), several parties to that hearing filed exceptions to the Commission challenging the administrative law judge's initial decision. *See supra* p. 17 (explaining status of ongoing proceeding). (Though the precise amounts remain in dispute, the

payments at stake are substantial. Entergy’s proposed calculations, in the compliance filing that initiated the proceeding, provided for Entergy Arkansas to pay more than \$167 million in bandwidth payments for the seven-month period in 2005, plus \$56 million in interest. *See* Hearing Order PP 7-8, JA 494 (summarizing Entergy’s proposed calculations.)

After the Commission rules on the exceptions briefed in that proceeding (*see* 18 C.F.R. § 385.711), one or more parties may — as in many other bandwidth-related proceedings — seek judicial review of those orders. Therefore, the Commission submits that, while the bandwidth calculations for 2005 remain in dispute, the instant appeal lacks the finality and/or ripeness necessary for judicial review. *See, e.g., Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 800 (D.C. Cir. 2006) (“For agency action to be ‘final’ and reviewable under the APA, it must generally ‘mark the consummation of the agency’s decisionmaking process’ and either determine ‘rights or obligations’ or result in ‘legal consequences.’”) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)); *Miss. Valley Gas Co. v. FERC*, 68 F.3d 503, 509 (D.C. Cir. 1995) (rejecting appeal as unripe because the effect of the Commission’s legal holding would likely be more clear when actual rates were finalized at the conclusion of ongoing FERC proceedings); *see also Truckers United for Safety v. Mead*, 251 F.3d 183, 192 (D.C. Cir. 2001) (“the burden of pursuing future litigation is not enough, by itself,

to demonstrate hardship justifying premature judicial decision-making”).

Accordingly, the Court should decline, as a prudential matter, to engage in piecemeal review of the ongoing litigation over the 2005 payments.

## **II. ASSUMING JURISDICTION, THE COMMISSION PROPERLY DETERMINED THAT ENTERGY ARKANSAS REMAINED LIABLE FOR ITS BANDWIDTH PAYMENT OBLIGATIONS THAT ACCRUED DURING ITS PARTICIPATION IN THE SYSTEM AGREEMENT**

### **A. Standard Of Review**

The Court reviews FERC orders under the Administrative Procedure Act’s arbitrary and capricious standard. *See, e.g., Louisiana 2008*, 522 F.3d at 391. The “scope of review under [that] standard is narrow.” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016) (citation omitted). The relevant inquiry is whether the agency has “articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Elec. Power Supply Ass’n*, 136 S. Ct. at 784 (finding reasoned decisionmaking where Commission “weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice”).

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) (affording "great deference" to Commission's rate decisions); *W. Area Power Admin. v. FERC*, 525 F.3d 40, 51 (D.C. Cir. 2008) ("When FERC's orders concern ratemaking, we are particularly deferential to the Commission's expertise.") (internal quotation marks and citation omitted). The Commission's policy assessments likewise are afforded "great deference." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *see also Louisiana 2008*, 522 F.3d at 393-94 (recognizing FERC's broad remedial discretion and policy choice in designing bandwidth remedy).

Additionally, this Court affords *Chevron* deference to the Commission's interpretation of filed tariffs, including the Entergy System Agreement. *See New Orleans*, 692 F.3d at 175; *see generally Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998). This Court also "defer[s] to the Commission's interpretations of its own precedents." *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007); *accord Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015).

**B. The Commission Appropriately Upheld Entergy Arkansas's Contractual Obligation To Make Bandwidth Payments For 2005**

In this appeal, the Arkansas Commission does not dispute that Entergy Arkansas's obligation to make bandwidth payments for a portion of 2005 arose under the terms of the System Agreement and accrued during the period that Entergy Arkansas participated in the System Agreement. *See* Br. 2, 8. But the Arkansas Commission contends that Entergy Arkansas's obligation to make bandwidth payments for 2005 expired upon its withdrawal from the System Agreement in December 2013. *See* Br. 8-10, 12-24.

The Commission, however, reasonably concluded, based on the System Agreement and the exchange of services thereunder, as well as on judicial and FERC precedents, fundamental principles of contracts, and policy judgment, that Entergy Arkansas remained liable for obligations that accrued when it was participating in, and benefiting from, the System Agreement.

**1. The Commission Reasonably Concluded That Obligations Accrued During Participation In The System Agreement Did Not Expire Upon Withdrawal From The System Agreement**

The Commission began its analysis, appropriately, with the contract, finding that the bandwidth payments were obligations that accrued under the terms of the System Agreement during the time when Entergy Arkansas participated in that Agreement, well before its withdrawal. "Bandwidth payments are required under

the System Agreement for services exchanged among the Operating Companies during seven months in 2005 that fall entirely within the period of Entergy Arkansas’[s] participation.” Rehearing Order P 22, JA 529; *accord* Hearing Order P 20, JA 498-99. *See generally New Orleans*, 692 F.3d at 177 (finding that the rough equalization requirement “is rooted in the [System] Agreement”).

The Commission also emphasized the contract performance of, and benefits reaped by, the participating Operating Companies, including joint planning, single system dispatch, and cost sharing. *See* Rehearing Order P 26, JA 531 (“the Operating Companies fulfilled their obligations imposed by the System Agreement since 2005”); *see also supra* pp. 6-7 (describing mutual obligations and benefits under the Agreement). In turn, “[t]he rough equalization of production costs through bandwidth payments is part of the mutual obligation undertaken by all the Operating Companies in the System Agreement.” Rehearing Order P 26, JA 531.

Having found the contractual obligations to have accrued during Entergy Arkansas’s participation, the Commission found no basis to extinguish those obligations upon its exit. *See* Rehearing Order P 23, JA 529. This Court’s decision in *New Orleans*, 692 F.3d 172, provides no such basis. Neither the FERC orders in that case<sup>4</sup> nor the Court’s decision affirming those orders purported to

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<sup>4</sup> *Entergy Servs., Inc.*, 129 FERC ¶ 61,143 (2009), *reh’g denied*, 134 FERC ¶ 61,075 (2011).

address the status of obligations that had already accrued, or were still accruing, while the Operating Companies were still participating in the System Agreement — even as (within the same 2009-2012 timeframe as the withdrawal litigation) multiple annual bandwidth proceedings, bandwidth-related complaint proceedings, and further proceedings on remand from *Louisiana 2008* were pending in various stages of litigation.

Rather, the withdrawal dispute in *New Orleans* turned on whether the withdrawing companies could retain the facilities that they owned, which had been planned through the Entergy System’s centralized planning process, without paying exit fees to compensate the other Operating Companies for the loss of system assets, and whether the withdrawing companies must continue to participate in the bandwidth remedy going forward (i.e., to accrue additional bandwidth payment obligations). *See* 692 F.3d at 175-76.<sup>5</sup>

The Arkansas Commission strains to distinguish the discussion of exit fees in *New Orleans* (*see* Br. 14-17), arguing that exit fees include any existing payment obligations at the time of withdrawal. But both the Commission and this

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<sup>5</sup> At oral argument before this Court, the discussion focused primarily on the ownership of generation facilities — i.e., whether Entergy Arkansas and Entergy Mississippi could take the facilities that they owned to serve their customers after exiting the System Agreement. *See* [https://www.cadc.uscourts.gov/recordings/recordings2012.nsf/91AF573F124A812F85257BDF00039F26/\\$file/01131211-1043.mp3](https://www.cadc.uscourts.gov/recordings/recordings2012.nsf/91AF573F124A812F85257BDF00039F26/$file/01131211-1043.mp3).

Court have used that term to refer to contractual *conditions* on the right to withdraw, rather than to every liability that arises during participation in a contract. *See, e.g., FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 351, 354 (D.C. Cir. 2014) (discussing contractual exit fee representing allocated share of costs of transmission system facilities); *Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282 at PP 58-50 (2006) (same); *see also Entergy Servs.*, 129 FERC ¶ 61,143 at P 60 (contrasting such prerequisites with the absence of conditions in the System Agreement’s termination provision). The Commission, affirmed by this Court, already approved Entergy Arkansas’s withdrawal from the System Agreement without conditions (other than the 96 months’ notice specified in the Agreement).

As to bandwidth payments, in the withdrawal case the dispute concerned whether Entergy Arkansas must continue to participate in annual bandwidth proceedings even after withdrawing from the System Agreement. *See New Orleans*, 692 F.3d at 177 (rejecting the argument that rough equalization “must continue, potentially forever”); *Entergy Servs.*, 134 FERC ¶ 61,075 at P 35 (rejecting premise that Operating Companies are “entitled to bandwidth payments in perpetuity” and finding “no basis to suggest that bandwidth payments should continue indefinitely” even after an Operating Company ends participation in the System Agreement). *Cf. Opinion No. 480*, 111 FERC ¶ 61,311 at P 145 (explaining that bandwidth reallocations of costs are implemented on a prospective

basis each year); *Opinion No. 480-A*, 113 FERC ¶ 61,282 at PP 53-54 (same).

Therefore, the Commission here reasonably concluded that *New Orleans* “does not address or excuse Entergy Arkansas from paying its System Agreement obligations that existed prior to its exit.” Hearing Order P 20, JA 499. In short, Entergy Arkansas’s exit from the System Agreement cut off its liability for prospective bandwidth obligations, beginning with the eighth annual bandwidth filing in 2014 (*see supra* p. 13), but the withdrawal did not erase its existing bandwidth obligations that accrued prior to the termination date.

Moreover, the Commission had, in another proceeding, found Entergy Arkansas’s obligations during the period of its participation in the System Agreement to be unchanged by its impending termination. *Ark. Elec. Energy Consumers, Inc. v. Entergy Corp.*, 126 FERC ¶ 61,029 (2009), *discussed in* Rehearing Order P 25, JA 530. There, the Commission rejected an argument that Entergy Arkansas, having given its 96 months’ notice of withdrawal, should cease planning on a system basis and instead plan for its own operations. *Ark. Elec. Energy Consumers*, 126 FERC ¶ 61,029 at PP 8, 34. The Commission explained that, until Entergy Arkansas left the System Agreement, it continued to be part of the Agreement and bound to the obligations provided therein. *Id.* at P 37.

Furthermore, the Commission in this case found no basis in contract precedents or principles to support the termination of Entergy Arkansas’s accrued

obligations. The Commission noted that the Arkansas Commission had not provided persuasive authority that a party may erase its contractual obligation by exercising an option to terminate the contract. *See* Rehearing Order P 23, JA 529. To the contrary, the Commission pointed to cases affirming “the principle that accrued contractual obligations do not vanish upon termination of the agreement.” *Id.* (The Commission cited such precedents in recognition of basic principles — not, as the Arkansas Commission claims, as “controlling” authority, Br. 17.) In particular, in *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977), the Supreme Court upheld a contractual obligation to arbitrate a dispute notwithstanding the termination of the contract. *See* Rehearing Order P 23, JA 529; *cf. Int’l Ass’n of Machinists & Aerospace Workers v. Oxco Brush Div.*, 517 F.2d 239, 243-44 (6th Cir. 1975) (contract termination did not extinguish workers’ rights to seek accrued pay), *cited in* Rehearing Order P 23 n.33, JA 530. Indeed, in *Nolde Brothers* the Court found a contractual obligation to arbitrate even though the pay dispute to be arbitrated arose after the contract termination (430 U.S. at 249) — unlike bandwidth obligations that accrued in 2005 and have been litigated throughout the ensuing eleven years.

**2. The Commission Reasonably Concluded That, Where Entergy Arkansas Received The Benefits Of The System Agreement For Several Decades, Extensive Litigation Of Bandwidth Disputes Would Not Erase Its Accrued Payment Obligations**

Having determined, in accordance with the System Agreement, precedent, and contract principles, that Entergy Arkansas's accrued bandwidth obligations did not evaporate upon its withdrawal from the Agreement, the Commission also, exercising its policy judgment, appropriately determined that bandwidth litigation does not run out the clock on those obligations. "Having availed itself of the System Agreement benefits, Entergy Arkansas may not now escape its System Agreement obligations due to the delay in their determination and quantification." Rehearing Order P 26, JA 531; *accord id.* at P 22, JA 529.

Indeed, the background of bandwidth litigation — with which this Court has extensive experience — lays bare the fallacy of expiration-by-litigation. Numerous bandwidth-related disputes arose between the establishment of the bandwidth remedy, effective June 1, 2005, and Entergy Arkansas's departure from the System Agreement on December 18, 2013 — in many cases, with litigation continuing after 2013 (with both Entergy Arkansas and the Arkansas Commission participating). To date, every annual bandwidth proceeding in which Entergy Arkansas has participated has included a trial-type evidentiary hearing before an administrative law judge. Litigation of the first annual bandwidth proceeding

began in 2007 and concluded with this Court’s decision in 2015. The second and third bandwidth proceedings began in 2008 and 2009, respectively, and concluded with decisions by the Fifth Circuit in 2014 and the Supreme Court’s denial of certiorari in 2015. The fourth bandwidth proceeding, initiated in 2010, remains pending on rehearing before the agency, while the fifth through seventh (the last annual proceeding that included Entergy Arkansas), which began in 2011 through 2013, are pending on exceptions from the ALJ’s initial decision. *See supra* pp. 12-13.<sup>6</sup>

And, of course, the instant appeal arose from the same FERC docket (EL01-88) as the bandwidth remedy itself, established in *Opinion Nos. 480 and 480-A*. The challenged orders addressed a compliance filing to implement the bandwidth remedy for part of 2005, as the Commission directed on remand from *Louisiana 2008*. This case alone has spanned nearly 16 years, from the Louisiana Commission’s complaint filed in June 2001, through an administrative hearing in 2003 and *Opinion Nos. 480 and 480-A* in 2005, to this Court’s decision in *Louisiana 2008* — followed by various proceedings on remand concerning refunds

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<sup>6</sup> This array of bandwidth-related litigation — against the backdrop of several decades of multi-party disputes arising under the System Agreement (*see supra* note 1) — casts considerable doubt on the Arkansas Commission’s assertion that, when Entergy made its initial (rejected) compliance filing in 2011 to set the 2005 calculations, “reasonable expectations were that payments would be due before [Entergy Arkansas’s] withdrawal” in 2013. Br. 10.

and implementation, calculations rejected in the Compliance Order in 2014, orders on remand concerning implementation in 2014-2015 (with an appeal to this Court now pending after argument in December 2016), revised calculations set for hearing in these challenged orders in 2015-2016, a partial settlement in 2016, an evidentiary hearing in 2016, and an ALJ decision pending on exceptions before the agency into 2017. *See supra* pp. 9-10, 14-16. *Cf.* Rehearing Order P 21, JA 529 (“As a sophisticated entity and experienced participant in the Entergy System, the Arkansas Commission . . . has no basis for arguing that it had no notice that Entergy Arkansas would be required to make payments despite its withdrawal.”).

Nor is such timing unique to the bandwidth remedy. A separate dispute concerning allocation of capacity costs among the Operating Companies has been litigated since 1995, including four appeals to this Court. *See La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999); *La. Pub. Serv. Comm’n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007); *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014); *La. Pub. Serv. Comm’n v. FERC*, Case No. 16-1382 (D.C. Cir. filed Nov. 4, 2016).

In this context, where the multistate Entergy system has, since the 1982 System Agreement, given rise to dozens of complex Commission proceedings and judicial appeals, the Commission made a rational policy choice: that an Operating Company that has received the benefits of that integrated system for decades could

not shed its corresponding obligations merely because the extensive litigation surrounding those obligations lasted beyond the Company's withdrawal date. *See* Rehearing Order P 22, JA 529 (“[H]aving received the benefits of the System Agreement in 2005, Entergy Arkansas may not escape its obligations that accrued at that time.”); *id.* (“Due to delays in litigation, the obligation of Entergy Arkansas to make other Operating Companies whole for costs pertaining to bandwidth payments for [2005] . . . was not finally determined until after [its] withdrawal”); *accord id.* at P 26, JA 531; *cf. Nolde Bros.*, 430 U.S. at 251 (declaring that “it could not seriously be contended” that termination of a contract would halt an ongoing arbitration process under that contract). This is precisely the type of “disputed question,” involving “both technical understanding and policy judgment,” that is particularly suited to Commission decision-making; “[i]t is not [the Court’s] job to render that judgment, on which reasonable minds can differ.” *Elec. Power Supply Ass’n*, 136 S. Ct. at 784; *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) (court affords “great deference” to FERC’s policy judgments).

## CONCLUSION

For the reasons stated, the petition for review should be dismissed as premature; if not, the petition should be denied and the challenged FERC Orders should be affirmed on the merits.

Respectfully submitted,

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Final Brief: February 16, 2017

## CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(B), (f), and (g), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2013, in 14-point Times New Roman) and contains 7,460 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, the signature block, and the addendum.

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February 16, 2017

# **ADDENDUM**

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as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109-58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

**SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE**

**§ 824. Declaration of policy; application of subchapter**

**(a) Federal regulation of transmission and sale of electric energy**

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

**(b) Use or sale of electric energy in interstate commerce**

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

**(c) Electric energy in interstate commerce**

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

**(d) "Sale of electric energy at wholesale" defined**

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

**(e) "Public utility" defined**

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),<sup>1</sup> 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

**(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt**

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

**(g) Books and records**

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

<sup>1</sup>So in original. Section 824e of this title does not contain a subsec. (f).

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms “affiliate”, “associate company”, “electric utility company”, “holding company”, “subsidiary company”, and “exempt wholesale generator” shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, §201, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 847; amended Pub. L. 95-617, title II, §204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102-486, title VII, §714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109-58, title XII, §§1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

#### REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109-58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

#### AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109-58, §1295(a)(1), substituted “Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title” for “The provisions of sections 824i, 824j, and 824k of this title” and “Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title” for “Compliance with any order of the Commission under the provisions of section 824i or 824j of this title”.

Subsec. (e). Pub. L. 109-58, §1295(a)(2), substituted “section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title” for “section 824i, 824j, or 824k of this title”.

Subsec. (f). Pub. L. 109-58, §1291(c), which directed amendment of subsec. (f) by substituting “political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,” for “political subdivision of a state,” was executed by making the substitution for “political subdivision of a State,” to reflect the probable intent of Congress.

Subsec. (g)(5). Pub. L. 109-58, §1277(b)(1), substituted “2005” for “1935”.

1992—Subsec. (g). Pub. L. 102-486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95-617, §204(b)(1), designated existing provisions as par. (1), inserted “except as provided in paragraph (2)” after “in interstate commerce, but”, and added par. (2).

Subsec. (e). Pub. L. 95-617, §204(b)(2), inserted “(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)” after “under this subchapter”.

#### EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109-58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109-58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

#### STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 796 of this title.

#### PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95-617, title II, §214, Nov. 9, 1978, 92 Stat. 3149, provided that:

“(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

“(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.”

#### § 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

##### (a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon

TRANSFER OF FUNCTIONS

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

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

**(a) Just and reasonable rates**

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

**(b) Preference or advantage unlawful**

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

**(c) Schedules**

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

**(d) Notice required for rate changes**

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

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

#### AMENDMENTS

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

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

#### STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classi-

fication is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER  
FEDERAL POWER ACT

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

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

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

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classi-

fication is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

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

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

shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

**(c) Refund considerations; shifting costs; reduction in revenues; “electric utility companies” and “registered holding company” defined**

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission’s order. For purposes of this subsection, the terms “electric utility companies” and “registered holding company” shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.<sup>1</sup>

**(d) Investigation of costs**

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

**(e) Short-term sales**

(1) In this subsection:

(A) The term “short-term sale” means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term “applicable Commission rule” means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject

to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100-473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109-58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109-58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58, § 1295(b)(1), substituted “hearing held” for “hearing had” in first sentence.

Subsec. (b). Pub. L. 109-58, § 1295(b)(2), struck out “the public utility to make” before “refunds of any amounts paid” in seventh sentence.

Pub. L. 109-58, § 1285, in second sentence, substituted “the date of the filing of such complaint nor later than 5 months after the filing of such complaint” for “the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period”, in third sentence, substituted “the date of the publication” for “the date 60 days after the publication” and “5 months after the publication date” for “5 months after the expiration of such 60-day period”, and in fifth sentence, substituted “If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision” for “If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision”.

Subsec. (e). Pub. L. 109-58, § 1286, added subsec. (e).

1988—Subsec. (a). Pub. L. 100-473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

<sup>1</sup> See References in Text note below.

Subsecs. (b) to (d). Pub. L. 100-473, §2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

**EFFECTIVE DATE OF 1988 AMENDMENT**

Pub. L. 100-473, §4, Oct. 6, 1988, 102 Stat. 2300, provided that: "The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice."

**LIMITATION ON AUTHORITY PROVIDED**

Pub. L. 100-473, §3, Oct. 6, 1988, 102 Stat. 2300, provided that: "Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.]."

**STUDY**

Pub. L. 100-473, §5, Oct. 6, 1988, 102 Stat. 2301, directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

**§ 824f. Ordering furnishing of adequate service**

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, §207, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 853.)

**§ 824g. Ascertainment of cost of property and depreciation**

**(a) Investigation of property costs**

The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determina-

tion of such cost or depreciation, and the fair value of such property.

**(b) Request for inventory and cost statements**

Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, §208, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 853.)

**§ 824h. References to State boards by Commission**

**(a) Composition of boards; force and effect of proceedings**

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

**(b) Cooperation with State commissions**

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

**(c) Availability of information and reports to State commissions; Commission experts**

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient

**§ 825j. Investigations relating to electric energy; reports to Congress**

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

**§ 825k. Publication and sale of reports**

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing,

and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

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

CODIFICATION

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

CHANGE OF NAME

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

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

**§ 825l. Review of orders**

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

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

**(b) Judicial review**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United

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

**(c) Stay of Commission's order**

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

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

**CODIFICATION**

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

**AMENDMENTS**

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

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

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

**CHANGE OF NAME**

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

**§ 825m. Enforcement provisions**

**(a) Enjoining and restraining violations**

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

**(b) Writs of mandamus**

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

**(c) Employment of attorneys**

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

**(d) Prohibitions on violators**

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or

§ 131.80

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

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

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

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

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

**PART 141—STATEMENTS AND REPORTS (SCHEDULES)**

Sec.

- 141.1 FERC Form No. 1, Annual report of Major electric utilities, licensees and others.
- 141.2 FERC Form No. 1–F, Annual report for Nonmajor public utilities and licensees.
- 141.14 Form No. 80, Licensed Hydropower Development Recreation Report.
- 141.15 Annual Conveyance Report.
- 141.51 FERC Form No. 714, Annual Electric Balancing Authority Area and Planning Area Report.
- 141.61 [Reserved]
- 141.100 Original cost statement of utility property.
- 141.300 FERC Form No. 715, Annual Transmission Planning and Evaluation Report.
- 141.400 FERC Form No. 3–Q, Quarterly financial report of electric utilities, licensees, and natural gas companies.
- 141.500 Cash management programs.

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

18 CFR Ch. I (4–1–14 Edition)

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

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

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

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

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

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

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

## Federal Energy Regulatory Commission

## § 141.51

pursuant to §385.2011 of this chapter is required.

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

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

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

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

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

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

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

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

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

The form of the report, Licensed Hydropower Development Recreation Report, designated as FERC Form No. 80, for use by licensees in reporting information with respect to existing and potential recreational use at developments within projects under major and

minor license, is approved and prescribed for use as provided in §8.11 of this chapter.

[46 FR 50059, Oct. 9, 1981]

### § 141.15 Annual Conveyance Report.

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

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

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

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

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

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

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

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

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

§ 385.711

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(d) *Waiver by presiding officer.* A motion for waiver of the initial decision, requested for the purpose of certification of a contested settlement pursuant to Rule 602(h)(2)(iii)(A), may be filed with, and decided by, the presiding officer. If all parties join in the motion, the presiding officer will grant the motion. If not all parties join in the motion, the motion is denied unless the presiding officer grants the motion within 30 days of filing the written motion or presenting an oral motion. The contents of any motion filed under paragraph (d) of this section must comply with the requirements in paragraph (b) of this section. A motion may be oral or written, and may be made whenever appropriate for the consideration of the presiding officer.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 578, 60 FR 19508, Apr. 19, 1995]

**§ 385.711 Exceptions and briefs on and opposing exceptions after initial decision (Rule 711).**

(a) *Exceptions.* (1)(i) Any participant may file with the Commission exceptions to the initial decision in a brief on exceptions not later than 30 days after service of the initial decision.

(ii) Not later than 20 days after the latest date for filing a brief on exceptions, any participant may file a brief opposing exceptions in response to a brief on exceptions.

(iii) A participant may file, within the time set for filing briefs opposing exceptions, a brief on exceptions solely for the purpose of incorporating by reference one or more numbered exceptions contained in the brief of another participant. A brief filed under this clause need not comply with the requirements set forth in paragraph (b) of this section.

(2) A brief on exceptions or a brief opposing exceptions may not exceed 100 pages, unless the Chief Administrative Law Judge, upon motion, changes the page limitation.

(3) The Secretary may extend, on motion or upon direction of the Commission, the time limits for any brief on or opposing exceptions. No additional briefs are permitted, unless specifically ordered by the Commission.

(4) A participant may not attach to, or incorporate by reference in, any brief on exceptions or brief opposing exceptions any portion of an initial or reply brief filed in the proceeding.

(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver*. If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver*. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver*. Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

**§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).**

(a) *General rule*. If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument*. When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review*. After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

**§ 385.713 Request for rehearing (Rule 713).**

(a) *Applicability*. (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under

subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file*. A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request*. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled “Statement of Issues,” listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers*. (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay*. Unless otherwise ordered by the Commission, the filing of a request for rehearing does

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**CERTIFICATE OF SERVICE**

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 16th day of February 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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**TIMELINE OF FILINGS, ORDERS, AND EVENTS IN BANDWIDTH AND RELATED PROCEEDINGS**

<b>Year</b>	<b>Month</b>	<b>Description of Event/Order/Proceeding</b>	<b>Citation</b>	<b>JA</b>
2005	June	<i>Opinion No. 480</i> in Bandwidth Remedy Proceeding	111 FERC ¶ 61,311	
	December	<i>Opinion No. 480-A</i> in Bandwidth Remedy Proceeding Entergy Arkansas gives 96 months' notice of withdrawal	113 FERC ¶ 61,282	
2006	November	<i>2006 Compliance Order</i>	117 FERC ¶ 61,203	
2007	April	<i>2007 Compliance Order</i>	119 FERC ¶ 61,095	
	May	[Entergy files First Bandwidth Proceeding]		
	November	Entergy Mississippi gives 96 months' notice of withdrawal		
2008	April	<i>Louisiana 2008</i> (affirming bandwidth remedy in <i>Opinion Nos. 480 &amp; 480-A</i> , remanding certain issues)	522 F.3d 378 (D.C. Cir.)	
	May	[Entergy files Second Bandwidth Proceeding]		
2009	May	[Entergy files Third Bandwidth Proceeding]	341 F. App'x 649 (D.C. Cir.)  129 FERC ¶ 61,143  129 FERC ¶ 61,238	
	July	<i>LPSC v. FERC</i> (affirming <i>2006/2007 Compliance Orders</i> )		
	November	Order accepting notices of withdrawal		
	December	Order on remand from <i>Louisiana 2008</i> (staying proceeding pending separate hearing on similar refund issues)		
2010	January	<i>Opinion No. 505</i> in First Bandwidth Proceeding	130 FERC ¶ 61,023	
	May	[Entergy files Fourth Bandwidth Proceeding]		

**TIMELINE OF FILINGS, ORDERS, AND EVENTS IN BANDWIDTH AND RELATED PROCEEDINGS**

<b>Year</b>	<b>Month</b>	<b>Description of Event/Order/Proceeding</b>	<b>Citation</b>	<b>JA</b>
2011	February	Rehearing Order on notices of withdrawal	134 FERC ¶ 61,075	
	May	[Entergy files Fifth Bandwidth Proceeding]		
	October	<i>Opinion No. 514</i> in Second Bandwidth Proceeding Remand Order (from <i>Louisiana 2008</i> ) (pending on review in D.C. Cir. No. 14-1063)	137 FERC ¶ 61,029 137 FERC ¶ 61,047	
2012	May	<i>Opinion No. 505-A</i> in First Bandwidth Proceeding <i>Opinion No. 518</i> in Third Bandwidth Proceeding [Entergy files Sixth Bandwidth Proceeding]	139 FERC ¶ 61,103 139 FERC ¶ 61,105	
	August	<i>New Orleans v. FERC</i> (affirming withdrawal orders)	692 F.3d 172 (D.C. Cir.)	
2013	January	<i>Opinion No. 514-A</i> in Second Bandwidth Proceeding	142 FERC ¶ 61,013	
	May	[Entergy files Seventh Bandwidth Proceeding]		
	October	[Various orders: First, Third, Fourth Bandwidth Proceedings]		
	December	Entergy Arkansas ends participation in System Agreement		
2014	February	First Rehearing on Remand Order (pending on review in D.C. Cir. No. 14-1063)	146 FERC ¶ 61,152	JA 607
		<b>Compliance Order</b> (rejecting compliance filing)	146 FERC ¶ 61,153	
	April	Entergy submits revised compliance filing		
	May	[Entergy files Eighth Bandwidth Proceeding]		
	August	<i>LPSC v. FERC</i> (affirming orders in Second BW Proceeding)	761 F.3d 540 (5th Cir.)	
November	<i>LPSC v. FERC</i> (affirming orders in Third BW Proceeding)	771 F.3d 903 (5th Cir.)		

**TIMELINE OF FILINGS, ORDERS, AND EVENTS IN BANDWIDTH AND RELATED PROCEEDINGS**

<b>Year</b>	<b>Month</b>	<b>Description of Event/Order/Proceeding</b>	<b>Citation</b>	<b>JA</b>
2015	March	<i>LPSC v. FERC</i> (affirming orders in First BW Proceeding)	606 F. App'x 1 (D.C. Cir.)	JA 491
	May	[Entergy files Ninth Bandwidth Proceeding]		
	October	<b>Hearing Order</b> Second Rehearing of Remand Order (on interest issue)	<b>153 FERC ¶ 61,032</b> 153 FERC ¶ 61,033	
	November	Entergy Mississippi ends participation in System Agreement		
2016	April	<b>Rehearing Order</b>	<b>155 FERC ¶ 61,118</b>	JA 521
	May	[Entergy files Tenth Bandwidth Proceeding]		
	July	ALJ issues initial decision on Fifth through Eighth Bandwidth Proceedings	156 FERC ¶ 63,017	
	August	System Agreement and all service schedules are terminated FERC approves partial settlement of 2005 BW calculations	156 FERC ¶ 61,101	
	November	ALJ issues initial decision on 2005 bandwidth calculations	157 FERC ¶ 63,018	
	December	Argument held in <i>LPSC v. FERC</i> , D.C. Cir. No. 14-1063		