ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 14-1063

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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April 27, 2016

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioner.

B. Rulings Under Review

1. *Louisiana Public Service Commission v. Entergy Services, Inc.*, 129 FERC ¶ 61,238 (2009), JA 1;

2. *Louisiana Public Service Commission v. Entergy Services, Inc.*, 137 FERC ¶ 61,047 (2011), JA 5; and

3. *Louisiana Public Service Commission v. Entergy Services, Inc.*, 146 FERC ¶ 61,152 (2014), JA 18.

C. Related Cases

The orders challenged in this appeal were issued in response to *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), which affirmed the Commission's imposition of a "bandwidth" remedy to implement rough equalization among the operating companies on the Entergy system, but remanded issues regarding the timing of implementation of the remedy and refunds. In *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014), this Court remanded Commission orders denying refunds in a related Entergy proceeding. As a result of the 2014 remand, the Commission in this proceeding is requesting a partial remand of the issue of refunds for further agency consideration.

/s/ *Lona T. Perry*
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April 27, 2016

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GLOSSARY

Commission or FERC	Respondent Federal Energy Regulatory Commission
FERC Form 1	FERC Form No. 1, an annual report that major electric utilities must file with the Commission every April, pursuant to 18 C.F.R. § 141.1
Formula Rate Order	Proceeding establishing the formula rate implementing the bandwidth remedy, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006), JA 154, *on reh'g*, 119 FERC ¶ 61,095 (2007), JA 303, *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. 2009)
Formula Rate Rehearing Order	Proceeding establishing the formula rate implementing the bandwidth remedy, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 119 FERC ¶ 61,095 (2007), JA 303, *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. 2009)
Louisiana Commission or Louisiana	Petitioner Louisiana Public Service Commission
Opinion No. 480	Proceeding establishing the bandwidth remedy, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, JA 46, *on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), JA 112, *aff'd in part, rev'd in part*, *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008)
Remand Order	*La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,047 (2011), JA 5
Rehearing Order	*La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,152 (2014), JA 18

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BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In 2005, the Federal Energy Regulatory Commission (FERC or the Commission) determined that the production costs of the operating companies comprising the integrated multistate Entergy power system were not roughly equal and thus were unreasonable. To remedy this disparity, the Commission required that Entergy reallocate costs that deviated on an annual basis from a fixed "bandwidth" around the system average. On appeal, this Court affirmed the remedy, but remanded the Commission's implementation of the remedy as of

January 1, 2006, the first calendar year following the unreasonableness finding, rather than as of June 1, 2005, the date the Commission found Entergy's rates unreasonable. The Court also remanded the Commission's denial of refunds.

The Commission issued the orders on review, *Louisiana Public Service Commission v. Entergy Services, Inc*., 129 FERC ¶ 61,238 (2009), JA 1; *Louisiana Public Service Commission v. Entergy Services, Inc*., 137 FERC ¶ 61,047 (2011), JA 5 (Remand Order); and *Louisiana Public Service Commission v. Entergy Services, Inc*., 146 FERC ¶ 61,152 (2014), JA 18 (Rehearing Order), in response to the Court's remand. The questions presented on appeal with regard to the implementation of the remedy are:

(1) Whether, in accordance with this Court's remand, in implementing the bandwidth remedy as of the Commission's June 1, 2005 determination that Entergy's rates were unreasonable, the Commission reasonably determined that section 206 of the Federal Power Act, 16 U.S.C. § 824e, did not authorize the retroactive application of the bandwidth remedy to production cost disparities predating June 1, 2005 that are outside of the statutory refund period.

(2) Whether, in accordance with this Court's remand, in implementing the remedy as of June 1, 2005, the Commission reasonably applied the filed formula rate implementing the bandwidth remedy which was effective in 2006, where no filed tariff implementing the bandwidth remedy existed before 2006, and the

Commission has authority to retroactively apply the 2006 tariff to correct its legal error in failing to implement the remedy as of June 1, 2005.

With regard to refunds, the refund effective period in this case is from September 13, 2001 through May 2, 2003. In the challenged orders, the Commission denied refunds during this period, in substantial reliance on a Commission order issued in a related Entergy proceeding, which was subsequently remanded by this Court in 2014. In light of this Court's remand of the related order, the Commission requests a partial remand to the Commission of the issue of refunds so that refunds in this case can be reconsidered along with the remand of the related order.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF FACTS

I. THE ENTERGY SYSTEM AND SYSTEM AGREEMENT

Entergy Corporation[1] is a public utility holding company that, at the time period relevant here, sold electricity, both wholesale and retail, in Arkansas,

[1] 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.

Louisiana, Mississippi, and Texas, through five operating companies.[2] *See La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 383 (D.C. Cir. 2008) (describing the Entergy system). The Entergy system is highly integrated, operating the operating companies' transmission and generation facilities as a single electric system. *Id.* Entergy has a system agreement that acts as an interconnection and pooling agreement for the energy generated in the system and provides for the joint planning, construction and operation of new generating capacity in the system. *Id*. At all times relevant to this case, transactions among the operating companies were governed by the system agreement. *Id*.

The system agreement requires that production costs be roughly equal among the operating companies. *Id*. at 384. 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 id.* at 384, 386 (describing both instances); *id.* at 391-94 (affirming Commission's 2005 finding of

[2] Those operating companies were: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, LLC; and Entergy New Orleans, Inc. Entergy Arkansas and Entergy Mississippi have since terminated their participation. *See Council of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (finding no obligation on operating companies to make bandwidth remedy payments after withdrawal).

undue discrimination and "bandwidth" remedy for rough equalization of production costs); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1553-58 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987) (affirming Commission's 1985 finding of undue discrimination and remedy of reallocating nuclear investment costs).[3] The orders on review in the instant case arise from the implementation of the bandwidth remedy imposed in 2005.

[3] Because the Entergy system spans four states and involves a number of retail regulators and other interested parties, that arrangement has given rise to many federal appeals over the past three decades. *See Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (filing of 1982 system agreement); *Miss. Indus.*, 808 F.2d 1525 (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*, 522 F.3d 378 (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*, 606 F. App'x 1 (D.C. Cir. 2015) (first annual bandwidth proceeding); *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014) (second annual bandwidth proceeding); *La. Pub. Serv. Comm'n v. FERC*, 771 F.3d 903 (5th Cir. 2014) (third annual bandwidth proceeding); *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014) (allocation of capacity costs, after remand). The Supreme Court also has considered Entergy system cost allocation disputes. *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003) (preemption of state jurisdiction as to cost allocation); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988) (same).

II. THE BANDWIDTH REMEDY AND RELATED PROCEEDINGS

A. The Bandwidth Remedy Proceeding

The bandwidth remedy arose from a June 2001 complaint filed by the Louisiana Public Service Commission (the Louisiana Commission or Louisiana), which asserted that the cost allocations among the Entergy operating companies had become unjust, unreasonable, and unduly discriminatory. *La. Pub. Serv. Comm'n*, 522 F.3d at 385. Specifically, in 2000, there was a spike in the cost of natural gas, which disproportionately affected Entergy Louisiana's relatively large amount of gas-fired generation, as compared to Entergy Arkansas' relatively large amount of cheaper coal-based generation. *Id*.

In the Opinion No. 480 proceeding, 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.*, Opinion No. 480, 111 FERC ¶ 61,311 PP 28-30, R. 336 at JA 59, *on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), R. 373 at JA 112. In fashioning a remedy, the Commission considered that the system experienced rough production cost equalization for the years 1986-1999, during which cost disparities among the companies varied from year to year but generally evened out over time. Opinion

No. 480, R. 336 at P 141, JA 94. During this period, cost deviations among operating companies did not exceed 22 percent on an annual basis. *Id*.

Based on this historical data, the Commission concluded that the appropriate remedy to restore rough production cost equalization on the system was to apply an annual bandwidth remedy of +/- 11 percent to allow for a maximum of 22 percent spread of production costs among operating companies on an annual basis. *Id*. at P 144, JA 96. *See also La. Pub. Serv. Comm'n*, 522 F.3d at 387 (Commission "ordered an annual bandwidth of +/- 11 percent, allowing for a maximum 22-percent spread in production costs between operating companies"). Because the bandwidth was applied on an annual basis, "in any given year, one Operating Company could be 11 percent below the system average while another company could be 11 percent above the average and the system as a whole would still be in rough production cost equalization." Opinion No. 480-A, R. 373 at P 28, JA 124.

The Commission determined that comparisons of production costs among the operating companies should follow the methodology that Entergy had proposed in its Exhibit ETR-26 in that proceeding. Opinion No. 480, R. 336 at P 33, JA 61. Entergy's Exhibit ETR-26, JA 608, compared historical production costs of the operating companies for 1983-2002. Exhibit ETR-28, JA 613, was a production cost analysis for September 2001 through August 2002 that detailed the figures supporting the data in Exhibit ETR-26.

The Commission found that section 206(c) of the Federal Power Act, 16 U.S.C. § 824e(c), prohibited ordering refunds, and therefore the Commission applied the bandwidth remedy prospectively, "effective for the calendar year 2006." Opinion No. 480, R. 336 at P 145, JA 96. In Opinion No. 480-A, the Commission clarified that the bandwidth remedy would apply to 2006 production costs, with any equalization payments for any disparity for that year exceeding the bandwidth to be made in 2007. Opinion No. 480-A, R. 373 at PP 53-54, JA 131-32.

On appeal, this Court held that the bandwidth remedy was reasonable, supported by substantial evidence, and well within the Commission's broad remedial discretion. *La. Pub. Serv. Comm'n*, 522 F.3d at 383, 391-94. The Court, however, found that the Commission inadequately explained its determination that refunds were barred under section 206(c) of the Federal Power Act, and remanded that issue for further proceedings. *Id*. at 399. The Court also 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 found that the system agreement rates were unjust and unreasonable on June 1, 2005. *Id*. at 399-400.

B. The Formula Rate Proceeding

In 2006, Entergy made filings in compliance with the Opinion No. 480 orders, proposing amendments to the system agreement to implement the bandwidth remedy, which the Commission ultimately accepted in April 2007. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 (2006) (Formula Rate Order), R. 893 at JA 154, *on reh'g and compliance*, 119 FERC ¶ 61,095 (2007) (Formula Rate Rehearing Order), R. 904 at JA 303, *aff'd*, *La. Pub. Serv. Comm'n v. FERC*, 341 F. App'x 649 (D.C. Cir. 2009).

In its compliance filings, Entergy added new sections 30.11 through 30.14 to Service Schedule MSS-3 of the system agreement. Those sections established a formula rate methodology (based on Exhibits ETR-26 and ETR-28 that Entergy had submitted in the Opinion No. 480 bandwidth remedy proceeding[4]) for comparing production costs among the Entergy operating companies and roughly equalizing their respective shares of the Entergy system's costs through inter-company payments and receipts. *See* Formula Rate Order, R. 893 at PP 24-27, 63, JA 161-62, 171; Formula Rate Rehearing Order, R. 904 at P 48, JA 319. The

[4] Entergy's Exhibit ETR-26, JA 608, compared historical production costs of the operating companies for 1983-2002. Exhibit ETR-28, JA 613, was a production cost analysis for September 2001 through August 2002 that detailed the figures supporting the data in Exhibit ETR-26.

calculations would be based on data reported in Entergy's annual FERC Form 1,[5] filed each April (covering the previous calendar year). *See* Formula Rate Order, R. 893 at PP 46-47, JA 166-67.

The Commission found Entergy's proposal consistent with the intent of Opinion No. 480 that rough production cost equalization would be undertaken in the year following the year in which the costs are incurred. Formula Rate Order, R. 893 at P 41, JA 165. As the Commission stated in Opinion No. 480-A, cost equalization for 2006 was to be undertaken in 2007. *Id*. *See* Opinion No. 480-A, R. 373 at P 54, JA 132. "The correct implementation of the remedy is as follows: Entergy calculates production costs for 2006, payments and receipts for 2006 occur in 2007. In calendar year 2007, production costs are again measured and bandwidth payments and receipts for 2007 would occur in 2008." Formula Rate Order, R. 893 at P 41, JA 165.

The Commission further accepted Entergy's proposal that equalization payments begin in June of every year to implement the preceding year's bandwidth payment. *Id*. at P 46, JA 166. Entergy's annual Form 1 data is due in April of each year. *Id*. Implementing the bandwidth remedy billing in June gives Entergy a

[5] FERC regulations require large electric utilities to file an annual report, in a format specified by the Commission ("FERC Form 1"), each April. *See* 18 C.F.R. § 141.1. *See also* 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).

reasonable amount of time between its Form 1 filing and the bandwidth remedy billing. *Id*. *See also* Formula Rate Rehearing Order, R. 904 at P 20, JA 310. The Commission, however, rejected Entergy's proposal to spread the payments over a full year (i.e. June to May of the following year), finding that Opinion No. 480-A directed that all payments for 2006 production cost disparities must be made in 2007. Formula Rate Order, R. 893 at P 46, JA 166.

The Commission also found that the bandwidth remedy does not involve refunds, but rather bandwidth remedy payments bring the Entergy operating companies within the Opinion No. 480 bandwidth on a prospective basis. Formula Rate Order, R. 893 at P 51, JA 168. There is a necessary delay in the payments that results from the need to perform the calculations, but once the calculations are completed, the Commission is requiring settlements to be made in a reasonable time period, i.e. before the end of the calendar year. *Id*.

The Commission rejected the Louisiana Commission's argument that the Commission was delaying the remedy until two years after the Commission found Entergy's rates unjust and unreasonable on June 1, 2005, because no bandwidth payments for 2006 would be received until June of 2007. Formula Rate Rehearing Order, R. 904 at PP 22-23, JA 310-11. The Commission disagreed that the prospective nature of the bandwidth remedy indicates that the remedy would not begin until the payments are made. *Id*. at P 25, JA 311. Rather, the bandwidth

remedy for rough production cost equalization commenced on January 1, 2006. *Id*. at P 24, JA 311. Calculations are made on an annual basis with the first annual calculations occurring for calendar year 2006. *Id*.

The Commission also required that the Formula Rate be consistent with the methodology in Entergy Exhibits ETR-26, JA 608, and ETR-28, JA 613, from the Opinion No. 480 proceeding. Formula Rate Order, R. 893 at PP 62-63, JA 171; *La. Pub. Serv. Comm'n*, 341 F. App'x at 650 (Opinion No. 480 "required future calculations to be based on [Exhibit ETR-26]"). The Commission denied Entergy's request to adjust that methodology in its compliance filing. Formula Rate Order, R. 893 at P 69, JA 172. "This is a compliance filing and Entergy must comply with the requirements of Opinion Nos. 480 and 480-A." *Id*. *See also* Formula Rate Rehearing Order, R. 904 at P 39, JA 316 (rejecting Louisiana's argument that interruptible load should be treated differently than in the Exhibit ETR-26 methodology); *id*. at P 43, JA 317 (rejecting Entergy's proposed adjustments to the Exhibit ETR-26 methodology); *id*. at P 47, JA 318 (rejecting the Louisiana Commission's proposed re-pricing of the energy produced by the Vidalia hydroelectric plant because Entergy's re-pricing of Vidalia was consistent with Exhibit ETR-26).

On appeal, this Court affirmed the Commission's orders. *La. Pub. Serv. Comm'n*, 341 F. App'x at 650-51. The Court rejected, *inter alia*, Louisiana

Commission arguments that certain items (interruptible load and the pricing of Vidalia energy) should be treated differently than the methodology set out in Exhibit ETR-26, JA 608. *La. Pub. Serv. Comm'n*, 341 F. App'x at 650-51. The Court found that Opinion No. 480 required Entergy to calculate production costs based on Exhibit ETR-26, and the Louisiana Commission should have raised any objections to that requirement on rehearing of Opinion No. 480. *Id*.

C. Annual Bandwidth Remedy Proceedings

1. The 2007 Filing To Roughly Equalize 2006 Costs

In May 2007, Entergy made an annual bandwidth remedy filing to roughly equalize production costs for 2006. The Commission orders on that filing, *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010), *on reh'g*, Opinion No. 505-A, 139 FERC ¶ 61,103 (2012), were affirmed by this Court in *Louisiana Public Service Commission v. FERC*, 606 F. App'x 1 (D.C. Cir. 2015).

In its decision, this Court recognized that the bandwidth Formula Rate approved in the Formula Rate proceeding is the filed rate. *Id*. at 4. The Court rejected the Louisiana Commission's argument that one aspect of the Formula Rate (the Energy Ratio) approved in the Formula Rate Orders was inconsistent with the methodology of Exhibit ETR-26, and therefore contravened the direction in Opinion No. 480 that Entergy follow the Exhibit ETR-26 methodology in calculating bandwidth payments. *Id*. at 5. This Court held that the Louisiana

Commission waived any claim that the Formula Rate was inconsistent with Exhibit ETR-26 and Opinion No. 480 by not raising it in the Formula Rate proceeding. *Id*. "Louisiana should have advanced its claim against the Energy Ratio before the formula became the filed rate. It cannot do so here." *Id*.

2. The 2008 Filing To Roughly Equalize 2007 Costs

Entergy initiated the annual bandwidth proceeding to roughly equalize 2007 production costs in May 2008. The Commission orders on that filing, *Entergy Services, Inc.*, Opinion No. 514, 137 FERC ¶ 61,029 (2011), JA 731, *reh'g denied*, Opinion No. 514-A, 142 FERC ¶ 61,013 (2013), were affirmed by the Fifth Circuit in *Louisiana Public Service Commission v. FERC*, 761 F.3d 540 (5th Cir. 2014). Like this Court in the annual proceeding on 2006 costs, the Fifth Circuit recognized that the Formula Rate adopted in the Formula Rate proceeding was the filed rate governing the bandwidth remedy. *Id*. at 555. Accordingly, the Fifth Circuit rejected the Louisiana Commission's argument that Entergy's Formula Rate tariff failed to comply with Opinion No. 480 and the Exhibit ETR-26 methodology (here with regard to the treatment of the production costs of the Vidalia hydroelectric plant), finding that this argument constituted a collateral attack on the Formula Rate orders. *Id*. at 556-59.

The Court observed that the Formula Rate Orders specifically rejected Entergy's proposed changes to the Exhibit ETR-26 methodology as non-compliant

with Opinion No. 480. *Id*. at 559. Accordingly, it was incumbent on the Louisiana Commission to object during the Formula Rate proceeding to any provision in the Formula Rate that the Louisiana Commission believed failed to comply with Opinion No. 480 and the methodology of Exhibit ETR-26. *Id*. Because the Louisiana Commission failed to raise such an objection, the Court lacked jurisdiction over the Louisiana Commission's claim. *Id*. at 560.

3. The 2009 Filing To Roughly Equalize 2008 Costs

The annual bandwidth proceeding to equalize 2008 production costs began in May 2009. The Commission's orders on that filing, *Entergy Services, Inc.*, Opinion No. 518, 139 FERC ¶ 61,105 (2012), *on reh'g*, 145 FERC ¶ 61,047 (2013), were affirmed by the Fifth Circuit in *Louisiana Public Service Commission v. FERC*, 771 F.3d 903 (5th Cir. 2014). As in the preceding annual proceedings, the Fifth Circuit recognized that the Formula Rate approved in the Formula Rate proceeding was the filed rate governing the bandwidth remedy. *Id*. at 910-11.

III. THE CHALLENGED ORDERS

In its 2008 decision, *Louisiana Public Service Commission*, 522 F.3d at 383, 391-94, this Court upheld the Commission's bandwidth remedy. The Court, however, 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 found that the system

agreement rates were unjust and unreasonable on June 1, 2005. *Id*. at 399-400. The Court also found that the Commission inadequately explained its determination that refunds were barred under section 206(c) of the Federal Power Act, 16 U.S.C. § 824e(c), and remanded that issue for further proceedings. *Id*. at 399.

In the challenged orders, in accordance with this Court's remand, the Commission implemented the bandwidth remedy on June 1, 2005, the date the Commission in Opinion No. 480 determined that the Entergy system rates were unreasonable. Remand Order at P 34, JA 16. The Commission ordered that Entergy calculate bandwidth payments and receipts for the seven-month period of June 1, 2005 through December 31, 2005 in accordance with the Formula Rate tariff approved in the Formula Rate proceeding, and make any payments and receipts required within 90 days. *Id*.

On rehearing, the Louisiana Commission agreed that the remedy should be implemented effective June 1, 2005. *See* Louisiana Commission Request for Clarification and/or Rehearing, R. 950 at 10-12, JA 337-39. However, in the Louisiana Commission's view, implementing the remedy as of June 1, 2005 required applying the bandwidth remedy to production costs pre-dating June 1, 2005, so that payments under the bandwidth remedy commenced on June 1, 2005. *Id*. at 14-15, JA 341-42. To provide a "full remedy" as of June 1, 2005, the

Louisiana Commission argued that the Commission must provide for bandwidth payments commencing in June of 2005, based on calendar year 2004 production cost disparities, and payments commencing in June of 2006 for the full year of 2005 production cost disparities. *Id.*

The Commission rejected the argument that it should implement the bandwidth remedy in a manner requiring payments for calendar year 2004 and early 2005 production cost disparities. Rehearing Order at P 37, JA 32. *See also id*. at P 43 n.62, JA 36 (whether the bandwidth remedy should be applied to 2004 and early 2005 cost disparities is a separate issue from whether refunds should be awarded for the refund effective period of September 13, 2001 through May 2, 2003). As the Commission held in Opinion No. 480, any reallocation of production costs under the bandwidth remedy must be implemented prospectively. Rehearing Order at P 37, JA 32 (citing Opinion No. 480, R. 336 at P 145, JA 96). The remedy, therefore, was effective when applied to production cost data, with any payments based on disparities in those production costs made in the following year. *Id*. "Thus, the 2006 calendar year's data is accounted for under the bandwidth formula through payments the following year. Similarly, the 2007 calendar year's data is roughly equalized through payments commencing in 2008." *Id*., JA 32. "But because the Commission was required to push back the effective

date to June 1, 2005, the Commission must now also equalize production costs for the seven-month period of June 1, 2005 through December 31, 2005." *Id*.

The Commission also rejected the argument that this finding was inconsistent with the prospective nature of the bandwidth remedy. *Id*. at P 38, JA 33. In Opinion No. 480, the Commission held that the bandwidth would be implemented prospectively because it would be effective for calendar year 2006, with equalization payments made in 2007. *Id*. The Commission's holding on remand follows this approach and "merely advances it seven months earlier, resulting in the need for the production costs from those seven months to be roughly equalized." *Id*.

The Louisiana Commission also argued that it would be retroactive ratemaking to use the Formula Rate tariff to calculate bandwidth payments for June to December of 2005, because the Formula Rate tariff was not effective until 2006. Rehearing Order at P 40, JA 34. However, the Formula Rate tariff was the only lawful filed tariff implementing the bandwidth remedy. *Id*. While that tariff was not originally effective in 2005, this Court's remand required that the Commission make the remedy effective as of June 1, 2005. *Id*. Therefore, because the Commission has the authority to correct its legal error, it is not retroactive ratemaking to use the Formula Rate tariff to calculate bandwidth remedy payments based on 2005 production costs. *Id*.

The challenged orders also denied refunds during the refund effective period of September 13, 2001 through May 2, 2003, in substantial reliance on *Louisiana Public Service Commission v. Entergy*, 142 FERC ¶ 61,211 (2013). *See* Rehearing Order at PP 50-59, JA 40-44. This Court subsequently remanded that order denying refunds to the Commission for further consideration. *See La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014). (Given the significance of that now-remanded order to the Commission's analysis here, the Commission is requesting in this brief that this Court remand the issue of refunds to the Commission for further consideration in light of this Court's 2014 remand.).

SUMMARY OF ARGUMENT

The orders challenged in this appeal were issued in response to this Court's 2008 decision in *Louisiana Public Service Commission*, 522 F.3d 378. In that decision, the Court affirmed imposition of a "bandwidth" remedy on the Entergy system rates to assure rough equalization of production costs. The Court, however, remanded to the Commission for further explanation the implementation of the remedy as of calendar year 2006, with equalization payments to begin in 2007, when the Commission found the Entergy rates unreasonable as of June 1, 2005.

In the challenged orders, in accordance with the Court's remand, the Commission found that the bandwidth remedy should be implemented as of June 1, 2005, and ordered Entergy to apply the bandwidth remedy to production cost

disparities for June-December 2005. On appeal, the Louisiana Commission agrees that the bandwidth remedy is properly effective as of June 1, 2005. The Louisiana Commission nevertheless argues that bandwidth equalization *payments* must begin on June 1, 2005, which would require applying the bandwidth remedy to production cost disparities in 2004 and January-May 2005. The Commission reasonably concluded that imposing the bandwidth remedy on production cost disparities predating the Commission's finding that Entergy's rates were unreasonable, outside of the statutory refund period (September 2001 to May 2003), would be contrary to the Federal Power Act section 206 requirement that the Commission's remedy be prospective from the finding of unreasonable rates.

The Commission also reasonably directed Entergy to use the Formula Rate tariff, approved in 2006, to implement the bandwidth remedy for the June–December 2005 time period. *Id*. at 56-57. No filed tariff implementing the bandwidth remedy existed prior to the 2006 Formula Rate tariff. Moreover, the Commission has authority on remand from the Court to correct its legal error in implementing the remedy, by retroactively applying the Formula Rate tariff as of the date the system rates were found unreasonable.

Also in its 2008 decision in *Louisiana Public Service Commission*, the Court remanded to the Commission for further explanation its decision to deny refunds for the refund period of September 2001 through May 2003. In the challenged

orders, the Commission again declined to order refunds, this time in substantial reliance on a Commission order denying refunds in a related Entergy proceeding. The Commission order in the related proceeding was subsequently remanded by this Court in its 2014 decision in *Louisiana Public Service Commission v. FERC*, 772 F.3d 1297. In light of this 2014 remand, the Commission is requesting a partial remand of the issue of refunds so that the Commission may reconsider that issue in conjunction with the Court's remand of the related Entergy order.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). As the Supreme Court has recently stated, "[t]he 'scope of review under the 'arbitrary and capricious standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. "Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor*

Vehicle Mfrs. Ass'n, 463 U.S. at 43). "And nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Id*. (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)). The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b).

This case concerns FERC's interpretation of provisions of the Federal Power Act. To review FERC's interpretation of a statute it administers, the Court applies the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), under which the Court "giv[es] effect to clear statutory text and defer[s] to an agency's reasonable interpretation of any ambiguity." *MetroPCS Cal., LLC v. FCC*, 644 F.3d 410, 412 (D.C. Cir. 2011). *See also City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

II. THE COMMISSION REASONABLY IMPLEMENTED THE BANDWIDTH REMEDY AS OF JUNE 1, 2005 BY APPLYING THE REMEDY TO PRODUCTION COST DISPARITIES BEGINNING ON THAT DATE.

The Entergy system is "a multi-state affiliation of power companies that share the costs and benefits of power generation." *La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042, 1043 (D.C. Cir. 2008). The affiliation is governed by the Entergy system agreement, which requires that affiliates share the costs of power generation in roughly equal proportion. *Id*. Rough equalization is accomplished

primarily through allocation of new generation capacity. *Id*. However, "[a]s an 'insurance policy' should long-term allocation plans fail to achieve proper cost spreading," FERC "adopted a 'bandwidth remedy' that limits any relative cost discrepancies to plus or minus 11 percent." *Id*. *See also* Opinion No. 480, R. 336 at P 44, JA 65 (the bandwidth remedy is an insurance policy in the event that the system fails to remain in rough production cost equalization). The bandwidth remedy therefore allows a maximum 22 percent spread in production costs among operating companies on an annual basis. *La. Pub. Serv. Comm'n*, 522 F.3d at 387.

This appeal concerns the proper effective date for implementation of the bandwidth remedy under section 206 of the Federal Power Act, 16 U.S.C. § 824e. Section 206(a) requires that, upon finding an existing rate unjust and unreasonable, the Commission fix a just and reasonable rate to be "thereafter observed and in force."

In Opinion No. 480, issued on June 1, 2005, the Commission found Entergy's system rates unreasonable, and ordered that the annual bandwidth remedy be applied to production costs for the first full calendar year following its finding, 2006, with equalization payments for any production cost disparities exceeding the bandwidth in 2006 to be paid in 2007. Rehearing Order at P 38, JA 33 (citing Opinion No. 480, R. 336 at P 145, JA 96; Opinion No. 480-A, R. 373

at PP 53-54, JA 131-32; and Formula Rate Rehearing Order, R. 904 at P 25, JA 311).

On appeal of Opinion No. 480, the Louisiana Commission argued that the remedy should take in effect on June 1, 2005, the date on which the Commission found the system rates unjust and unreasonable. *See La. Pub. Serv. Comm'n*, 522 F.3d at 399. "Delaying implementation until 2006, [the Louisiana Commission] argued, would be arbitrary and capricious." *Id*. The Court remanded for further proceedings, finding that the Commission's orders did not "rebut [the Louisiana Commission's] contention that it is an abuse of discretion for the Commission to delay implementation of a remedy until 2007, having found on June 1, 2005 that the System Agreement's rates were unduly discriminatory." *Id*. at 400.

In the challenged orders, in response to this Court's remand, the Commission "implement[ed] the bandwidth remedy on June 1, 2005, the date the Commission's order in Opinion No. 480 determined that the rates were unjust and unreasonable." Remand Order at P 34, JA 16. The Commission directed Entergy to calculate bandwidth payments and receipts for the seven-month period of June 1, 2005 through December 31, 2005. *Id*. P 34 & n.41, JA 16-17.

On appeal, the Louisiana Commission agrees that the bandwidth remedy is properly effective as of June 1, 2005. *See* Louisiana Commission Brief at 33, 37. *See also, e.g.*, Louisiana Commission Request for Clarification and/or Rehearing,

R. 950 at 2, JA 329 ("The Commission correctly commences the remedy on June 1, 2005, the date of Opinion No. 480"); *id*. at 10, JA 337 ("In the Order on Remand, the Commission correctly acts to implement the remedy as of June 1, 2005, the date on which Opinion No. 480 found that Entergy's cost allocations were unjust, unreasonable and unduly discriminatory."). The Louisiana Commission disagrees, however, that the Commission properly implemented the remedy as of that date. Louisiana Commission Brief at 31-48. These arguments are without merit as demonstrated below.

A. The Commission Reasonably Concluded That The Bandwidth Remedy Was Effective When It Was Applied To Production Cost Data.

In the challenged orders, in response to this Court's remand, the Commission ordered Entergy to calculate bandwidth equalization payments for production cost disparities occurring during the seven-month period from June 1, 2005 to December 31, 2005. Remand Order at P 34, JA 16; Rehearing Order at P 34, JA 31. Although the bandwidth remedy is designed as an annual remedy to be based upon Entergy's annual FERC Form 1 filing, the Commission in response to the Court's remand imposed the remedy on a partial year basis for the seven months at issue in 2005. Rehearing Order at P 34, JA 31.

The Louisiana Commission contends that the bandwidth remedy is not effective until *payments* commence, and therefore FERC must begin production

cost equalization with calendar year 2004 costs so that bandwidth remedy payments would commence as of June 1, 2005. Louisiana Commission Brief at 32. In other words, to "implement" the bandwidth remedy as of June 1, 2005, in the Louisiana Commission's view, the Commission must order the rough equalization of the production costs incurred by the Entergy Companies for the 17 months *prior* to Opinion No. 480, *i.e*. from January 2004 to May 2005, so that bandwidth payments would commence on June 1, 2005. *See id*.

The Commission reasonably rejected the argument that it should require equalization payments for production cost disparities beginning in calendar year 2004. Rehearing Order at PP 37-39, JA 32-34. As the Commission held in Opinion No. 480, any reallocation of production costs under the bandwidth remedy must be implemented prospectively. *Id*. at P 37, JA 32 (citing Opinion No. 480, R. 336 at P 145, JA 96). Any reallocation of costs prior to June 1, 2005 outside of the refund effective period (September 2001 through May 2003)[6] would constitute a prohibited retroactive remedy. Remand Order at PP 5-6, JA 7 (citing *La. Pub. Serv. Comm'n*, 522 F.3d at 399) (any reallocation of costs prior to the June 1, 2005 issuance of Opinion No. 480 would constitute a retroactive remedy); Rehearing

[6] Under section 206(b), 16 U.S.C. § 824e(b), the Commission may provide retroactive relief for unreasonable rates through refunds that are limited to a 15-month period. The parties here agreed to a 20-week extension of the 15-month refund effective period, resulting in a refund effective period of September 13, 2001 through May 2, 2003. Rehearing Order at P 43 n.62, JA 36.

Order at P 43 n.62, JA 36 (whether refunds should be awarded for the 2001-2003 statutory refund effective period is distinct from the issue of whether the bandwidth remedy should be applied to 2004 calendar year production cost data). The Commission reasonably concluded that, under Federal Power Act section 206, the bandwidth remedy should be implemented prospectively, which precludes the re-allocation of 2004–May 2005 production costs that pre-date the June 1, 2005 finding that the system rates were unreasonable. Remand Order at P 5, JA 7; Rehearing Order at P 5, JA 20.

As the Commission noted, it had previously in the Formula Rate proceeding rejected the Louisiana Commission's argument that the remedy does not begin until payments are made. Rehearing Order at P 38, JA 33 (quoting Formula Rate Rehearing Order, R. 904 at P 25, JA 311). The Commission held in Opinion No. 480 and 480-A that the remedy was effective in 2006, even though equalization payments would not commence until 2007. *Id*. *See* Opinion No. 480, R. 336 at P 145, JA 96; Opinion No. 480-A, R. 373 at PP 53-54, JA 131-32 ("Any reallocation of production costs among the Operating Companies necessitated by our percentage bandwidth remedy must be implemented prospectively."). Thus, the bandwidth remedy becomes effective when the calendar year's data is accounted for under the bandwidth formula, even though payments based on any disparities in those costs exceeding the bandwidth do not begin until the next year.

Rehearing Order at P 37, JA 32. The holding in the challenged orders follows this approach and merely advances it seven months earlier, to equalize production costs for the last seven months of 2005. *Id*. at P 39, JA 33.

The Louisiana Commission argues that the delay between the effectiveness of the remedy and payments is analogous to the "phasing-out" of an unreasonable rate that was rejected by this Court in *Louisiana Public Service Commission v. FERC*, 482 F.3d 510, 518 (D.C. Cir. 2007). *See* Louisiana Commission Brief at 37-38. In that case, the Commission had found including interruptible capacity costs in monthly capacity cost allocations to be unjust and unreasonable, but nonetheless permitted Entergy to continue to include interruptible load in the rolling 12-month average of peak usage used to calculate the allocation. *La. Pub. Serv. Comm'n*, 482 F.3d at 514. The Court remanded, finding that "the Commission has not explained why Entergy may continue to bill for costs the Commission has determined may not be justly and reasonably recovered." *Id*. at 518.

The Commission reasonably concluded that its decision here was fully consistent with this Court's 2007 remand in the interruptible load proceeding. *See* Remand Order at PP 33-34, JA 16. The Commission implemented the bandwidth remedy as of the date the Commission found the rates unreasonable, June 1, 2005. *See id*. at P 34, JA 16. It is the nature of the bandwidth remedy that there is a

necessary delay between the effectiveness of the remedy and any payments. *See id*.; Formula Rate Order, R. 893 at P 51, JA 168. Unlike in the interruptible proceeding, here there is no identifiable unreasonable cost that can be immediately removed from the production cost allocation. Rather, the bandwidth remedy addresses production cost disparities among operating companies that are *not* unjust and unreasonable *unless* they exceed the +/- 11 percent bandwidth on an annual basis. Remand Order at P 4, JA 6. As this Court has found, the bandwidth remedy was adopted "[a]s an 'insurance policy' should long-term allocation plans fail to achieve proper cost spreading." *La. Pub. Serv. Comm'n*, 551 F.3d at 1043. The Commission therefore reasonably found that it was acting consistently with the interruptible load decisions and not delaying a remedy by implementing the bandwidth remedy on June 1, 2005, the date the Commission found Entergy's rates unreasonable. Remand Order at PP 33-34, JA 16-17.

B. The Commission's Interpretation Of Rate And Remedial Provisions Of The Federal Power Act Is Fully In Accord With This Court's Precedent.

The Commission's interpretation of section 206 of the Federal Power Act, 16 U.S.C. § 824e, in this context is fully in accord with this Court's precedent. As this Court held in *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009), after finding a rate unreasonable, section 206 requires that FERC determine the just and reasonable rate "to be *thereafter* observed and in force." *Id*. at 523 (quoting

section 206(a)). Therefore, the statute "'bars the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.'" *Id*. (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (interpreting parallel language of section 5 of the Natural Gas Act, 15 U.S.C. §717d)). Further, although under section 205, 16 U.S.C. § 824d, retroactive ratemaking may be avoided where purchasers have sufficient notice of a change, section 206 "involves an entirely different – and stricter – set of procedures than [section] 205." 558 F.3d at 525.

Under this rule against retroactive ratemaking, "the Commission has no power to order reparation for illegal rates or practices that existed prior to the date of the Commission's finding of illegality." *Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1138-39 (D.C. Cir. 1987) (interpreting section 5 of the Natural Gas Act) (cited in the Louisiana Commission's brief at 38). Thus, "even charges that are imposed prospectively, and therefore satisfy the filed rate doctrine, are improper if they are based on the pipeline's losses in a prior period." *Pub. Utils. Comm'n of the State of Cal. v. FERC*, 988 F.2d 154, 161 (D.C. Cir. 1993) (the rule against retroactive ratemaking prevents collecting revenues to compensate for prior over or under-recoveries); *id*. at 160 ("the relevant inquiry [is] to 'identify the purchase decision to which the costs are attached'") (quoting *Associated Gas Distribs. v. FERC*, 893 F.2d 349, 353 (D.C. Cir. 1989)).

This Court's recent decision in *Xcel Energy Services, Inc. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016), is not to the contrary. In *Xcel*, the Court concluded that the Commission was not limited to prospective relief under section 206 of the Federal Power Act to remedy its legal error in failing to suspend and set for refund a rate proposed under section 205. *Id*. at 955-56. Because the Commission committed legal error in allowing the rates to take effect immediately without refund protection, contrary to section 205, the Court found that the Commission had authority under section 309 of the Federal Power Act, 16 U.S.C. § 825h, to remedy its legal error. *Id*. Likewise, this Court has found that the Commission may order refunds under section 309 for tariff violations, including charging rates in excess of the filed rate. *See, e.g., Consol. Edison Co. v. FERC*, 347 F.3d 964, 973 (D.C. Cir. 2003) (the Commission may order refunds for tariff violations under section 309); *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 224 n.6 (D.C. Cir. 1999) (Commission has authority under section 309 to order refunds of amounts improperly collected in excess of the filed rate).

But such authority does not apply to the allegation that properly-filed existing rates have become unjust and unreasonable. In that circumstance, section 309 "does not authorize the Commission to fix rate orders retrospectively. The Commission may establish rates only 'to be thereafter observed and in force.'" *See Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 260-61 (1951)

(quoting section 206); *see also id*. at 258 ("we think it clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low"). *See also, e. g., New Eng. Power Co. v. FPC*, 467 F.2d 425, 430 (1972), *aff'd*, 415 U.S. 345 (1974) (section 309 augments existing powers conferred upon Commission by Congress and confers no independent authority to act).

In 1988, in the Regulatory Fairness Act, Congress added subsections (b) and (c) to section 206, 16 U.S.C. § 824e(b) and (c), authorizing the Commission to order refunds for a limited 15-month statutory period. *La. Pub. Serv. Comm'n*, 482 F.3d at 519. This limited refund period provides the only retroactive relief that the Commission may provide for unjust and unreasonable existing rates. *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1215 (D.C. Cir. 2009) (retroactive refunds of amounts paid outside of the refund period are forbidden). *See also, e.g., Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006) (refunds awarded under section 206 are limited to the statutory refund period, but refunds awarded for tariff violations under section 309 are not).

While the Commission may, on remand, provide some retroactive relief through refunds, the refund effective period in this case is from September 13, 2001 through May 2, 2003 (the parties agreed to a 20-week extension of the section 206(b) 15-month refund period). Rehearing Order at P 43 n.62, JA 36.

Therefore, the issue of whether refunds should be ordered in this matter for the 2001-2003 refund effective period (*see infra* pp. 47-48), is distinct from the issue of whether the Louisiana Commission is entitled to equalization payments based on production cost disparities incurred in 2004. Rehearing Order at P 43 n.62, JA 36.

That the Commission may award retroactive relief for the limited duration of the statutory refund period explains the remedy effective date in *Louisiana Public Service Commission v. Entergy Corp*., 139 FERC ¶ 61,100 (2012). *See* Louisiana Commission Brief at 43, 44. The Louisiana Commission asserts that, in that 2012 order, the Commission made changes to the system agreement effective in response to Louisiana's complaint as of the date the complaint was filed (April 3, 2007). *Id*. This order post-dated the Louisiana Commission's request for rehearing, and thus was not raised to the Commission nor addressed in the Rehearing Order, but it is, nevertheless, fully consistent with the result here. In that case, the Commission set the date of the Louisiana Commission's complaint, April 3, 2007, as the *refund* effective date (i.e. the start of the statutory 15-month refund period), not the date of *prospective* implementation of the system agreement change. *La. Pub. Serv. Comm'n v. Entergy Corp*., 139 FERC ¶ 61,100 at P 27. *See Entergy Servs., Inc*., 145 FERC ¶ 61,047 at P 15 (2013) (the order in *La. Pub. Serv. Comm'n v. Entergy Corp*., 139 FERC ¶ 61,100 "is only effective

prospectively (commencing May 7, 2012 [the date of the 139 FERC ¶ 61,100 order]) and for the refund effective period, April 3, 2007 through July 3, 2008"). Accordingly, in *Louisiana Public Service Commission v. Entergy Corp*., 139 FERC ¶ 61,100, as here, the change to the system agreement was given *prospective* effect as of the date of the Commission order finding the agreement unreasonable.

C. The Commission Reasonably Rejected The Argument That Prior Year Production Cost Disparities Are Merely A Proxy For Current Cost Disparities.

The Louisiana Commission asserts that payments commencing on June 1, 2005 would not constitute a retroactive remedy because the 2004 costs used to calculate such payments were simply a "proxy for current costs." Louisiana Commission Brief at 32. *See also id*. at 42 (formula rates use past accounting data as a "proxy for the cost data in the rate-effective period").

The Commission reasonably rejected the Louisiana Commission's argument that the bandwidth remedy formula uses prior-year cost disparities as a proxy for current-year cost disparities. *See* Rehearing Order at PP 30, 37, JA 29, 32. Opinion No. 480 made the bandwidth remedy effective for calendar year 2006, with the first equalization payments, based on calendar year 2006 production costs, paid in 2007. *Id.* at P 37, JA 32 (citing Opinion No. 480, R. 336 at P 145, JA 96; Remand Order at P 5, JA 7). "Thus, the 2006 calendar year's data is accounted for under the bandwidth formula through payments the following year. Similarly, the

2007 calendar year's data is roughly equalized through payments commencing in 2008." *Id*. Here, "because the Commission was required to push back the effective date to June 1, 2005, the Commission must now also equalize production costs for the seven-month period of June 1, 2005 through December 31, 2005." *Id*.

As support for its argument that prior-year costs are merely a proxy for current costs, the Louisiana Commission points to Commission statements that the bandwidth remedy is prospective in nature. *See* Louisiana Commission Brief at 34, 45. *See also id*. at 18-19 (Statement of Facts). As the Commission explained, however, in stating in Opinion No. 480 that the remedy would be prospective, the Commission meant that it would be implemented prospectively for calendar year 2006 production costs, and the Commission clarified in Opinion No. 480-A that payments would commence in 2007 based on those 2006 costs. Rehearing Order at P 38, JA 33 (quoting Formula Rate Rehearing Order, R. 904 at P 25, JA 311). Thus, the Commission's description of the remedy as "prospective" in no way indicates that the bandwidth remedy is not effective until bandwidth payments are made. *Id*. at PP 37-38, JA 32-33.

Likewise, *Entergy Services, Inc*., Opinion No. 514, 137 FERC ¶ 61,029 (2011), JA 731, *reh'g denied*, Opinion No. 514-A, 142 FERC ¶ 61,013 (2013), *aff'd*, *Louisiana Public Service Commission v. FERC*, 761 F.3d 540 (5th Cir. 2014)

(cited in Louisiana Commission Brief at 19), is fully consistent with the orders here. Rehearing Order at P 38, JA 33. In that order, the Commission held that 2008 equalization payments based on 2007 production costs were not refunds but rather payments bringing the Entergy operating companies within the bandwidth on a prospective basis. Opinion No. 514 at P 159, JA 797. In so stating, the Commission recognized that the 2008 payments "roughly equalize production costs for the 2007 calendar year." *Id*. at P 161, JA 797.

In affirming Opinion No. 514, the Fifth Circuit held that, in calculating annual bandwidth payments, the bandwidth Formula Rate mandates the use of the operating companies' actual production costs as reflected on each company's books for the preceding calendar year. *La. Pub. Serv. Comm'n*, 761 F.3d at 551; *see id*. at 555 ("[t]he System Agreement reflects a decision to incorporate actual costs reflected on FERC Form 1 into the formula"). *See also La. Pub. Serv. Comm'n*, 771 F.3d at 907 ("As required by FERC, Entergy must annually file its rates calculated from [the Formula Rate tariff] and any bandwidth payments and receipts derived therefrom. These compliance filings implement the bandwidth formula using the prior calendar year's production costs.") (affirming Commission orders in the annual bandwidth proceeding establishing 2009 payments based on 2008 production costs); Entergy December 18, 2006 Compliance Filing in the Formula Rate Proceeding, R. 896 at sections 30.12 (formula for calculation of each

operating company's annual actual production costs) and 30.13 (formula for calculation of each operating company's share of system average production costs), JA 275-82. Thus, the actual data for each calendar year is accounted for under the bandwidth formula through payments the following year. Rehearing Order at P 37, JA 32. The prior year is not therefore a proxy for current costs, as Louisiana claims. *See* Louisiana Commission Brief at 32.

In further support of its argument that the bandwidth remedy uses prior year production costs as a proxy for current costs, the Louisiana Commission raises a number of arguments that were not raised in its request for rehearing, and that should therefore be precluded from consideration here. *See La. Pub. Serv. Comm'n*, 606 F. App'x at 5 (citing § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b)). In any event, these arguments lack merit.

The Louisiana Commission likens the bandwidth remedy to formula rates that use "a recent test period as the basis for setting current cost-based rates." *See* Louisiana Commission Brief at 42 (citing *Va. Elec. & Power Co. v. FERC*, 580 F.2d 710, 712 (4th Cir. 1978)). *See also id*. at 35 (citing *Pub. Serv. Comm'n of N.H. v. FERC*, 600 F.2d 944, 950 (D.C. Cir. 1979); *Jersey Cent. Power & Light Co. v. FERC*, 589 F.2d 142, 145 (3d Cir. 1978)). These cases do not support the Louisiana Commission's claims. In these cases, the courts considered whether the inclusion of past fuel costs in a fuel adjustment clause formula rate was intended to

recover the actual past costs or to use the past fuel costs as a proxy for current costs. In resolving this issue, the three courts examined the relevant tariff language and concluded that the past costs were intended to provide a proxy estimate for current costs. *See Pub. Serv. Co. of N.H.*, 600 F.2d at 952-53; *Jersey Cent.*, 589 F.2d at 145; *Va. Elec.*, 580 F.2d at 712. Under the relevant tariff language, the *past* fuel cost adjustment in those cases was applied to the customer's *current* usage to determine the rate. This "mismatch" applying a fuel adjustment factor based on the fuel costs in one month to the customer's usage in another month demonstrated that the charge was not designed to recover the actual past costs, and therefore the courts concluded that the prior period fuel costs were intended to provide a proxy for current costs. *See Pub. Serv. Co. of N.H.*, 600 F.2d at 952-53, 955; *Jersey Cent.*, 589 F.2d at 145; *Va. Elec.*, 580 F.2d at 712.

In contrast, here, as discussed above, the Formula Rate tariff specifies that bandwidth remedy payments are calculated based upon the actual production costs for each Entergy operating company as reflected in the company's books in the prior calendar year, as compared to the system average costs for that year. *La. Pub. Serv. Comm'n*, 761 F.3d at 544; *La. Pub. Serv. Comm'n*, 771 F.3d at 906-07, 911-12. Thus, the actual data for each calendar year is accounted for under the bandwidth formula. Rehearing Order at P 37, JA 32.

Likewise, express tariff language explains why the Commission did not require Entergy Arkansas to continue making equalization payments after it withdrew from the Entergy system agreement in December 2013. Louisiana Commission Brief at 44-45. As this Court explained, Entergy Arkansas was not required to continue making equalization payments after withdrawal because the system agreement simply did not impose conditions on withdrawal other than the requirement to provide 96-months advance notice. *Council of New Orleans v. FERC*, 692 F.3d 172, 175-77 (D.C. Cir. 2012).

The Louisiana Commission also complains that Entergy was permitted to amend the Formula Rate tariff in 2007 to control 2007 bandwidth billings, and that the Commission in *Entergy Services, Inc*., 121 FERC ¶ 61,126 at P 12 (2007), *reh'g denied*, 123 FERC ¶ 61,078 (2008), rejected Louisiana's argument that Entergy's requested changes should be treated consistently with Louisiana's. Louisiana Commission Brief at 43-44, 46. As the Commission explained in *Entergy Services, Inc*., 121 FERC ¶ 61,126 at P 12, the statute requires the different treatment of Louisiana's complaints under Federal Power Act section 206 and Entergy's rate filings under section 205; unlike section 206 which provides only prospective relief from a Commission finding of unreasonableness (except for the statutory 15-month refund period), section 205 permits utilities to make filings to amend their rates effective upon 60-days notice. *Id*. at P 12 & n.21. "Therefore,

regardless of the different outcomes in the two proceedings, the Commission treated the Louisiana Commission and Entergy consistently with the provisions of the [Federal Power Act]." *Id*. *See also, e.g.*, *La. Pub. Serv. Comm'n*, 772 F.3d at 1299 (section 206 affords prospective relief from the conclusion of a rate proceeding, except for the limited refund period, whereas section 205 affords utility companies seeking to raise their rates "nearly immediate relief, subject to refund only where the Commission decline[s] to approve the increase").

D. The Challenged Orders Are Not Inconsistent With This Court's Mandate.

The Louisiana Commission also argues that the challenged orders are inconsistent with the Court's 2008 mandate in *Louisiana Public Service Commission*, 522 F.3d at 400, where the Court found that the Commission had not rebutted the Louisiana Commission's "contention that it is an abuse of discretion for the Commission to delay implementation of a remedy until 2007, having found on June 1, 2005 that the System Agreement's rates were unduly discriminatory." Louisiana Commission Brief at 46-47.

The Commission did not interpret this statement as a holding by the Court that the remedy did not commence until 2007, finding that "[a] reasonable interpretation of the court's statement that a remedy was delayed until 2007 is that it was merely an acknowledgement that initial bandwidth payments for calendar year 2006 would not be made until 2007." Rehearing Order at P 39, JA 33.

Indeed, the Court observed that the Commission had declared that the remedy would be effective for 2006, and that the Louisiana Commission had "sought rehearing and requested that the bandwidth remedy take effect in 2005 to remedy the undue discrimination that occurred from June 1, 2005 forward. Delaying implementation until 2006, [the Louisiana Commission] maintained, would be arbitrary and capricious." *La. Pub. Serv. Comm'n*, 522 F.3d at 399.

E. There Is No Gap In Equalization Payments Under The Challenged Orders.

In the challenged orders, in response to this Court's remand, the Commission ordered bandwidth remedy payments to adjust production cost disparities for the June-December 2005 time period. Rehearing Order at P 42, JA 35. The Louisiana Commission argues that the Commission's orders "corrected seven months of the two-year delay," i.e. from June to December 2005, but continued to deny a remedy from January 1, 2006 to June 1, 2007, when the equalization payments based upon 2006 production costs began. Louisiana Commission Brief at 34. In the Louisiana Commission's view, this left unduly discriminatory rates in place "for 17 of the 24 months following FERC's determination." *Id*. at 33.

There is, however, no gap in bandwidth remedy payments following the Commission's finding that the Entergy rates were unreasonable on June 1, 2005. Under the Formula Rate tariff, equalization payments for a calendar year are made

from June to December of the next calendar year. Formula Rate Rehearing Order, R. 904 at P 20, JA 310 (equalization payments for production cost disparities in the preceding year commence in June, following the filing of annual FERC Form 1 data in April, and conclude by December 31). In the challenged orders, the Commission ordered bandwidth payments for June-December 2005 production cost disparities that would have been payable in June-December 2006, and ordered interest on those payments to compensate for the delay. Rehearing Order at P 42, JA 35. *See, e.g., La. Pub. Serv. Comm'n,* 606 F. App'x at 6 (affirming Commission award of interest on 2007 bandwidth payments based on 2006 production cost disparities to ensure full compensation).

Thus, bandwidth equalization payments effectively commenced in June of 2006 for June-December 2005 production cost disparities, Rehearing Order at P 42, JA 35, payments commenced in June of 2007 for 2006 production cost disparities, *see La. Pub. Serv. Comm'n,* 606 F. App'x 1, and payments for production costs disparities in subsequent years likewise commenced in June of the following year. *See, e.g., La. Pub. Serv. Comm'n,* 761 F.3d 540 (equalization payments for 2007 commenced in June 2008); *La. Pub. Serv. Comm'n,* 771 F.3d 903 (equalization payments for 2008 commenced in June 2009).

Therefore, under the challenged orders, there is no gap in equalization payments in 2006 or in 2007. The equalization payments for June-December 2006

cover only seven months (June-December) of 2005 rather than the entire calendar year, but that limitation is a function of the remedies available under Federal Power Act section 206, as previously discussed.

III. THE COMMISSION REASONABLY DIRECTED ENTERGY TO USE THE FORMULA RATE TARIFF TO CALCULATE THE EQUALIZATION PAYMENTS BASED ON JUNE-DECEMBER 2005 PRODUCTION COST DISPARITIES.

In the Remand Order, the Commission directed Entergy to calculate the equalization payments based on June-December 2005 production costs using the Formula Rate tariff. Remand Order at P 34 & n. 41, JA 16-17. The Louisiana Commission argues that, because the Formula Rate tariff was not effective until June 9, 2006, the Commission instead should have required that Entergy use the "Exhibit ETR-26 methodology" from the Opinion No. 480 proceeding that Entergy used as the basis for the Formula Rate tariff.[7] Louisiana Commission Brief at 55-56. The Louisiana Commission asserts that it would be lawful to apply the Formula Rate tariff to 2005 costs if the Formula Rate tariff "adhered to the Exhibit ETR-26 and ETR-28 methodology." *Id*. at 56. The Louisiana Commission claims,

[7] In Opinion No. 480, the Commission determined that comparisons of production costs among the operating companies should follow the methodology that Entergy had proposed in its Exhibit ETR-26 in that proceeding. Opinion No. 480, R. 336 at P 33, JA 61. Entergy's Exhibit ETR-26, JA 608, compared historical production costs of the operating companies for 1983-2002. Exhibit ETR-28, JA 613, was a production cost analysis for September 2001 through August 2002 that detailed the figures supporting the data in Exhibit ETR-26.

however, that the Formula Rate tariff deviated from the Exhibit ETR-26 methodology, in reliance on *Louisiana Public Service Commission*, 606 F. App'x at 5, and *Louisiana Public Service Commission*, 761 F.3d at 558-59. Louisiana Commission Brief at 56.

In those cases, however, the courts *rejected* as jurisdictionally barred Louisiana's claims that the Formula Rate tariff deviated from the Exhibit ETR-26 methodology because the Louisiana Commission had failed to raise these alleged deviations in the Formula Rate proceeding, in which the Commission required that the Formula Rate tariff follow the Exhibit ETR-26 methodology. *See* Formula Rate Order, R. 893 at P 69, JA 172.[8] Specifically, in *Louisiana Public Service Commission*, 606 F. App'x at 5, this Court found that the Louisiana Commission had *waived* its claim that the Energy Ratio in the Formula Rate tariff deviated from Opinion No. 480 and the ETR-26 methodology because the Louisiana Commission failed to assert that claim in the Formula Rate proceeding. Likewise, in *Louisiana Public Service Commission*, 761 F.3d at 558-60, the Fifth Circuit rejected the claim that the Formula Rate treatment of the Vidalia hydroelectric project deviated from

[8] *See, e.g.*, *La. Pub. Serv. Comm'n*, 341 F. App'x at 650-51 (affirming Formula Rate Orders, in which the Commission rejected tariff changes that were inconsistent with Exhibit ETR-26); *La. Pub. Serv. Comm'n*, 761 F.3d at 559 (noting that, in the Formula Rate Orders, the Commission rejected any adjustments to the Formula Rate tariff that did not comply with the Exhibit ETR-26 methodology).

that in Exhibit ETR-26, finding that the Louisiana Commission failed to raise this argument in the Formula Rate proceeding, and therefore its challenge was a collateral attack on the Formula Rate Orders.

Even assuming that the Louisiana Commission had a judicially cognizable claim that the Formula Rate tariff deviated from the Exhibit ETR-26 methodology, the "Exhibit ETR-26 methodology" was an evidentiary exhibit from the Opinion No. 480 proceeding, not a filed tariff. *See* Exhibit ETR-26, JA 608. Accordingly, the Commission reasonably rejected the argument that this "methodology" could control, finding that the Formula Rate tariff was the only lawful filed tariff implementing the bandwidth remedy. Rehearing Order at P 40, JA 34.

Nor is application of the Formula Rate tariff to 2005 costs impermissible retroactive ratemaking. *Id.* Although the Formula Rate tariff was intended to go into effect in 2006, not 2005, the Commission was required to implement the bandwidth remedy as of the earlier date as a result of this Court's 2008 remand in *Louisiana Public Service Commission*, 522 F.3d at 399-400. Rehearing Order at P 40, JA 34. The Supreme Court and this Court have recognized the Commission's authority to order retroactive rate adjustments in response to an appellate determination. *See, e.g., United Gas Improvement Co. v. Callery Properties, Inc*., 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Xcel Energy Servs.*, 815 F.3d at

955-56 (section 309 of the Federal Power Act gives the Commission remedial authority to correct its legal error); *Pub. Util. Comm'n of Cal.*, 988 F.2d at 162 (recognizing "FERC's authority to order retroactive rate adjustments when its earlier order disallowing a rate is reversed on appeal"); *id*. at 168 ("when the Commission commits a legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made"); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1074 (D.C. Cir. 1992) (Commission's authority to correct its legal errors included imposing retroactive surcharges to correct its error in refusing to accept a proposed rate). *See also, e.g., City of Anaheim*, 558 F.3d at 525 (retroactive ratemaking in a section 206 proceeding not excused where Commission was not responding to a court decision).

Indeed, the factual situation here is very similar to that in *Office of Consumer's Counsel*, 826 F.2d 1136. In that case, upon appellate review of a proceeding under section 5 of the Natural Gas Act, 15 U.S.C. §717d (the parallel provision to section 206 of the Federal Power Act), the Court determined that the Commission had correctly found a pipeline practice unjust and unreasonable but had committed legal error in failing to impose a remedy. Notwithstanding that section 5 of the Natural Gas Act, like section 206 of the Federal Power Act, provides for only prospective relief, the Court found that the Commission had authority on remand to correct its legal error and grant a remedy retroactively to

the date on which the Commission found the rates unjust and unreasonable. *Id*. at 1139 ("when the Commission has committed a legal error in a section 5 case the proper remedy is one that puts the parties in the position they would have been in had the error not been made").

IV. IN LIGHT OF THIS COURT'S 2014 REMAND IN *LOUISIANA PUBLIC SERVICE COMMISSION*, 772 F.3d 1297, THE COMMISSION REQUESTS A PARTIAL REMAND ON THE ISSUE OF REFUNDS.

In the challenged orders, the Commission denied refunds for the refund effective period from September 13, 2001 through May 2, 2003, in substantial reliance on *Louisiana Public Service Commission v. Entergy*, 142 FERC ¶ 61,211 (2013). *See* Rehearing Order at PP 50-59, JA 40-44. This Court subsequently remanded that order to the Commission for further consideration in its 2014 decision in *Louisiana Public Service Commission*, 772 F.3d 1297. Given the significance of that now-remanded order to the Commission's analysis here, the nd issue in connection with the Commission's preparation of its responsive brief in this matter, the Commission now agreeof this Court's remand in *Louisiana Public Service Commission*, 772 F.3d 1297.

Previously, on July 17, 2015, while this case was in abeyance pending Commission action on a request for rehearing of the Rehearing Order, the Louisiana Commission filed a motion asking that the Court lift the abeyance and sever the issue of refunds for immediate remand to the Commission based on the

Court's 2014 remand in *Louisiana Public Service Commission*, 772 F.3d 1297, while proceeding with review of the other issues in this appeal. *See* Document No. 1563139 filed in Docket No. 14-1063. In the Commission's July 27, 2015 response, the Commission opposed the piecemeal review of the Commission orders and the remand of the refund issue, given that the matter was still pending on rehearing before the Commission. *See* Document No. 1564612 filed in Docket No. 14-1063. In response to the Louisiana Commission's motion, this Court on October 5, 2015, removed this appeal from abeyance and denied without prejudice the Louisiana Commission's request for severance and remand. *See* Document No. 1576593 issued in Docket No. 14-1063.

Subsequent to issuance of this Court's order, the Commission acted on the pending rehearing request, which did not result in a further petition for review of the challenged orders. *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 153 FERC ¶ 61,033 (2015). Upon further consideration of the refund issue in connection with the Commission's preparation of its responsive brief in this matter, the Commission now agrees that the issue of refunds should be reconsidered in light of this Court's remand in *Louisiana Public Service Commission*, 772 F.3d 1297, and therefore the Commission respectfully requests that the Court remand the issue of refunds to the Commission for further consideration.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review upheld, save for the requested partial remand of the issue of refunds.

Respectfully submitted,

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April 27, 2016

Louisiana Pub. Serv. Comm'n v. FERC,
No. 14-1063

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,561 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 with 14-point, Times New Roman font.

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April 27, 2016

ADDENDUM
STATUTES AND REGULATIONS

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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 anticompetitive 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 classification 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—

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(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.

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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.[1]

(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.

[1] 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 determination 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

individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on 60th day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before 60th day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 825g. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 10, 1920, ch. 285, pt. III, § 308, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 10, 1920, ch. 285, pt. III, § 309, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

COMMISSION REVIEW

Pub. L. 99–495, § 4(c), Oct. 16, 1986, 100 Stat. 1248, provided that: ''In order to ensure that the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.], as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act [16 U.S.C. 825h], review all provisions of that Act [16 U.S.C. 791a et seq.] requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as meaning 'working days', rather than 'calendar days' unless calendar days is specified in such Act for such action.''

§ 825i. Appointment of officers and employees; compensation

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 10, 1920, ch. 285, pt. III, § 310, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attor-neys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employ-ees of the United States'' have been omitted as obsolete and superseded.

Such appointments are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provi-sions of the 1949 Act, and section 5103 of Title 5 author-izes the Office of Personnel Management to determine the applicability to specific positions and employees.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which en-acted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

such increased rates or charges by its decision 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 natural-gas company, 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) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, §4, 52 Stat. 822; Pub. L. 87–454, May 21, 1962, 76 Stat. 72; Pub. L. 109–58, title III, §312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109–58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87–454 inserted ''or gas distributing company'' after ''State commission'', and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, de-velopment and demonstration activities by Gas Re-search Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, §408(c), Oct. 24, 1992, 106 Stat. 2882.

§717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, §4A, as added Pub. L. 109–58, title III, §315, Aug. 8, 2005, 119 Stat. 691.)

§717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification 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: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

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 transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, §5, 52 Stat. 823.)

§717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation

§ 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 sec-tion 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 Docu-ments.

''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.

§ 825*l*. 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 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.

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.

§ 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

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 recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

Louisiana Public Service Commission v. FERC **Docket No. EL01-88**
D.C. Cir. No. 14-1063

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 27th day of April 2016, 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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