

171 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Louisiana Public Service Commission

Docket No. EL10-65-006

v.

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

Entergy Services, Inc.

Docket Nos. ER14-2085-002
ER11-3658-002
ER12-1920-002
ER13-1595-002
(consolidated)

ORDER GRANTING, IN PART, AND DENYING, IN PART, REHEARING

(Issued April 16, 2020)

1. On April 16, 2018, the Louisiana Public Service Commission (Louisiana Commission) sought rehearing of the Commission's March 15, 2018 Order on Initial Decision¹ in the above-captioned proceeding, Opinion No. 560. We grant, in part, and deny, in part, rehearing, as explained below.

¹ *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 560, 162 FERC ¶ 61,234 (2018).

I. Background

2. This proceeding is part of a long history of litigation over the allocation of the production costs of electric power plants among the Entergy Operating Companies (Operating Companies)² under the Entergy System Agreement (System Agreement). In 2005, in Opinion No. 480, the Commission determined that production costs across the multistate Entergy system were not roughly equal and were thus unduly discriminatory.³ To ameliorate this situation, the Commission imposed a bandwidth remedy that reallocated costs that deviate from an established bandwidth around the system average, as determined in annual proceedings.⁴ The bandwidth formula calculation in Service Schedule MSS-3 of the System Agreement determined whether

² Entergy Corporation is an electric utility holding company consisting of the Entergy Operating Companies and various service and support subsidiaries, including Entergy Services, Inc. The Entergy Operating Companies at the time relevant to this proceeding were Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States), Entergy Louisiana, L.L.C. (Entergy Louisiana), Entergy Mississippi, Inc., Entergy Texas, Inc., and Entergy New Orleans, Inc. Entergy Gulf States and Entergy Louisiana have since become a single entity, also named Entergy Louisiana, L.L.C. For the purposes of this order, we refer to Entergy Corporation, the Entergy Operating Companies, and/or Entergy Services, Inc. (now named Entergy Services, LLC) as “Entergy.”

³ *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, et al., Opinion No. 480, 111 FERC ¶ 61,311 (2005), *order on reh’g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006) (Order Accepting Compliance Filing, As Modified), *order on reh’g and compliance*, 119 FERC ¶ 61,095 (2007), *aff’d in part and remanded in part*, *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047 (2011), *order dismissing reh’g*, 137 FERC ¶ 61,048 (2011), *order on reh’g*, 146 FERC ¶ 61,153 (2014), *order rejecting compliance filing*, 146 FERC ¶ 61,153 (2014), *order on compliance*, 151 FERC ¶ 61,112 (2015).

⁴ *See Entergy Servs., Inc.*, 148 FERC ¶ 63,015, at P 3 (2014) (Fourth Bandwidth Initial Decision). The System Agreement terminated at 11:59 p.m. on August 31, 2016. *See Entergy Ark., Inc.*, 153 FERC ¶ 61,347 (2015) (approving settlement terminating System Agreement). The tenth and final annual bandwidth filing was accepted by delegated letter order on July 26, 2016, in Docket No. ER16-1806.

the Operating Companies' production costs were roughly equal in a given year and reallocated them if they were not.⁵

3. On May 5, 2010, pursuant to section 206 of the Federal Power Act (FPA),⁶ the Louisiana Commission filed a complaint in Docket No. EL10-65-000, proposing changes to specific cost items in the annual bandwidth calculation.⁷ The Commission issued an order setting the complaint for hearing and settlement judge procedures, but held certain issues (including those pertinent here on rehearing) in abeyance, pending resolution of related matters already before the Commission in annual bandwidth proceedings.⁸ After the abeyance was lifted, the administrative law judge held a hearing and issued an Initial Decision on July 28, 2016.⁹

4. Opinion No. 560 addressed the following exceptions to the Initial Decision: (1) whether the sale/leaseback of 9.3% of the Waterford 3 nuclear plant (Waterford 3 Financing)¹⁰ is a capital lease or a financing, whether Entergy has properly accounted

⁵ *Id.* P 3; *see also La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,152 at P 3 (Under the bandwidth formula, the production costs of each Operating Company are calculated each calendar year and, if necessary, "payments [are] made by the low cost Operating Company(ies) to the high cost Operating Company(ies) such that, after reflecting the payments and receipts, no Operating Company would have production costs more than 11% above the Entergy System average or more than 11% below the Entergy System average.").

⁶ 16 U.S.C. § 824e (2018).

⁷ For the full procedural history, *see* Opinion No. 560, 162 FERC ¶ 61,234 at PP 5-11.

⁸ *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,104, at P 38 (2010).

⁹ *La. Pub. Serv. Comm'n v. Entergy Corp.*, 156 FERC ¶ 63,017 (2016) (Initial Decision).

¹⁰ We note that the presiding judge in this Docket No. EL10-65 proceeding recognized that the Commission has found that, for accounting purposes, Entergy's sale and leaseback of the 9.3% interest in Waterford 3, frequently referred to as the "Waterford 3 Sale/Leaseback," is a financing transaction and not a sale and leaseback of plant. *See id.* P 130 & n.220 (citing *Entergy Servs., Inc.*, Opinion No. 545, 153 FERC ¶ 61,303, at P 144 (2015)). Accordingly, we will refer to the "Waterford 3 Sale/Leaseback" as simply the "Waterford 3 Financing."

for the Waterford 3 Financing transaction,¹¹ and whether Entergy should include the tax effect of the Waterford 3 Financing, that is the Waterford 3 Financing Accumulated Deferred Income Taxes (ADIT), in the bandwidth calculation; (2) whether Entergy should include interruptible load¹² in the fifth (2010) and sixth (2011) annual bandwidth calculations; and (3) whether Entergy properly accounted for its Allowance for Funds Used During Construction for the River Bend nuclear facility in the bandwidth formula.¹³ The Louisiana Commission's rehearing request concerns only the Waterford 3 Financing ADIT and interruptible load.

5. Specifically, the Louisiana Commission continues to seek to include the Waterford 3 Financing ADIT in Account 190 in the bandwidth calculation.¹⁴ The Presiding Judge excluded this ADIT, and the Commission affirmed this exclusion in Opinion No. 560.¹⁵ Additionally, the Louisiana Commission continues to seek to correct an alleged inconsistency in the bandwidth formula between the demand responsibility factor for allocating fixed costs, and the reserve equalization cost credit for interruptible load in Service Schedule MSS-1 to the System Agreement.¹⁶ The Presiding Judge determined

¹¹ ADIT reflects timing differences between when a tax liability is actually incurred and when the tax expense associated with the liability is recorded on the company books. The "tax" associated with the difference between book income and income per the tax return is recorded as deferred tax expense and is reflected in the balance sheet of a company as an asset or liability under the title of ADIT. Ex. ESI-13 at 17.

¹² Interruptible load, as opposed to firm load, refers to customers whose electric service can be interrupted pursuant to contracts between customers and the utility. See *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,100, at P 6 (2012) (2012 Rehearing Order); see also *La. Pub. Serv. Comm'n v. FERC*, 18 F.3d 892, 895-96 (D.C. Cir. 1999) ("Electric utilities often distinguish between 'firm' service, under which customers can demand power or transmission at any time, and 'interruptible' service, which the utility is entitled to shut off at any point when there is not enough excess capacity beyond that required to guarantee the needs of the utility's firm customers.") (quoting *Fort Pierce Util. Auth. v. FERC*, 730 F.2d 778, 785-86 (D.C. Cir. 1984)).

¹³ Opinion No. 560, 162 FERC ¶ 61,234 at P 1.

¹⁴ See Rehearing Request at 1-2, 4.

¹⁵ Opinion No. 560, 162 FERC ¶ 61,234 at P 57.

¹⁶ Rehearing Request at 2-3, 4-6; see also Initial Decision, 156 FERC ¶ 63,017 at P 5.

that it was too late to make this correction for the fifth (2010) and sixth (2011) bandwidth calculations, and the Commission affirmed this determination in Opinion No. 560.¹⁷

6. We grant, in part, rehearing on the Waterford 3 ADIT issue, and deny rehearing (that is, affirm Opinion No. 560) on the interruptible load issue, as discussed below.

II. Discussion

A. Waterford 3 Financing ADIT

1. Waterford 3 nuclear plant

7. Waterford 3 is a 1,158 MW nuclear plant owned by Entergy Louisiana. In 1989, Entergy Louisiana's predecessor entered into a transaction considered for Internal Revenue Service (IRS) purposes to be a sale/leaseback of a 9.3% interest in Waterford 3. The purpose of this transaction was to retire high cost debt and replace it with lower cost debt.¹⁸ Entergy received approximately \$353.6 million from the transaction and simultaneously entered a 27.5-year lease of the facility back from the purchaser.¹⁹ Entergy continued to own and operate the entire plant. The sale price exceeded both the net book value of the asset (approximately \$220 million) and the tax basis of the asset (approximately \$118 million).²⁰ The tax basis was lower than the net book value, primarily because Entergy used accelerated (tax) depreciation of Waterford 3 prior to executing the Waterford 3 Financing.²¹ The difference between the sale price and the tax basis produced a gain for tax purposes and a tax liability for Entergy (tax gain).²² Accordingly, the gain on the transaction was recognized solely for tax purposes²³ and a

¹⁷ See Opinion No. 560, 162 FERC ¶ 61,234 at P 66.

¹⁸ *Id.* P 13.

¹⁹ *Id.* Entergy Louisiana continued to own the remaining 90.7% interest in Waterford 3 and there is no distinction between the owned and leased portions of the plant for operational purposes. See Fourth Bandwidth Initial Decision, 148 FERC ¶ 63,015, at PP 141-42 (2014).

²⁰ Opinion No. 560, 162 FERC ¶ 61,234 at P 13.

²¹ *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 131 FERC ¶ 63,009, at P 6 (2010).

²² Opinion No. 560, 162 FERC ¶ 61,234 at P 13.

²³ *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 131 FERC ¶ 63,009 at P 5.

new tax basis was established, which created a tax timing difference on Entergy's books in Account 190 (Accumulated Deferred Income Taxes) (i.e., the Waterford 3 Financing tax gain ADIT).²⁴ Entergy also records in Account 190 the tax effects of the "additional interest" associated with the Waterford 3 leased plant excess amortization recorded in Account 427 (Interest on Long-Term Debt), a non-bandwidth formula account.²⁵ While the parties dispute certain aspects of this additional interest, they all agree that it arises from the difference in depreciating the Waterford 3 asset over the (40-year) plant life, rather than over the (27.5 year) lease life Entergy Louisiana used for retail ratemaking purposes.²⁶ They further agree that the tax effect of "additional interest" associated with the difference in depreciating the Waterford 3 plant over different service lives is recorded in Account 190 (i.e., the Waterford 3 Financing additional tax ADIT). Entergy treats the combined effect of the tax on the tax gain and the tax effect of "additional interest" as a single item in Account 190, but the two are separate elements: (1) Waterford 3 Financing tax gain ADIT; and (2) Waterford 3 Financing additional interest ADIT.²⁷

²⁴ Opinion No. 560, 162 FERC ¶ 61,234 at P 13 & n.26 (citing Louisiana Commission Brief on Exceptions at 26; *Entergy Servs., Inc.*, 156 FERC ¶ 61,196, at PP 116-119 (2016)).

²⁵ *Id.* P 13 & n.27 (citing Fourth Bandwidth Initial Decision, 148 FERC ¶ 63,015 at P 19 (citing Entergy Initial Br. at 25-31; Entergy Reply Br. at 28-32)).

²⁶ *See* Initial Decision, 156 FERC ¶ 63,017 at P 72 & n.75 (citing Louisiana Commission Initial Br. at 18 (citations omitted)). According to Entergy, this additional interest acts as a provision for loss to cover events that are expected to occur at the end of the lease as a result of the Louisiana Commission's 1989 requirements for approving the Waterford 3 Financing. Opinion No. 560, 162 FERC ¶ 61,234 at P 13 & n.27 (citing Fourth Bandwidth Initial Decision, 148 FERC ¶ 63,015 at P 119) (citing Entergy Initial Brief at 25-31; Entergy Reply Brief at 28-32)). Entergy explains that in 1992, the Chief Accountant performed an audit of what is now Entergy Louisiana, which concluded that the accrual was additional interest expense associated with the Waterford 3 Financing and directed Entergy to record the additional expense in accounts that are not included in the bandwidth formula. Entergy Pre-Hearing Br. at 5 & n.12 (citing Ex. ESI-13 at 33-35; Ex. ESI-17 at 9-10). Fourth Bandwidth Initial Decision, 148 FERC ¶ 63,015, at PP 119-221 (explaining relationship between additional interest recorded in non-bandwidth formula Account 427 and amortization period for Waterford 3 Financing).

²⁷ Opinion No. 560, 162 FERC ¶ 61,234 at P 13.

8. Following the Waterford 3 Financing, Entergy retained the plant investment, as well as the depreciation, on its books as if no sale of the 9.3% interest in Waterford 3 had occurred.²⁸ This meant that the net book value of the 9.3% interest in Waterford 3 remained at approximately \$220 million. What changed on Entergy's books was that Entergy used the sale proceeds to pay down higher cost long-term debt, and then recorded a \$353.6 million debt obligation in Account 224 (Other Long-Term Debt).²⁹

9. The plant investment and depreciation amounts associated with the 9.3% interest in Waterford 3 are directly inputted into the bandwidth formula through the Variable Production Rate Base components.³⁰ The long-term debt and interest rate associated with the Waterford 3 Financing are incorporated into the bandwidth formula through the weighted average cost of capital, or CM, component.³¹ The "additional interest" in Account 427 is not incorporated into the bandwidth formula.³² Entergy has not included the Waterford 3 Financing Account 190 ADIT in the bandwidth calculation in any of the annual bandwidth proceedings.³³

2. Opinion No. 560

10. In Opinion No. 560, the Commission affirmed the Presiding Judge's findings: (1) the Waterford 3 Financing is a financing transaction;³⁴ (2) Entergy should implement

²⁸ *Id.* P 14.

²⁹ *Id.*

³⁰ *Id.* P 14 & n.29 (citing Service Schedule MSS-3 Section 30.12). The Variable Production Cost (VPC) = $VPRB * (CM + F) + VPX$, wherein VPRB = Variable Production Rate Base, CM = Weighted average cost of capital, F = Federal and State Income Tax, and VPX = Variable Production Expense.

³¹ *Id.* P 13.

³² *Id.* P 15 & n.30 (citing System Agreement, Service Schedule MSS-3 Section 30.12). We note that the "i" variable within the CM variable is defined as the "[a]verage embedded cost of debt capital and preferred stock with tax deductible dividends (QUIPS) outstanding at Dec. 31 of the previous year." The additional interest in Account 427 does not meet this definition.

³³ *Id.* P 16.

³⁴ We note that, in the fourth (2009) bandwidth proceeding, in Docket No. ER10-1350, the Presiding Judge ruled that the Waterford 3 Financing is a financing transaction, and not a capital lease. See Initial Decision, 156 FERC ¶ 63,017 at P 121 & n.196 (citing

Trial Staff's accounting change recommendations regarding the Waterford 3 Financing; and (3) the Waterford 3 Financing ADIT should not be included in the bandwidth formula.³⁵

11. The Commission explained that the bandwidth formula requires Entergy to include ADIT in Account 190 (Accumulated Deferred Income Taxes) in the rate base of each Operating Company, except for amounts that are "not generally and properly includable for FERC cost of service purposes, including but not limited to, [Statement of Financial Accounting Standards] 190 ADIT amounts and ADIT amounts arising from retail ratemaking decisions"³⁶ The Commission stated that, according to Entergy, the Waterford 3 Financing ADIT in Account 190 consists of two elements: (1) tax on the tax gain resulting directly from the Waterford 3 Financing transaction (Waterford 3 Financing tax gain ADIT), and (2) the tax effect of "additional interest" (Waterford 3 Financing additional interest ADIT).³⁷ The Commission found that neither element is generally and properly includable for Commission cost of service purposes, and therefore the Waterford 3 Financing ADIT in Account 190 should not be included in the bandwidth formula.³⁸

12. The Commission explained that, while it agreed with the Louisiana Commission that the entire outstanding debt on the Waterford 3 Financing, and interest on that debt, is included in the bandwidth formula through Entergy Louisiana's weighted average cost of debt, or CM variable, it did not agree that this meant that the tax gain associated with the Waterford 3 Financing is automatically included in the bandwidth formula.³⁹ The Commission found that the Louisiana Commission had not demonstrated that the Waterford 3 Financing inputs in the weighted average cost of debt (CM) variable fully represented the Waterford 3 Financing debt payments and sale proceeds.⁴⁰ The

Fourth Bandwidth Initial Decision, 148 FERC ¶ 63,015 at P 200). The Commission affirmed this finding. See Opinion No. 545, 153 FERC ¶ 61,303, at P 143, *on reh'g and clarification*, 156 FERC ¶ 61,196, at PP 126, 142 (2016).

³⁵ Opinion No. 560, 162 FERC ¶ 61,234 at P 57.

³⁶ *Id.* P 57 & n.88 (citing Ex. ESI-3 (System Agreement)).

³⁷ *Id.* P 57 & n.89 (citing Initial Decision, 156 FERC ¶ 63,017 at P 81).

³⁸ *Id.* P 57.

³⁹ *Id.* P 59.

⁴⁰ *Id.*

Commission explained that, while the bandwidth formula provides that all rate base, revenue and expense items shall be based on the “actual amounts” on Entergy Louisiana’s books for the twelve months ended December 31 of the previous year, the bandwidth formula also provides for certain retail regulatory adjustments, including for the “debt rate associated with the Waterford 3 [Financing] for [Entergy Louisiana].”⁴¹ The Louisiana Commission, in approving the Waterford 3 Financing in 1989, mandated that for ratemaking purposes the interest rate must be .125% below the interest rate on the long-term debt issued in connection with the sale/leaseback.⁴² Accordingly, while the Louisiana Commission explained how the Waterford 3 ADIT reflected the Waterford 3 Financing lease payments and sale proceeds, the Commission was not persuaded that the Waterford 3 Financing ADIT in Account 190 reflected the cost of the Waterford 3 Financing that is included in the bandwidth calculation.⁴³

13. The Commission explained that the System Agreement provides that when an item (such as a tax gain) is not included in FERC cost of service, neither should the tax effects of that item (such as the Account 190 ADIT associated with a tax gain).⁴⁴ The Commission found, therefore that, since the tax gain associated with the Waterford 3 Financing is not included in the bandwidth formula, the Account 190 ADIT associated with the Waterford 3 Financing tax gain is not generally and properly includable in FERC cost of service.⁴⁵

14. As for the “additional interest” component of the Waterford 3 Account 190 ADIT, the Commission found that the additional interest does not currently flow through the bandwidth formula’s weighted average cost of debt calculation. In reaching its determination, the Commission considered the Louisiana Commission’s argument that the 1992 Commission Audit Report determined that the amount exceeding service-life

⁴¹ *Id.* P 60 & n.93 (quoting MSS-3 Section 30.12 n.1).

⁴² *Id.* P 60.

⁴³ *Id.*

⁴⁴ *Id.* P 61 & n.94 (citing Ex. ESI-3 at 56 n.1 (“All Rate Base, Revenue and Expense items shall be based on the *actual amounts on the Company’s books* for the twelve months ended December 31 of the previous year as reported in FERC Form 1”) (emphasis added)).

⁴⁵ *Id.* P 61.

amortization should be recorded as “a cost of financing the sale/leaseback,”⁴⁶ and, therefore, this element of the Account 190 Waterford 3 Financing ADIT should be included in the bandwidth calculation, just like the tax gain element. The Commission determined, however, that the additional interest is not generally and properly includable in FERC cost of service because it does not flow through the bandwidth formula’s weighted average cost of debt, and, therefore, the associated ADIT should not be included in the bandwidth calculation.⁴⁷

3. Request for Rehearing

15. The Louisiana Commission argues that excluding the Waterford 3 Financing ADIT from the bandwidth calculation is in error because the Commission: (1) applies the wrong test; (2) misinterprets the evidence; and (3) fails to address the discriminatory treatment of this Waterford 3 Financing ADIT as opposed to all other taxes on sale/leaseback gains in the Commission’s cost of service rates.⁴⁸

a. Tax Gain ADIT

16. The Louisiana Commission contends that Opinion No. 560 applies an “erroneous and illogical test” to determine whether the Waterford 3 Financing ADIT is includable in the bandwidth calculation. Specifically, according to the Louisiana Commission, the Commission relies on a “strawman” standard put forth by Entergy – whether the tax gain is in the rate base.⁴⁹ The Louisiana Commission argues that this cannot be the test because cost of service rates rely on book data, not tax data.⁵⁰ In essence, the Louisiana Commission argues that while the tax gain on the deemed sale transaction for IRS purposes is not recorded on the books, and thus, not included in rate base, the resulting ADIT on the books reflects the difference between book and tax differences related to the Waterford 3 plant, which is in the bandwidth calculation. Thus, the Louisiana

⁴⁶ *Id.* P 62 & n.95 (quoting Louisiana Commission Brief on Exceptions at 46) (citation omitted)).

⁴⁷ *Id.* P 62.

⁴⁸ Rehearing Request at 4-5, 6.

⁴⁹ *Id.* at 6 (citing Opinion No. 560, 162 FERC ¶ 61,234 at P 58).

⁵⁰ *Id.* at 6.

Commission argues, excluding ADIT because the tax value differs from the book value – the very reason ADIT is created – is a circular and illogical test.⁵¹

17. The Louisiana Commission highlights the Commission’s statement in Opinion No. 560 that the System Agreement “provides that when an item (such as a tax gain) is not included in the Commission’s cost of service, neither should the tax effect of that item (such as the Account 190 ADIT associated with a tax gain).”⁵² The Louisiana Commission points out that, as support, the Commission quotes Footnote 1 in the bandwidth calculation, which provides that “Rate Base, Revenue and Expense items shall be based on the *actual amounts on the Company’s books . . .*”⁵³ But the Louisiana Commission objects that this quotation proves nothing. Instead, the Louisiana Commission asserts that because the Waterford 3 Financing ADIT is an “actual amoun[t] on the Company’s books,”⁵⁴ according to the quoted language, it should be included in the bandwidth calculation, not excluded. The Louisiana Commission states that the issue is the ADIT itself, and it is “on the Company’s books.”⁵⁵ In any event, however, the Louisiana Commission asserts that, rather than Footnote 1, the more specific language in the ADIT variable controls, providing that ADIT should be included unless it is “not generally and properly includable for FERC cost of service purposes.”⁵⁶

18. The Louisiana Commission states that the Commission’s regulations provide that differences in amounts reported for tax purposes versus book purposes should be recognized as ADIT.⁵⁷ Specifically, the Louisiana Commission explains that General Instruction 18(A) of the Uniform System of Accounts (USOA) provides that when the recognition of amounts for tax and accounting purposes differs, “the income tax effects on such transactions are to be recognized in the periods in which the differences between

⁵¹ *Id.* at 7.

⁵² *Id.*

⁵³ *Id.* (quoting Opinion No. 560, 162 FERC ¶ 61,234 at P 61 n.94) (emphasis added by Louisiana Commission).

⁵⁴ *Id.* (quoting Ex. ESI-6, Attach. 1 at 4.3.1 (listing ADIT in Account 190)).

⁵⁵ *Id.*

⁵⁶ *Id.* (quoting Ex. ESI-3 at 57 (ADIT variable)).

⁵⁷ *Id.* at 8.

book accounting income and taxable income arise and in the periods in which the differences reverse using the deferred tax method.”⁵⁸

19. The Louisiana Commission states that, if there is ADIT, the amount reported for tax purposes *must* differ from the amount reported in the same period for book purposes. The Louisiana Commission states that “[t]he tax amount is not reported *on the books*.”⁵⁹ The Louisiana Commission adds that FERC ratemaking relies on assets, revenues and expenses reported for book purposes, noting that the bandwidth formula also relies on “actual amounts on the Companies books . . . as reported in the FERC Form 1.”⁶⁰ The Louisiana Commission asserts, however, that if ADIT could be included only if the taxable amount were in rate base, revenue or expense, then ADIT could never enter the rates.⁶¹

20. Additionally, the Louisiana Commission argues that Opinion No. 560 is not in accordance with relevant precedent. The Louisiana Commission states that, for example, in the first (2006) bandwidth proceeding, in Opinion No. 505,⁶² the Commission ruled that Net Operating Loss ADIT was includable in the bandwidth calculation. The Louisiana Commission states that expenses declared for tax purposes were much larger than the expenses recorded for book purposes, creating tax net operating losses and associated ADIT. The Louisiana Commission states that only the book costs entered the cost of service. The Louisiana Commission states that the Commission ruled that the Net Operating Loss ADIT could not be excluded because “[t]o the extent storm damage costs are amortized to expense accounts included in the bandwidth calculation (production storm damage expense), such costs are included in a Commission cost of service rate.”⁶³ The Louisiana Commission states that the tax losses were not in the rate, but that would not have been the correct test. The Louisiana Commission states that the ADIT was includable because the book expense entered the cost of service.⁶⁴

⁵⁸ *Id.* (quoting 18 C.F.R. Pt. 101, Gen’l Instr. 18 (A) (emphasis added)).

⁵⁹ *Id.*

⁶⁰ *Id.* (quoting Ex. ESI-3 at 56 n.1).

⁶¹ *Id.* at 9.

⁶² *Id.* (citing *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023 (2010), *clarified*, 145 FERC ¶ 61,045 (2013)).

⁶³ *Id.* (quoting Opinion No. 505, 130 FERC ¶ 61,023 at P 234).

⁶⁴ *Id.*

21. Next, the Louisiana Commission argues that the Commission similarly required inclusion of casualty loss ADIT in the bandwidth calculation because casualty losses are related to “storm damage expenses, which are costs that are generally and properly included in cost of service and are recorded in accounts included in the bandwidth formula.”⁶⁵ The Louisiana Commission states that casualty losses were not included in cost of service – asserting that is a calculation for tax purposes – but the book storm cost expenses were included if they were recorded in a production account. The Louisiana Commission states that if the tax losses had to be included in order to include the ADIT, the casualty loss ADIT would have been excluded.⁶⁶

22. The Louisiana Commission asserts that liberalized depreciation ADIT and Contributions in Aid of Construction ADIT are other similar examples where the ADIT was directly related to a book amount, but the tax amount was not on the books.⁶⁷ Thus, the Louisiana Commission argues that Opinion No. 560 treats the Waterford 3 Financing ADIT differently than it treats all other ADIT in the bandwidth calculation.⁶⁸ The Louisiana Commission argues that the Commission never requires that the tax amount rather than the book amount be included in FERC accounts before the ADIT will be included, although that is the test Opinion No. 560 relies on for the Waterford 3 Financing ADIT.⁶⁹ The Louisiana Commission contends that the Commission should reconsider its determination and rule that the Waterford 3 Financing tax gain ADIT is includable in the bandwidth calculation because the net book value of the Waterford 3 plant is included in the rate base in the bandwidth calculation.⁷⁰

23. The Louisiana Commission argues that, even under the incorrect Opinion No. 560 test, the Waterford 3 Financing tax gain ADIT should have been included in the bandwidth calculation because the gain is an input to the cost of capital in the formula rate.⁷¹ The Louisiana Commission argues that the evidence is unrefuted that the gain was

⁶⁵ *Id.* (quoting *Entergy Services, Inc.*, 145 FERC ¶ 61,048, at P 18 (2013)).

⁶⁶ *Id.*

⁶⁷ *See* Rehearing Request at 10-11.

⁶⁸ *Id.* at 11.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

in the purchase price and the purchase price was the amount of debt recorded for the Waterford 3 Financing transaction.⁷² The Louisiana Commission explains that, as the purchase price is reduced through the lease payments, the outstanding debt is reduced.⁷³ The Louisiana Commission argues that the difference between the outstanding debt amount in Account 224, which is in the bandwidth calculation, and the net book value, which is in the bandwidth calculation, is the basis for the gain ADIT.⁷⁴ The Louisiana Commission states that these values represent principal amounts; the interest rate has nothing to do with the gain ADIT.⁷⁵ The Louisiana Commission states that both values relevant to the gain ADIT are in the formula and the ADIT should be included as well.⁷⁶

24. The Louisiana Commission argues that the Commission does not explain its holding that “[a]s an initial matter, we are not persuaded that the tax gain is in the CM variable because, as a financing arrangement, the amount recorded in Account 224 represents the balance owed on the long term debt borrowings, and, as such, does not include a tax gain”⁷⁷ The Louisiana Commission states that the Commission is supposed to rely on evidence and the evidence shows, without refutation, that the outstanding purchase price (i.e., the sale price), which includes the gain, is the outstanding debt. The Account 224 debt amount is the value used to calculate the ADIT.⁷⁸ Accordingly, the Louisiana Commission insists that the Commission’s holding is unsupported.⁷⁹ In other words, the tax gain is included in the bandwidth calculation by decreasing the amount of outstanding debt.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 11-12 (citing Opinion No. 560, 162 FERC ¶ 61, 234 at P 59).

⁷⁸ *Id.* at 12.

⁷⁹ *Id.*

25. The Louisiana Commission asserts there is no dispute that the debt recorded in Account 224 is the same as the sale proceeds related to the Waterford 3 Financing Transaction.⁸⁰ The Louisiana Commission points out that its expert witness, Mr. Lane Kollen, testified that “[t]he Waterford 3 Financing’s debt principal was equal to the sale proceeds at the date of the transaction and reflects the gain on the sale.”⁸¹ He explained that the lease payments reduce the principal amount of the debt and “reduce the ADIT in Account 190.”⁸² At the hearing, he said that the ADIT in Account 190 is the “difference between the remaining amount of the debt due to the lessor minus the net book value, that difference between those two temporary differences times the income tax rate is the ADIT in account 190.”⁸³

26. The Louisiana Commission states that Entergy’s expert witness, Mr. Rory Roberts, testified that balance sheet differences between book and tax are temporary differences; income statement differences are “timing differences.”⁸⁴ Net book value is reflected in balance sheet accounts. The Louisiana Commission adds that Mr. Roberts testified that the Waterford 3 Financing tax gain ADIT was computed using the outstanding debt balance in Account 224 and the net book value.⁸⁵ The Louisiana Commission states that Mr. Roberts also testified that the purchase price (i.e., the sale price) included the gain and is recorded as debt, and that the proceeds are recorded only as debt.⁸⁶ The Louisiana Commission also pointed out that Mr. Roberts testified that the ADIT related to the sale price is reduced as the debt principal in Account 224 is reduced.⁸⁷ The Louisiana Commission quotes Entergy expert witness, Mr. Bruce

⁸⁰ *Id.*

⁸¹ *Id.* (quoting Ex. LC-44 at 50).

⁸² *Id.*

⁸³ *Id.* (citing Tr. at 314).

⁸⁴ *Id.* (quoting Tr. at 518).

⁸⁵ *Id.* at 12-13 (citing Tr. at 514).

⁸⁶ *Id.* at 13 (citing Tr. at 515-516).

⁸⁷ *Id.* at 13-14 (citing Tr. at 523).

Louiselle, who agreed that the sale proceeds are included in the cost of debt in the bandwidth calculation.⁸⁸

27. The Louisiana Commission speculates that perhaps in paragraph 59 of Opinion No. 560, the Commission discerns some “metaphysical distinction” between the debt balance and the sales proceeds, even though the sales proceeds are recorded as a debt balance.⁸⁹ The Louisiana Commission states that, if so, Opinion No. 560 conflicts with the required accounting for the transaction.⁹⁰ The Louisiana Commission notes that, as the 1991 FERC audit of Entergy Louisiana explains, the Commission by letter order “authorized [Entergy Louisiana] to enter into the transaction and to account for the transaction as a financing, instead of a sale of utility plant.”⁹¹ The Louisiana Commission states that, in a financing, the proceeds are recorded as debt.⁹² The Louisiana Commission asserts that different treatment for tax purposes makes the gain ADIT like all other ADIT – it is an amount treated differently for tax purposes than book purposes.⁹³ But the gain is in the proceeds and the proceeds are recorded as debt.

28. The Louisiana Commission further argues that Opinion No. 560 also expresses uncertainty as to whether the cost of debt (i.e., the interest) for the Waterford 3 Financing is included in the bandwidth calculation because that cost is affected by a Louisiana Commission adjustment.⁹⁴ The Louisiana Commission argues that this is irrelevant to determining the includability of the gain ADIT. The Louisiana Commission asserts that the calculation is based on the balance sheet amount – the original cost, accumulated depreciation, and outstanding debt balance.⁹⁵ The Louisiana Commission states that one

⁸⁸ *Id.* at 14 (citing Tr. at 432).

⁸⁹ *Id.* at 14-15.

⁹⁰ *Id.* at 15.

⁹¹ *Id.* (citing Ex. S-6 at 9).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* (citing Opinion No. 560, 162 FERC ¶ 61,234 at P 59).

⁹⁵ *Id.*

hundred percent of each of the amounts is included in the bandwidth calculation; the cost of debt does not affect the calculation.⁹⁶

29. The Louisiana Commission adds that, with respect to the cost of debt, Opinion No. 560 refers to a .125% reduction mandated by the Louisiana Commission in the cost of the sale-leaseback debt.⁹⁷ The Louisiana Commission argues that in the relevant test years the cost of the debt in the bandwidth calculation was more than the actual per-books costs of the debt, which, the Louisiana Commission states, reflects a refinancing amount included in retail rates in those years that was more than the actual interest cost.⁹⁸ The Louisiana Commission points out that Ex. LC-65 at 3 shows the long-term debt calculation for the Waterford 3 Financing for 2010 in the bandwidth calculation, which produced \$17,991,716 in interest, reflecting a 7.965% rate before the added cost of premium discounts.⁹⁹ The Louisiana Commission states that LC-66 shows the actual Form 1 interest cost for the Waterford 3 Financing debt – \$17,119,933 – reflecting a 7.45% effective cost rate.¹⁰⁰ The Louisiana Commission states that, thus, the inputs at least “fully represent” the Waterford 3 Financing lease payments and sales proceeds.”¹⁰¹

30. Thus, in sum, the Louisiana Commission argues that, even under the test that Opinion No. 560 applied, the Waterford 3 Financing tax gain ADIT is includable in the bandwidth calculation because the gain is an input to the cost of capital in the bandwidth formula.¹⁰²

31. Additionally, the Louisiana Commission argues that the Commission acted unreasonably by failing to address the Louisiana Commission’s showing that, for other sale/leasebacks, Commission ratemaking always includes the tax on a gain in the cost of service.¹⁰³ The Louisiana Commission states that the Commission normally allows

⁹⁶ *Id.*

⁹⁷ *Id.* (citing Opinion No. 560, 162 FERC ¶ 61,234 at P 60).

⁹⁸ *Id.*

⁹⁹ *Id.* at 15-16.

¹⁰⁰ *Id.* at 16.

¹⁰¹ *Id.* (quoting Opinion No. 560, 162 FERC ¶ 61,234 at P 59).

¹⁰² *Id.* at 11.

¹⁰³ *Id.*

utilities to recover the lease payments, and the lease payments include the taxes on any gain. The Louisiana Commission asserts that it introduced considerable evidence concerning the treatment of ADIT related to sale/leaseback gains in other Commission cases,¹⁰⁴ particularly the Grand Gulf Unit Power Sales Agreement.¹⁰⁵ The Louisiana Commission states that the Grand Gulf sale/leaseback is a financing like the Waterford 3 Financing, but unlike Waterford 3 Financing ADIT, the Grand Gulf transaction-related ADIT is included in the bandwidth calculation.¹⁰⁶ Thus, the Louisiana Commission argues that the different treatment of the Waterford 3 Financing ADIT is discriminatory. The Louisiana Commission points out that its witness, Mr. Kollen, testified that the Louisiana Commission “is substantially disadvantaged” by the disparate treatment of ADIT for Grand Gulf and Waterford 3.¹⁰⁷

32. The Louisiana Commission asserts that the ADIT variable in the bandwidth formula makes clear that general Commission policy controls in this Waterford 3 Financing context – not some unique interpretation of the bandwidth formula. The Louisiana Commission reiterates that the ADIT variable provides that ADIT in Account 190 should be included unless it is “not generally and properly includable for FERC cost of service purposes”¹⁰⁸ The Louisiana Commission states that the issue, therefore, is whether the Waterford 3 Financing tax gain ADIT is “generally and properly includable” in rates.

b. Additional Interest ADIT

33. The Louisiana Commission argues that the “additional interest” portion of the Waterford 3 Financing ADIT (which relates to the difference in depreciating the Waterford 3 plant over its estimated service life of 40 years for accounting purposes as opposed to the lease or debt term life of 27.5 years for tax purposes) is properly includable in the bandwidth calculation because the Commission’s Chief Accountant

¹⁰⁴ *Id.* at 19 (quoting *AEP*, 52 FERC ¶ 61,031, at 61,163 (1990)); *see also id.* (citing *San Diego Gas & Elec. Co. v. Century Power*, 55 FERC ¶ 63,016 (1991)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 17.

¹⁰⁷ *Id.* at 18-19 (quoting Ex. LC-44 (Kollen Rb.) at 39).

¹⁰⁸ *Id.* at 17 (quoting Ex. EIS-3 at 17 (ADIT variable)). The Louisiana Commission points out that Entergy witness Louiselle agreed at the hearing, the phrase “generally and properly includable” would “apply in any ratemaking setting, whether it’s bandwidth or rate case” *Id.* (quoting Tr. at 439).

provided for recording it and the different ratemaking method for calculating capital costs is not a basis to require its exclusion.¹⁰⁹ The Louisiana Commission explains that the “additional interest” permits expensing the Waterford 3 Financing over the life of the “lease” (more accurately, over the 27.5 debt obligation period) and enables the tax effect of the additional interest, i.e., the Waterford 3 additional interest ADIT in Account 190, to net to zero when the debt is paid off.¹¹⁰ The Louisiana Commission asserts that the fact that the interest recorded in Account 427 is not in the bandwidth calculation should make no difference, because interest expense is determined under a different, cost-of-capital ratemaking methodology.¹¹¹

34. The Louisiana Commission argues that all the benefits of the financing are included in the bandwidth calculation and the tax effect of the financing costs should be included as well.¹¹² The Louisiana Commission adds that the additional interest and principal repayment, in combination with book amortizations, serve to expense the Waterford 3 asset over the life of the lease, which is also the life of the financing.¹¹³ The Louisiana Commission states that the book expenses increase the ADIT annually, while principal payments decrease it.

35. The Louisiana Commission asserts that the additional interest was required to amortize the net book value of the asset over the life of the lease. Under the calculation, an accrual over the lease life of \$63 million of additional interest was set up to match the expected unamortized book value at the end of the lease. The Louisiana Commission argues that, if the additional interest ADIT were not included with other items that create ADIT, the ADIT balance would be negative at the end of the lease. The principal will have been repaid, so the tax basis of the asset will be zero. According to the Louisiana Commission, absent the additional interest, there would be \$63 million of unamortized book value at the end of the “lease” (debt obligation period). The Louisiana Commission states that the difference (between net book value and value for tax accounting purposes) times the tax rate would create a negative ADIT balance.¹¹⁴ The Louisiana Commission

¹⁰⁹ *Id.* at 21.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 21 (citing Ex. LC-60 (Sale-Leaseback part of long-term debt)).

¹¹³ *Id.* (citing Ex. LC-52 (FERC Audit Compliance Report) at 7).

¹¹⁴ *Id.* at 22.

argues that it would make no sense to have a negative ADIT balance once the debt is discharged.

36. The Louisiana Commission argues that ratemaking never, or almost never, bases the interest component of the return requirement on the booked amount of interest. Instead, it allows interest as part of the return calculation. The Louisiana Commission states that the bandwidth formula follows this normal approach, so asserting that the booked amount of interest is not in the bandwidth calculation is meaningless for the purpose of determining the ADIT's includability.

c. Louisiana Commission's Summary

37. In sum, the Louisiana Commission argues that the Commission used an improper test to eliminate ADIT that might benefit Louisiana customers from the bandwidth calculation.¹¹⁵ Asserting that a tax gain, tax loss, taxable revenue or tax expense is never in the cost of service if it differs from the book amount, the Louisiana Commission argues that Opinion No. 560's test for including ADIT (i.e., that the tax gain related to the Waterford 3 Financing is in the cost of service) would eliminate most or all ADIT from the bandwidth calculation and from other rates, because only book amounts go into cost of service rates, not tax amounts.¹¹⁶ Additionally, the Louisiana Commission contends that the Commission misunderstood the evidence. Specifically, the Louisiana Commission maintains that "the outstanding debt amount in the bandwidth formula reflects *precisely* the outstanding gain and is used to determine the [Waterford 3] Financing gain."¹¹⁷ And, with respect to the gain ADIT, the Louisiana Commission contends that "the principal debt is the only relevant number, not the interest rate."¹¹⁸ The Louisiana Commission further asserts that all the interest for the Waterford 3 Financing ADIT is in the bandwidth formula, and the ADIT related to the additional interest, a cost of financing, as determined by the Chief Accountant, should also be included in the bandwidth calculation because the bandwidth formula treats the Waterford 3 Financing as a financing. Finally, the Louisiana Commission asserts that the Commission failed to address evidence establishing that taxes on a sale/leaseback gain (such as Grand Gulf) are included in all other wholesale rates, rendering exclusion of the Waterford 3 Financing ADIT unreasonable.

¹¹⁵ *Id.* at 2.

¹¹⁶ *Id.* at 1-2, 4.

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.*

4. Commission Determination

38. We grant rehearing with respect to the tax gain portion of the Waterford 3 Financing ADIT, but deny rehearing with respect to the additional interest portion of the Waterford 3 Financing ADIT. The complainant and challenger to the existing rate, the Louisiana Commission, bears the burden of proof in this proceeding.¹¹⁹ On rehearing, as explained below, we are persuaded that the tax gain portion of the Waterford 3 Financing ADIT in Account 190 arises from the Waterford 3 Financing, and is directly related to amounts included in bandwidth formula accounts. Consequently, we conclude that the tax gain portion of the Waterford 3 Financing ADIT is generally and properly includable for FERC cost of service purposes, and should be included in the bandwidth calculation.

39. Under the bandwidth formula, Entergy is required to include ADIT in the rate base of each Operating Company, except for amounts that are “not generally and properly includable for FERC cost of service purposes, including but not limited to, [Statement of Financial Accounting Standards] 190 ADIT amounts and ADIT amounts arising from retail ratemaking decisions. . . .”¹²⁰ The critical question is what constitutes “generally and properly includable for FERC cost of service purposes.”¹²¹ The Commission has declared, and the court has affirmed, that the appropriate test for determining what is “generally and properly includable for FERC cost of service purposes” is whether the ADIT is directly attributable to a cost included in the bandwidth calculation.¹²² This

¹¹⁹ 16 U.S.C. § 824e(b); *see also FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014); *Ala. Power Co. v FERC*, 995 F.2d 1557, 1572 (D.C. Cir. 1993).

¹²⁰ *See* Ex. ESI-3 at 55 (Service Schedule MSS-3 at section 30.12). We note that the Louisiana Commission agrees that the bandwidth formula test for including ADIT in the bandwidth calculation is whether the ADIT is “generally and properly includable for FERC cost of service purposes.” Rehearing Request at 2.

¹²¹ *See* Opinion No. 505, 130 FERC ¶ 61,023 at P 233 & n.278 (“The tariff language of section 30.12 [off MSS-3] instructs Entergy to remove “amounts not generally and properly includable for FERC cost of service purposes.”).

¹²² *See, e.g., Entergy Servs., Inc.*, 167 FERC ¶ 61,246, at P 39 (2019) (explaining that (1) casualty loss ADIT is includable in the bandwidth calculation because it is “directly related” to casualty losses, which are included in the bandwidth calculation but (2) contra-securitization ADIT is not includable in the bandwidth calculation because it is directly related to securitized asset amounts that are excluded from the bandwidth calculation); *La. Pub. Serv. Comm’n v. FERC*, 771 F.3d 903, 918-919 (5th Cir. 2014) (affirming Commission’s decision that casualty loss ADIT is includable in the bandwidth calculation because “[c]asualty loss ADIT amounts are directly attributable to storm damages” that are included in bandwidth formula accounts). *Accord* Opinion No. 505,

requires examining whether the Waterford 3 ADIT in Account 190 is directly related to amounts that are recorded in Entergy cost of service accounts that are included in the bandwidth formula.¹²³

40. At the outset, we highlight the fact that the Waterford 3 Financing is a financing, and not a typical sale/leaseback transaction for financial reporting purposes.¹²⁴ As explained earlier, in 1989, Entergy Louisiana's predecessor entered into an agreement to retire high cost debt associated with a 9.3% interest in Waterford 3, and to make use of unused investment tax credits and net operating loss carryforwards.¹²⁵ Entergy received approximately \$353.6 million from the transaction.¹²⁶ Entergy entered into a 27.5-year lease with the owner and Entergy continued to own and operate the entire plant.¹²⁷ For IRS purposes, the retirement of high cost debt was treated as a sale/leaseback transaction. As such, the transaction was treated as a taxable sale of assets and the difference between the sale price and the tax basis produced a gain for tax purposes and a tax liability for Entergy (tax gain).¹²⁸ No gain was recorded on Entergy's books for

130 FERC ¶ 61,023 at PP 234-235 (reversing presiding judge and agreeing with the Louisiana Commission that ADIT amounts related to Net Operating Loss carryforwards should be included in the bandwidth calculation to the extent they are directly related to storm losses from hurricanes Katrina and Rita, which, in turn, are properly recorded in bandwidth formula accounts; *Entergy Servs., Inc.*, 145 FERC ¶ 61,047, at P 25 (2013) (clarifying that the ADIT must be "directly attributable" to a cost included in the bandwidth calculation) (Rehearing and Clarification of Opinion No. 518).

¹²³ Rehearing and Clarification of Opinion No. 518, 145 FERC ¶ 61,047 at P 23 & n.45 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 230).

¹²⁴ Opinion No. 545, 153 FERC ¶ 61,303 at P 143.

¹²⁵ Opinion No. 560, 162 FERC ¶ 61,239 at P 13.

¹²⁶ *Id.* Entergy Louisiana continued to own the remaining 90.7% interest in Waterford 3 and there is no distinction between the owned and leased portions of the plant for operational purposes. See Fourth Bandwidth Initial Decision, 148 FERC ¶ 63,015 at PP 141-42.

¹²⁷ Opinion No. 545, 153 FERC ¶ 61,303 at P 143.

¹²⁸ Opinion No. 560, 162 FERC ¶ 61,234 at P 13.

financial reporting purposes,¹²⁹ but the gain on the deemed sale transaction was recognized solely for tax purposes,¹³⁰ which created a tax timing difference on Entergy's books (that is, Waterford 3 Financing ADIT in Account 190).¹³¹ The Waterford 3 Financing ADIT recorded in Account 190 indicates that Entergy paid taxes on the gain created at the time of the deemed sale transaction and created a future tax benefit by having greater future tax deductions than book expenses associated with the Waterford 3 plant and associated debt. This method of accounting results in reducing the Waterford 3 Financing ADIT recorded in Account 190 over time, as Entergy repays the debt and depreciates Waterford 3. As such, we clarify that, among other things, in contrast to the traditional sale/leaseback transaction, there are no lease payments for financial reporting purposes. Instead, Entergy: (1) has a debt liability recorded on its books (Account 224) and extinguishes this debt balance as it makes cash payments (principal and interest) to pay off the debt; (2) continues to depreciate the Waterford 3 plant, and (3) reverses the balance recorded in Account 190 as the debt is paid and plant asset is depreciated.

41. Next, we examine the source of the amounts that resulted in Waterford 3 Financing ADIT in Account 190: (1) tax gain; and (2) "additional interest." First, the source of the tax gain. We begin with the fact that the entire Waterford 3 plant is an asset in plant in service (Account 101).¹³² For accounting purposes, the net book value of the Waterford 3 plant did not change after the Waterford 3 Financing. Instead, after executing the Waterford 3 Financing, Entergy maintained its plant book balances in rates as if the transaction had never transpired. There was no change in the net book value (original cost minus depreciation) of the Waterford 3 plant asset that is included in the rate base and the bandwidth calculation. The deemed sale price of the 9.3% interest in Waterford 3 did not affect the net book value of the plant asset. Instead, the sales proceeds were used to "reduce" (basically retire) the amount of outstanding debt in Account 224 and the deemed "sale" price of the Waterford 3 Financing was equal to the amount of new debt in Account 224, or \$353.6 million. However, unlike FERC book

¹²⁹ See Entergy Pre-hearing Br. at 5 & n.9 (citing Ex. ESI-11 at 2-3; Ex. ESI-13 at 14-16, 32-33, 39).

¹³⁰ *Id.* at 5.

¹³¹ Opinion No. 560, 162 FERC ¶ 61,234 at P 13 & n.26 (citing Louisiana Commission Brief on Exceptions at 26; *Entergy Servs., Inc.*, 156 FERC ¶ 61,196, at PP 116-119 (2016)).

¹³² The presiding judge accepted Trial Staff's recommendation to require the cost of the 9.3% interest in Waterford 3 to be accounted for in Account 101, as electric plant in service subject to financing, and not in Account 101.1 as property under capital leases. See Initial Decision, 156 FERC ¶ 63,017 at P 244; see also *id.* P 238.

accounting, for IRS purposes, the transaction was deemed a sale, so the tax gain is equal to the difference between the sale price and the *tax basis* (as distinguished from book basis).¹³³ Therefore, the source of the tax gain and the resulting ADIT is the Waterford 3 plant and the associated debt/lease.

42. Next, we turn to the source of the “additional interest.” As all parties agree, this amount represents the difference between (a) depreciating the Waterford 3 plant asset over its service life (40 years) and (b) “amortizing” the debt over the “lease” life – more accurately, repayment of the debt obligation over the debt term of 27.5 years. As such, the term “additional interest” is a particularly confusing misnomer, as it does not involve interest at all.

43. Having established the source of the tax gain and the “additional interest,” we now examine the Waterford 3 Financing ADIT in Account 190. As all parties agree, the Waterford 3 Financing ADIT in Account 190 comprises the tax effect of the tax gain and the tax effect of the “additional interest.” As we have confirmed, the Waterford 3 plant asset (in Account 101) and the associated long-term debt, are in the bandwidth formula. In Opinion No. 560, the Commission agreed with the Louisiana Commission that “the entire debt outstanding on the Waterford 3 [Financing], and interest on that debt, is included in the bandwidth formula through Entergy Louisiana’s weighted average cost of debt, or CM variable.”¹³⁴ However, in Opinion No. 560, the Commission also found that the Louisiana Commission had not shown that the Waterford 3 Financing inputs in the CM variable fully represent the Waterford 3 Financing.¹³⁵ Specifically, the Commission noted that the debt rate associated with the Waterford 3 Financing in the CM variable reflects a debt cost that was administratively determined by the Louisiana Commission in retail rate proceedings, not the cost reflected on Entergy Louisiana’s books.¹³⁶ Based on this finding, the Commission determined that it was appropriate to exclude the Waterford 3 Financing ADIT in Account 190 from the bandwidth calculation.¹³⁷ Upon further consideration, we are now persuaded that, even though the debt rate associated with the Waterford 3 Financing in the CM variable does not reflect the cost of debt on Entergy

¹³³ The tax basis did not equal net book value for accounting purposes due to accelerated depreciation, nor did it equal sales price. (If the gain had been booked, then it would have been the sale price minus the net book value on the books.)

¹³⁴ Opinion No. 560, 162 FERC ¶ 61,234 at P 59.

¹³⁵ *Id.*

¹³⁶ *Id.* PP 59-60.

¹³⁷ *Id.* P 61.

Louisiana's books, the Waterford 3 plant asset and associated debt, on which the Waterford 3 Financing are based, is included in the bandwidth calculation.¹³⁸ We agree that Account 224 is included in the bandwidth calculation, as it is used as an input (i.e., the balance of the outstanding long-term debt component of the CM variable) in calculating the weighted cost of debt in the Variable Production Cost formula. The future tax benefits associated with the outstanding debt amount in bandwidth eligible Account 224 and the net book value of the Waterford 3 plant asset (now in bandwidth Account 101) is the basis for the Waterford 3 Financing tax gain ADIT. Thus, because both the debt balance and the net book value of the plant are included in the bandwidth calculation, the associated ADIT should also be included in the calculation. Consequently, we agree with the Louisiana Commission that, since both values relevant to the Waterford 3 Financing tax gain ADIT are in the bandwidth formula, the Waterford 3 Financing tax gain ADIT should be included as well.

44. Thus, we conclude that the Waterford 3 Financing tax gain ADIT is directly related to amounts in bandwidth formula accounts, and therefore it should be included in the bandwidth calculation.¹³⁹

45. As for the "additional interest" portion of the Waterford 3 Financing, we continue to conclude that it is reasonable to exclude it from the bandwidth calculation.¹⁴⁰ The Chief Accountant directed Entergy to record the "additional interest" in Account 427, a non-bandwidth formula account.¹⁴¹ The System Agreement provides that when an item

¹³⁸ We note that Entergy calculates the Waterford 3 Financing ADIT by comparing the outstanding debt amount in Account 224 for the Waterford 3 Financing with the net book value of the Waterford 3 plant in Accounts 101.1 [now Account 101] and 109. As Entergy witness Mr. Roberts acknowledged, the Waterford 3 Financing tax gain ADIT is "the difference between the amount recorded in [Account] 224 and the net book value [of Waterford 3] . . . times whatever tax rate you use." Tr. at 514. As explained above, the debt includes the tax gain – because the debt is reduced by the gain from the sale – and thus the debt is included in the bandwidth calculation because it is in a bandwidth formula account, Account 224.

¹³⁹ See, e.g., *La. Pub. Serv. Comm'n v. FERC*, 771 F.3d at 918 (upholding Commission's determination that casualty loss ADIT should be included in the bandwidth calculation because it is directly attributable to storm damages that are included in a bandwidth eligible account, and therefore generally and properly includable for cost of service purposes).

¹⁴⁰ Opinion No. 560, 162 FERC ¶ 61,234 at P 62.

¹⁴¹ See Ex. ESI-13 at 33-35; Ex. ESI-17 at 9-10.

(here, the “additional interest”) is not included in FERC cost of service, neither should the tax effects of that item (here, the “additional interest” portion of the Waterford 3 Financing ADIT).¹⁴² Since the “additional interest” is not recorded in a bandwidth formula account, nor does it currently flow through the weighted cost of debt via the CM variable in the bandwidth formula, the “additional interest” is not generally and properly includable in FERC cost of service. The fact that the “additional interest” is related to the book/tax timing difference on the Waterford 3 plant is irrelevant, because the “additional interest” is not in a bandwidth formula account, so it is excluded from the bandwidth calculation. Therefore, the tax effect of this “additional interest,” i.e., the Waterford 3 Financing additional interest ADIT, should be excluded as well.¹⁴³

46. In sum, we grant rehearing with respect to the tax gain portion of the Waterford 3 Financing ADIT in Account 190. The Waterford 3 Financing tax gain ADIT is directly related to the Waterford 3 plant and associated debt, and therefore it is generally and properly includable for cost of service purposes, and belongs in the bandwidth calculation. The additional interest component of the Waterford 3 Financing, however, is recorded in non-bandwidth formula Account 427, as directed by the Chief Accountant. Consequently, the Waterford 3 Financing additional interest ADIT associated with the additional interest in Account 427 must be excluded from the bandwidth calculation. Thus, we grant, in part, rehearing and require Entergy to include only the tax gain portion of the Waterford 3 Financing ADIT in the fifth (2010), sixth (2011), and seventh (2012) bandwidth calculations.

B. Interruptible Load

¹⁴² Opinion No. 560, 162 FERC ¶ 61,234 at P 61 & n.94 (citing Ex. ESI-3 at 56, n.1 (“All Rate Base, Revenue and Expense items shall be based on the *actual amounts on the Company’s books* for the twelve months ended December 31 of the previous year as reported in FERC Form 1) (emphasis added)).

¹⁴³ *Id.* P 62. See also *Entergy Servs., Inc.*, 167 FERC ¶ 61,246 at P 45 (explaining that securitized assets are not included in cost of service, so securitized asset ADIT is also not generally and properly includable in the FERC cost of service, and therefore securitized asset ADIT should be excluded from the bandwidth calculation). Additionally, upon closer inspection of the 1992 audit report, we noted that the Chief Accountant directed Entergy to record the “additional interest” as a debit to account 427 and a credit to Account 253 (Other deferred credits). However, because the audit report did not discuss how the balance in Account 253 will be reversed, it is not clear whether or not Entergy is recovering this balance outside of the bandwidth formula, further supporting the exclusion of the “additional interest” from the bandwidth formula.

1. Opinion No. 560

47. In Opinion No. 560, the Commission affirmed the Presiding Judge's determination that interruptible load should remain in the system monthly coincident peaks¹⁴⁴ for the fifth (2010) and sixth (2011) bandwidth calculations, and that refunds are not warranted.¹⁴⁵ The Commission agreed with the Presiding Judge that the primary issue before the Commission is whether it is legally permissible to apply the same remedy that the Commission adopted for the second (2007), third (2008), and seventh (2012) bandwidth calculations and all future bandwidth calculations, to the fifth (2010) and sixth (2011) bandwidth calculations, which would expand the relief granted in the 2007 Complaint proceeding.¹⁴⁶ The Commission explained that it had already resolved the interruptible load issue in the 2012 Rehearing Order issued in Docket No. EL07-52, where it ruled that interruptible load should be excluded from the demand responsibility allocator prospectively and ordered refunds for the 15-month period after the April 3, 2007 refund effective date.¹⁴⁷ The Commission found that, consequently, no further relief is available in this separate proceeding.¹⁴⁸ The Commission agreed with the Presiding Judge that the appropriate time for the Louisiana Commission to have sought relief beyond the statutory 15-month refund period would have been in Docket No. EL07-52, when the Commission reversed its position on rehearing.¹⁴⁹

2. Request for Rehearing

48. The Louisiana Commission maintains that the Commission erred in concluding that the issue the Louisiana Commission raised, and the relief it requests, are the same as those in Docket No. EL07-52. The Louisiana Commission argues that this ruling incorrectly equates very different causes of action, which could lead to very different relief. It states that the mismatch could be cured through the same relief as that granted

¹⁴⁴ Coincident peak is the utility's demand during the time when the system-wide demand peaks.

¹⁴⁵ Opinion No. 560, 162 FERC ¶ 61,234 at P 137.

¹⁴⁶ *Id.* (discussing *La. Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,100 (2012) (2012 Rehearing Order)).

¹⁴⁷ *Id.* P 139.

¹⁴⁸ *Id.* PP 138, 143. *See also* Initial Decision, 156 FERC ¶ 63,017 at P 211.

¹⁴⁹ Opinion No. 560, 162 FERC ¶ 61,234 at PP 139, 143. *See also* Initial Decision, 156 FERC ¶ 63,017 at P 211.

in Docket No. EL07-52, but the cause of action here is different than that in Docket No. EL07-52.¹⁵⁰

49. The Louisiana Commission states that the problem presented in Docket No. EL07-52 was one of cost causation.¹⁵¹ It states that it sought in that proceeding a change in the demand responsibility allocator used in assigning responsibility for all demand costs in the bandwidth calculation.¹⁵² Specifically, it sought “the removal of interruptible load from the ‘12 CP allocator used to allocate fixed capacity costs – defined in the tariff to include the fixed costs of non-nuclear generating units.’”¹⁵³ The Louisiana Commission states that the basis for that request was cost causation, as the demand responsibility allocator determines fixed cost responsibility in the bandwidth calculation, and it included costs that interruptible load did not cause.¹⁵⁴

50. The Louisiana Commission states that in this proceeding, it sought a change, for bandwidth calculation purposes, in allocating the actual costs of reserve units, so that the allocation of demand responsibility would not reverse the effect of Opinions Nos. 468 and 468-A.¹⁵⁵ The Louisiana Commission notes that those orders eliminated interruptible load in the allocation of system reserves on the grounds that the interruptible load did not cause Entergy to construct or acquire capacity.¹⁵⁶ The change in allocation was intended to correct the mismatch in the bandwidth calculation, which compared actual costs, including costs allocated under Service Schedule MSS-1, from which interruptible load had been removed, to an overall allocation of cost responsibility that includes interruptible load. In the bandwidth formula, removing interruptible load for companies with higher amounts of interruptible load lowered their actual costs, but because interruptible load is included in the demand responsibility variable of the formula to determine responsibilities, the impact of the removal is reversed. As a result, the

¹⁵⁰ Rehearing Request at 34.

¹⁵¹ *Id.* at 27.

¹⁵² *Id.* at 3, 5.

¹⁵³ *Id.* at 27 (internal citation omitted).

¹⁵⁴ *Id.* at 27, 34.

¹⁵⁵ *Id.* at 3, 5.

¹⁵⁶ *Id.* at 25.

bandwidth payments and receipts reversed the effect of the Commission's decision in Opinion Nos. 468 and 468-A.¹⁵⁷

51. The Louisiana Commission states that it sought to correct this problem through fixing the actual cost calculation for bandwidth purposes by imputing the costs removed by Opinion Nos. 468 and 468-A back into actual costs.¹⁵⁸ It also notes that Commission staff had proposed using the remedy used in Docket No. EL07-52, i.e., a change in the demand responsibility allocator, and that its own witness had agreed that this would solve the mismatch problem.¹⁵⁹

52. The Louisiana Commission distinguishes this request from the matters at issue in Docket No. EL07-52, based on three considerations. First, as noted above, the Louisiana Commission maintains that this proceeding concerns a different allocation than the one at issue in Docket No. EL07-52. Second, the Louisiana Commission states that the remedy in the two proceedings addresses different variables.¹⁶⁰ The Louisiana Commission maintains that this proceeding involves different monthly loads, different interruptible loads, and different levels of costs to be allocated, and these facts create a new claim under Commission precedent.¹⁶¹ Third, the Louisiana Commission states that the remedy in this proceeding is more limited in scope than that in Docket No. EL07-52. It states that the remedy in this proceeding pertains to the allocation of costs of generating units that serve as system reserves, whereas the remedy in Docket No. EL07-52 concerns the allocation of costs of all Entergy fossil fuel-based generation.

53. Alternatively, the Louisiana Commission argues that even if this proceeding involves the same issue as that presented in Docket No. EL07-52, Commission precedent does not prohibit successive complaints on the same issue. The Louisiana Commission states that the Commission has allowed successive complaints on the issue of return on equity where new facts or data are presented, and this precedent applies here. It states that this proceeding involves different underlying facts than those presented in Docket No. EL07-52.¹⁶² The Louisiana Commission also states that *res judicata* cannot preclude

¹⁵⁷ *Id.* at 31.

¹⁵⁸ *Id.* at 30.

¹⁵⁹ *Id.* at 32-33.

¹⁶⁰ *Id.* at 3, 24-25.

¹⁶¹ *Id.* at 5, 41-42.

¹⁶² *Id.* at 3, 35-40.

its claim because it has advanced a distinct cause of action,¹⁶³ and issue preclusion does not apply because its claim does not involve relitigating facts and issues that have already been litigated in a prior proceeding.¹⁶⁴

54. The Louisiana Commission maintains that the Commission failed to address and enforce an agreement between the parties in Docket No. EL01-88 that the outcome of the Opinion No. 468 proceeding should control the treatment of interruptible load in the rough production cost equalization calculation. According to the Louisiana Commission, that agreement placed all parties on notice that the decision on the treatment of interruptible load in the Opinion No. 468 proceeding would apply to the bandwidth and bound them to the outcome in that case. The Louisiana Commission describes enforcement of this as “a different cause of action than cost causation.”¹⁶⁵

55. Finally, the Louisiana Commission asserts that the Commission “appears to hold” in Opinion No. 560 that a party cannot seek the correction of a legal error unless it seeks to do so in the same proceeding in which the error occurred.¹⁶⁶ The Louisiana Commission maintains that the Commission stated in Opinion No. 560 that it changed its mind on interruptible load in Docket No. EL07-52 when it granted rehearing, and the Commission did not deny that its initial decision on the matter constituted legal error. The Louisiana Commission argues that the Commission has failed to explain why the Louisiana Commission cannot seek relief from that legal error in this proceeding.¹⁶⁷

3. Commission Determination

56. We deny rehearing. As explained in Opinion No. 560, the primary issue before the Commission is whether it is legally permissible to apply the same remedy adopted by the Commission (in the 2012 Rehearing Order in Docket No. EL07-52) for the second (2007), third (2008), seventh (2012), and future bandwidth calculations to the fifth (2010) and sixth (2011) bandwidth calculations, thus expanding the relief granted in the 2007 Complaint proceeding. We continue to find that the Commission already resolved the

¹⁶³ *Id.* at 3, 42-45.

¹⁶⁴ *Id.* at 46-47.

¹⁶⁵ *Id.* at 47-51.

¹⁶⁶ *Id.* at 51.

¹⁶⁷ *Id.* at 51-53.

interruptible load issue in the 2012 Rehearing Order and that no further relief is available in this separate proceeding.

57. First, we reject the Louisiana Commission's arguments that this case is sufficiently distinct from the 2007 Complaint proceeding, such that the Commission may grant additional relief. As to the Louisiana Commission's argument that this proceeding involves a different "cause of action" than the one litigated in the 2007 Complaint proceeding, the Louisiana Commission's additional explanation on rehearing serves to clarify the flaw in its argument. To explain why this is so, it is useful to begin by considering what is meant by a "cause of action."

58. "A cause of action is generally defined as the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief."¹⁶⁸ The primary point here is the essential link between a right and a remedy contained in a cause of action. The Louisiana Commission essentially concedes on rehearing that it is seeking in substance the same remedy here that it sought in the 2007 Complaint proceeding, as evidenced by its acknowledgement that its own expert stated that relief in the form provided in Docket No. EL07-52 "would also correct the mismatch problem."¹⁶⁹ The Louisiana Commission, nonetheless, maintains that the two proceedings involve different "issues," i.e., here, the mismatch issue and, in 2007, the cost causation issue, and "Opinion No. 560 fails to explain how a different problem, becomes the 'same issue' simply because it could be addressed with the same remedy."¹⁷⁰ The explanation is that, at root, there is only one problem presented here, i.e., the problem of Entergy Louisiana becoming responsible for costs that its interruptible load did not cause. To explain this conclusion fully, it is useful to consider what is meant by an "issue."

59. An "'issue' has been defined as 'a single, certain and material point arising out of the allegations and contentions of the parties.'"¹⁷¹ The single, certain, and material point that the Louisiana Commission has alleged both here and in Docket No. EL07-52 resides in the cost causation problem that underlies the interruptible load issue. Indeed, without reference to this cost causation problem, it would be impossible to speak of a mismatch. The Louisiana Commission maintains that because of the mismatch, Entergy Louisiana's

¹⁶⁸ *Stewart v. Shanahan*, 277 F.2d 233, 236 (8th Cir. 1960).

¹⁶⁹ Rehearing Request at 33.

¹⁷⁰ *Id.* at 34.

¹⁷¹ *Narramore v. U.S.*, 30 Fed. Cl. 383, 388 (1994) (quoting *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F.Supp. 499, 518 n.66a (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir. 1975)).

“final responsibility for production costs for each year is almost exactly the same as if Opinions 468 and 468-A had never been issued.”¹⁷² In other words, Entergy Louisiana becomes responsible for costs it did not cause, which means that both the mismatch issue and the interruptible load issue arise out of a single, common source, the cost causation problem. The Louisiana Commission is not seeking here correction of the mismatch *per se*; it is seeking relief from the burden of costs that interruptible load did not cause, which was also the relief Louisiana Commission sought, and received, with respect to the same underlying facts in the 2007 Complaint proceeding. The only difference between the two proceedings on this point is that, in Docket No. EL07-52, the Louisiana Commission sought removal of interruptible load from the demand responsibility allocator, whereas here it proposes that it be retained and that costs be restated to compensate for its presence.¹⁷³ These are simply alternative ways to address a single issue. As discussed below, the issue was resolved in Docket No. EL07-52.

60. The Commission found in the 2007 Complaint proceeding “that interruptible load should be excluded from the allocation of fixed production costs in section 30.13 of the bandwidth formula in Service Schedule MSS-3.”¹⁷⁴ The Commission also found that the reason given in Opinion Nos. 468 and 468-A for excluding interruptible load from the peak demand used to allocate production capacity costs under Service Schedule MSS-1 also applies to the allocation of fixed production costs in the bandwidth formula under section 30.13 of Service Schedule MSS-3: the fact that curtailable interruptible load does not cause Entergy to incur production capacity costs or determine investment necessary to meet the system peak.¹⁷⁵ To remedy this situation, the Commission directed Entergy to remove interruptible load from the system 12 CP demand ratio to allocate system average production costs in section 30.13 of Service Schedule MSS-3, and to identify and make all related changes to the bandwidth formula and the System Agreement.¹⁷⁶

¹⁷² Rehearing Request at 30 (citing Ex. ESI-45, ¶ 51 (quoting Trial Staff witness Mr. John Sammons in Docket No. ER09-1224) (internal quotation marks omitted)).

¹⁷³ *Id.* at 31 (quoting the Louisiana Commission’s expert as stating that the proposed “correction of the mismatch would restate costs determined under MSS-1, the energy exchange portions of MSS-3, MSS-5 and joint account purchases, on a basis that includes interruptible loads in the allocations”).

¹⁷⁴ 2012 Rehearing Order, 139 FERC ¶ 61,100 at P 23.

¹⁷⁵ *Id.* P 24.

¹⁷⁶ *Id.* P 27.

61. The Louisiana Commission states that it does not seek here any change “to the [demand responsibility] allocator,” as was the case in the 2007 Complaint proceeding.¹⁷⁷ Instead it argues that because the demand responsibility allocator includes interruptible load for the bandwidth calculations in question, its application undoes the removal of interruptible load from actual production costs. According to the Louisiana Commission, the result is that “the final responsibility for production costs for each year is almost exactly the same as if Opinions 468 and 468-A had never been issued,”¹⁷⁸ and Entergy Louisiana becomes responsible for costs it did not cause. In this way, the mismatch issue merges with the cost causation issue, and the distinction that the Louisiana Commission propounds becomes a distinction without a difference. In both cases the “fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief”¹⁷⁹ are the same. The mismatch is not per se an issue here; it is only one way of framing the issue.

62. As the Commission explained in Opinion No. 560, “in both complaints the Louisiana Commission sought to address the same issue – to ensure that the bandwidth payments and receipts fully reflect the same treatment of interruptible load adopted in Opinion No. 468 for Service Schedules MSS-1 and MSS-5 and for Joint Account Purchases.”¹⁸⁰ Stated another way, both complaints sought to correct an alleged disparity between the exclusion of interruptible load from Service Schedules MSS-1 and MSS-5 and for Joint Account Purchases and its inclusion in the allocation of fixed production costs in section 30.13 of the bandwidth formula in Service Schedule MSS-3. The Commission corrected this disparity in the 2012 Rehearing Order in Docket No. EL07-52 by directing that interruptible load be removed from Service Schedule MSS-3.¹⁸¹ That action had the effect of eliminating the mismatch for the second (2007), third (2008), seventh (2012), and future bandwidth calculations.¹⁸² In the 2012 Rehearing Order, the Commission did not address the fifth (2010) and sixth (2011) bandwidth calculations, at issue in the present docket, because the Louisiana Commission did not seek relief for those periods, and they involved retrospective periods beyond the 15-month refund

¹⁷⁷ Rehearing Request at 3.

¹⁷⁸ *Id.* at 30 (quoting Trial Staff witness Sammons in Docket No. ER09-1224, Ex. ESI-45, ¶ 51 (internal quotation marks deleted)).

¹⁷⁹ *See supra* n.166 and accompanying text.

¹⁸⁰ Opinion No. 560, 162 FERC ¶ 61,234 at P 141.

¹⁸¹ 2012 Rehearing Order, 139 FERC ¶ 61,100 at P 23.

¹⁸² Opinion No. 560, 162 FERC ¶ 61,234 at P 137.

period applicable in that proceeding. We address that matter from a different perspective below. We note here only that the mismatch cannot be either a different issue or a different cause of action from those presented in Docket No. EL07-52 if it is resolved for multiple periods in that docket through one and the same Commission action.

63. Alternatively, the Louisiana Commission argues that even if this proceeding addresses the same issue as that presented in Docket No. EL07-52, Opinion No. 560 implicitly and incorrectly finds that FPA section 206(b) “precludes multiple complaints on the same issue.”¹⁸³ This phrasing misstates the matter, as it obscures the distinction between allowable successive complaints dealing with similar issues and duplicative complaints dealing with the same issue. Section 206(b) of the FPA provides that the Commission may order refunds for a maximum of 15 months from the refund effective date in a section 206 proceeding concerning the justness and reasonableness of a rate.¹⁸⁴ A second complaint on this same issue would effectively seek to expand the refund period beyond the statutory maximum. The Louisiana Commission seeks to avoid this problem by arguing that Commission precedent allowing successive complaints on similar issues supports its position, but this precedent can be distinguished from this case based on the facts presented. We therefore deny rehearing on this point.

64. Specifically, the Louisiana Commission principally relies on cases in which the Commission allowed successive complaints concerning a public utility’s return on equity (ROE). There is, however, a fundamental difference between that issue and the cost causation issue being dealt with here. As the Commission explained in *Allegheny Generating II*, which the Louisiana Commission cites as support, “[i]n contrast to other cost of service issues, return on equity [ROE] can be particularly volatile. It will change both as an individual public utility’s risks change over time and as capital market conditions change over time.”¹⁸⁵ In other words, what constitutes an appropriate ROE will depend on the facts and circumstances that obtain in a particular time period. Thus, in *Allegheny Generating I*¹⁸⁶ and *Allegheny Generating II*, the Commission allowed successive complaints concerning the ROE of Allegheny Generating Company (Allegheny) to proceed simultaneously. The Commission noted that the record in the two proceedings reflected market conditions during different time periods. Accordingly, the

¹⁸³ Rehearing Request at 36.

¹⁸⁴ 16 U.S.C. § 824e(b).

¹⁸⁵ *Consumer Advocate Div. of the Pub. Serv. Comm’n of W. Va. v. Allegheny Generating Co.*, 68 FERC ¶ 61,207, at 61,998 (1994) (*Allegheny Generating II*).

¹⁸⁶ *Consumer Advocate Div. of the Pub. Serv. Comm’n of W. Va. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288 (1994) (*Allegheny Generating I*).

Commission explained in *Allegheny II* that although the issue in the initial complaint proceeding “and in the instant proceeding may nominally be the same, i.e., return on equity, in substance it is a different issue in each of the proceedings.”¹⁸⁷

65. The Louisiana Commission maintains that this precedent applies here because, contrary to the Commission’s position, this proceeding involves new facts and evidence that create a new claim, i.e., different monthly loads, different interruptible loads, and different levels of costs to be allocated.¹⁸⁸ According to the Louisiana Commission, “these differences are similar to the cost differences affecting successive return on equity complaints.”¹⁸⁹ But in fact they simply represent differences in variables that are applied to a calculation that does not change other than through a Commission-approved change. Thus, whether the issue is characterized as a mismatch, an interruptible load issue, or a problem of cost causation, the issue remains unchanged as long as it persists, although the inclusion of interruptible load in the bandwidth calculation may produce different results over time due to changes in load and costs. But such changes do not represent factors that produce fundamentally different issues with the passage of time. The mismatch remains the mismatch regardless of changes in the magnitude in loads and costs and corresponding changes in the effect of the mismatch. In the ROE cases, on the other hand, as the Commission explained in *Allegheny II*, changes in fact and circumstances can result in substantively different issues because in ROE cases the central issue is the appropriate magnitude of the ROE based on prevailing facts and circumstances.

66. This conclusion is bolstered by the fact that the remedy the Commission adopted in the 2007 Complaint proceeding applies “for the 2007, 2008, 2012, and *all future bandwidth calculations*.”¹⁹⁰ In other words, the remedy cures the mismatch permanently, with the exception of “the bandwidth calculations for 2010 and 2011.”¹⁹¹ From this perspective, the only thing that distinguishes the fifth (2010) and sixth (2011) bandwidth calculations from those addressed in the 2012 Rehearing Order is that they reside beyond the 15-month refund period applicable to the 2007 Complaint proceeding, and prior to the

¹⁸⁷ *Allegheny Generating II*, 68 FERC ¶ 61,207 at 61,998.

¹⁸⁸ Rehearing Request at 5, 41-42.

¹⁸⁹ *Id.*

¹⁹⁰ Opinion No. 560, 162 FERC ¶ 61,234 at P 137 (emphasis added).

¹⁹¹ *Id.*

Commission's action in the 2012 Rehearing Order.¹⁹² This confirms that the mismatch, unlike the appropriate ROE, does not represent a volatile matter that varies depending on facts and circumstances. The mismatch can be resolved for all future periods, whereas it is not possible to establish the appropriate ROE for all times in the future. The different facts that the Louisiana Commission points to, i.e., different monthly loads, different interruptible loads, etc., therefore have no bearing on the issue presented and do not establish the basis for successive complaints.

67. For this reason, we disagree with the Louisiana Commission that *res judicata* and issue preclusion cannot preclude its claim here because that claim is based on a distinct cause of action.¹⁹³ As the Louisiana Commission notes, *res judicata* precludes relitigating the same cause of action, and issue preclusion prevents relitigating the same issues and facts.¹⁹⁴ As discussed above, the Louisiana Commission has not shown that this proceeding presents either a different cause of action or a different issue than those presented in Docket No. EL07-52. The Commission, therefore, correctly found the final outcome in Docket No. EL07-52 precludes the issue that the Louisiana Commission raises in this proceeding.¹⁹⁵

68. We are also unconvinced by the Louisiana Commission's argument that "[t]he Commission's failure to remove interruptible load from the Bandwidth Formula allocator in its initial Order in Docket No. EL07-52 was a legal error."¹⁹⁶ The implicit premise of this argument is that the Commission's decision, in the 2012 Rehearing Order, to change course and remove interruptible load from the bandwidth formula allocator made possible bandwidth calculations (specifically, the fifth (2010) and sixth (2011)) based on the inclusion of interruptible load that do not fall within the 15-month refund period applicable in Docket No. EL07-52.

69. According to the Louisiana Commission, the Commission essentially conceded that it erred in Docket No. EL07-52 when it stated in Opinion No. 560 that it had "changed its mind" on the interruptible load issue in that docket and granted rehearing of the 2007 Order Denying Complaint. The Louisiana Commission maintains that the

¹⁹² See *id.* P 144 ("Because there are no new facts, we conclude that the only purpose of this complaint was to extend the [15]-month refund period.").

¹⁹³ Rehearing Request at 42-45.

¹⁹⁴ *Id.* at 42, 46.

¹⁹⁵ Opinion No. 560, 162 FERC ¶ 61,234 at P 139.

¹⁹⁶ Rehearing Request at 6.

Commission conceded the error because “it does not deny that the initial ruling was legal error.”¹⁹⁷ It argues that even if this proceeding involves the same issue as that involved in Docket No. EL07-52, the Commission is not precluded from correcting that error in this proceeding and providing additional relief.¹⁹⁸ The Louisiana Commission goes on to argue that this means the Commission found in Opinion No. 560 that a party cannot seek the correction of a legal error unless it does so in the same proceeding in which the error occurred.¹⁹⁹

70. In response, we find that the Commission neither conceded such a legal error in Opinion No. 560 nor made it in Docket No. EL07-52. The Commission’s statement in Opinion No. 560 that it had “changed its mind” on the interruptible load issue in Docket No. EL07-52 and granted rehearing of the 2007 Order Denying Complaint is not a concession of legal error. The Supreme Court has stated that “the term ‘legal error’ means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence.”²⁰⁰ The Louisiana Commission does not identify any mistake about the law here. When the Commission stated in Opinion No. 560 that it “changed its mind on rehearing” of the 2007 Order Denying Complaint, it was not stating or implying that it had misinterpreted or misapplied the law; it was explaining how it had come to a reassessment of the “facts and circumstances” of the proceeding “based on considerable additional experience addressing issues concerning the Entergy System Agreement in general, and the bandwidth formula in particular, and based on the record on rehearing”²⁰¹

71. The Commission explained that it had initially found that the Louisiana Commission had not established that Service Schedule MSS-3 as filed at that time was unjust and unreasonable with regard to the inclusion of interruptible load in the system monthly coincident peaks,²⁰² but based on additional experience and factual support, it concluded that the rationale underlying Opinion Nos. 468 and 468-A should apply to the

¹⁹⁷ *Id.* at 52.

¹⁹⁸ *Id.* at 51, 56.

¹⁹⁹ *Id.* at 51, 55.

²⁰⁰ *Griffin v. U.S.*, 502 U.S. 46, 59 (1991).

²⁰¹ Opinion No. 560, 162 FERC ¶ 61,234 at PP 146-147.

²⁰² *Id.* P 146.

allocation of fixed production costs in the bandwidth formula.²⁰³ This reassessment did not involve an error of law, nor can it even be characterized as a mistake concerning the weight or the factual import of the evidence. It simply represents an evolving understanding of a complex set of facts and circumstance based on additional experience and an expanded record acquired over time.²⁰⁴

72. We thus clarify our finding in Opinion No. 560 that “there are no new facts or data presented here.”²⁰⁵ The Louisiana Commission disputes this finding through reference to the ROE cases and by asserting that “new facts and evidence exist in this proceeding because it is based on a different time period than the issue in Docket No. EL07-52” and “[t]he amount of every Company’s interruptible load at issue in this proceeding is different than the amount of interruptible load at issue in FERC Docket No. EL07-52.”²⁰⁶ These may be new facts, but they are not relevant facts. As explained above, the existence of a different time period or differing amounts of interruptible load does not change the issue presented, i.e., whether characterized as one of cost causation or interruptible load, or as a mismatch.

²⁰³ *Id.* P 147.

²⁰⁴ The Louisiana Commission alleges an additional legal error by the Commission in this connection, stating that “Opinion No. 560 also says the Commission distinguished Opinion Nos. 468 and 468-A from this case, but that was the legal error, because the Commission ultimately rules that it could not distinguish the cases with respect to cost causation.” Rehearing Request at 52. The Louisiana Commission provides no citations to Opinion No. 560 to support this allegation, which is limited to a single sentence, nor does it specify the alleged error of law. We are unable to discern what error of law the Louisiana Commission is alleging and therefore will not address the matter further here. We note that the Commission has explained that ““rather than bald allegations, [complainants] must make an adequate proffer of evidence including pertinent information and analysis to support its claims.”” *Californians for Renewable Energy, Inc. v. Pacific Gas and Elec. Co.*, 142 FERC ¶ 61,143, at P 18 (2013) (quoting *Illinois Mun. Elec. Agency v. Central Illinois Pub. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996)).

²⁰⁵ Opinion No. 560, 162 FERC ¶ 61,234 at P 144.

²⁰⁶ Rehearing Request at 42.

73. Finally, we are unconvinced by the Louisiana Commission's argument that the Commission failed in Opinion No. 560 to enforce the parties' agreement in Docket No. EL01-88 to the effect that the outcome of the proceeding that produced Opinion No. 468 should control the treatment of interruptible load in the rough production cost equalization calculation. The Louisiana Commission states that that agreement not only placed all parties on notice that the interruptible load decision would apply to the bandwidth, it bound them to the outcome in that case. The Louisiana Commission states that in addition to its reliance on cost causation in Docket No. EL07-52 as the basis for removing interruptible load from the demand allocator, it also relied on the agreement of the parties to allow the result in Opinion No. 468 to govern in the bandwidth calculation. The Louisiana Commission states that the Commission found in the 2012 Rehearing Order that because it was granting relief on cost-causation grounds, it did not need to address the Louisiana Commission's argument regarding this agreement. The Louisiana Commission argues that enforcing the agreement is a different cause of action than cost causation, and the Commission must address it here.²⁰⁷ This argument suffers from two defects.

74. First, as the Commission noted in Opinion No. 560, the agreement that the Louisiana Commission alludes to is an agreement that the Louisiana Commission "alleged existed between the parties" in the 2007 Complaint proceeding.²⁰⁸ The Louisiana Commission has not presented the precise terms and conditions of the alleged agreement here, and its sole support for the agreement's existence is a brief excerpt from testimony in Docket No. EL01-88.²⁰⁹ The Louisiana Commission therefore has not established that an enforceable agreement exists that applies here, nor has it provided a basis for the Commission to address enforcement here.

75. Second, while the Louisiana Commission has alluded to the alleged agreement earlier in this proceeding,²¹⁰ it presents for the first time on rehearing the argument that enforcement of the agreement is a "different cause of action than cost causation"²¹¹ that the Commission must address in this proceeding. But it is also asserting a different cause of action than the one it has asserted from the beginning, the mismatch. This is a rehearing request based on a new issue, indeed an entirely new cause of action, that could

²⁰⁷ *Id.* at 47-50.

²⁰⁸ Opinion No. 560, 162 FERC ¶ 61,234 at P 146.

²⁰⁹ See Rehearing Request at 48-49.

²¹⁰ See Opinion No. 560, 162 FERC ¶ 61,234 at PP 74, 80.

²¹¹ Rehearing Request at 50.

have been properly raised at an earlier stage of this proceeding. The Commission has declined to address such requests on numerous occasions.²¹² We decline to do so here as well.

The Commission orders:

The Louisiana Commission's rehearing request is granted, in part, and denied, in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²¹² *Dominion Transmission, Inc.*, 155 FERC ¶ 61,234, at P 10 (2016) (stating “we reject requests for rehearing that raise a new issue, unless we find that the issue could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances”); *Texas Gas Transmission, LLC*, 155 FERC ¶ 61,099, at P 23 (2016) (same); 18 C.F.R. § 385.713 (c)(3) (requiring justification that matters were not available for consideration at the time of the final decision). *See also NO Gas Pipeline v. FERC*, 756 F.3d 764, 770 (D.C. Cir. 2014) (stating that “FERC regularly rejects requests for rehearing that raise issues not previously presented where there is no showing that the issue is ‘based on matters not available for consideration . . . at the time of the final decision’”); *PJM Interconnection, LLC*, 126 FERC ¶ 61,030, at P 15 & n.10 (2009) (A request for rehearing of a new issue is outside the proper scope of the rehearing); *Calpine Oneta Power v. American Elec. Power Serv. Corp.*, 114 FERC ¶ 61,030, at P 7 (2006); *Midwest Indep. Transmission Sys. Op., Inc.*, 112 FERC ¶ 61,211, at P 34 (2005) (citing *Baltimore Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000) and *Baltimore Gas & Elec. Co.*, 92 FERC ¶ 61,043, at 61,114 (2000)).